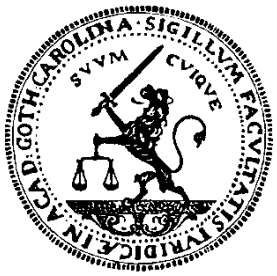


FACULTY OF LAW
Lund University

Ihor Konopka

# Getting hard to resist

## Prospect of mandatory human rights due diligence in Ukraine

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Radu Mares

Term: Spring 2021

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# Summary

No one can resist an idea whose time has come.
*Victor Hugo*

The 2011 UN Guiding Principles on Business and Human Rights *(UNGPs)* introduced human rights due diligence *(HRDD)* as a societal expectation to businesses to implement a new kind of due diligence risk management process to 'know and show' they respect human rights. Ten years later, mandatory human rights due diligence *(mHRDD)* legislation imposing a legal duty to carry out HRDD has become mainstream across Europe. Although just one piece of such legislation is currently in effect – the 2017 French Duty of Vigilance Law – the momentum is growing for passing similar laws in seven other European states alongside at the EU level. Notably, corporate civil liability for harm resulted from business-related human rights abuse features as a critical element of the mHRDD regimes. In addition, the prospect of a long-awaited reversal of the burden of proof from a victim to a company, as suggested by the 2021 EU legislative report on corporate due diligence and corporate accountability, brings hope for greater access to justice.

Ukraine has pledged to implement the UNGPs and, to this end, has recently adopted the business and human rights chapter within the 2021-2023 National Human Rights Strategy. Furthermore, the Government publicly committed to pursuing a stand-alone National Action Plan on Business and Human Rights. Ukraine is concurrently under treaty obligation to align its legislation to one of the EU, which creates additional opportunities to follow the mHRDD trends.

To a considerable extent, Ukrainian legal and policy frameworks already reflect elements of HRDD, such as impact assessment and corporate reporting. They also cover closely related issues, including stakeholder engagement, corporate governance and directors' duties, public procurement. Interestingly, Ukrainian civil law establishes a relatively more advanced delict (tort) liability regime in terms of the burden of proof distribution: fault-based liability with a statutory presumption of the tortfeasor's fault. Other liability regimes and sanctions may be potentially relevant in the business and human rights context too. The Government's ongoing efforts to fundamentally reform civil, labour, and company law, accompanied by the strategic plans to pass a law on economic stimuli for responsible business, bear significant potential in bringing about change in corporate behaviour thus should all be concerted. The New Economic Strategy 2030 yet gives rise to concerns as it echoes the '"human rights" read "anti-development"' sentiment. The latter should not become a recourse hindering a sound foundation for legislative progress on the business and human rights agenda.

The mHRDD legislative mainstream is getting hard to resist, and, fortunately, Ukraine is well-positioned to join it instead.

# Acknowledgements

My sincere gratitude to my supervisor Radu Mares for our thought-provoking discussions, his valuable comments and helpful guidance throughout the process.

Thank you to esteemed members of the Human Rights and Business team of the Danish Institute for Human Rights for the insightful internship and numerous conversations that motivated me to choose this topic. Special thanks to Dirk Hoffmann for his essential considerations on the Ukrainian business and human rights agenda.

Thank you to Olena Uvarova for sharing her unique knowledge gained through long and determined efforts to drive the business and human rights agenda in Ukraine and her willingness to facilitate my endeavour.

I would also like to thank Bohdan Karnaukh for sharing the manuscript of his notable contribution on civil liability and human rights violations in Ukraine and for our dialogue.

My appreciation to Ekaterina Aristova for providing useful articles and information on the forthcoming comparative study of civil liability for human rights violations.

My appreciation to the Ukrainian Ministry of Justice Directorate for Strategic Planning and European Integration for a quick response to a document request.

Thank you to the Lund University Global Scholarship, the WorldWideStudies programme, and the Temerty Foundation for providing me with kind financial assistance that allowed me to pursue studies at Lund University.

Thank you to my friends and brother Volodymyr for their constant encouragements.

Warmly thank you to my dear wife Iryna for her endless love, inspiration and support.

*Lund, 27 May 2021*
*Ihor Konopka*

# Abbreviations

| | |
|---|---|
| AA | Association Agreement |
| AP | Action Plan |
| BHR | Business and Human Rights |
| CCU | Civil Code of Ukraine |
| CoE | Council of Europe |
| CORE | Corporate Responsibility Coalition |
| Covid-19 | Coronavirus disease of 2019 |
| CSOs | Civil Society Organisations |
| CSR | Corporate Social Responsibility |
| DD | Due Diligence |
| DIHR | Danish Institute for Human Rights |
| ECCJ | European Coalition for Corporate Justice |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EDF | Électricité de France |
| EEC | European Economic Community |
| EIA | Environmental Impact Assessment |
| ESIA | Environmental and Social Impact Assessment |
| EU | European Union |
| EY | Ernst & Young |
| GDP | Gross Domestic Product |
| HR | Human Rights |
| HRBA | Human Rights-Based Approach |
| HRDD | Human Rights Due Diligence |
| HRIA | Human Rights Impact Assessment |
| IBA | International Bar Association |
| ICAR | International Corporate Accountability Roundtable |
| IFC | International Finance Corporation |
| IHRL | International Human Rights Law |
| ILO | International Labour Organisation |
| IMF | International Monetary Fund |
| JSC | Joint Stock Company |
| LCU | Code of Labour Laws of Ukraine |
| LLC | Limited Liability Company |
| mHRDD | mandatory Human Rights Due Diligence |
| MNEs | Multinational Enterprises |
| MoJ | Ministry of Justice of Ukraine |
| NAP | National Action Plan on Business and Human Rights |
| NATO | North Atlantic Treaty Organisation |
| NBA | National Baseline Assessment on Business and Human Rights |

| | |
|---|---|
| NCP | National Contact Point |
| NES | National Economic Strategy 2030 |
| NFR | Non-Financial Reporting |
| NGO | Non-Governmental Organisation |
| OECD | Organisation for Economic Co-operation and Development |
| OEIGWG | Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights |
| OHCHR | Office of the High Commissioner for Human Rights |
| OHS | Occupational Health and Safety |
| PCG | Principles of Corporate Governance |
| PP | Public Procurement |
| PRR | Protect, Respect, Remedy |
| PWD | Persons With Disabilities |
| RBC | Responsible Business Conduct |
| RtR | Corporate Responsibility to Respect Human Rights |
| SCG | Sustainable Corporate Governance |
| SDGs | Sustainable Development Goals |
| SMEs | Small and Medium Enterprises |
| SOEs | State-Owned Enterprises |
| SRSG | Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises |
| TNCs | Transnational Corporations |
| UDHR | Universal Declaration of Human Rights |
| UK | United Kingdom |
| UN | United Nations |
| UN CESCR | United Nations Committee on Economic, Social and Cultural Rights |
| UN HRC | United Nations Human Rights Council |
| UNGC | United Nations Global Compact |
| UNGPs | United Nations Guiding Principles on Business and Human Rights |
| US | United States |
| WB | World Bank |
| WG BHR | Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises |
| WTO | World Trade Organisation |

# 1 Introduction

## 1.1 Background and research problem

The UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights *(UNGPs, Guiding Principles)* in June 2011.[1] Since then, they became the most authoritative soft law instrument providing the first global framework for 'enhancing standards and practices with regard to business and human rights'.[2] The UNGPs rest on three interrelated pillars: the state duty to protect human rights *(Pillar I)*, the corporate responsibility to respect human rights *(Pillar II)* and the access to remedy for victims of business-related human rights abuse *(Pillar III)*. The key concept underpinning Pillar II is human rights due diligence *(HRDD)*. The businesses are called to put HRDD in place 'to identify, prevent, mitigate and account for how they address their impacts on human rights'.[3]

Since 2011, the Guiding Principles have been reflected in numerous soft and hard law frameworks, while HRDD took a sinuous path from uncertainty to the mainstream. Initially unusual for businesses, HRDD is now widely recognised and even called for by many companies alongside other advocates for greater corporate accountability. In today's business and human rights *(BHR)* agenda, HRDD or corporate due diligence hold among the very few most topical issues. In recent years, the focus of the HRDD-related debate has been on mandatory human rights due diligence *(mHRDD)* – adopting hard law instruments obliging companies to carry out HRDD. Turning HRDD into a legal duty is needed for many reasons, one of which is the proven insufficiency of voluntary measures.[4] As of May 2021, several states around the globe have passed various models of mHRDD legislation. Most notably, the 2017 French Duty of Vigilance Law imposed a legal duty to exercise HRDD on certain large companies with attached civil liability for harms resulting from a company's failure to observe that duty. Besides, seven other European countries have started the political process towards adopting an HRDD law, while eight others witnessed civil society calls for it.[5]

At the regional level, in March 2021, the European Parliament endorsed the legislative report calling for an EU directive on corporate due diligence and corporate accountability. It aims to oblige companies to carry out effective human rights, environmental and good governance due diligence, create a liability regime allowing to hold them accountable and liable for not doing so, and provide victims with access to legal remedies.[6]

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[1] Human rights and transnational corporations and other business enterprises, Resolution adopted by the Human Rights Council, A/HRC/RES/17/4 (2011).
[2] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31 (2011) Annex *(hereinafter – UNGPs)* preamble.
[3] ibid principle 15(b).
[4] Lise Smit and others, 'Study on Due Diligence Requirements through the Supply Chain: Final Report' (Publications Office 2020) Study for the European Commission Directorate General for Justice and Consumers 97–98, 218–221.
[5] ECCJ, 'Evidence for Mandatory Human Rights and Environmental Due Diligence Legislation' (2021) 1–5 <https://corporatejustice.org/eccj-publications/16867-evidence-for-mandatory-human-rights-and-environmental-due-diligence-legislation-january-2021> accessed 14 February 2021; 'Map: Corporate Accountability Legislative Progress in Europe' (*ECCJ*, May 2021) <https://corporatejustice.org/publications/mapping-corporate-accountability-legislative-progress-in-europe/> accessed 5 May 2021.
[6] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability 2020/2129(INL) Annex *(hereinafter – EU Mandatory Due Diligence Initiative)*.

At the international level, since 2014, a legally binding instrument on BHR has been developed under the UN auspices. The second revised draft of this instrument released in August 2020 suggests requiring business enterprises to undertake HRDD[7] while imposing a duty on states to ensure legal liability for business-related human rights abuses.[8]

Another far-reaching effect of the UNGPs' endorsement was the emergence of national action plans on business and human rights *(NAPs)*. The EU, followed by the Council of Europe and the UN Human Rights Council, has called for the development of NAPs 'to promote the implementation of the UNGPs within their respective national contexts'.[9] By the end of 2020, 25 states have published NAPs articulating their priorities and actions to implement the Guiding Principles, while the other seventeen have been developing such a plan.[10] The absolute majority of NAPs contains action points on promoting HRDD.[11]

Against this backdrop, in January 2019, Ukraine officially started the UNGPs' implementation process. The plan to develop a NAP was announced in mid-2019[12] stemming from the National Baseline Assessment on BHR finding that neither Ukrainian legislation requires businesses to undertake HRDD nor does the Government provide any guidance.[13] In March 2021, the new National Human Rights Strategy was adopted, which for the first time included the BHR Chapter,[14] while the tentative plan to develop a stand-alone NAP remained.

Notably, since Ukraine has just begun its path towards ensuring corporate respect for human rights, its legal and policy frameworks do not explicitly envision HRDD obligations or civil liability for harm resulted from corporate abuse of human rights. These frameworks yet set specific comparable standards as well as regulate HRDD-related issues. At the same time, such standards and issues have not been explored in the Ukrainian legal and policy context in light of the recent legislative developments abroad.

Considering the centrality of the HRDD concept within the current BHR agenda and the strong impetus for mHRDD in Europe and internationally, the UNGPs' implementation in Ukraine will most likely require adopting HRDD legislation in one form or another.

The presented background leads to the following research problem: what is the prospect of introducing HRDD into the Ukrainian legal and policy frameworks?

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[7] OEIGWG, Second revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises 2020 art 6.2.
[8] ibid art 8.3.
[9] DIHR and ICAR, 'National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks' (2014) v <https://media.business-humanrights.org/media/documents/files/documents/DIHR_-_ICAR_National_Action_Plans_NAPs_Report.pdf> accessed 23 March 2021.
[10] DIHR, 'Business And Human Rights National Action Plans – A Snapshot in 2020' (2020) 1 <https://globalnaps.org/wp-content/uploads/2020/11/summary-of-bhr-naps-november-2020-dihr_final.pdf> accessed 14 February 2021.
[11] Among the mentioned 25 states, all but Georgia, Lithuania and South Korea, have included respective provisions in their NAPs, 'Human Rights Due Diligence | National Action Plans on Business and Human Rights' <https://globalnaps.org/issue/human-rights-due-diligence/> accessed 24 March 2021.
[12] 'Ukraine | National Action Plans on Business and Human Rights' (29 March 2019) <https://globalnaps.org/country/ukraine/> accessed 14 February 2021.
[13] Olena Uvarova, 'The National Baseline Assessment on Business and Human Rights in Ukraine. Executive Summary' Report developed by the Yaroslav Mudryi National Law University in cooperation with the Ministry of Justice of Ukraine 13 <https://legalforum.nlu.edu.ua/wp-content/uploads/2019/06/executive-summary.pdf> accessed 14 February 2021 *(hereinafter – NBA Report. Executive Summary).*
[14] President of Ukraine, Decree 'On National Human Rights Strategy' (Про Національну стратегію у сфері прав людини), 24.03.2021 No 119/2021 Annex *(hereinafter – National Human Rights Strategy 2021-2023).*

## 1.2 Purpose and research questions

The key purpose of this thesis is to make a twofold contribution to the upcoming discussion on further steps towards mHRDD in Ukraine. First, an investigation on how Ukrainian laws and policies currently treat elements of HRDD and HRDD-related issues, such as corporate governance and directors' duties, stakeholder engagement, and corporate civil liability. Second, an inquiry into how these laws and policies may be improved to achieve stronger corporate respect for human rights considering the main features of foreign mHRDD regimes as well as existing national regulations on anti-corruption and anti-money laundering, non-financial reporting, civil liability, and public procurement, among many others.

To this end, the present thesis focuses on the following research questions:

- What status does HRDD currently have under European and international soft and hard law instruments?
- To what extent do existing Ukrainian legal and policy frameworks reflect elements of HRDD and the key related issues?
- How can mHRDD be incorporated in the Ukrainian legal and regulatory context?

## 1.3 Methodology

In order to answer the research questions, this thesis analyses *lex lata* and *lex ferenda* on HRDD and HRDD-related issues using three methods: legal dogmatic method, systemic analysis and comparative analysis. The combination of these methods is applied in three phases following the respective research question. To answer the first question, soft and hard law instruments, focusing on the latter, were analysed, and an analytical framework based on the constitutive elements of the HRDD process and an mHRDD regime was developed. To answer the second question, the analytical framework was applied to analyse Ukrainian legislation and state policy, focusing on the former, aiming at identifying similarities between processes and standards provided by them with the HRDD. Finally, to answer the third question, the analytical framework applied once again to analyse the identified legal and policy frameworks' features and developments in light of foreign mHRDD regimes, highlighting areas of significant importance for constructing the Ukrainian own mHRDD regime. Accordingly, the second and third phases of the inquiry are partly overlapping. In addition, the historical background was provided at the first phase, alongside the contextual background at the other two phases.

The thesis draws on two sets of sources: primary and secondary.

The primary sources comprise various international, regional and national legal instruments, legislative proposals and other official documents adopted or put forward by the UN, the EU and several European states, including Ukraine. Regarding the latter, particular attention was paid to the National Baseline Assessment on BHR, the BHR Chapter of the National Human Rights Strategy and the draft action plan to this strategy. Primary sources also include landmark case law, mainly of the Ukrainian Supreme Court.

The secondary sources encompass plenty of academic and analytical sources on BHR topics, specifically the UNGPs, HRDD, corporate civil liability and other HRDD-related

issues, mHRDD regimes. Academic sources consist of the thematic research handbook, books and book chapters, articles and blogs. Analytical sources cover comprehensive reports and studies (in particular, those commissioned by the European Commission) on the Guiding Principles implementation, due diligence in the supply chains, the role of states regarding HRDD, access to remedy, non-financial reporting, directors' duties and corporate governance, mHRDD regimes and other topics. In addition, legal practitioners' opinions on existing and upcoming regulations and selected contributions from expert organisations working in the BHR field were also used. Lastly, information from the BHR webinars/online events attended by the author of this paper and his conversations with BHR experts covering the most recent developments were used.

## 1.4 Delimitations

This thesis focused on HRDD, HRDD-related issues and mHRDD regimes in Europe. Considering that these are broad and complex issues, the study was delimited as follows.

In terms of soft law instruments, following the goal to explain elements of the HRDD process and how the respective concept has evolved within ten years since the Guiding Principles were adopted, the research was primarily concentrated on the latter. However, certain aspects of the OECD Guidelines for Multinational Enterprises *(OECD Guidelines)* and the UN Sustainable Developments Goals *(SDGs)* were also considered.

Regarding hard law, the discussion was centred on HRDD legislation and legislative proposals in France, Switzerland, the Netherlands, and the EU. The UK, Germany, and Norway were also touched upon while the UN draft international treaty on BHR was not considered. One reason for taking a closer look at the above European states is that, alike Ukraine, they are all civil law countries. Another reason is that in each of these countries, HRDD legislation has been adopted or proposed recently. Regarding the EU, if the most recent initiative on corporate due diligence and corporate accountability turns into legislation, it will be applied to Ukrainian companies exporting goods and services to the EU internal market. Moreover, a future directive might become a subject of the approximation (aligning) of Ukrainian legislation to one of the EU under the 2014 EU-Ukraine Association Agreement, the BHR aspects of which were also analysed.

Corporate voluntarism was not a priority for the study. Instead, the HRDD regulatory frameworks were. Particular emphasis was placed on how HRDD obligations and other elements of the mHRDD regimes are and should be framed to achieve more responsible business conduct and greater corporate accountability. Regarding the latter, long-standing human rights litigation efforts by victims of corporate abuse of human rights abuse were only briefly mentioned while various HRDD legislative acts and proposals were considered along with case-law on specific HRDD-related issues. Concerning the access to remedy, this thesis concentrated on a wide range of liability regimes rather than grievance mechanisms.

This study touched upon the small and medium enterprises *(SMEs)* and state-owned enterprises *(SOEs)* in the BHR context and the nexus between human rights and anti-corruption, but these issues were not paid particular attention. Besides, this quite broad study did not discuss several important but specific issues, such as gender perspectives on BHR issues and international investment agreements and human rights.

This paper mainly covers about ten years from June 2011 to late May 2021, considering the intention to reflect the most recent developments on mHRDD.

## 1.5 Outline

This thesis consists of five chapters. Following introductory *Chapter 1*, chapters two to four host the substantive discussion of the research questions, while the last fifth chapter concludes the study. In more detail:

*Chapter 2* briefly discusses the foundation and nature of the HRDD concept, the tripartite structure of the Guiding Principles, constitutive elements (phases) of the HRDD process and its evolution into a standard of expected conduct. In particular, through elaborated discussion on the mHRDD legislation and legislative initiative in France, Switzerland, the Netherlands, and the EU, along with a brief discussion on the UK, Germany and Norway. Chapter 2 ends with considerations on constitutive elements of an mHRDD regime and the key issues related to HRDD.

*Chapter 3* provides contextual background on Ukraine. It explains the Association Agreement with the EU and describes the emergence of the BHR agenda in Ukraine. Finally, it discusses the National Baseline Assessment on BHR and the most recent developments regarding the BHR Chapter of the National Human Rights Strategy and the draft action plan.

*Chapter 4* takes a close look at Ukrainian legal and policy frameworks covering the various applications of the due diligence concept, a broad range of liability regimes, non-financial reporting, corporate governance and directors, environmental protection, stakeholder engagement and economic stimuli. Civil liability and other kinds of liability receive particular attention. The chapter elucidates essential features of the Ukrainian legislation in light of the foreign mHRDD regimes. It also lays out a ‘big picture’ and connects parallel legislative reforms to highlight the need for state policy coherence.

*Chapter 5* presents conclusions and recommendations of this thesis stemming from the discussions and finding of the previous chapters.

# 2 Human rights due diligence: from uncertainty to the mainstream

## 2.1 Foundation of the human rights due diligence concept

Human rights due diligence is a relatively new concept, which was developed and introduced into the business and human rights field by Professor John Ruggie during his mandate as Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises *(SRSG)* in 2005-2011. This section explores the foundations of the HRDD concept, how the so-called 'business as usual' was first challenged and why the concept of 'sphere of influence' has not made its way into the UNGPs while the 'due diligence' concept has.

For a long time, business has been a driving force for improving human lives by providing jobs, developing innovations, and moving the economy forward. However, wealth creation has yet been the primary purpose of doing business in the first place, while the question of how human lives were adversely affected by it remained largely unaddressed until the 1950s-1960s. This period is when the *corporate social responsibility (CSR)* discussion emerged concerning corporate response to social and moral expectations and responsibility beyond wealth creation and profit maximisation. Gradually CSR evolved into an international phenomenon representing numerous voluntary initiatives[15] and processes corporations employ to meet those expectations and responsibility.

In the late 1970s, another movement began to spring up – *business and human rights (BHR)* – which later matured as a separate debate and field focused firmly on human rights issues related to businesses' activities in the increasingly globalised world.[16] Contrary to CSR that paid attention exclusively to the private sector's responsibilities, corporate philanthropy and other voluntary activities, BHR concerned not only with the business but also states and their role in 'overseeing company respect for human rights' as well as corporate accountability issues, particularly access to remedies.[17]

The exponential rise of transnational corporations *(TNCs)* and growing concerns about their impunity in human rights violations in the 1980s-1990s[18] made the UN finally

[15] Of significant importance were the 1976 OECD Guidelines for Multinational Corporations that also focused mainly on corporate behaviour. Later editions of these guidelines brought about the notion of *responsible business conduct (RBC)* and extended the scope of certain aspects of access to justice, as will be discussed further. At the same time, the EU treats RBC as a term alternative to CSR, understood as 'the responsibility of enterprises for their impacts on society', European Commission, 'Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights. Overview of Progress' (2019) 6 <https://ec.europa.eu/docsroom/documents/34963> accessed 1 May 2021.

[16] Florian Wettstein, 'The History of "Business and Human Rights" and Its Relationship with Corporate Social Responsibility' in Surya Deva and David Birchall (eds), *Research handbook on human rights and business* (Edward Elgar Publishing 2020) 22–23.

[17] Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14 Journal of Human Rights 237, 237–238.

[18] Among the most infamous cases were the widespread use of sweatshop labour by Nike, Gap and the likes, the horrific industrial disaster in Bhopal (India) killing thousands of people, and the execution by a Nigerian army of activist Ken Saro-

address the issue with two independent initiatives in 1999.[19] First, the drafting of the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' *(UN Norms)*, led by the UN Sub-Commission on the Promotion and Protection of Human Rights. The 2003 draft of the UN Norms – suggesting attribution to business enterprises obligations 'to promote, secure the fulfilment of, respect and ensure respect of and protect' human rights – was firmly rejected by the Commission on Human Rights since those obligations were drawn heavily from existing obligations of states with no solid foundation for such approach.[20] Second, the *UN Global Compact*, advanced personally by the UN Secretary-General – 'a norms-based learning forum and engagement mechanism' complementary to business initiatives and law-making, promoting ten principles on human rights, labour, environment and anti-corruption – exists to this day.[21]

The 'sphere of influence' concept, used by CSR professionals, was employed by both initiatives. The UN Norms' drafters suggested limiting the general obligations of TNCs and businesses to their 'sphere of activity and influence'[22] while the UN Global Compact saw the concept as one qualifying the scope of all its ten principles.[23] Still, the UN admitted that the concept was not well defined in international human rights law *(IHRL)* and was couched on the idea that some individuals have 'a certain political, contractual, economic or geographic *proximity*' to the company in question.[24] The UN Global Compact later offered the business to treat sphere of influence as a way 'to begin to define what relationships it might have with different stakeholder groups in relation to human rights as well as in relation to all the other principles of the Compact'.[25] Due to its unclarity, Lukas describes the sphere of influence as a fluid concept that turned the mentioned proximity to specific individuals and their human rights into a basis for attributing responsibility for them to a respective business. That sphere, she continues, was meant to be determined on a case-by-case basis by applying specific parameters, like direct control or contractual obligations, where more influence meant increased responsibilities for the business.[26]

After the UN Norms failed to gather support, the UN made another endeavour to regulate corporate responsibility regarding human rights. This time professor John Ruggie was appointed as SRSG with a two-year mandate for identifying and clarifying existing

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Wiwa, who had led a campaign against Shell's operations in the Niger Delta; for more cases, *see* Chris Jochnick and Louis Bickford, 'The Role of Civil Society in Business and Human Rights' in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and human rights: from principles to practice* (Routledge 2016) 259–260.

[19] Technically, the first attempt by the UN to deal with TNCs was taken between 1974 and 1993 when the UN Code of Conduct on Transnational Corporations was negotiated, but the draft code was never agreed upon, Karl P Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) The Journal of World Investment & Trade 11, 13, 55.

[20] John Gerard Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' in Surya Deva and David Birchall (eds), *Research handbook on human rights and business* (Edward Elgar Publishing 2020) 70–71.

[21] Originally there were nine principles, while the tenth on anti-corruption was added once the respective UN convention was adopted, ibid 70–72; 'Homepage | UN Global Compact' <https://www.unglobalcompact.org/> accessed 14 March 2021.

[22] The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft), E/CN.4/Sub.2/2003/12/Rev.2 2003 para A.1.

[23] OHCHR and UNGC, 'Embedding Human Rights in Business Practice I' (2004) 10 <https://www.unglobalcompact.org/library/12> accessed 9 March 2021.

[24] ibid 15 (emphasis added).

[25] OHCHR and UNGC, 'Embedding Human Rights in Business Practice II' (2007) 10 <https://www.unglobalcompact.org/library/12> accessed 9 March 2021.

[26] Karin Lukas, 'Human Rights in the Supply Chain: Influence and Accountability' in Radu Mares and Karin Lukas (eds), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation.* (BRILL 2011) 153–155.

concepts, standards and practices of corporate responsibility and accountability.[27] The sphere of influence was explicitly listed among vague concepts that require clarification.[28] In developing his framework for corporate responsibilities for human rights abuses, Ruggie chose to build on the 'due diligence' concept rather than on the 'sphere of influence'. The latter did not reflect the realities of globalised commerce[29] and, according to SRSG, was unclear in terms of separating influence as impact and influence as leverage (responsibility based on influence as leverage would wrongly mean that 'can implies ought'). Neither was it precise about actions companies may take when the influence was identified or how its sphere of influence is different from the state's jurisdiction.[30]

First mentions of 'due diligence' appeared in Ruggie's report in February 2007, when he discussed the origins and meaning of the term within IHRL. The UN treaty bodies expect states to act with 'due diligence' in fulfilling their duty to protect human rights. This approach mainly stemmed from the *Velasquez case,* where the Inter-American Court of Human Rights held that states 'could be held responsible for private acts where they fail to act with "due diligence" to prevent or respond to violations'.[31] The Human Rights Committee later pronounced a similar conclusion regarding states' failure to 'exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities' while the Committee on the Elimination of Discrimination against Women applied due diligence concept in framing the state duties to tackle violence against women.[32]

In the following reports, SRSG actively proceeded[33] in discovering 'due diligence' as applicable to states and applied by businesses. The familiarity of the business community with the due diligence concept was soon identified as the latter's distinct advantage over the 'sphere of influence'. Indeed, due diligence was familiar to businesses as the concept referring to the financial aspects of decision-making. Traditionally, due diligence was applied as an investigative and evaluative exercise involving 'risk reduction, mitigation and management' performed by a prospective purchaser to verify the purchase subject. This traditional understanding was later extended to include aspects of business operations beyond financial. For example, environmental risks posed by business activities began to get assessed within the social (and then human rights) impact assessment before and during the implementation of major projects.[34]

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[27] Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/RES/2005/69 (2005) paras 1, 7.
[28] ibid 1(c).
[29] Mark B Taylor, 'Human Rights Due Diligence in Theory and Practice' in Surya Deva and David Birchall (eds), *Research handbook on human rights and business* (Edward Elgar Publishing 2020) 98.
[30] Clarifying the Concepts of "Sphere of influence" and "Complicity", Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, A/HRC/8/16 (2008) para II.B.10-18.
[31] State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries, Addendum to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/35/Add.1 (2007) para 9.
[32] ibid 27.
[33] The term 'due diligence' appeared numerous times in 17 out of 22 of SRSG's reports, including most prominently in the 2008 'Protect, Respect and Remedy' Framework and the 2011 UNGPs themselves, where it was fully unfolded, 'Reports of the SRSG on Human Rights and Transnational Corporations and Other Business Enterprises' (*OHCHR*) <https://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx> accessed 9 March 2021.
[34] Geordan Graetz and Daniel M Franks, 'Incorporating Human Rights into the Corporate Domain: Due Diligence, Impact Assessment and Integrated Risk Management' (2013) 31 Impact Assessment and Project Appraisal 97, 100.

Due diligence appeared among critical components of the 2008 'Protect, Respect and Remedy' Framework *(PRR Framework)* as a concept describing 'the steps a company must take to become aware of, prevent and address adverse human rights impacts' with reference to comparable processes which companies are already using for risk assessment and management.[35] The PRR Framework also clarified that 'the scope of due diligence…is not a fixed sphere, nor is it based on influence. Rather, it depends on the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities'.[36] Moving towards operationalization of the PRR Framework, SRSG reported that due diligence had a common legal definition as 'diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation'. However, as emphasised immediately after, he was using the term not in strictly transactional terms but in a broader sense as 'a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks'.[37]

Thanks to its familiarity within the business community and higher clarity, 'due diligence' unlike 'sphere of influence' made its way into the Guiding Principles in the form of HRDD and ultimately offered a common standard of meeting corporate responsibility to respect human rights.[38] The UNGPs state that the responsibility to respect human rights arises from the company's own actions and its business relationships that often cross national borders. Such an innovative approach made HRDD suitable to the realities of the globalised economy and helped turn the Guiding Principles into global norms.[39] The UNGPs do not explicitly define HRDD, but they do explain that it 'can be included within broader enterprise risk-management systems'.[40] In addition, the 2012 OHCHR Interpretative Guide to the Corporate Responsibility to Respect Human Rights clarified that HRDD 'comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake…to meet its responsibility to respect human rights'.[41]

After his mandate was over, Ruggie explained that the HRDD 'brought the issue of identifying and addressing companies' adverse human rights impacts into a familiar risk-based framing for them', and confirmed that in designing it, he drew from established business practice of conducting due diligence to manage risks in transnational operations, like merger and acquisition.[42] Therefore, the corporate practice of conducting due diligence to

[35] Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5 (2008) para 56.
[36] ibid 72.
[37] Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/11/13 (2009) para 71.
[38] UNGPs principles 11, 13.
[39] Taylor, 'Human Rights Due Diligence in Theory and Practice' (n 29) 98–99; although the UNGPs do not set a legal principle for attributing responsibility to business, the idea of tying the latter to a failure to carry out effective HRDD or harm resulting from business activities and relationships was later translated into legal provisions in one law and several legislative initiatives, as demonstrated below.
[40] UNGPs commentary to principle 17.
[41] OHCHR, The Corporate Responsibility To Respect Human Rights: An Interpretive Guide 2012 6.
[42] John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W W Norton & Company 2013) 99–101.

manage risks related to decision-making in various business activities is a central component in the foundation of the HRDD concept.

Taylor commented that 'due diligence is a process found in commercial law legislation in a number of countries and the [PRR] Framework adopts it into the human rights context'.[43] However, it worth noting that the first attempt of such adoption (although with neither original naming nor success) was made by the Commentary on the UN Norms in 2003. It referred to 'due diligence' twice. Firstly, requiring TNCs and other business enterprises 'to use *due diligence* in ensuring that their activities do not contribute directly or indirectly to human abuses and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware'.[44] Secondly, obliging these enterprises '[to] engage with *due diligence* in investigations of potential security guards or other security providers before they are hired […]'.[45] The latter application reflects the traditional understanding of due diligence as an investigative/risk-management tool, in this case, aimed at verifying the compliance of prospective employees or providers with specific criteria. Still, the former application, accommodated to human rights context – due diligence as a preventive tool against direct and indirect contributions to or benefits from human rights abuses – was something new later used and further developed by Ruggie into HRDD. Therefore, at least to some extent, the UN Norms' contribution to the rise of the due diligence concept has also served as a building block of the HRDD's foundation.

## 2.2 Human rights due diligence in soft law

### 2.2.1 The United Nations Guiding Principles on Business and Human Rights

Professor John Ruggie concluded his 6-year mandate by issuing the Guiding Principles, which rested, like the PRR Framework,[46] on three interrelated pillars:

- the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication;
- the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved;
- greater access by victims to effective remedy, both judicial and non-judicial.[47]

[43] Mark B Taylor, 'The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility' (2011) 5 Etikk i praksis - Nordic Journal of Applied Ethics 9, 15.
[44] Commentary for the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft), E/CN.4/Sub.2/2003/38 (2003) para A.1.b (emphasis added).
[45] ibid C.4.d (emphasis added).
[46] Despite an apparent resemblance between the PRR Framework and the UNGPs, operationalization did lead to some significant changes. One example, according to Mares, is that by employing a number of reframing and drafting manoeuvres, SRSG, in particular, turned the 2008 single-pronged concept of respect (not to infringe human rights) into the 2011 double-pronged concept (to avoid infringing and to address human rights impacts with which businesses are involved). For more examples and the discussion, Radu Mares, '"Respect" Human Rights: Concept and Convergence' in Robert Bird, Daniel Cahoy and Jamie Prenkert, *Law, Business and Human Rights* (Edward Elgar Publishing 2014) <http://www.elgaronline.com/view/9781782546610.00007.xml> accessed 23 March 2021.
[47] UNGPs Introduction para 6; John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (1. ed, Norton 2013) xlviii, 82.

The Guiding Principles did not create new international law obligations. Instead, they elaborated the implications of existing standards and practices for states and businesses.[48] Along with the foundational and operational principles of each pillar, the UNGPs introduced several key concepts. For the purposes of this section, a few of them are further explained.

Human rights risks are any risks that a business enterprise's operations pose *to human rights* and that may lead to adverse human rights impacts.[49] In other words, human rights risks are potential adverse human rights impacts. 'Adverse' in the sense of removing or reducing the ability to enjoy human rights. Once such impacts are occurring or have already occurred, they turn into actual human rights impacts.[50] In addressing adverse human rights impacts, the latter may be prioritised by their severity: those of larger scale, scope, or risk getting irremediable should be considered the most severe.[51]

#### 2.2.1.1 Corporate respect for human rights through human rights due diligence

The corporate responsibility to respect human rights *(RtR)* stands as Pillar II of the UNGPs. To respect human rights means that business enterprises 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[52] In order to 'know and show that they respect human rights' businesses should put in place specific policies and practices, including 1) a policy commitment to meet their RtR, 2) an HRDD process to identify, prevent, mitigate and account for their actual and potential adverse human rights impacts, and 3) processes to remedy those impacts, which they caused or contributed to.[53] In this tripartite structure of Pillar II the most considerable weight is attached to the effective HRDD: without it, a company can hardly meet its RtR.

The Guiding Principles call all business enterprises (both transnational and others, regardless of their size, sector, location, ownership and structure) to adopt and publicly communicate *a policy commitment* to respect for human rights.[54] It will serve as a normative foundation for operationalising respect for human rights inside the enterprise and as 'a visible commitment to which external stakeholders can hold it accountable'.[55] The human right policy is an initial step of developing the HRDD processes aiming at its implementation.

Under Guiding Principle 17, the four key elements of the HRDD process include assessing impacts, taking action, tracking responses and finally, communicating all of these.

##### 1 Assessing actual and potential human rights impacts

In practice, this process came to be known as human rights impact assessment *(HRIA)* which could be a stand-alone assessment, a one integrated with environmental *(EIA)* or social

[48] UNGPs Introduction para 14; Ruggie, *Just Business: Multinational Corporations and Human Rights* (n 42) xlviii, 82.
[49] 'This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related', OHCHR, The Corporate Responsibility To Respect Human Rights: An Interpretive Guide 7.
[50] UNGPs principle 17 and the commentary; OHCHR, The Corporate Responsibility To Respect Human Rights: An Interpretive Guide 5–7.
[51] UNGPs principle 24; OHCHR, The Corporate Responsibility To Respect Human Rights: An Interpretive Guide 8.
[52] UNGPs principle 11.
[53] ibid principles 15, 17.
[54] ibid general principles, principle 16.
[55] Claire Methven O'Brien, *Business and Human Rights. A Handbook for Legal Practitioners* (Strasbourg: Council of Europe (Non-peer-reviewed) 2019) 86.

impact assessment *(SIA)*, or an evaluation within another thematic assessment, such as on security or labour rights.[56] HRIA's intended purposes include identifying and addressing adverse human rights impacts, contributing to effective HRDD, facilitating meaningful dialogue between stakeholders, and empowering rights-holders to hold businesses accountable for their adverse impacts.[57]

### 2 Integrating and acting upon the findings

To integrate HRIA's findings across all relevant internal functions and processes and take appropriate action means developing measures to cease, prevent, mitigate, or remediate adverse human rights impacts.[58] Considering that such measures may affect 'human resources, health, safety and environment, security, legal and compliance, marketing and procurement' or any other area of the business, they will usually require internal human rights capacity building, prescribing accountability for human rights in certain job descriptions and key performance indicators, allocating financial and other resources for an ongoing HRDD process.[59]

### 3 Tracking responses

The above-described measures constitute an enterprise's response to identified human rights impacts. In an effort to figure out whether such a response is adequate, an enterprise will need to track or monitor the implementation of respective measures against appropriate indicators. Both internal and external sources should inform this process. Tracking should be integrated into internal reporting[60] to get a clear picture of an enterprise's human rights performance which would allow it to increase internal accountability and inform further external communication.[61] Tracking should also involve rights-holders and other stakeholders, for instance, through 'joint community-company monitoring initiatives'. As a part of the ongoing process, tracking should enforce continuous improvement of company policies and practices by introducing necessary changes.[62]

### 4 Communicating how impacts are addressed

Once a business enterprise has assessed its adverse human rights impacts, implemented measures to address them and tracked the effectiveness of such implementation, it should be well equipped for external communication on how is it coping. This element includes two components: 1) communicating with directly (or potentially) affected rights-holders as soon as human rights impacts are identified and when concerns are raised, and 2) regular formal public corporate reporting.[63] In any case, the external communication should

[56] UNGPs principle 18 and the commentary; O'Brien (n 55) 87.
[57] DIHR, 'Human Rights Impact Assessment: Guidance and Toolbox' (2020) 6 <https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hria_toolbox_2020/eng/dihr_hria_guidance_and_toolbox_2020_eng.pdf> accessed 7 April 2021.
[58] UNGPs principle 19; 'to remediate' means here that an enterprise has to take measures, for example, by planning budget, enabling remediation rather than provide for it as such, since remediation (principle 22) operationally falls beyond the scope of HRDD (principles 17-20).
[59] O'Brien (n 55) 84.
[60] UNGPs principle 20.
[61] OHCHR, The Corporate Responsibility To Respect Human Rights: An Interpretive Guide 53.
[62] O'Brien (n 55) 84.
[63] ibid 85; UNGPs principle 21.

be accessible to its intended audiences, provide information sufficient for evaluation of an enterprise's response, and bear no risk to affected stakeholders, personnel, or confidential information.[64]

In terms of scope, HRDD should cover all adverse human rights impacts that the business enterprise may cause or contribute to through its own activities or be directly linked to through its business relationships. At the same time, the HRDD process' complexity will depend on numerous factors, such as the size of the business enterprise or its operating context.[65] Another crucial point is that the Guiding Principles do not provide for HRDD as 'a single prescriptive formula'. Instead, they set a framework of the key four elements accompanied by remediation process, which a company will need to tailor to its internal processes considering in addition to size and operating context, its industry and corporate structure as well as the severity of its human rights impacts.[66] Finally, yet importantly, HRDD should be an ongoing process because human rights risks are dynamic, just like company activity itself. Consequently, approaching certain milestones, like a product launch or market entry, companies should begin a cycle again by launching respective HRIA.[67]

It worth highlighting once again that despite having its foundation in due diligence processes which are traditionally conducted to manage business-related risks, i.e. those posed *to businesses*, HRDD is designed to address human rights risks which in turn are posed *by businesses to human rights*. Thus, HRDD is a risk-based due diligence, but in a way, it requires companies to manage 'reversed' business-related risks.

The last two points about HRDD refer to its connection to legal obligations and liability. Firstly, Guiding Principle 12 clarifies that RtR refers to 'internationally recognized human rights', including at least those enshrined by the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.[68] Despite this reference, companies are not assigned with any legal duties under the UNGPs because they are soft law instrument.[69] In addition, Ruggie explains:

> The long-standing doctrinal debate about whether business enterprises can be duty bearers under [IHRL] is avoided because the UNGPs state that businesses should look to current internationally recognized human rights for an authoritative enumeration, not of human rights *laws* that might apply to them, but of human *rights* they should respect.[70]

Secondly, HRDD should not be turned into a procedural tick-box exercise, and companies should not assume that just carrying it out will automatically and fully absolve them from liability for causing or contributing to human rights abuse. Nevertheless, companies that do carry out appropriate HRDD, i.e. take all reasonable steps to avoid such

[64] UNGPs principle 21.
[65] ibid principle 17.
[66] OHCHR, The Corporate Responsibility To Respect Human Rights: An Interpretive Guide 32–33.
[67] UNGPs principles 17, 18.
[68] ibid principle 12.
[69] Bernaz aptly points out that the Ruggie's approach – to advance corporate human rights responsibility as social expectations, not legal duties – 'may sound puzzling' to lawyers, and yet she argues that it was 'a second-best option', Nadia Bernaz, *Business and Human Rights: History, Law and Policy: Bridging the Accountability Gap* (Routlege 2017) 204.
[70] Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (n 20) 76.

abuse, should be able to rely on this fact when facing legal claims of their involvement in it.[71] 'Due diligence obligations should be carefully designed to be *an ongoing and dynamic process instead of a 'box-ticking exercise'* and that due diligence strategies should be in line with the dynamic nature of adverse impacts', stresses the European Parliament in its recent legislative report.[72]

Finally, along with policy commitment and HRDD, Pillar II includes another essential component – remediation: business enterprises should provide for or cooperate in it where they have caused or contributed to respective adverse human rights impacts.[73] The issue of access to remedy is considered in the following section.

#### 2.2.1.2 Interplay with state duty to protect and access to remedy

Since the late 1990s, BHR has strongly developed from the emerging movement to the wide professional field and policy area. Nevertheless, its original focus on not just corporate responsibilities but also the role of states and access to remedy persists. Moreover, the tripartite structure, crystalised in the Guiding Principles, stands as the central feature that sets BHR apart from CSR/RBC. This section explains the interplay between the three pillars.

Pillar I of the UNGPs overall requires two things from states: to protect human rights against abuse by businesses and to clearly manifest that businesses are expected to respect human rights.[74] In order to fulfil these obligations, states should put in place and enforce laws and policies requiring and enabling corporate respect for human rights, in particular corporate reporting.[75] When it comes to state-owned, controlled, or those businesses receiving substantial state support, additional protective measures should be taken. For instance, states may oblige such businesses and entities they support to carry out HRDD.[76] Similarly, states should ensure through respective rules and contracts that their service providers and commercial contractors respect human rights.[77] In conflict-affected areas, states should heighten their efforts by assisting businesses in HRDD processes and excluding public support for those involved in gross abuses of human rights.[78] Finally, states should ensure policy coherence throughout their laws and policies, between implementing state bodies and via their investment agreements and activities at international fora.[79] These guiding principles

[71] UNGPs commentary to principle 17; this so-called 'due diligence defence' mechanism is discussed in much detail in section 4.2.1.
[72] EU Mandatory Due Diligence Initiative para 16 (emphasis added).
[73] UNGPs principle 22; here, the UNGPs refer to those remedial mechanisms relevant to business while Pillar III on access to remedy covers both these and other mechanisms, not related to business. As a result, business-related remedies are addressed under the UNGPs twice – in Pillar II and III, OHCHR, The Corporate Responsibility To Respect Human Rights: An Interpretive Guide 4.
[74] UNGPs principles 1, 2.
[75] ibid principle 3.
[76] ibid principle 4.
[77] ibid principles 5, 6.
[78] ibid principle 7.
[79] ibid principles 8-10.

are largely mirrored by the analogues recommendation for the member states of the Council of Europe[80] and the state parties to the International Covenant on Civil and Political Rights.[81]

Pillar III of the UNGPs elaborates on the state duty to protect against business-related human rights abuse by requiring states to provide those adversely affected with access to effective remedy. To meet this requirement, states are again asked to employ all appropriate means at their disposal, including judicial, administrative, and legislative.[82] Among such means, the UNGPs encompass state-based judicial and non-judicial grievance mechanisms along with non-state-based ones. All non-judicial mechanisms must satisfy certain effectiveness criteria (e.g., be based on stakeholder engagement and dialogue[83]). States should reduce existing barriers against access to remedy and facilitate non-state-based avenues for remedy. Businesses in their turn should either set up or participate in operational-level grievance mechanisms for adversely affected individuals and communities. Finally, collaborative (like industry or multi-stakeholder) initiatives should also partake to increase the availability of effective grievance mechanisms.[84] The Commentary to Guiding Principle 29 notes that operational-level grievance mechanisms should support HRIA, a part of an ongoing HRDD. As previously mentioned, the remediation complements HRDD as an unalienable component of RtR. In addition, among legislative means, setting corporate civil liability is currently getting a lot of attention and will be discussed below.

Ultimately, under the UNGPs, states take all necessary measures to enable corporate respect for human rights (Pillar I), companies carry out effective HRDD and provide remediation if they caused or contributed to human rights abuse (Pillar II), both states and companies ensure access to effective remedies for affected third parties (Pillar III). The interplay between them occurs, for example, when a state imposes HRDD requirements to make corporate HRDD practices more effective or offers economic incentives for companies that put effective HRDD processes in place (Pillars I – Pillar II). Another example is where stakeholders' complaints via a company's internal whistle-blowing mechanism inform the next cycle of HRDD or where a state introduces class action for cases on business-related human rights abuse (Pillar III – Pillar II).

### 2.2.2 Other soft law instruments

The concept of human rights due diligence introduced in the Guiding Principles consequently was implemented in one form or another in a significant number of soft law instruments. They include inter alia the OECD Guidelines,[85] the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[86] *(ILO Tripartite*

[80] Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states on human rights and business ch II, III *(hereinafter – Council of Europe BHR Recommendation 2016)*.
[81] CESCR, General comment No 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (2017) ch III.
[82] UNGPs principle 25.
[83] However, this should complement wider stakeholder engagement (including with trade unions) rather than replace it, ibid commentary to principle 29, principle 31.
[84] ibid principles 26-31.
[85] OECD Guidelines for Multinational Enterprises 2011.
[86] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at is 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions.

*Declaration)*, the International Organization for Standardization Guidance on Social Responsibility ISO 26000,[87] the International Finance Corporation Performance Standards,[88] the Equator Principles (for financial institutions), the Voluntary Principles on Security and Human Rights (for extractives sector),[89] the European Commission's renewed EU strategy 2011-14 for Corporate Social Responsibility,[90] and the Recommendation CM/Rec(2016)3 of the Committee of Ministers of Council of Europe to member states on human rights and business[91] *(CoE BHR Recommendation)*.

For the purposed of this thesis, the OECD Guidelines is touched upon, which were among the earliest yet the most authoritative followers of the UNGPs: their updated 2011 edition for the first time included a human rights chapter, drawn upon and consistent with the Guiding Principles.[92]

The OECD Guidelines are an integral part of the OECD Declaration on International Investment and Multinational Enterprises *(OECD Declaration)*. The list of 50 countries that have adhered to this declaration hence to the guidelines contain 37 OECD and 13 non-OECD countries, including Ukraine.[93] Although OECD Guidelines are voluntary principles and standards, all adhering countries make a binding commitment to implement them.[94]

Two points about due diligence under the OECD Guidelines worth highlighting. First, the guidelines take a comprehensive approach to due diligence and extend the scope of application of the risk-based due diligence beyond human rights to labour, environment, anti-corruption, consumer protection and disclosure.[95] In 2018, to elaborate on the meaning of due diligence and to provide a framework for carrying it out, the OECD Guidelines were complemented by the OECD Due Diligence Guidance for Responsible Business Conduct.[96] Second, adhering countries commit to set up state-based non-judicial grievance institutions – National Contact Points *(NCPs)* – tasked with promotional activities, handling enquiries and contributing to the resolution of the guidelines' implementation-related issues. Notably, companies are only participating in the procedure hold by the NCPs if they want, and no enforcement of the decisions is prescribed.[97] At the same time, as observed, among the most common complaints dealt with by the NCPs are those concerning companies' risk-based due diligence processes.[98]

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[87] 'ISO 26000 — Social Responsibility' (*ISO*) <https://www.iso.org/iso-26000-social-responsibility.html> accessed 15 April 2021. *See also* 'ISO 26000 and OECD Guidelines - Practical Overview of the Linkages' (2019) <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100418.pdf> accessed 15 April 2021.
[88] IFC Performance Standards on Environmental and Social Sustainability 2012.
[89] 'The Voluntary Principles on Security and Human Rights' (*Voluntary Principles on Security and Human Rights*) <https://www.voluntaryprinciples.org/> accessed 15 April 2021.
[90] European Commission, A renewed strategy 2011-14 for Corporate Social Responsibility COM(2011) 681 final 2011.
[91] Council of Europe BHR Recommendation 2016.
[92] OECD Guidelines for Multinational Enterprises 3.
[93] OECD Declaration and Decisions on International Investment and Multinational Enterprises 1976.
[94] OECD Guidelines for Multinational Enterprises 13.
[95] ibid 3, 20; since 2011, following its 'proactive agenda' the OECD has also developed sector-specific due diligence guidance for mineral, textile and garment, agricultural supply chains as well as for extractive and financial sectors, 'Guidelines for MNEs - OECD, Proactive Agenda' <https://mneguidelines.oecd.org/proactiveagenda.htm> accessed 5 May 2021; 'Guidelines for MNEs - OECD, Responsible Business Conduct by Sector' <https://www.oecd.org/industry/inv/mne/> accessed 15 April 2021.
[96] OECD Due Diligence Guidance for Responsible Business Conduct 2018.
[97] OECD Guidelines for Multinational Enterprises 67.
[98] Karin Buhmann, 'Human Rights Due Diligence' (*Teaching Business and Human Rights Forum*, 6 November 2018) <https://teachbhr.org/resources/teaching-bhr-handbook/teaching-notes/human-rights-due-diligence/> accessed 12 April 2021.

Despite being non-binding, the OECD Guidelines and numerous additional guidance by the OECD provide adhering countries with comprehensive normative resource from which they may draw when developing binding national instrument aligned with widely supported international standards for RBC.

In addition to the above-listed standards that directly refer to due diligence, the UN 2030 Agenda should be touched upon, even though it does not mention HRDD. The SDGs are nevertheless interconnected with human rights,[99] RBC,[100] BHR.[101] The WG BHR explains that 'a development path in which human rights are not respected and protected cannot be sustainable, and would render the notion of sustainable development meaningless'. Accordingly, it provides ten recommendations to governments and businesses couched on the idea that respect for human rights is a cornerstone in pursuing SDGs.[102] While there exist concerns about the SDGs implying 'regression to business philanthropy and early interpretations of [CSR]', the Danish Institute for Human Rights *(DIHR)* contends that 'the implementation of the UNGPs can be the single most important contribution by business to the realisation of the SDGs'.[103] The institute argues for an integrated approach to RBC and sustainable development. Thus, along with other steps, it recommends businesses to use HRDD, in particular, HRIA and corporate reporting, while states are advised to encourage such corporate practices.[104]

The above findings provide a valuable lesson that sustainable development should not be perceived and pursued as opposing to the RBC agenda. Instead, these agendas may well complement and reinforce one another.

## 2.3 Human rights due diligence in hard law

### 2.3.1 Three generations of human rights due diligence laws

The Guiding Principles are the first global BHR standard which eventually became the most authoritative one. Still, as a soft law instrument, the UNGPs do not have binding force. The corporate respect for human rights is therefore grounded in non-legal norms (or 'societal expectations' in Ruggie's words). Nevertheless, like any soft law, the UNGPs represent 'a transitional stage in the development' of norms and 'can obtain legal force and

[99] According to the DIHR, 92% of the 169 SDGs targets are linked to international human rights instruments, DIHR, 'Human Rights and the 2030 Agenda for Sustainable Development: Lessons Learned and Next Steps' (2018) <https://www.humanrights.dk/sites/humanrights.dk/files/media/document/HR%202030%20agenda.pdf> accessed 15 April 2021. *See also* 'The Human Rights Guide to the Sustainable Development Goals | Linking Human Rights with All Sustainable Development Goals and Targets' (*DIHR*) <https://sdg.humanrights.dk/> accessed 15 April 2021.
[100] Daniel Morris and others, *Responsible Business Conduct as a Cornerstone of the 2030 Agenda: A Look at the Implications* (Danish Institute for Human Rights 2019).
[101] The business and human rights dimension of sustainable development: Embedding "Protect, Respect and Remedy" in SDGs implementation (10 key recommendations to Governments and businesses from the UN Working Group on Business and Human Rights) 2017.
[102] ibid.
[103] Morris and others (n 100) 9.
[104] ibid 28.

give rise to harder-edged legal duties' through national legislation.[105] Indeed, a corporate responsibility to respect human rights is 'slowly finding its way into mandatory regulatory frameworks'.[106]

However, emerging legislation aiming at implementing HRDD as defined in the Guiding Principles – so-called 'HRDD legislation' – differs across countries. It embeds different elements of HRDD, prescribes different nature of corporate duties, different liability regimes (if any) and overall has different scope in terms of protected human rights and companies covered by the law. As a result, HRDD laws are traditionally considered in three broad categories or generations: 1) disclosure/transparency/reporting laws, 2) HRDD and sanctions laws, and 3) HRDD and liability for harm laws.[107]

The first generation is limited to a single HRDD obligation – corporate reporting. Disclosure laws may have multiple goals,[108] but they usually require companies to 'disclose information regarding their human rights and environmental impacts generally or relating to specific human rights issues'.[109] The underlying idea is that making more human rights-related information public allows investors, consumers, and other stakeholders to reward companies if their corporate practices respect human rights[110] or to sanction them for poor human rights performance.[111] The HRDD laws of the first generation include inter alia the 2010 US Dodd-Frank Wall Street Reform and Consumer Protection Act, the 2012 Californian Transparency in Supply Chains Act, the 2014 EU Non-Financial Reporting Directive, the 2015 UK Modern Slavery Act, and the 2018 Australian Modern Slavery Act.[112] The inherent limitation of disclosure laws is that they require only reporting. This allows for superficial or cosmetic compliance, hence renders them weak and highly ineffective.[113]

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[105] Chiara Macchi and Claire Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in Martina Buscemi and others (eds), *Legal Sources in Business and Human Rights* (Brill | Nijhoff 2020) 219.

[106] Olga Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2014) 32 Netherlands Quarterly of Human Rights 44, 72.

[107] There is no consensus on naming these categories/generations. For example, Bueno calls them: 1) mandatory disclosure laws, 2) mandatory due diligence laws strictly defined, and 3) HRDD and liability laws, Nicolas Bueno, 'Mandatory Human Rights Due Diligence Legislation' (*Teaching Business and Human Rights Forum*, 22 October 2019] <https://teachbhr.org/resources/teaching-bhr-handbook/mandatory-human-rights-due-diligence/> accessed 19 April 2021; the ECCJ refers to these laws by the obligations they stipulate: 1) on HRDD reporting, 2) on full HRDD obligation, 3) on HRDD obligation linked with existing (civil) corporate liability, ECCJ, 'Key Features of Mandatory Human Rights Due Diligence Legislation' (2018) 1–2 <https://corporatejustice.org/eccj-position-paper-mhrdd-final_june2018_3.pdf> accessed 15 February 2021.

[108] For instance, Mares identifies six possible objectives of disclosure laws: 1) supporting substantive policy goals (e.g., supply chain workers' protection against forced labour), 2) enhancing the quality and quantity of disclosed corporate data, 3) enrolling regulatory potential of private actors (e.g., consumers and investors), 4) stimulating responsible decision-making, 5) generating change in other legal orders (e.g. conflict minerals laws reinforce the OECD Guidance on conflict minerals), 6) delivering flexible but effective state interventions (e.g. by using "outright opt-out clauses" such as companies to 'disclose to what extent, if any' or 'may include' or 'to the extent necessary' or 'where relevant and proportionate' information mentioned in the law'), Radu Mares, 'Corporate Transparency Laws: A Hollow Victory?' (2018) 36 Netherlands Quarterly of Human Rights 189, 191–196.

[109] Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' (2020) 69 International and Comparative Law Quarterly 789, 800.

[110] Anna Triponel, 'Business and Human Rights Legislation: An Overview' (*Triponel Consulting*, 14 October 2019) <https://triponelconsulting.com/business-and-human-rights-legislation/> accessed 15 April 2021.

[111] Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20 (1) Melbourne Journal of International Law 221, 230.

[112] ibid.

[113] For in-depth discussion of transparency laws' flaws, eg *see* Mares, 'Corporate Transparency Laws' (n 108); Landau (n 111).

Moreover, reporting requirements are usually focused on whether a report is provided rather than on its content and veracity, while failure to report usually is not followed by any effective sanction.[114] The recent study on the UK Modern Slavery Act aptly summarises the issue: 'weak requirements, a limited scope & failure to enforce'.[115]

The second-generation HRDD laws prescribe companies to conduct a full range of HRDD obligations, including risks identification, taking action, and reporting on measures taken.[116] However, such laws are limited in scope since they cover a specific sector or issue: the EU Timber Regulation, the EU Conflict Minerals in Supply Chain Regulation and the Dutch Child Labour Due Diligence Act. Another feature is their reliance on state-based monitoring and enforcement mechanisms, such as sanctions for failure to comply with the due diligence obligations put forward. Yet, the HRDD laws of second-generation fall short in providing affected persons with an effective remedy: they mention no liability for harm.[117]

The third generation of HRDD laws, unlike the previous two, does not only require carrying out HRDD but also 'explicitly links [this duty] to existing (civil) corporate liability'[118] or even establishes a new one. To this day, just one piece of such 'overarching mandatory due diligence legislation' was adopted – the French Duty of Vigilance Law.[119] Nevertheless, there have been initiatives in several European countries presenting similar approaches of linking the HRDD duties to liability. Among the 'most advanced legislative proposals'[120] was the Swiss Responsible Business Initiative aimed at establishing a new liability regime for controlling companies that failed to conduct HRDD. Unfortunately, the initiative was rejected by the popular vote in late 2020.[121] Both the French law and the Swiss proposal 'establish a duty of care – a legal obligation to adhere to a standard of reasonable care, while performing any acts that could foreseeably harm human rights or the environment. Those harmed may bring civil (tort) action and claim remedy'.[122] Additionally, the Dutch draft law presented in March 2021 also aims at establishing civil liability for the breach of the duty of care or the due diligence obligation.[123]

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[114] Smit and others (n 4) 245.
[115] The report concluded that '[t]he Modern Slavery Act is not fit for purpose…The publication of a modern slavery statement will not by itself prevent the egregious abuse being inflicted on victims of modern slavery, Business & Human Rights Resource Centre, 'Modern Slavery Act: Five Years of Reporting. Conclusions from Monitoring Corporate Disclosure' (2021) 5, 11 <https://media.business-humanrights.org/media/documents/Modern_Slavery_Act_2021.pdf> accessed 19 April 2021.
[116] ECCJ, 'Key Features of Mandatory Human Rights Due Diligence Legislation' (n 107) 1, 4.
[117] Bueno and Bright (n 109) 800–801.
[118] ECCJ, 'Key Features of Mandatory Human Rights Due Diligence Legislation' (n 107) 2.
[119] Bueno and Bright (n 109) 801.
[120] ibid.
[121] Nicolas Bueno, 'Human Rights Due Diligence Legislation in Switzerland: The State-of-Play after the Swiss Responsible Business Initiative' (*NOVA BHRE Blog*, 1 February 2021) <https://novabhre.novalaw.unl.pt/human-rights-due-diligence-switzerland/> accessed 19 April 2021.
[122] Sandra Cossart, Jérôme Chaplier and Tiphaine Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 Business and Human Rights Journal 317, 318–319.
[123] Joseph Wilde-Ramsing, Manon Wolfkamp and David Ollivier de Leth, 'The next Step for Corporate Accountability in the Netherlands: The New Bill for Responsible and Sustainable International Business Conduct' (*NOVA BHRE Blog*, 18 March 2021) <https://novabhre.novalaw.unl.pt/new-bill-for-responsible-sustainable-international-business-conduct-netherlands/> accessed 19 March 2021.

That HRDD legislation is a rapidly evolving field can be demonstrated by the fact that since the beginning of 2021, another two countries in Europe – Germany and Norway – have presented their proposals for draft laws on mandatory due diligence. The German supply chains due diligence proposal *(German Proposal)* suggests a corporate duty of care 'closely aligned' in content with HRDD under the UNGPs on certain large companies (however, the duty would extend to companies' own operations and only the first tier of the supply chain: direct suppliers[124]). A failure to perform the duty is subjected to administrative sanctions (fines and exclusion from public procurement), while in case of damage, victims are entitled to seeking access to justice through NGOs and unions.[125] Under the Norwegian business transparency proposal *(Norwegian Proposal)*, the country's largest companies would be required to fulfil three separate duties: 1) to exercise 'due diligence with respect to human rights and decent work' following the OECD Guidelines, 2) to disclose their 'due diligence practice' annually, and 3) to disclose 'information about their negative impacts and their due diligence' on a public demand (written request). Among sanctions for non-compliance, only fines are yet mentioned. [126] As neither the German nor the Norwegian Proposals links HRDD duty to the existing civil corporate liability regime, as the French Duty of Vigilance Law, or suggests establishing liability for harm, as the Swiss Responsible Business Initiative, they both would qualify as second-generation HRDD laws.

In any case, it is telling of the progress made ten years into the UNGPs implementation after all national, regional, and international efforts and despite repeated demands from civil society and other stakeholders for corporate accountability. Thus far, only one single law in force mandates companies to exercise general HRDD. Moreover, even this rare piece of legislation does not provide victims who suffered from business-related human rights abuse with an effective remedy, nor is it flawless, as demonstrated below.

### 2.3.2 France

The French Duty of Vigilance Law *(French Law)* was adopted and enacted within the French Commercial Code in 2017. The law assigns certain large parent companies with a legal duty to carry out HRDD. This duty of vigilance[127] is threefold: companies are required to develop, disclose, and effectively implement a vigilance plan specifying measures aiming

[124] John Gerard Ruggie, 'Letter from John Ruggie to German Ministers Regarding Alignment of Draft Supply Chain Law with the UNGPs' (9 March 2021) <https://shiftproject.org/ruggie-letter-german-law-supply-chain-law/> accessed 23 April 2021.

[125] Robert Grabosch, 'The German Supply Chain Due Diligence Act in the Making – What to Expect' (*NOVA BHRE Blog*, 15 February 2021) <https://novabhre.novalaw.unl.pt/german-supply-chain-due-dligence-act-what-to-expect/> accessed 23 April 2021; for more details, *see* Morrison & Foerster LLP, 'German Federal Government Agrees On Act On Human Rights Due Diligence Obligations Of Companies' (*JD Supra*) <https://www.jdsupra.com/legalnews/german-federal-government-agrees-on-act-9488832/> accessed 23 April 2021; for a brief discussion of limitations on the draft law, *see* Ruggie, 'Letter from John Ruggie to German Ministers Regarding Alignment of Draft Supply Chain Law with the UNGPs' (n 124).

[126] The author explains that the promising on-demand disclosure duty is proposed within a 'Right to Information' and was drawn from 'a similar provision in Norway's Environmental Information Act of 2003 […] which empowers people to demand information from companies about the latter's environmental impacts, including in their supply chains', Mark Taylor, 'Mandatory Human Rights Due Diligence in Norway – A Right to Know' (*Blogging for Sustainability*, April 2021) <https://www.jus.uio.no/english/research/areas/companies/blog/companies-markets-and-sustainability/2021/mandatory-human-rights--taylor.html> accessed 23 April 2021.

[127] Under the French civil liability law, the breach of a duty of 'vigilance' amounts to negligence and can lead to civil liability, Lucie Chatelain, 'Corporate Due Diligence and Civil Liability: Comment from Multi-Stakeholders' (*NOVA BHRE Blog*, 3 March 2021) <https://novabhre.novalaw.unl.pt/corporate-due-diligence-civil-liability-comment-from-multi-stakeholders/> accessed 5 May 2021.

at identifying risks and preventing serious harm to human rights, health and safety and the environment.[128]

Following the key elements of the HRDD process under the UNGPs, the French Law puts forth a non-exhaustive list of five elements of a vigilance plan: 1) risks mapping 2) risks assessment; 3) harm mitigating and preventing measures; 4) a whistle-blowing mechanism for reporting on potential and actual risks, and 5) a monitoring and evaluation mechanism.[129] Importantly, the drafting of a vigilance plan may involve stakeholders or be conducted within multi-party initiatives.[130]

The French Law applies to French companies with a national workforce of at least 5,000 persons or an international of at least 10,000. It also extends its effect beyond the company's own activities to activities of its controlled companies and to its subcontractors and suppliers in an 'established commercial relationship' as defined by law.[131] Controlled companies include direct and indirect subsidiaries registered in France or abroad[132] that fall under one of three kinds of 'exclusive control' by a parent company – legal, de facto or contractual control – enabling decision-making power over inter alia their financial and operational policies.[133] Regarding the 'established commercial relationship', the French law defines it as a 'stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last'.[134] This concept is arguably employed to exclude ad hoc business relationships and hence limit the number of a company's subcontractors and suppliers to be covered in its vigilance plan. Consequently, the French Law offers a narrower scope of the HRDD requirements if compared to the UNGPs, which list direct linkage among the kinds of business relationships.[135]

The French Law has reached prominence as the first-ever law imposing a legal duty on MNEs to monitor their supply chains for human rights abuses,[136] and as the first HRDD law establishing, contrary to existing legislation, potentially stronger enforcement and

[128] Bueno and Bright (n 109) 801; disclosure element of the duty also requires the publication of the report on how the vigilance plan was effectively implemented, Stéphane Brabant and Elsa Savourey, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' (2017) 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires 2; as observed, the French Law does not use the term 'due diligence' *(diligence raisonnable)* or 'human rights due diligence' as the UNGPs do. Instead, the former refers to 'reasonable vigilance' *(mesures de vigilance raisonnable)* because it is a more suitable translation of the HRDD concept into French law, to which the vigilance concept is more familiar than a common law's due diligence; in addition, a different term could have avoided confusion between 'due diligence' (process) and 'human rights due diligence' (standard of conduct) highlighted by McCorquodale and Bonnitcha, Macchi and Bright (n 105) 13.

[129] Macchi and Bright (n 105) 13, 14; probably due to the nature and constitutive elements of a vigilance plan, Palombo calls it 'a monitoring plan', Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' (2019) 4 Business and Human Rights Journal 265, 275, 276, 281, 282, 286.

[130] Cossart, Chaplier and Beau De Lomenie (n 122) 320.

[131] ibid.

[132] Under the French Commercial Code, 'a subsidiary is a company in which over half of the company capital is held by another company', Elsa Savourey and Stéphane Brabant, 'Scope of the Law on the Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations' (2017) 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires 1, 5.

[133] Stéphane Brabant, Charlotte Michon and Elsa Savourey, 'The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance' (2017) 50 Revue Internationale de la Compliance et de l'Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires 2.

[134] Cossart, Chaplier and Beau De Lomenie (n 122) 320.

[135] Bueno and Bright (n 109) 802.

[136] Palombo (n 129) 275.

remediation mechanisms, namely 'periodic penalty payments and a civil liability action'.[137] The focus is further places on the latter aspect.

If a company fails to follow the law, any interested party may send a formal notice asking for compliance and then apply for an injunction ordering the company to fulfil its duty of vigilance. When a company continually fails to comply with such an order, hence the law, periodic penalty payments may be imposed.[138]

If a company fails to follow the law and by this inflicts preventable damage, any interested party may bring a civil liability action against such a company under the general French tort law. The latter implies that a claimant bears a burden of proof regarding three constitutive elements of a fault-based liability: 'a breach, damage and causation between the two'. This is one of the key practical hurdles since needed evidence is normally held by the company.[139] Yet another uncertainty remains in regard to two existing theories on determining causation in French tort law that the court may apply: the equivalence of conditions (damage is caused by each factor contributing to causing it) or adequate causality (damage is caused by a most likely determining factor).[140] Moreover, as observed, plaintiffs find it difficult to prove both breach and causation elements of the tort concerning vigilance plan because 'effective implementation' remains an obligation of means, not an outcome, while the causal link is far from obvious in cases involving controlled companies, subcontractors, or suppliers.[141]

The outlined practical challenges, along with the limited possibility for victims, especially foreigners, to file a civil claim, led Brabant and Savourey to conclude in 2017 that the French Law provides insufficient access to remedy.[142] In 2021 they re-examined the challenges faced by claimants, and unfortunately, the findings only confirmed the previous conclusions, including the onerous burden of proof and the limited access to courts due to 'material, social, cultural, institutional and linguistic circumstances'.[143]

Lastly, as of mid-May 2021, four cases regarding extraterritorial activities of French MNEs have been brought against them under French law before the French national courts. The first two climate litigations are against oil giant Total.[144] Another two environmental cases brought by Mexican indigenous communities against largely state-owned energy giant

[137] Brabant and Savourey (n 128) 1; initially, the French Law also provided for civil fines (the equivalent of a criminal sanction under the national law) up to EUR 10 mln in addition to periodic penalty payments and up to EUR 30 mln in addition to civil liability. However, the civil fine sanctioning was declared unconstitutional by the French Constitutional Council Cossart, Chaplier and Beau De Lomenie (n 122) 318, 321.
[138] Macchi and Bright (n 105) 14.
[139] ibid; Bueno and Bright (n 109) 802.
[140] Bueno and Bright (n 109) 804.
[141] ibid 803.
[142] Brabant and Savourey (n 128) 2–3; at the same time, they assert that the French Law's penalties are an effective prevention tool against human rights abuses, ibid 4–5.
[143] Elsa Savourey and Stéphane Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption' (2021) 6 Business and Human Rights Journal 141, 151–152; besides, the authors found that three years into the law's implementation 'a number of companies still approach the vigilance plan as a tick-box exercise and are wary of transparency and stakeholder engagement', ibid 147.
[144] 'First Court Decision in the Climate Litigation against Total: A Promising Interpretation of the French Duty of Vigilance Law' (*SHERPA*) <https://www.asso-sherpa.org/first-court-decision-in-the-climate-litigation-against-total-a-promising-interpretation-of-the-french-duty-of-vigilance-law> accessed 25 May 2021.

EDF,[145] while Brazilian and Colombian indigenous communities are suing the supermarket group Casino.[146] At the same time, according to *Sherpa* (an NGO behind the original proposal to adopt the French Law),[147] no judgement on merits was yet held. Jurisdictional issues were nevertheless considered in three cases leading to inconsistent decisions on whether jurisdiction lies with civil or commercial courts. The Supreme Court is expected to give an answer to that by the end of 2021. Interestingly, as Sherpa's representative further explains, early court hearings have already revealed some of the companies' defence strategies, namely arguing that HRDD under the French Law is a duty of conduct, not an outcome. As a result, the courts will most probably focus on whether the vigilance plans were established and effectively implemented in compliance with the French Law and whether violations could have been prevented had the company taken all necessary measures.[148]

The latter issue is exceptionally contentious considering that it remains unclear at this point what legal nature and effect within the elements of the general tort liability scheme would the 'preventability of damage' have. It may likely fall within either breach or causation elements rather than the damage itself, specifically because it deals with its preventability. Even less clear is the question of how such preventability would be correlated with the fault, which serves as an overarching base for the liability under the French tort law. Ultimately, it appears that a company would be found liable only if a court establishes breach, damage, causation, the preventability of damage and the company's fault.

To sum up, even the most progressive HRDD law is weakened by serious flaws, especially regarding access to justice for victims of business-related human rights abuse. Nonetheless, the French Law is an important step towards greater corporate accountability. Hopefully, the ongoing four cases under the French Law will soon confirm this evaluation.

### 2.3.3 Switzerland

The Swiss Popular Initiative on Responsible Business launched in 2016 aimed at the revision of the Swiss Constitution by adding an article on corporate responsibility to respect human rights *(Swiss Proposal)*. It suggested a mandatory due diligence provision requiring Switzerland-based companies to carry out 'appropriate due diligence' by taking measures to prevent or cease adverse impacts on human rights and the environment as well as account for actions taken to address these impacts.[149] In other words, the Swish Proposal was a proposal to impose on parent companies a legal duty to conduct HRDD in their supply chains.

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[145] 'Corporate Human Rights Due Diligence in Practice: The Union Hidalgo Case in France' (*Oxford Law Faculty*, 19 November 2020) <https://www.law.ox.ac.uk/events/corporate-human-rights-due-diligence-practice-union-hidalgo-case-france> accessed 25 May 2021.

[146] 'Indigenous Organisations and NGO Coalition Warn Top French Supermarket Casino: Do Not Sell Beef from Deforestation in Brazil and Colombia – or Face French Law' (*SHERPA*) <https://www.asso-sherpa.org/indigenous-organisations-and-ngo-coalition-warn-top-french-supermarket-casino-do-not-sell-beef-from-deforestation-in-brazil-and-colombia-or-face-french-law-stop-gambling-with-our-forests> accessed 25 May 2021.

[147] Cossart, Chaplier and Beau De Lomenie (n 122) 317.

[148] Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *On the Precedents of Mandatory Human Rights Due Diligence in Europe - 2021 Webinar Series (Part II)* (2021) at 9:25-11:15, 13:40-14:10 <https://www.youtube.com/watch?v=cu1I-JNItDE&t=893s> accessed 25 May 2021.

[149] Nicolas Bueno, 'The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability' in Liesbeth FH Enneking and others (eds), *Accountability, international business operations and the law: providing justice for corporate human rights violations in global value chains* (Routledge, Taylor & Francis Group 2020) 12, 13.

The scope of HRDD under the Swiss Proposal was interestingly extended to controlled companies and all business relationship as defined by the UNGPs and OECD Guidelines but did not explicitly cover companies' own operations.[150] Controlled companies would generally include subsidiaries, but they might also be ones under de facto (economic) control of a parent company. Another important provision set out civil (tort) liability for harm caused by third parties, namely controlled companies.[151] The controlling company would be liable 'unless it can prove that it took all due care to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken'.[152] This civil liability regime was an example of 'a strict liability with a due diligence defence mechanism'. Unlike a fault-based liability under the French Law, it would shift the burden of proof on the breach from a victim to a controlling company and lift the practical difficulty of collecting evidence to prove that the latter acted negligently.[153] This would undeniably strengthen the victims' position even though they would still carry the remaining burden of proof on 'the harm, the causality, and the control relationship between the business entities'.[154]

The Swiss Proposal attracted much attention due to its progressive provisions on general direct obligation on human rights, formulation of the HRDD duty and establishing a civil liability regime that would, for the first time, shift the burden of proof from a claimant to a respondent company. No wonder that the proposal was met in 2018 with a 'watered-down' counterproposal from the Swiss Parliament to amend the national code of obligations.[155]

Although the counterproposal also required corporate respect for human rights and the environment and carrying out HRDD, it limited the application of these duties to only certain large and wealthy companies, similarly to the French Law. It also narrowed the definition of harm to just 'bodily harm or damage to property' along with raising the bar of control to 'effective control', which is much harder to prove in practice.[156] This would provide parent companies with additional defence mechanism along with due diligence defence ('not liable if [they] took the required measures')[157] contrary to the Swiss Proposal, which offered them only the latter way to avoid liability for harm. The second counterproposal was prepared by the Swiss Council of States and accepted by Parliament in 2020. It diluted the original proposal even further by suggesting imposing HRDD duty on 'certain large companies in only two areas: conflict minerals and child labour'. Most importantly, it prescribed no civil liability, only a criminal one for a company's failure to report on its HRDD obligations.[158]

[150] Nevertheless, Bueno notes that since respective provision, according to the explanatory note to the initiative, was based on the UNGPs and OECD Guidelines, in case of harm caused by a parent (controlling) company's own activities, it would most likely felt under the general tort law, ibid 14.
[151] This type of liability for third parties was designed on the basis of the existing employer's liability under the Swiss Code of Obligations, ibid.
[152] ibid.
[153] Bueno and Bright (n 109) 805.
[154] Bueno, 'The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability' (n 149) 14.
[155] Palombo (n 129) 277.
[156] ibid 277–278.
[157] Nicolas Bueno, 'The Swiss Responsible Business Initiative and Its Counter-Proposal: Texts and Current Developments' (*Cambridge Core Blog*) <https://www.cambridge.org/core/blog/2018/12/07/the-swiss-responsible-business-initiative-and-its-counter-proposal-texts-and-current-developments/> accessed 22 April 2021.
[158] Bueno and Bright (n 109) 806.

As advanced as it could have been, the Swiss Proposal was narrowly rejected by the constitutional referendum in November 2020.[159] Under national legislation, this resulted in the automatic adoption of the second counterproposal imposing reporting and due diligence obligations along with criminal sanctions but no civil liability for harm. It is expected to take force in 2022.[160]

Swiss unique experience with the Responsible Business Initiative and its counterproposals teaches a valuable lesson on how more and less progressive HRDD and civil liability provisions look like. It also reminds how crucial the role of states is when it comes to enabling corporate uptake of HRDD.

### 2.3.4 The Netherlands

The Dutch Child Labour Due Diligence Act *(Dutch Act)* is a consumer protection law that was adopted in 2019 and has not yet entered into force. It envisages that any company, Dutch or foreign, that 'sells goods or provides services to Dutch end-users [must] exercise due diligence in relations to the risks of child labour being used in their supply chains'.[161]

It worth noting from the outset that contrary to French and Swiss models, this presents a different approach to framing the scope of law through a link between a company and a consumer rather than by setting threshold criteria for a company to fall within. Consequently, it creates an inherent limitation unique for the Dutch Act: while the act covers all companies, including Dutch ones, supplying goods and services to the Dutch market, it does not cover Dutch exporting companies.[162] Actually, it makes complete sense considering that the primary (or even only) purpose of the law is the protection of the Dutch consumers, namely ensuring through child labour prevention that they may buy goods and services 'with peace of mind'.[163]

In order to fulfil its HRDD duty, a company must 'investigate whether there is a reasonable suspicion that the goods or services to be supplied have been produced using child labour' and, had such a suspicion been identified, to draft and implement an action plan addressing this issue.[164] Another element is the reporting duty to release and send to a supervisory authority (for further publication) a statement declaring that due diligence has been exercised 'to prevent such goods or services from being produced using child labour'.[165] No requirements for a statement are specified in the act, and what is even more obscure the

[159] Notably, the proposal achieved a short majority (50.7%) of the popular votes but failed to also win in a majority of cantons as required by national law, Bueno, 'Human Rights Due Diligence Legislation in Switzerland' (n 121); regardless of the final result, 'the debate on the popular initiative has increased knowledge of this area for all actors in Switzerland', Robert McCorquodale, 'Some Concluding Remarks on Business and Human Rights in Switzerland' (*NOVA BHRE Blog*, 28 February 2021) <https://novabhre.novalaw.unl.pt/concluding-remarks-bhr-switzerland/> accessed 22 April 2021.
[160] Bueno, 'Human Rights Due Diligence Legislation in Switzerland' (n 121).
[161] Claire Bright and others, 'Options for Mandatory Human Rights Due Diligence in Belgium. KUL Leuven and Nova School of Law' (2020) 27.
[162] ibid 30.
[163] ibid 27; the authors yet argue that the law has 'a twofold objective': child labour prevention and ensuring consumers' peace of mind. This interpretation seems not entirely correct because the respective provision reads 'enshrining in law that companies…prevent their products and services from being produced using child [labour], *so that* consumers can buy them with peace of mind' (emphasis added). Such formulation indicates that, at minimum, child labour prevention is a secondary purpose while at maximum, it is just a tool to achieve the only purpose of consumer protection.
[164] ibid 28.
[165] ibid 29.

statement has to be submitted just once (as opposed to regularly).[166] This amounts to another troubling limitation of the Dutch Act.

In terms of enforcement, any third party affected by a company's failure to comply with its HRDD duties may file a complaint to it. If the company has not responded in six months, a complaint may be submitted to the supervisory authority, which can impose administrative fines (at most extreme: up to 10% of the worldwide annual turnover). If the already fined violation has been repeated within five years, criminal liability may be incurred.[167] Interestingly, while consumers as third parties are entitled to complaining about a company's misbehaviour, the Dutch Act does not explicitly provide for a ban on goods or services produced using child labour had a reasonable suspicion turned into facts proved with evidence. At the same time, since HRDD duties are imposed to arguably prevent child labour, it will make sense if the action plan that a company elaborates to address the issues would include such a ban. On the other hand, the act does not require companies to place such a ban or to recall goods or services produced using child labour from the market[168] neither it outlines, unlike the French Law, the elements of an action plan, leaving this to companies' discretion.

Finally, although the Dutch Act covers entire supply chains of companies falling within its scope and imposes certain administrative and criminal sanctions for non-compliance with HRDD obligations, it nevertheless simply lacks any provisions on civil liability for harm had instances of child labour been identified.[169] This missing link, as previously discussed, is a common limitation of the second-generation HRDD laws.

Hopefully, the Netherlands might soon witness a change for a stronger regulation that would replace the Dutch Act. In March 2021, a promising bill on RBC *(Dutch Bill)* was proposed suggesting obliging certain large companies with a duty of care regarding human rights and the environment in their supply chains along with a duty to carry out HRDD pursuant to the OECD Guidelines.[170] Similarly to the Swiss Proposal, the Dutch Bill appears to be another attempt to impose direct human rights obligations on companies.

The scope of the bill is defined through a combination of the two approaches touched upon above. Firstly, it covers large Netherlands-based companies satisfying two of three threshold criteria: 250 employees, EUR 20 mln of a total balance sheet value, EUR 40 mln of a net turnover. Secondly, it extends to companies that supply goods and services to the Dutch

[166] MVO Platform, 'Update: Frequently Asked Questions about the New Dutch Child Labour Due Diligence Law' (*MVO Platform*, 3 June 2019) <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/> accessed 22 April 2021.
[167] Bright and others (n 161) 9, 29.
[168] Strikingly, some commentators call companies to treat human rights abuse in the supply chain as a quality issue hence consider a product whose production involves such abuse as a defective one as much as a product with a technical defect, ECCJ and CORE, 'Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check' (2020) 37 <http://corporatejustice.org/wp-content/uploads/2021/03/debating-mhrdd-legislation-a-reality-check.pdf> accessed 3 May 2021.
[169] Claire Bright and others, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) 22 Business & Politics 667, 685.
[170] MVO Platform, 'Dutch Bill on Responsible and Sustainable International Business Conduct a Major Step towards Protecting Human Rights and the Environment Worldwide' (*MVO Platform*, 11 March 2021) <https://www.mvoplatform.nl/en/dutch-bill-on-responsible-and-sustainable-international-business-conduct-a-major-step-towards-protecting-human-rights-and-the-environment-worldwide/> accessed 22 April 2021.

market.[171] The Dutch Bill provides for administrative (financial) sanctions to be imposed by a public regulator for non-compliance with duties of care and HRDD, while repeated non-compliance carries a risk of criminal sanctions. Interestingly, the public regulator, along with its punitive functions, will also have the authority to provide companies with specific guidance on their HRDD duties.[172] Probably, an idea to confer a regulator with such additional function was drawn from the French experience where the lack of guidance on vigilance obligations attracted heavy criticism and eventually made the mentioned above Sherpa prepare such guidance instead.[173]

As regards access to justice for affected persons, the violation of duties under the Dutch Bill triggers civil liability regulated under the national civil code hence allowing 'stakeholders such as NGOs and labour unions' to bring action against companies.[174] Due to limited information regarding the Dutch Bill, it is yet early to make a definitive conclusion on whether it would ensure access to an effective remedy for victims who suffered from negative impacts on human rights and the environment.

The Dutch Act and the Dutch Bill also exemplify different approaches to constructing HRDD laws but, contrary to the Swiss Proposal and counterproposals, hopefully, will serve as an example of the evolution rather than the decline of regulation.

### 2.3.5 The European Union

The EU is currently developing a set of comprehensive legal and policy frameworks on corporate respect for human rights and the environment covering a wide range of thematic issues. Four different pieces of the EU legislation on HRDD, both currently in force and in drafting, were previously touched upon. They, however, represent just a few fragments in the regional regulatory regime, which is growing rapidly due to inter alia strategic direction toward strengthening the foundations for sustainable investment set by the European Green Deal in 2019.[175] This section attempts to capture key HRDD-related developments at the EU level by considering core features of several instruments representing respective threads of work: corporate reporting, corporate due diligence, and sustainable corporate governance.

#### 2.3.5.1 Corporate reporting

The EU Non-Financial Reporting Directive 2014/95 *(EU NFR Directive)* requires large publicly listed companies with more than 500 employees to report on their policies in relation to environmental, social and employee matters, human rights, anti-corruption and bribery by including a non-financial statement into their management reports.[176] The reporting should cover information about implemented due diligence processes addressing

[171] Wilde-Ramsing, Wolfkamp and Ollivier de Leth (n 123).
[172] ibid.
[173] Savourey and Brabant (n 143) 146–147.
[174] Wilde-Ramsing, Wolfkamp and Ollivier de Leth (n 123).
[175] It stipulates measures like embedding sustainability into the corporate governance framework and increasing disclosure on climate and environmental data, European Commission, The European Green Deal, 11.12.2019, COM(2019) 640 final para 2.2.1.
[176] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups art 19a(1).

risks of adverse impacts both from the company's own activities and its business relationships, including supply and subcontracting chains.[177] In 2017, the European Commission issued the non-binding Guidance on non-financial reporting 'to help companies disclose high quality, relevant, useful, consistent and more comparable non-financial (environmental, social and governance-related) information'.[178]

The EU NFR Directive is yet based on the 'comply or explain' principle meaning that a company may choose not to report, but then it must 'provide a clear and reasoned explanation' for why it does not pursue respective policies.[179] Besides, the directive generally requires only a formal audit assuring that a non-financial statement has been provided.[180] Moreover, as rightly noted, it prescribes just a duty to report, not the one to actually carry out substantive HRDD.[181] It worth emphasising that the reporting duty under the EU NFR Directive is also conditioned by '*the extent necessary* for an understanding of the development, performance, position and impact of [the company's] activities'.[182] This represents the so-called 'double materiality' concept that disclosure requirement should concern both the 'outside-in' risks sustainability issues may pose to a company and the 'outside-in' risks for society and the environment stemming from the company. However, as one report has recently found, this concept is inadequately defined thus difficult in implementation; the other implementation shortcomings relate to 'a lack of comparability, reliability and relevance of the non-financial information provided'.[183] These are some of the typical limitations of the first-generation HRDD laws, as was mentioned above.

Considering compelling evidence that companies report insufficiently, in April 2021, the European Commission presented its legislative proposal on Corporate Sustainability Reporting Directive[184] to amend the current system of non-financial reporting. In particular, it suggests requiring more detailed reports and substantial audit assuring accuracy and reliability of provided sustainability information. The latter should be provided in a digitalised machine-readable format. The proposal introduces the new requirement for companies to adhere to the mandatory EU sustainability reporting standards, which will be developed in the nearest year or two. In addition, the proposed directive's scope broadens to

[177] ibid preamble paras 6, 8, art 19a(1).
[178] European Commission, Communication from the Commission — Guidelines on non-financial reporting (methodology for reporting non-financial information) [2017] OJ C215 para 2.
[179] EU NFR Directive art 19a(1).
[180] ibid preamble para 16, art 19a(5).
[181] Bright and others (n 169) 688.
[182] EU NFR Directive art 19a(1) (emphasis added); according to Mares, this counts as an 'outright opt-out clause', an example of 'prized flexibility' that waters down reporting requirements and hence creates loopholes allowing companies to avoid meaningful reporting, Mares, 'Corporate Transparency Laws' (n 108) 196.
[183] European Parliamentary Research Service, 'Non-Financial Reporting Directive. Implementation Appraisal Briefing' (2021) summary, 3 <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf> accessed 24 April 2021; for more nuanced research, *see* Willem Pieter De Groen and others, 'Study on the Non-Financial Reporting Directive: Final Report' (Publications Office 2021) Study for the European Commission Directorate General for Financial Stability, Financial Services and Capital Markets Union.
[184] The proposal makes part of the comprehensive Sustainability finance package of measures aimed at improving 'the flow of money towards sustainable activities across [the EU]', *see* 'Sustainable Finance Package' (*European Commission*, April 2021) <https://ec.europa.eu/info/publications/210421-sustainable-finance-communication_en> accessed 24 April 2021. *See also* 'EU Taxonomy for Sustainable Activities' (*European Commission*) <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en> accessed 15 May 2021.

all large companies regardless of whether they are listed or have 500 employees, and more unusually to SMEs (except micro-enterprises).[185]

#### 2.3.5.2 Corporate due diligence

The European Parliament the endorsed legislative initiative on mandatory corporate due diligence and corporate accountability *(EU DD Initiative)* in March 2021.[186] As opposed to the sector-specific EU Timber Regulation and EU Conflict Minerals in Supply Chain Regulation, this initiative is headed for imposing general mandatory due diligence duty.[187] The initiative covers two categories of companies: the EU-based large companies and SMEs (publicly listed or high-risk), and companies of these same kinds that are based outside the EU but supply goods or services to its internal market.[188] The due diligence duty extends to companies' own activities and business relationships, including to subsidiaries and throughout their supply chains.[189]

Under the EU DD Initiative, the said duty consists of several components. First, '[to] carry out effective due diligence with respect to potential or actual adverse impacts on human rights, the environment and good governance'. Second, if *no* such adverse impacts were identified – a company must issue a respective statement supported by risk assessment. Alternatively, if adverse impacts *were* identified – the company must elaborate, publish, and effectively implement a due diligence strategy encompassing its adverse impacts, supply chain mapping, developing preventive and mitigating measures, and setting priorities.[190] Importantly, the HRDD strategy should be established and implemented with the meaningful participation of relevant stakeholders, including trade unions and workers' representatives.[191] Besides, the stakeholders should be entitled to raise concerns regarding a company's adverse impact through corporate grievance mechanisms.[192]

Further, in terms of enforcement, the EU DD Initiative provides for competent national authorities with promotional as well as supervisory and investigative functions concerned with corporate due diligence practices.[193] Besides, to ensure consistent compliance, the initiative stipulates that non-binding guidelines for companies will be

[185] European Commission proposal of 21 April 2021 for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM(2021)189 final Explanatory note 5.
[186] The following clear explanation by corporate lawyers should prevent confusion between legislative initiatives and proposals: 'Although the European Commission holds a near exclusive right to propose new EU legislation, the Parliament and the Council may adopt legislative initiatives calling for the Commission to issue a legislative proposal. A legislative initiative does not oblige the Commission to act and propose the legislation requested. However, the Commission must justify a refusal to follow the Parliament's initiative', White & Case LLP, 'Pressure Mounts on EU Regulator to Deliver on Mandatory Human Rights, Environmental and Governance Due Diligence' <https://www.whitecase.com/publications/alert/pressure-mounts-eu-regulator-deliver-mandatory-human-rights-environmental-and> accessed 24 April 2021.
[187] EU Mandatory Due Diligence Initiative art 1; notwithstanding, another Parliaments' initiative from late 2020 is sector-specific namely it suggests imposing due diligence duty on 'operators placing forest and ecosystem-risk commodities' on the EU market, European Parliament resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL)).
[188] EU Mandatory Due Diligence Initiative art 2.
[189] ibid arts 1, 3(2, 3, 4, 5).
[190] ibid arts 4, 6.
[191] ibid art 5.
[192] ibid art 9.
[193] ibid arts 12, 13.

published.[194] Non-compliance with HRDD duties carries risks of administrative fines and other sanctions.[195] Moreover, the initiative calls for ensuring civil liability for harm caused or contributed to by companies or their controlled entities (those under their decisive influence). However, the due diligence defence clause is also present, enabling companies to shun liability where they can prove having taken all due care to avoid harm or that the latter would have occurred despite all due care.[196]

The drafting of the EU DD Initiative was preceded by the comprehensive study on due diligence requirements through the supply chain,[197] which contained inter alia regulatory review of existing domestic frameworks and the lessons learned from them, particularly ineffectiveness of transparency laws and advantages of certain elements of existing HRDD laws. Therefore, it comes as no surprise that along with the UNGPs, the OECD Guidelines and other soft law instruments, the previously discussed national laws significantly informed the drafting process of the EU DD Initiative. The latter has virtually combined different approaches employed by those laws. For example, that HRDD duty may comprise several obligations, that the scope of the initiative may be based on both threshold criteria and the link to market/consumers, that enforcement mechanisms may encompass administrative oversight and sanctions, and finally that the civil liability may be constructed as a strict liability with due diligence defence. However, in some areas, the initiative goes further. For instance, it requires meaningful stakeholder engagement.

Eventually, as of late May 2021, the EU DD Initiative is full of promise as presumably the most advanced legislative initiative on HRDD that contains well-designed constitutive elements to inform the final legislative solution at the EU level. Its fate yet largely depends on another initiative discussed in the next section.

#### 2.3.5.3 Sustainable corporate governance

The Sustainable Corporate Governance Initiative *(EU SCG Initiative)* launched in mid-2020 by the European Commission is also at the initial stage of legislative procedure: after public consultations, a legislative initiative is expected to be adopted by June 2021.[198]

The Commission has nevertheless outlined that the initiative aims at fighting corporate short-termism by ensuring further embedding of sustainability into the corporate governance framework through a combination of at least three corporate and directors' duties. First, a company's HRDD duty as regards climate change, the environment and human rights in its own operations and supply chain. Second, directors' duty of care about all

[194] ibid art 14.
[195] ibid arts 3(9), 18.
[196] ibid art 19.
[197] Smit and others (n 4).
[198] 'Sustainable Corporate Governance' (*European Commission*) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance> accessed 26 April 2021; however, just ten days before June comes, media reported that after a concerted corporate lobbying effort Brussels is now 'putting its proposal on ice until the fall', 'Europe Inc. Wins as EU Delays New Business Rules' (*POLITICO*, 21 May 2021) <https://www.politico.eu/article/europe-inc-puts-brussels-new-business-rules-on-ice/> accessed 25 May 2021.

stakeholders' interests relevant for the long-term sustainability of the company or those affected by it. Third, a mechanism ensuring implementation of these duties.[199]

The European Parliament pronounced itself on the Commission's initiative by issuing a non-legislative thematic report[200] in late 2020, similarly seeking elaboration of mandatory obligations furthering sustainable business conduct. However, it suggests slightly different content with a focus on non-financial reporting and extending directors' duties. Interestingly, the report called for a clear separation between due diligence obligations and directors' duties as 'complementary but not interchangeable [nor] subordinate to [each] other' if they are to be legislated by a single instrument.[201] Along these lines, Ruggie has likewise expressed a warning against combining due diligence requirements with additional directors' duties in the same legal instrument.[202] Finally, it worth noting that the study on directors' duties conducted by the EY,[203] which served as a basis for the EU SCG Initiative, has been heavily criticised for allegedly a series of serious flaws undermining the offered policy recommendations and consequently the design of the upcoming legislative proposal.[204] In contrast, some commentators believe that the criticism is not 'that persuasive' since it does not target the subject matter of the study,[205] while others contend that '[it] does not imply that the potential for company law to make companies more sustainable should not be considered.[206]

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[199] European Commission. Directorate General for Justice and Consumers, 'Inception Impact Assessment of the Sustainable Corporate Governance Inititative' (2020) 3–4 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance> accessed 26 April 2021.

[200] Meaning that this report does not contain a draft legislative proposal for the European Commission to considered, as opposed to the report on the corporate due diligence and corporate accountability where the Parliament attached such a proposal.

[201] European Parliament resolution of 17 December 2020 on sustainable corporate governance (2020/2137(INI)) preamble para S.

[202] He rejected recognising directors as the short-termism's main driver, emphasised that strong opposition to extending directors' duties may endanger the entire project, and argued that there was largely no need for such extension considering that the well-constructed mandatory due diligence requirement alone would unavoidably change those duties 'in the desired directions', John Gerard Ruggie, 'European Commission Initiative on Mandatory Human Rights Due Diligence and Directors' Duties' <https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf> accessed 26 April 2021.

[203] EY, 'Study on Directors' Duties and Sustainable Corporate Governance: Final Report' (Publications Office 2020) Study for the European Commission Directorate General for Justice and Consumers.

[204] In particular, the conflation of companies' horizons (short-term v. long-term) and objectives (shareholder value v. stakeholder value); the belief that short-term value is the only shareholders' concern; the view that the pursuit of shareholders' interests is always detrimental for other stakeholders' interests, Alex Edmans, Luca Enriques and Steen Thomsen, 'EC Corporate Governance Initiative Series: Call for Reflection on Sustainable Corporate Governance' (*Oxford Law Faculty*, April 2021) <https://www.law.ox.ac.uk/business-law-blog/blog/2021/04/ec-corporate-governance-initiative-series-call-reflection-sustainable> accessed 26 April 2021. *See also* Mark Roe and others, 'The Sustainable Corporate Governance Initiative in Europe' (2021) Yale Journal on Regulation Online Bulletin. 7. 133.

[205] This opinion was expressed by one of the participants of the ECCJ recent annual general meeting, who also concluded that 'the opposition from the business associations to [EU SCG Initiative] keeps hitting a "straw man" of directors' duties reform [which] undermines the entire initiative', ECCJ, *Annual General Meeting 'Corporate Accountability: From Gaps to Opportunities' (Day 1)* (2021); notably, EU SCG Initiative enjoys wide support by NGOs but at the same time, met opposition 'from some business associations and investors, that have expressed concerns that such reforms might undermine both shareholder interests and their own financial performance', Anti-Slavery International and others to Mr. Frans Timmermans, Executive Vice President for the European Green Deal, Mr. Didier Reynders, Commissioner for Justice and European Commission, 'Regarding: NGO Support for the EU Commission Plans on Sustainable Corporate Governance and Response to Criticism' (24 May 2021) <https://corporatejustice.org/wp-content/uploads/2021/05/letter_ngo_support_for_eu_commission_plans_on_sustainable_corporate_governance.pdf> accessed 26 May 2021.

[206] Florian Möslein and Karsten Engsig Sørensen, 'Sustainable Corporate Governance: A Way Forward' (2021) 18 European Company Law 7, 7.

Ultimately, it remains extremely intriguing what path will the European Commission follow with its SCG Initiative and to what extent will the future legislative proposal be aligned with other initiatives, including those on corporate sustainability reporting and corporate due diligence. One thing is clear, though: globally, the EU is currently leading the way in framing a new legislative solution for ensuring corporate respect for human rights and the environment and holding companies accountable for their harmful misconduct.

## 2.3.6 Mandatory human rights due diligence regime

The discussion of various HRDD laws and legislative proposals provides an opportunity to decompose an HRDD regime into its key constitutive elements.[207] In what follows, the term 'mHRDD regime' refers to regimes currently in effect and the proposed ones, while the term 'HRDD duties' applies to duties within all phases of the HRDD process explained in section 2.1.1.1.

### 2.3.6.1 Nature

An mHRDD regime usually has statutory nature, i.e. it is imposed by legislative act(s). The latter may be of different areas of law. For instance, the French Law and the EU DD Initiative mainly represent civil and company law, while the Dutch Act is essentially a consumer protection law. A legislator may also go the extra mile and try to anchor an mHRDD regime in the constitution. The Swiss Proposal represents such an attempt, although initially advanced by the popular initiative. If the constitution appears in the picture, the mHRDD regime may probably be called constitutional-statutory, considering that the constitution as a foundational document usually sets a general legislative framework further elaborated on in national laws. Thus, the constitution may set up principal requirements regarding corporate respect for human rights via HRDD, while special laws (civil, company, consumer protection, international private law) prescribe a concrete mechanism to operationalise them.

### 2.3.6.2 Scope

Although the Guiding Principles apply to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership, and structure, an mHRDD regime's scope under existing laws is commonly limited to specific categories of companies. The first approach to determining scope is to set a threshold regarding the company's size or the other features. For example, the French Law covers only large companies with a specific number of employees; the Swiss Proposal covers all Switzerland-based parent companies, while counterproposals suggest narrowing the scope to only large and wealthy companies. Another approach is to base a scope on the link to the internal market as the Dutch Act does. It applies to any company, national and foreign, which supply goods and services to the

[207] This section is partly informed by the ECCJ's comparative tables on corporate due diligence legislation in Europe including the most recent from May 2021, *see* ECCJ, 'Corporate Due Diligence Laws and Legislative Proposals in Europe. Comparative Table' (2021) <https://corporatejustice.org/wp-content/uploads/2021/05/Corporate-due-diligence-laws-and-legislative-proposals-in-Europe-May-2021.pdf> accessed 10 May 2021. *See also* 'Map: Corporate Accountability Legislative Progress in Europe' (n 5); for a detailed discussion aimed at countering flawed or inaccurate claims against HRDD legislation, *see* ECCJ and CORE (n 168).

Dutch market. Finally, as evident from the Dutch Bill and the EU DD Initiative, the two approaches may be combined, extending the scope to both certain companies falling within set criteria and those exporting products or services into internal markets.

#### 2.3.6.3 Due diligence duties

Depending on how ambitious an mHRDD regime is, it may have different scope in terms of protected values, content and reach of HRDD duties.

Regarding protected values, at minimum, an mHRDD regime extends to all internationally recognised human rights, following the UN and OECD frameworks, or some of those rights (e.g., the Dutch Act concerns child labour exclusively). The more common is to protect values beyond human rights. The latter may be complemented by the environment (Swiss Proposal, Dutch Bill), the decent work (Norwegian proposal), the environment and the health and safety (French Law), the environment and the good governance (EU DD Initiative). However, as with other aspects of HRDD, there is no one prescriptive formula. Therefore, it is up to a legislator what values to include within the protective scope of the HRDD regime. To a large extent, this should reflect the most severe human rights and other issues faced by a respective state and its broader national context.

Concerning HRDD duties, the respective legal regime may establish just a reporting duty, as the UK Modern Slavery Act or the EU NFR Directive does, for instance. It may also impose the entire range of HRDD duties, including conducting HRIA, taking action upon its findings, and reporting on measures taken. The Dutch Act, French Law, the Swiss Proposal, and the EU DD Initiative all exemplify this. However, the way they frame directors' respective duties differ. Some require companies to set up, effectively implement and report on a particular plan addressing human rights adverse impacts. It may take the form of a vigilance plan (French Law), an action plan (Dutch Act), or a due diligence strategy (EU DD Initiative) and still, the rules on those plans and reporting duties differ considerably, as demonstrated in previous sections. Others oblige companies to carry HRDD without specific reference to a respective plan. The Swiss Proposal and the Dutch Bill serve as an example.

Finally, HRDD duties are typically imposed to cover companies' own operations and business relationships, meaning the whole or part of their supply chains. For example, the HRDD duties may be applied to a company's own operation and/or its controlled companies and all/some subcontractors and suppliers (French Law, Swiss Proposal). Another model is to cover the company's own operations and entire supply chains (Dutch Act, Dutch Bill, EU DD Initiative) or a particular supply chain tier (German Proposal).

#### 2.3.6.4 Enforcement mechanism

An mHRDD regime may contain no specific provisions on the public enforcement of imposed duties, like the Swiss Proposal (to amend the Constitution), but usually, such enforcement is prescribed to ensure the legal regime's implementation. It may be manifested through a third party's right to file complaints against a company, including with a regulatory body (French Law, Dutch Act), or to request information on the company's HRDD practice (Norwegian Proposal). Besides, state regulatory body may be authorised to provide guidance for companies, monitor and investigate their compliance with their HRDD duties and order

injunctive actions as well as impose administrative fines or other sanctions (which may also be ordered/imposed by courts) along with criminal liability in most extreme cases. Regulatory bodies are prescribed under the Dutch Act, Dutch Bill, and the EU DD Initiative while courts enforce the French Law.

The enforcement mechanism within an HRDD regime is crucially important. As Chambers and Vastardis emphasise, 'to achieve their stated accountability goals, [HRDD] and disclosure requirements should be accompanied by rules establishing: (1) a formal list of businesses covered by the requirements and a publicly accessible repository for storing annual disclosures; (2) an institutional structure to exercise oversight; and (3) enforcement functions'.[208]

#### 2.3.6.5 Civil liability for harm

In short, an mHRDD regime, like the Dutch Act, which does not prescribe civil liability for harm caused by business-related human rights abuse, is inherently weak. History teaches that such harm occurs even if companies are legally obliged to conduct HRDD, even upon the monitoring and under the risk to be fined. The financial sanctions imposed on companies by their nature do not provide a remedy for victims of corporate human rights abuse. Therefore, any mHRDD regime must put forward civil liability for harm.

HRDD legislation may establish an entirely new civil liability scheme like the Swiss Proposal, which aimed at imposing a strict liability with due diligence defence on a parent company for its controlling companies or the EU DD Initiative, which suggests imposing similar liability for harm caused by the company or those under its decisive control. Another option is to link a failure to comply with HRDD duties to an already existing civil liability scheme like the French Law does. As a part of the French Commercial Code, it refers to other parts of this code that specify a fault-based tort liability.

Of significant importance is the burden of proof. In the latter example, where the burden lies entirely on a victim to prove all elements of tort (breach, harm, and causation), it is practically complicated due to difficulties in gathering evidence (mainly the company's internal documentation) and numerous other barriers[209]. Therefore, the former examples should be instructive as they advance a civil liability scheme with a shifted burden of proof: a victim should prove harm, causation, and the control relationship while a company may recourse to due diligence defence.

In general, legislators should strive for civil liability schemes that are favourable to victims. The following section and section 4.2.1 discuss corporate civil liability in more detail as it should be an element of particular significance in any mHRDD.

[208] Rachel Chambers and Anil Yilmaz Vastardis, 'Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability' (2021) 21 Chicago Journal of International Law 323, 355.
[209] Axel Marx and others, *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries: Study.* (2019) 14–17.

## 2.4 Key issues related to human rights due diligence

Previous sections have demonstrated that HRDD is touched upon by all three pillars of the Guiding Principles due to their interconnectedness, despite being mainly contained within RtR. That states should also take appropriate measures to ensure HRDD's incorporation into corporate practice and that access to remedy is inextricably linked with conducting HRDD makes the latter virtually the key concept furthered by the UNGPs. Moreover, HRDD is a central concept behind the emerging mHRDD legislation in Europe and beyond. At the same time, as equally evident from the preceding text, effective HRDD is closely related to several important issues. The key four of them are considered further.

### 2.4.1 Stakeholder engagement

The development of the Guiding Principles was couched on 'extensive discussions with all stakeholder groups, including Governments, business enterprises and associations, [affected] individuals and communities…, civil society, and [legal] experts'.[210] Following this approach, the UNGPs place a strong emphasis on stakeholder engagement or consultation[211] for the HRDD, particularly within HRIA, tracking responses and external communication as indicated in previous sections.

The ongoing meaningful dialogue with (potentially) affected individuals and groups is simply a must for companies aiming at effective HRDD, which by design is meant to be 'about people' and hence requires an understanding of all relevant stakeholders.[212] Under the OECD Guidelines, companies should engage with such stakeholders 'to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities'.[213] At the same time, the governments are expected 'to provide [an NCP] of reference for enterprises and for other stakeholders'.[214] A meaningful stakeholder engagement is one that is ongoing, two-way (the parties are free to 'express opinions, share perspective and listen to alternative viewpoints to reach mutual'), conducted in good faith (the parties share 'genuine intention to understand how stakeholder interests are affected by enterprise activities'), and responsive (the parties' commitments resulted from the engagement is getting implemented in practice).[215]

Finally, as evident from the considered hard law instruments, they tend to require consultations with relevant stakeholders, although to a different extent. The BHR experts

[210] UNGPs Introduction para 10.
[211] Despite this emphasis, interestingly, some early critics of the UNGPs argued for the necessity of a fourth 'participate' pillar due to the allegedly '[m]issing critical role and key responsibilities of civil society actors in […] defining, monitoring, evaluating, participating in, assessing and (re)constructing the operational elements of state and business duties in the [BHR] context', Tara J Melish and Errol Meidinger, 'Protect, Respect, Remedy and Participate: "New Governance" Lessons for the Ruggie Framework' in Radu Mares and Karin Lukas (eds), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation.* (BRILL 2011) 328.
[212] OHCHR, The Corporate Responsibility To Respect Human Rights: An Interpretive Guide 33.
[213] OECD Guidelines for Multinational Enterprises Preface, para 7.
[214] ibid II.A(14).
[215] OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector 2017 18.

concurrently underline that the upcoming regulations should ensure such consultations to be meaningful and effective.[216]

The takeaway is that the importance of stakeholder engagement within the BHR context cannot be overestimated.

### 2.4.2 Corporate governance and directors' duties

Putting in place an ongoing HRDD process as much as any significant change in a company's policy and processes requires its management to make a decision to this effect. For the same reason, the company's human rights performance is much dependant on corporate governance, 'the system of rules and practices by which the corporation directed and controlled',[217] especially where it operates globally. Regarding directors of a corporation, they are generally required to make their decisions in the corporation's best interests following 'a duty of loyalty and a duty of care' known as fiduciary duties.[218]

Historically, CSR-related corporate governance regulations sought to increase 'managers' margin of manoeuvre and guide them to a better identification of new types of risks' aiming at profit maximisation.[219] This approach where directors must seek to maximise the value for shareholders above all is known as a 'shareholder approach'. The opposing 'stakeholder approach' requires directors to consider a range of other stakeholders than shareholders in their decision-making. Under an 'enlightened shareholder value approach', directors may or must take account of the interests of other stakeholders yet within the context of maximising the value for shareholders.[220] This hybrid approach was advanced, in particular, by Article 172 of the 2006 UK Companies Act, which clarified that business directors should have regard of other than shareholder's interests, including the company's employees and the wider community. However, these changes were 'not meant to have human rights trump profitability'.[221] Nonetheless, such a possibility turned into a contentious issue over the following years, particularly after the endorsement of the UNGPs in 2011.

Under the Guiding Principles, to discharge their duties in the BHR context, states should employ their regulatory and policy function to enhance corporate respect for human rights. Among other things, corporate and securities laws that shape business behaviour should 'not constrain but enable business respect for human rights', including providing sufficient guidance.[222] Similarly, the OECD Guidelines urge states to support, uphold and implement in practice good corporate governance principles 'drawn from the OECD Principles of Corporate Governance [which] call for the protection and facilitation of the

[216] In relation to the EU SCG Initiative, eg *see* DIHR, 'Sustainable Corporate Governance Consultation Response' (2021) 13 <https://www.humanrights.dk/publications/sustainable-corporate-governance-consultation-response> accessed 15 May 2021.
[217] Peter Muchlinski, *Multinational Enterprises and the Law* (Third edition, Oxford University Press 2021) 336.
[218] Jean-Philippe Robé, 'The Legal Structure of the Firm' (2011) 1 Accounting, Economics, and Law 34.
[219] Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in Radu Mares and Karin Lukas (eds), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation.* (BRILL 2011) 16.
[220] Human rights and corporate law: trends and observations from a crossnational study conducted by the Special Representative, Report of the Special Representative of the SecretaryGeneral on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31/Add.2 (2011) para 52.
[221] Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' (n 219) 17.
[222] UNGPs principle 3 and the commentary.

exercise of shareholder rights,'.[223] Consequently, directors' duties are commonly considered in tandem with corporate governance as an essential subject of company, securities and likewise regulations.

Along with the state duty to protect, the introduction of RtR also had implications for the corporate governance frameworks, as Muchlinski observed in 2012, drawing on the increased support for the '"enlightened shareholder value" approach allowing corporate managers to consider human rights issues when making decisions'. Specifically, RtR involved 'adaptation of shareholder based corporate governance towards a more stakeholder oriented approach and could lead to the development of a new, stakeholder based, corporate model'.[224] Ten years later, he emphasises that despite arguments in favour of convergence of corporate governance with the 'enlightened shareholder value' approach, no single global standard has yet been adopted.[225]

At the same time, the EU SCG Initiative that suggests introducing both new corporate duties and directors' duties aligned with the HRDD may well be seen as an attempt to set a regional standard for corporate governance and directors' duties, which potentially will shape the global standard-setting. Notably, in its response to the consultation regarding this legislative initiative, DIHR draws the following lesson from the UK's enlightened shareholder approach: 'a directors duty to have regard to the interests of a broad range of stakeholders alone is insufficient to ensure [meaningful HRDD]' because it could potentially contradict a company's duty to undertake the latter. Therefore, directors' duties should be extended to 'a legally binding obligation to develop, disclose and implement action plans […]' to ensure that the company undertakes meaningful HRDD.[226] In other words, the company's and directors' duties should be concerted, not siloed.

The takeaway is that the success of HRDD is practically impossible without being complemented with effective corporate governance and directors' duties towards responsible business conduct.

### 2.4.3 Corporate civil liability

The CoE BHR Recommendation[227] advises states to establish inter alia civil liability for 'human rights abuses caused by business enterprises within their jurisdiction'[228] while the UN CESCR calls states '[to establish] parent company or group liability regimes [and enable]

[223] OECD Guidelines for Multinational Enterprises ch II para A.6, Commentary on General Principles para 7.
[224] Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 Business Ethics Quarterly 145, 145; Ruggie called it 'amazing' that Muchlinski in his 2012 article predicted the most recent legislative developments at the national and the EU level when he argued that 'the notion of [HRDD] will lead to the creation of binding legal duties and that principles of corporate and tort law can be adapted to this end', Oxford Law Faculty, *Book Launch: Multinational Enterprises and the Law* (2021) at 34:00-36:00 <https://www.youtube.com/watch?v=MUBIB7Fb0GM> accessed 18 May 2021.
[225] Muchlinski (n 217) 336.
[226] DIHR, 'Sustainable Corporate Governance Consultation Response' (n 216) 18–19.
[227] According to the UNGPs' implementation study, this recommendation '[is] taking the implementation of Pillar III to the next level', Beata Faracik, 'Study on Implementation of the UN Guiding Principles on Business and Human Rights' (2017) Study for the European Parliament's Sub-Committee on Human Rights 8 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf> accessed 2 May 2021.
[228] Council of Europe BHR Recommendation 2016 Appendix para 32.

human rights-related class actions and public interest litigation'.[229] Moreover, the OHCHR instructs states to properly align such liability with the responsibility to conduct HRDD[230] and suggests three ways in which the non-observance of HRDD can lead to legal liability under domestic regulation: 1) regardless of whether the damage resulted from such non-compliance; 2) dependant on whether HRDD was exercised: along with others, this fact would form a threshold for liability, e.g. in tort cases liability depends on whether the damage was caused by non-compliance; 3) regardless of whether HRDD was exercised but where it was indeed exercised it might make a legal defence against liability.[231]

As observed, in the second scenario, the question then arises 'whether compliance […] *would have prevented* the damage from occurring' (the French Law case) while in the third scenario of strict liability with due diligence defence (the Swish Proposal case) the concern is that formal compliance may allow companies to escape liability.[232] In relation to the French Law, the unclarity concerning the preventability of damage should be recalled. It can be argued that under the general principles of fault-based tort liability if a company proves that the damage was not preventable despite the fact that it has taken all necessary measures to prevent it, no liability would follow since no causation nor fault; hence no breach could then be established. Accordingly, this *'preventability defence'* strongly resembles the due diligence defence under the Swiss Proposal. Section 4.2.1 further develops this another similarity argument in relation to Ukrainian fault-based civil (delict/tort) liability.

Importantly, Smit et al. in their 2020 comprehensive study on due diligence commissioned by the European Commission, concluded that '[since] HRDD is not merely a formal process but also a standard of expected conduct in order to prevent adverse human rights impacts […] the appropriateness of the HRDD that is conducted should be taken into account in considerations of liability'.[233]

The takeaway is that attaching corporate (civil) liability to non-compliance with HRDD obligation should make an essential part of any HRDD law to ensure corporate accountability for harm to rights-holders.

### 2.4.4 'Smart mix' of measures

De Shutter et al. recommend that states 'consider an appropriate mix of incentives and penalties' that would be reasonably effective in preventing human rights violations and contribution to it by companies.[234] In this manner, Deva also advises that states should 'offer incentives and disincentives to change corporate behaviour' considering that most companies

[229] CESCR, General comment No 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (2017) para 44.
[230] OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse, A/HRC/32/19 (2016) Annex paras 14.1-14.4.
[231] OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability, A/HRC/38/20/Add.2 (2018) para 12.
[232] Bueno and Bright (n 109) 796 (emphasis added).
[233] Smit and others (n 4) 264.
[234] Professor Olivier De Schutter and others, 'Human Rights Due Diligence: The Role of States' (2012) 62 <https://www.cidse.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf> accessed 3 May 2021.

are, in fact, rational actors.[235] The UN CESCR, in a similar fashion, calls states to inter alia align business incentives and disincentives with human rights responsibilities and impose due diligence requirements.[236]

All these suggestions apparently follow the commentary to Guiding Principle 3 recommendation for states '[to] consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights'. Through a 'smart mix' of measure, states may and act as 'the enforcer and promoter of human rights' to reinforce corporate respect for human rights.[237] The DIHR provides an illustrative example of possible various state actions:

| | National | International |
|---|---|---|
| Voluntary | Guidance on due diligence | Support for international multistakeholder initiatives and processes that further respect for human rights by business |
| Mandatory | mHRDD legislation, non-financial reporting requirements | Engagement in treaty process[238] |

The takeaway is that states have a vast range or a 'smart mix'[239] of measures at their disposal to enable the improvement of companies' human rights performance.

[235] Surya Deva, 'Achieving SDGs by Respecting Human Rights: A Pathway for Companies' (31 May 2019) 29 <sec.or.th/Documents/Seminar/Attach/6/Keynote%20Speech%20Dr.%20Surya%20Deva.pdf> accessed 1 May 2021.
[236] CESCR, General comment No 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (2017) paras 15, 16.
[237] Ramasastry (n 17) 246.
[238] DIHR, '"Smart Mix" in the Nordics. A Stocktake on Measures to Foster Business Respect for Human Rights' (2021) 13 <https://www.humanrights.dk/sites/humanrights.dk/files/media/document/Smart%20Mix%20in%20the%20Nordics_2021.pdf> accessed 3 May 2021. *See also* Shift, 'Fulfilling the State Duty to Protect: A Statement on the Role of Mandatory Measures in a "Smart Mix"' <https://shiftproject.org/fulfilling-the-state-duty-to-protect-a-statement-on-the-role-of-mandatory-measures-in-a-smart-mix/> accessed 19 May 2021.
[239] 'The term "smart mix" is regularly used in policy discussions around responsible business conduct and business and human rights in particular', DIHR, '"Smart Mix" in the Nordics. A Stocktake on Measures to Foster Business Respect for Human Rights' (n 238) 13; it worth noting that overall the concept of a 'smart mix' of measures is currently receiving meticulous attention. The likely reasons for that are the rise of mHRDD mainstream legislation in Europe, on the one hand, and the development of the international BHR treaty on the other.

# 3 Human rights due diligence in Ukraine: emerging agenda

## 3.1 Ukrainian context

Ukraine declared independence in August 1991 after about seventy years of being the Ukrainian Soviet Socialist Republic[240] within the Soviet Union. The reborn democracy rejected 'the traditional Soviet dualist approach to the implementation of international law in domestic legal system'.[241] Instead, Article 9 of the 1996 Constitution of Ukraine established that the ratified international treaties currently in force form part of the national legislation. Except for being a constitutive member of the UN, Ukraine has become a member of the Council of Europe, OSCE, IMF, WB, WTO, ILO, and many other multilateral organisations since gaining independence. It also cooperates with the OECD, the EU and NATO.

Ukrainian legislation follows a civil law system and comprises four principal layers:

- the Constitution;
- laws adopted by the Parliament;
- international treaties ratified or acceded to by the Parliament;
- other normative acts, including decrees and orders of the President, and resolutions and orders of the Government (Cabinet of Ministers of Ukraine).[242]

Ukraine has ratified all but two basic international human rights treaties[243] and 119 out of 190 ILO Conventions, including all fundamental ones.[244] In addition, Ukraine signed the Convention on the Protection of Human Rights and Fundamental Freedoms *(ECHR)* and notably adopted a special law obliging courts to apply the ECHR and the case-law of the European Court of Human Rights *(ECtHR)* as a source of law.[245] It worth emphasising that the fundamental rights and freedoms enshrined in the directly applicable provisions of the Constitution of Ukraine are also prescribed by the Civil Code of Ukraine as 'personal non-property rights of a natural person'. These include the right to life, health, liberty, personal integrity, family, safe environment, name, dignity, privacy, information, freedom of association and many others.[246] Unlike the Constitution, the Civil Code of Ukraine 'describes

[240] Alongside the Belorussian Soviet Socialist Republic and the Soviet Union itself, Ukrainian Soviet Socialist Republic features as a signatory of the UN Charter, Charter of the United Nations, 26.06.1945.
[241] Gennady M Danilenko, 'Implementation of International Law in CIS States: Theory and Practice.' (1999) 10 EJIL 51, 51.
[242] Baker McKenzie, *Conducting Business in Ukraine 2021* (Baker McKenzie 2021) 14 <https://www.bakermckenzie.com/en/insight/publications/guides/doing-business-in-ukraine> accessed 19 May 2021.
[243] The two unratified treaties are the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (although it was signed by Ukraine in 2009) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 'Status of Ratification of 18 International Human Rights Treaties' (*OHCHR*) <https://indicators.ohchr.org/> accessed 19 May 2021.
[244] At the same time, 6 technical conventions have been automatically denounced and 1 instrument has been abrogated, 'Ratifications of ILO Conventions: Ratifications for Ukraine' <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102867> accessed 19 May 2021.
[245] Law of Ukraine 'On the Execution of Judgments and Application of the Practice of the European Court of Human Rights (Про виконання рішень та застосування практики Європейського суду з прав людини), 23.02.2006 No 3477-IV art 17.
[246] Civil Code of Ukraine (Цивільний кодекс України), 16.01.2003 No 435-IV Book II.

human rights in a more detailed manner and from the perspective of private law, avoiding those facets of human rights that expressly pertain to criminal procedure'.[247] Parliament Commissioner for Human Rights *(Ombudsperson)* exercises control over the observance of constitutional rights and freedoms.[248] In 2021, Ukraine scored 60 out of 100 points and got a 'partly free' status in the Freedom of the World Index assessing the level of political rights and civil liberties.[249]

In recent years Ukraine went through acute political, security, and economic challenges. During the last days of the late 2013-early 2014 Revolution of Dignity ('Euromaidan'), which brought president Yanukovych's kleptocratic regime to an end,[250] the Russian Federation began its military aggression against Ukraine. It resulted in the annexation of the Crimean Peninsula, occupation and the outbreak of armed conflict in certain territories in eastern Donetsk and Luhansk regions of Ukraine.[251] Nonetheless, in 2014-2019, the Government undertook several major reforms, such as 'enhancing the transparency of public procurement, simplifying business regulations, stabilising and restructuring the banking sector, moving forward on health and pension reforms, and establishing anti-corruption agencies'. The lack of trust in public institutions yet remains a widespread concern.[252]

In 2019, the Ukrainian GDP amounted to USD 153.8 bn with real GDP growth of 3.2% and an inflation rate of 7.9%, while unemployment reached 8.9% and the poverty ratio at national poverty lines was 1.1%. However, the 2020 economic crisis stemmed from the Covid-19 negatively impacted the country's conditions resulting in GDP estimated 4.5% decline and a 48% rise in unemployment compared to the previous year.[253] At the same time, Ukraine ranked 64$^{th}$ in ease of doing business in 2020, while Georgia, the highest-ranking economy in Eastern Europe and Central Asia, ranked seventh.[254]

As of late September 2020, the total amount of foreign direct investments in the Ukrainian economy amounted to USD 49 bn, with 31.1% originated from Cyprus and 20.2%

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[247] Bohdan Karnaukh, 'Tort Law and Human Rights in Ukraine' in Ekaterina Aristova and Ugljesa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions (Hart Publishing 2021) (forthcoming)* 2.

[248] Constitution of Ukraine, 28.06.1996 art 101.

[249] The report assesses such liberties 'in a given geographical area, regardless of whether they are affected by the state, nonstate actors, or foreign powers', *see* 'Ukraine: Freedom in the World 2021 Country Report' (*Freedom House*) <https://freedomhouse.org/country/ukraine/freedom-world/2021> accessed 19 May 2021.

[250] Yuriy Shveda and Joung Ho Park, 'Ukraine's Revolution of Dignity: The Dynamics of Euromaidan' (2016) 7 Journal of Eurasian Studies 85, 90; the name 'Euromaidan' comes as a combination of the two words: 'Euro' because the Ukrainian Government's abrupt U-turn from the Association Agreement with the EU in November 2013 sparked the widespread popular protests demanding the singing of this Association Agreement among others original demands; 'Maidan' because the protests traditionally took place at the Maidan Nezalezhnosti ('Independence Square') in the capital Kyiv and later in city squares across the country including its Southern and Eastern regions, ibid 85, 87, 90.

[251] 'Russian Aggression' (*Permanent Mission of Ukraine to the United Nations*) <http://ukraineun.org/en/ukraine-and-un/russian-aggression/> accessed 19 May 2021.

[252] 'Ukraine | Overview' (*World Bank*) <https://www.worldbank.org/en/country/ukraine/overview> accessed 20 May 2021.

[253] OECD, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (2021) 17–18, 21 <https://www.oecd.org/corporate/soe-review-ukraine.htm> accessed 19 May 2021; the data on estimated decline of GDP comes from the World Bank, 'Ukraine | Overview' (n 252).

[254] 'Doing Business 2020, Fact Sheet: Europe and Central Asia' (*Doing Business*) <https://www.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/DB20-FS-ECA.pdf> accessed 16 April 2021.

from the Netherlands (both jurisdictions are recognised as tax heavens),[255] while manufacturing accounts for 22.6% and trade for 16.3%.[256] However, according to late October's survey of foreign investors, 48% of participants thought Ukraine's investment attractiveness was declining, 42% did not see significant changes, and only 9% saw improvement. Notably, *lack of trust in the judiciary topped the list of major obstacles to foreign investments,* followed by widespread corruption, market monopolisation and state capture by oligarchs,[257] cumbersome and frequently changing legislation, while the military conflict with Russia placed seven.[258] More broadly, this list aptly summarises the perennial problems faced by the Ukrainian state: dependent courts, rampant corruption, oligarchic rule.

Furthermore, there are challenges specific to the BHR context in Ukraine: low awareness of human rights standards in general and BHR standards in particular, underdeveloped democratic traditions, low public trust in state institutions; prevailing paternalistic approaches to ensuring respect to human rights (it is commonly identified only with the state's duty).[259] On top of national, Ukraine as an Eastern European country faces tough regional challenges in the BHR field. They include considerable state involvement in business through SOEs as important players for national economy;[260] 'collision of public, state and business interests; the weak rule of law and weak institutions; and prosecution of human rights defenders'.[261] In additions, national human rights institutions are largely inactive in addressing BHR issues[262] and lack capacity in BHR or even a clear mandate to protect individuals against corporate abuse of human rights. Moreover, victims of such abuse have rather poor access to effective remedy, including alternative remedies. Consequently, the implementation of the in the region and 'hinges on the improvement of the rule of law in state institutions and in the private sector'.[263]

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[255] '[A] recent research study has identified five EU Member States as corporate tax havens: Cyprus, Ireland, Luxembourg, Malta and the Netherlands', European Parliament resolution of 26 March 2019 on financial crimes, tax evasion and tax avoidance (2018/2121(INI)) para 330; an update of the Oxfam study mentioned by the European Parliament, explains that tax havens 'artificially attract company profits that remain untaxed in other countries', Oxfam, 'EU Tax Haven Blacklist Review' (2020) Annex page 1 <https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2020-02/2020-02-17%20Oxfam%20background%20briefing%20-%20EU%20tax%20haven%20list.pdf> accessed 24 May 2021.

[256] 'UkraineInvest Guide | March-May 2021' (*UkraineInvest*, May 2021) 13 <https://ukraineinvest.gov.ua/guide/> accessed 20 May 2021.

[257] On May 20, 2021, during the press conference marking his second year in office, the President of Ukraine confirmed that he has initiated a draft law to fight oligarchs' influence. He explained that '[w]e do not want to kill big business, but we are definitely killing the concept, content and influence of the oligarchic system in our country', *see* 'The Bill Initiated by the President Is Designed to Eliminate the Influence of Oligarchs in Ukraine' (*Official website of the President of Ukraine*) <https://www.president.gov.ua/en/news/inicijovanij-prezidentom-zakonoproekt-poklikanij-usunuti-vpl-68597> accessed 20 May 2021.

[258] 'Lack of Trust in the Judiciary Is the Major Obstacle to Foreign Investment in Ukraine' (*European Business Association*, 9 November 2020) <https://eba.com.ua/en/nedovira-do-sudovoyi-systemy-posila-1-mistse-sered-pereshkod-dlya-inozemnyh-investytsij/> accessed 20 May 2021.

[259] 'Business and Human Rights: Key Challenges for New Democracies (Panel Discussion: Programme and Draft Resolution, Yaroslav Mudryi National Law University, Kharkiv, 25 September 2019)' (September 2019) <https://legalforum.nlu.edu.ua/wp-content/uploads/2019/06/forum_business_2019_prohrama_ukr_press.pdf> accessed 3 April 2021.

[260] According to the recent OECD study, '[c]ompared with most countries, Ukraine has a significantly large SOE portfolio, with 3,293 SOEs reported at the central level of government. Out of these entities, 1,535 were operational and 1,063 were profitable, with an overall profit of UAH 52.1 billion in 2019', OECD, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (n 253) 27.

[261] Jernej Letnar Černič, 'Mapping Business and Human Rights in Central and Eastern Europe' (*Cambridge Core Blog*, December 2020) <https://www.cambridge.org/core/blog/2020/12/11/mapping-business-and-human-rights-in-central-and-eastern-europe/> accessed 19 May 2021.

[262] Ukrainian Ombudsperson has only put BHR issues into her strategic agenda in 2019, as indicated below.

[263] Černič (n 261).

## 3.2 European integration

The EU-Ukraine Association Agreement, including the Deep and Comprehensive Free Trade Area *(AA, EU-Ukraine AA)*, was signed in 2014. It was 'the most ambitious agreement the [EU had] ever offered to a non-Member State, […] opening the most ambitious external relationship ever developed with the EU'.[264] Van der Loo argues that the AA represents a 'new generation of [Eastern Partnership Association Agreements seeking] to establish a new and unique form of *EU integration without membership*'.[265]

The AA is an exceptionally comprehensive (over 2140 pages in total) 'cross-pillar agreement' aiming at political and economic integration between the parties. It covers the broad spectrum of relations between the parties, including cooperation and convergence in the field of foreign and security policy and the area of freedom, security and justice. It also regulates trade and trade-related matters, economic and financial cooperation.[266] Ukraine's integration into the EU internal market is intertwined with progressive legislative approximation to the EU acquis as a crucial tool and a condition for such integration.[267]

Among other things, the AA aims at increasing Ukraine's association with EU policies, Ukraine's gradual integration in the EU internal market and completion of the country's transition into a functioning market economy through, inter alia, progressive approximation of Ukrainian legislation to that of the Union.[268] The legislative approximation is required in a vast number of areas, for instance, public procurement (Article 153), environment policy (Article 363), corporate governance, accounting and auditing (Article 387), consumer protection (Article 417). Additionally, parties agreed that some provisions, for example, on state aid (Articles 262, 263), would be directly applicable. Regarding state aid, Ukraine also undertook to adopt national legislation in this area (Article 267).

The closest to the BHR agenda provisions of the EU-Ukraine AA are the following two.[269] Article 293 (chapter 'Trade favouring sustainable development') represents the so-called 'social clause'[270] and obliges parties to foster trade in products contributing to sustainable development, particularly those produced within the fair and ethical trade schemes and schemes respecting CSR and accountability principles. Article 422 (chapter 21 'Cooperation on employment, social policy and equal opportunities') prescribes that the parties:

[264] Guillaume Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration without Membership* (Brill Nijhoff 2016) 1 (citing former President of the European Council H. Van Rompuy on the signing ceremony on 27 June 2014).
[265] ibid 3 (emphasis added).
[266] ibid 190.
[267] ibid 210–211.
[268] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2014] OJ L161 art 1(2)(d).
[269] General principles of the AA should also be mentioned including respect for democratic principles, human rights and fundamental freedoms and the rule of law, good governance, the fight against corruption, and the promotion of sustainable development, ibid arts 2, 3.
[270] The social clause of a trade agreement may be 'defined as any attempt to link labour standards and trade relations', Jan Orbie, Hendrik Vos and Liesbeth Taverniers, 'EU Trade Policy and a Social Clause: A Question of Competences ?' (2005) n° 17 Politique europeenne 159, 159.

> shall promote [CSR] and accountability and encourage responsible business practices, such as those promoted by the UN Global Compact of 2000, the [ILO Tripartite Declaration] of 1977 as amended in 2006, and the [OECD Guidelines] of 1976 as amended in 2000.

Although the full text of the AA was agreed upon on December 19, 2011,[271] i.e. more than six months after the OECD Guidelines 2011 update and the following Guiding Principles' endorsement, Article 422 puzzlingly refers to soft law instruments which had not yet incorporated the three-pillar framework. Accordingly, the latter has not been explicitly provided for by the EU-Ukraine AA as opposed to the EU-Georgia AA, which contains a commitment to promote responsible business conduct in line with internationally recognised standards, including the Guiding Principles.[272] Although Ukraine and Georgia have signed their AA with the EU on the same day, Georgia had been negotiating its AA since 2012.[273]

In the light of the EU legislative developments on corporate reporting, corporate due diligence, and sustainable corporate governance, discussed in section 2.3.5, the "progressive" nature of legal approximation should be explained. In short, the binding approximation commitments refer to existing, and future Ukrainian legislation vis-à-vis the EU acquis annexed to the AA. Under Article 463(3), the Association Council, an institution authorised to update or amend the incorporated acquis as listed in respective annexes, "may" do that 'to take into account the evolution of EU law [however it] is not automatically obliged to consider updating or amending the annexes when a corresponding EU act is modified'.[274] Therefore, progressive legislative approximation does not apply to any newly adopted EU act but to ones already listed in the EU-Ukraine AA in case of their modification at the EU level and only if the Association Council decides to update or amend the annexes[275] accordingly. Where no such decision is made, Ukraine 'has some discretion when and how to take into account pieces of new EU legislation which were not explicitly mentioned in the AA'.[276]

Consequently, the EU DD Initiative proposed as a brand-new directive, if adopted, would most likely fall outside the original scope of the EU-Ukraine AA. Nevertheless, as argued, the Ukrainian Government may voluntarily decide to conduct legislative approximation with the EU acquis that falls beyond the scope of AA.[277] The argument is couched on Article 476(1) AA which obliges parties to take any general or specific measures required to fulfil obligations under AA and to ensure that the objectives set out in it are attained. Thus, as soon as the EU DD Initiative becomes part of the EU acquis, the Ukrainian Government is welcomed to decide using its discretion to approximate national legislation

[271] Van der Loo (n 264) 109.
[272] Visit to Georgia, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/44/43/Add.1 (2020) para 7.
[273] 'Chronology of Major Events in Georgia EU Cooperation' (*georgiaembassyusa.org*) <https://georgiaembassyusa.org/wp-content/uploads/2018/01/Chronology-of-Major-Events-in-Georgia-EU-Cooperation.pdf> accessed 21 May 2021.
[274] Van der Loo (n 264) 40, 205, 303.
[275] Since 2014, the Association Council has done that four times, twice in 2018 and twice in 2019, *see* Consolidated version of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part Amendments M1, M4, M6, M7.
[276] Association4U, 'Guidelines for the Ukrainian Public Administration on the Approximation of Ukrainian Legislation to EU Law' (2018) 15 <https://eu-ua.kmu.gov.ua/sites/default/files/inline/files/a4u_legal_approximation_guidelines_en_2018.10.pdf> accessed 20 May 2021.
[277] ibid 16.

with it. Regardless of whether the Government decided so, Ukrainian companies exporting to the EU will be directly covered by it as those supplying goods or services on the EU market.

Regarding the EU SCG Initiative, if it modifies the consolidated EU Directive on shareholder rights (2007/36) as suggested,[278] considering that the latter features in the AA,[279] it may be included by the Association Council in the respective annex and thus become subject to legal approximation.

The implementation of the NFR Directive took a different path. Since it was adopted in 2014, it did not appear in any of the AA's annexes. However, the NFR Directive amends EU Directive 2013/34, which in its turn repeals two other directives (78/660/EEC and 83/349/EEC) mentioned in the annexes.[280] Consequently, the implementation of the EU Directive 2013/34 as amended by the NFR Directive ended up in the governmental AA's implementation action plans set in 2014 and 2017.[281] In those cases, the Ukrainian Government exercised its discretion to approximate national legislation on financial (and eventually non-financial) reporting to the directive *linked to* those listed in the AA.

Finally yet significantly, trade in goods and services between the parties to the EU-Ukraine AA has boosted since 2014:

- the EU became 'Ukraine's largest trading partner, accounting for more than 40% of its trade [while Ukraine accounts] for around 1,1% of EU's total trade;
- Ukraine exports to the EU [mainly including raw materials, chemical products and machinery] amounted to €19.1 bn [while the] EU exports to Ukraine [mainly including machinery and transport equipment, chemicals, and manufactured goods] amounted to over €24.2 bn [that makes] a similar impressive increase since 2016 of 48,8%;
- the number of Ukrainian companies exporting to the EU has increased at an impressive rate, from approximately 11,700 in 2015 to over 14,500 in 2019.[282]

Had the EU DD Initiative been in effect in 2019, all eligible companies of those 14,500 would fall under its scope.

## 3.3 Emerging business and human rights agenda

The BHR's international standing and its manifestation in Ukraine differs sharply. While internationally, BHR is currently an independent and influential professional field and policy area, it remained a largely unknown topic in Ukraine until a few years ago. Even the UNGPs' endorsement in 2011, which brought the BHR agenda to an entirely new level, seems not to have been noticed in Ukraine.

[278] Although this EU directive was amended in 2014 and 2017, the SCG Initiative's inception impact assessment refers to its original 2007 edition, European Commission. Directorate General for Justice and Consumers (n 199) 2.
[279] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2014] OJ L161 Annex XXXIV to Chapter 13.
[280] ibid Annex XVII Appendix XVII-2.
[281] 'The Implementation Action Plan for the Association Agreement between Ukraine and the EU' (*Ministry of Justice*) <https://minjust.gov.ua/eurointergration/plan_zahodiv> accessed 20 May 2021.
[282] 'Ukraine - Trade' (*European Commission*) <https://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/> accessed 20 May 2021.

It was only in December 2014 when the Ukrainian Ministry of Foreign Affairs presented the Ukrainian translation of the Guiding Principles. Unfortunately, it appeared to be 'a false start', considering that no official statement supporting the UNGPs was made, neither were any steps towards implementation mentioned.[283] Moreover, the presentation was followed by almost three years of 'silence as usual' from the Government regarding BHR issues. As Uvarova emphasises, that silence can be partly explained by the ongoing armed conflict in the East of Ukraine, which to a large extent dictated the priorities then.[284]

In 2015, the Ukrainian academia took a step forward: the first in Ukraine certificate programme on 'Human rights in the business environment' for legal practitioners and corporate managers was launched by the Ukrainian Catholic University (Lviv). The programme continued through 2016 and 2017.[285]

In 2017, among secondary events of the I Kharkiv International Legal Forum *(Kharkiv Forum)*,[286] the BHR discussion was held featuring mainly scholars while no representatives of the state nor business.[287] Following the forum, the Yaroslav Mudryi National Law University *(Kharkiv University)* published the Pilot Report on BHR in Ukraine developed using the DIHR's methodology.[288] The report became a precursor to change, showing that academia again took the initiative as a driving force for the BHR agenda. The Government, for its part, had taken a vital step forward: Ukraine has signed the OECD Declaration and therefore became adherent to the OECD Guidelines and set up an NCP.[289]

The following year 2018, was full of developments. Firstly, the cooperation between the Kharkiv University and the Ukrainian Ministry of Justice *(MoJ)* brought about several essential publications in Ukrainian, namely the Guiding Principles, the NAP Toolkit (DIHR, ICAR, 2017 ed.) and the BHR Guidance for Bar Associations (IBA).[290] Secondly, another Kharkiv Forum was held in September[291] with the UNGPs' implementation discussed by a much more diverse panel featuring: the MoJ, the Ombudsperson's Secretariat, the OECD NCP, the Governmental Commissioner for Gender Equality, business representatives, and

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[283] One line in the press release reads: 'In Ukraine, a number of enterprises have already joined the implementation of the UN Guiding Principles, introducing an appropriate system of "hotlines", employee training, etc.' This seems both exaggerated considering how barely visible the UNGPs were in Ukraine at that point and telling, in terms of quite poor understanding of how implementation process might look like, 'The Ukrainian edition of the UN Guiding Principles on Business and Human Rights was presented in the MFA' (December 2014) <https://mfa.gov.ua/news/30627-v-mzs-prezentovano-ukrajinsyke-vidannya-kerivnih-principiv-oon-z-pitany-pidprijemnicykoji-dijalynosti-v-aspekti-prav-lyudini> accessed 1 April 2021; it worth noting that the Ukrainian branch of the UN Global Compact was open in 2013 and since then it has attracted 85 participants, *see* 'Ukraine | UN Global Compact' <https://www.unglobalcompact.org/engage-locally/europe/ukraine> accessed 14 May 2021.

[284] Olena Uvarova, 'Implementing the UNGPs in Eastern Europe: Is Ukraine the Example to Follow?' (*Rights as Usual*) <https://rightsasusual.appspot.com/?p=1404> accessed 1 April 2021.

[285] 'Human Rights in the Business Environment Programme' (*UCU Law School*) <http://law.ucu.edu.ua/programa-prava-lyudyny-v-biznes-seredovyshhi/> accessed 3 April 2021.

[286] 'I Kharkiv International Legal Forum' (2017) <https://legalforum.nlu.edu.ua/2017/> accessed 2 April 2021; Kharkiv is a city in the northeast of Ukraine, where the forum's host university is located.

[287] Uvarova, 'Implementing the UNGPs in Eastern Europe' (n 284).

[288] Olena Uvarova and Yulia Razmetaieva (eds), *Business and Human Rights in Ukraine: Pilot Report* (Pravo 2017).

[289] OECD Directorate for Financial and Enterprise Affairs Investment Committee, 'Ukraine: Follow-Up Report on the Adherence to the Declaration on International Investment and Multinational Enterprises' (2017) DAF/INV/RD(2017)6 2, 26; according to the OECD Watch, as of mid-May 2021, no complaint has been brought before the Ukrainian NCP yet, *see* 'Complaints Database' (*OECD Watch*) <https://www.oecdwatch.org/complaints-database/> accessed 14 May 2021.

[290] 'Ukraine | National Action Plans on Business and Human Rights' (n 12).

[291] The Government also ordered to hold this forum annually, Cabinet of Ministers of Ukraine, Order 'On Holding the Kharkiv International Legal Forum' (Про проведення Харківського міжнародного юридичного форуму) 19.09.2018 No 656-p para 2.

distinct international experts.[292] Finally, one of the first curriculums on human rights course with the BHR module[293] alongside the first in Ukraine BHR course curriculum for law students[294] was published. The year 2018 has thus marked the actual starting point in shaping the BHR agenda in Ukraine, followed by the Government's favourable (re)action.

In January 2019, MoJ officially announced that it had initiated the UNGPs' implementation process, starting with the BHR National Baseline Assessment *(NBA).*[295] The comprehensive yet largely missing stakeholders' contributions NBA Report was done by June 2019.[296] However, that year's spring presidential election and early parliamentary election in July, which sensationally brought comedian Volodymyr Zelensky and his party to power, grabbed most of the attention in the country. Accordingly, within months into the publication of the NBA Report, in focus was exclusively a political agenda, including the formation of a new government,[297] while the BHR one has been routinely forgotten again.

Nonetheless, in September, III Kharkiv Forum held once again an international panel discussion on BHR,[298] which among other things, invited the UN to hold a regional BHR forum.[299] Later that month, the President of Ukraine ordered to 'ensure compliance with' the SDGs and called the Government to analyse and improve (where needed) forecast and programme documents considering the SGDs and to introduce an effective SDGs implementation' monitoring system.[300] In addition, ever since 2019, the Ombudsperson includes promoting the UNGPs' implementation into her annual strategic action plan.[301] Finally, the first Ukrainian textbook on BHR was published.[302]

Fortunately, 2020 turned into another year full of thematic developments. In January, the Government has adopted the RBC Concept 2030 (anchored on the OECD Guidelines),[303] aimed at establishing a regulatory framework and implementing voluntary RBC standards. In

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[292] Uvarova, 'Implementing the UNGPs in Eastern Europe' (n 284); 'II Kharkiv International Legal Forum' (2018) <https://legalforum.nlu.edu.ua/2018/> accessed 2 April 2021.
[293] Yulia Razmetaieva, *The Doctrine and Practice of Human Rights Protection. Textbook* (FOP Holembovska OO 2018).
[294] Olena Uvarova and others, *Business and Human Rights: Syllabus* (Pravo 2018).
[295] 'Ukraine | National Action Plans on Business and Human Rights' (n 12); at the same time, the Ombudsperson's office informed that it is going to communicate the development of NAP as the next step, *see* 'Office of the Ombudsperson to Become a Platform for Communication of the National Action Plan on Business and Human Rights' (*Ukrainian Parliament Commissioner for Human Rights*, 29 January 2019) <https://ombudsman.gov.ua/ua/all-news/pr/29119-oz-ofis-ombudsmana-stane-osnovnoyu-platformoyu-dlya-komunikatsiii-z-pitan/> accessed 6 April 2021.
[296] 'Ministry of Justice has begun the implementation of the UN Guiding Principles on Business and Human Rights' (*Ministry of Justice*) <https://minjust.gov.ua/news/ministry/minyust-rozpochav-robotu-nad-implementatsieyu-kerivnih-printsipiv-oon-u-sferi-biznesu-ta-prav-lyudini-v-ukraini> accessed 2 April 2021; Uvarova, 'NBA Report. Executive Summary' (n 13).
[297] Uvarova, 'Implementing the UNGPs in Eastern Europe' (n 284).
[298] 'III Kharkiv International Legal Forum' (2019) <https://legalforum.simcord.com/en/> accessed 3 April 2021.
[299] 'Business and Human Rights: Key Challenges for New Democracies (Panel Discussion: Programme and Draft Resolution, Yaroslav Mudryi National Law University, Kharkiv, 25 September 2019)' (n 259) 11.
[300] President of Ukraine, Decree 'On Sustainable Developments Goals of Ukraine for the period until 2030' (Про Цілі сталого розвитку України на період до 2030 року), 30.09.2019 No 722/2019 paras 1, 2.
[301] Strategic action plans for 2020 and 2021 contain similar items, *see* 'Strategic Action Plan' (*Ukrainian Parliament Commissioner for Human Rights*) <https://ombudsman.gov.ua/ua/page/secretariat/docs/strategichnij-plan-diyalnosti.html> accessed 14 April 2021.
[302] Olena Uvarova and Kateryna Buriakovska, *Business and Human Rights. Textbook* (FOP Holembovska OO 2019).
[303] The concept naturally strongly emphasises the voluntary nature of the RBC ('the development of socially responsible business is a voluntary business enterprises' activity'), Cabinet of Ministers of Ukraine, Instruction 'On Approval of the Concept for the Implementation of State Policy in the Field of Promoting the Development of Socially Responsible Business in Ukraine for the Period until 2030' (Про схвалення Концепції реалізації державної політики у сфері сприяння розвитку соціально відповідального бізнесу в Україні на період до 2030 року), 24.01.2020 No 66-p Annex *(hereinafter – Responsible Business Conduct Concept 2030)*.

March, an opportunity to bring the BHR agenda into the spotlight appeared on the horizon. After the new MoJ's team announced updating the National Human Rights Strategy *(HR Strategy)* involving expert consultation, the proposal was made to complement the strategy with the BHR Chapter (following the Georgian experience)[304]. The Ombudsperson's Office and several CSOs supported the idea.[305] Meanwhile, the IV Kharkiv Forum hosted plenty of the BHR events,[306] including the presentation of the 'BHR in times of COVID-19' study.[307] By November, following a series of online expert consultations, the respective draft amendments to the HR Strategy were ready for the President's approval.[308]

Notably, in November 2020, the 9th UN BHR Forum[309] was held, followed by the 1st Regional BHR Forum in Eastern Europe and Central Asia.[310] Ukrainian representatives virtually attended both high-level events. It worth emphasising that at the regional one, the Ukrainian Ombudsperson's representative informed that the drafting of the action plan to the HR Strategy with the BHR Chapter was under way.[311] Moreover, the Deputy Minister of Justice of Ukraine confirmed that a stand-alone NAP would be developed anchored on multi-stakeholder consultations involving businesses aiming to design effective measures.[312] Participation in international and regional fora demonstrated the Ukrainian Government's interest and commitment to the BHR agenda. Soon after, in mid-December 2020, the Intersectoral BHR Platform was inaugurated on the Ombudsperson's initiative, with a task to ensure multi-stakeholder cooperation and promoting the UNGPs' implementation.[313]

Ironically, another three months of strained silence followed the busy 2020. Fortunately, the wait was rewarded: in late March 2021, the Ukrainian President finally approved the new HR Strategy with the BHR Chapter[314] (the latter suffers from internal

[304] Except for Georgia has included the BHR Chapter into the HR Action Plan to the strategy, not into the strategy itself, 'Georgia | National Action Plans on Business and Human Rights' (16 November 2017) <https://globalnaps.org/country/georgia/> accessed 16 April 2021.
[305] 'Ukraine | National Action Plans on Business and Human Rights' (n 12).
[306] 'IV Kharkiv International Legal Forum' (2020) <https://legalforum.nlu.edu.ua/en/program/> accessed 3 April 2021.
[307] Olena Uvarova, *Business and Human Rights in Times of COVID-19* (2020) <https://ombudsman.gov.ua/files/2020/UN/BHR_covid19_eng.pdf> accessed 3 April 2021.
[308] Uvarova, 'Implementing the UNGPs in Eastern Europe' (n 284).
[309] '2020 UN Forum on Business and Human Rights Schedule' (*Sched*, November 2020) <https://2020unforumbhr.sched.com/> accessed 3 April 2021.
[310] '1st Regional Forum on Business and Human Rights in Eastern Europe and Central Asia Making Human Rights a Priority for Business' (*Regional BHR Forum*, November 2020) <https://www.businesshumanrights-ecis.com> accessed 3 April 2021.
[311] 2020 UN Forum on Business and Human Rights, 'Business and Human Rights in Central and Eastern Europe: Rebuilding Trust for New Social Contract (A Transcript of the Session in Russian)' (*Sched*) 10 <https://static.sched.com/hosted_files/2020unforumbhr/c7/CEE%20session_2020_FINAL%20Rus%20revised.pdf> accessed 31 March 2021.
[312] *2020 UN Forum on Business and Human Rights: High Level Plenary (Valeria Kolomiets, Deputy Minister on European Integration, Ministry of Justice of Ukraine)* (2020) at 1:33:57-1:34:26 <http://webtv.un.org/search/high-level-plenary-forum-on-business-and-human-rights-2020/6210118752001/?term=&lan=english&cat=Meetings%2FEvents&page=3> accessed 14 April 2021.
[313] 'The Inaugural Meeting of the Intersectoral Platform on Business and Human Rights Took Place' (*Ukrainian Parliament Commissioner for Human Rights*, 15 December 2020) <https://www.ombudsman.gov.ua/ua/all-news/pr/v%D1%96dbulosya-ustanovche-zas%D1%96dannya-m%D1%96zhsektoralno%D1%97-platformi-z-pitan-b%D1%96znesu-%D1%96-prav-lyudini/> accessed 6 April 2021; yet, almost six months into its existence, the platform has shown no signs of work, in the public domain, which speaks either of its ineffectiveness or lacking transparency, neither of which is a desirable characteristic.
[314] National Human Rights Strategy 2021-2023. *See also* 'Decree of The President Of Ukraine No 119/2021 "On the National Strategy for Human Rights" (Unofficial Translation)' <https://globalnaps.org/wp-content/uploads/2021/05/ukrainian-bhr-chapter-2021-unofficial-english-translation.pdf> accessed 14 May 2021.

incoherence, as demonstrated further). Notably, the plan to set up a stand-alone NAP was not denounced.

In summary, to put it bluntly, in about five years, Ukraine took a path from *nothing* to *something* about BHR, including:

- annual Kharkiv Forum hosting authoritative BHR discussions;
- rare BHR textbook and syllabus;
- OECD NCP, which has yet to consider its first complaint;
- seemingly inactive Intersectoral BHR Platform;
- state policies promoting RBC and SDGs' implementation;
- comprehensive yet largely lacking stakeholders' input NBA
- arguably incoherent BHR Chapter of the HR Strategy;
- vague plan to enact a stand-alone NAP supported by the Government's commitment pronounced at authoritative international fora.

Nonetheless, it is undoubtedly progress worth celebrating, and the work is ongoing.

The following sections explore how Ukrainian laws and policies treat BHR matters, particularly HRDD and the key related issues. To begin with, the next section provides an overview of the NBA Report.

## 3.4 The 2019 National Baseline Assessment on Business and Human Rights

The NBA Report has been conducted between January and July 2019 by the Kharkiv University in cooperation with the MoJ, with the methodological and financial support from the DIHR and expert support from several civil society organisations and the UN Global Compact Ukraine. Unfortunately, since the NBA Report was prepared in that short timeframe, some methodological recommendations could not have been followed. Most importantly, NBA did not include, as it is advised, inputs from a wide range of stakeholders, among others, the most marginalised and excluded groups in society and potentially affected individuals and communities.[315] The central component of NBA Report – desk research on relevant current regulations and policy, case law, reports, and initiatives – was based mainly on the sources in the public domain, information received on requests from state bodies and the MoJ's survey for business taken by just 28 companies.[316]

Nevertheless, bearing in mind the Ukrainian context and the deeply uncertain political environment of early to mid-2019, the choice to undertake NBA with some methodological flaws in six months was, as practice shows, wiser than waiting for a better opportunity and

[315] DIHR and ICAR, 'National Action Plans on Business and Human Rights Toolkit' (2017) 26 <https://www.humanrights.dk/publications/national-action-plans-business-human-rights-toolkit-2017-edition> accessed 13 April 2021.

[316] Notwithstanding the low number of companies participated in the survey, they represent a wide range of industries (e.g. agriculture, oil and gas industry, construction, transportation, finance, advertising, entertainment, legal services, tobacco industry, automotive industry, etc.) Olena Uvarova, 'The National Baseline Assessment on Business and Human Rights in Ukraine' (2019) Report developed by the Yaroslav Mudryi National Law University in cooperation with the Ministry of Justice of Ukraine 10, 184 <https://minjust.gov.ua/files/general/2019/07/10/20190710170838-51.pdf> accessed 13 April 2021 *(hereinafter – NBA Report. Full text)*.

risking not to get one in the foreseeable future due to rapidly changing political agenda in the year of double elections.

As to the content, about two-thirds of the NBA Report concerns Pillar I of the Guiding Principles, while the remaining one-third addresses Pillar II and III. Such allocation is not unusual for this kind of reports for two primary reasons. First, methodically more questions relate to the state duty to protect and the access to remedy[317] considering the state's exclusive role in setting up effective legal and policy frameworks. Secondly, the focus of the assessment was precisely on the existing regulatory frameworks and actual cases of their implementation rather than on corporate practices. The latter is due to fewer established approaches on assessing compliance with Pillar II and the very lack of sufficient (or any) information on corporate human rights performance in Ukraine. Still, considering the broader features and state of the Ukrainian legal system and the economy as well as the Ukrainian businesses' poor awareness of the BHR standards, even with that information lacking, one might reasonably expect an extremely low level of compliance with such standards.[318]

Notably, all questions regarding HRDD within Pillar I were answered negatively. They concerned HRDD laws and guidance on the state's expectation and best corporate practices,[319] HRDD requirements for the state-related business enterprises (state-owned, controlled, and recipients of substantial state support), including on HRDD in their supply chains,[320] HRDD clauses in public procurement contracts and the thematic guidance for business, including on HRIA.[321] It is generally telling that no strategic document out of about 100 thereof referred to the Guiding Principles.[322]

Regarding HRDD under Pillar II, it was noted from the outset that the low corporate transparency in Ukraine hampered the NBA process in this part.[323] Nevertheless, it was found that only a certain few companies, mainly transnationals, adopted human rights-related policies yet usually as a part of broader corporate codes of conduct or the other internal document, not as a stand-alone human rights policy.[324] The NBA Report states that in Ukraine, commonly used corporate management practices do not usually include elements of the HRDD process. Companies do not typically conduct HRIA; hence they do not integrate respective findings, nor they take appropriate actions to prevent or mitigate adverse human rights impacts[325]. Still, it should be kept in mind that only 28 companies participated in the survey that informed the above conclusions.[326]

Finally, concerning HRDD interplay with Pillar III, access to remedy, the NBA Report summarised that despite various civil, specific administrative and limited criminal

[317] DIHR and ICAR (n 315) Annex B: NBA Template, 4-41.
[318] The conclusions presented in this paragraph are drawn on conversations the author of this thesis held with Olena Uvarova, the head of the International Laboratory for BHR and the author of the NBA Report (on April 14, 2021), and Dirk Hoffmann, a senior advisor at DIHR who provided methodological support in the NBA process (on May 4, 2021).
[319] Uvarova, 'NBA Report. Full Text' (n 316) 118.
[320] ibid 124, 126.
[321] ibid 138.
[322] ibid 31.
[323] ibid 181, 183.
[324] ibid 184, 187.
[325] Uvarova, 'NBA Report. Executive Summary' (n 13) 18. *See also* Uvarova, 'NBA Report. Full Text' (n 316) 194.
[326] Even the way this result was brought about may yet provide a lesson for achieving broader engagement with stakeholders in future at least in terms of the tools applied and the channels of communication used.

liability regimes applicable to misbehaviour of the business enterprises, there existed no special liability mechanism for addressing business-related human rights violations.[327]

Thus, as of May 2019, the NBA Report identified no law nor policy explicitly requiring Ukrainian companies to carry out HRDD; hence, corporate respect for human rights appeared to have no normative foundation. Fortunately, the HR Strategy approved less than two years since then brings new hope of establishing a decent mHRDD regime in Ukraine. In the meantime, as further argued, a searching look at selected legal and policy frameworks reveals their unfulfilled potential of being applied with the purpose to enable corporate respect for human rights and address human rights abuse.

## 3.5 The 2021 National Human Rights Strategy

The HR Strategy for the period of 2021-2023 approved by the Presidential Decree No 119/2021 on March 24, 2021 *(Presidential Decree)* features the BHR Chapter. The decree obliges the Government, inter alia, 'to develop involving representatives of public authorities, local governments, civil society institutions, leading national researchers and international experts and approve *within three months* an *action plan* for the implementation of the [HR Strategy]'.[328]

As previously mentioned, such a draft action plan for the implementation of the HR Strategy 2021–2023 *(Draft HR Action Plan)* has already been developed in 2020, along with the draft amendments to the HR Strategy involving online expert consultations. In early January 2021, the MoJ published the Draft HR Action Plan for public consultations.[329] After the HR Strategy was adopted with certain modifications compared to the initially prepared amendments, the Draft HR Action Plan was updated accordingly. As of late May 2021, it is undergoing the legislative process: currently pending further action by the Governments' Secretariat,[330] and is expected to be approved by late June 2021 as the Presidential Decree requires.

This section provides an overview and a brief discussion of the selected provisions of the HR Strategy, BHR Chapter and both editions of the Draft HR Action Plan.

Firstly, besides featuring the BHR Chapter,[331] the HR Strategy, for the first time, refers to the business when it pronounces its 'Goal and expected outcomes':

- 'business activities' is listed among other areas where the priority of human rights and freedoms should be ensured as a pivotal driver;

[327] Uvarova, 'NBA Report. Executive Summary' (n 13) 22.
[328] National Human Rights Strategy 2021-2023 para 2(1) (emphasis added).
[329] 'Notice of electronic public consultations on the draft Order of the Cabinet of Ministers of Ukraine "On approval of the Action plan to the National Human Rights Strategy 2021-2023" (Повідомлення про проведення електронних консультацій з громадськістю щодо проєкту розпорядження Кабінету Міністрів України 'Про затвердження Плану дій з реалізації Національної стратегії у сфері прав людини на 2021-2023 роки')' (*Ministry of Justice*, 1 April 2021) <https://minjust.gov.ua/uk/m/04012021-povidomlennya-pro-provedennya-elektronnih-konsultatsiy-z-gromadskistyu-schodo-proektu-rozporyadjennya-kabinetu-ministriv-ukraini-pro-zatverdjennya-planu-diy-z-realizatsii-natsionalnoi-strategii-u-sferi-prav-lyudini-na-2021-2023-roki> accessed 23 May 2021.
[330] The updated version of the Draft HR Action Plan has not yet been published by the MoJ but was received on May 24, 2021, shortly after the author of this thesis has made a request for it before the MoJ's Directorate for Strategic Planning and European Integration.
[331] National Human Rights Strategy 2021-2023 s 4 para 16.

- expected outcomes include cohesive actions of state authorities, local self-government bodies, civil society institution, and business entities.[332]

The same section also states that the HR Strategy' effective implementation will contribute, in particular, to international human rights treaties' implementation by Ukraine, including the EU-Ukraine AA, the SGDs' implementation and improvement of Ukraine's position in international human rights rankings.[333]

Secondly, even though including the BHR Chapter in the HR Strategy is a highly positive development, the chapter itself is largely internally incoherent that can be easily revealed through juxtaposing its constitutive elements. To demonstrate that, the BHR Chapter is presented in the table:

<table>
<tr><th colspan="2">16. Ensuring human rights in the course of conducting business activity</th></tr>
<tr><td>Strategic goal<ul><li>businesses apply a human rights-based approach while conducting business activity</li><li>victims of business-related human rights violations have access to effective remedy</li></ul></td><td rowspan="2">Expected outcomes<ul><li>Ukrainian legislation and state policy's compliance with the human rights standards, including human rights protection in case of their violation by business entities, is ensured</li><li>business entities have implemented human rights policies</li><li>access to judicial and non-judicial remedies for human rights violations that occurred while conducting business activity is provided</li></ul></td></tr>
<tr><td>The problem addressed by the strategic direction<br>instances of human rights violations by businesses (in particular, in areas of labour relations, personal data protection, consumer protection and environmental protection)</td></tr>
<tr><td>Objectives aimed at achieving the goal<ul><li>to implement the UNGPs and the CoE BHR Recommendation</li><li>to strengthen the capacity of state and local authorities for such implementation</li><li>to raise awareness of the UNGPs among business entities and associations, trade unions and civil society institutions</li><li>to promote business entities' updating their corporate policies (in particular, on labour relations, environmental protection, CSR, personal data protection, consumer protection, corruption prevention, combating human trafficking etc.) in order to ensure compliance with the UNGPs and other international human rights instruments</li><li>to provide citizens with access to judicial and non-judicial remedies for human rights violations occurring while conducting business</li></ul></td><td>Key indicators<ul><li>number of business entities that have updated policies following the standards of ensuring human rights while conducting business</li><li>number of complaints to the state authorities on human rights violations by business entities</li><li>level of awareness of the UNGPs of business entities and their associations, trade unions, other civil society institutions</li><li>number of employers registered in the Social Protection Fund for PWD</li><li>number of employers, complied with the statutory employment quotas for PWD</li><li>number of employers paid administrative and other sanctions for failure to comply with the statutory employment quotas for PWD</li><li>number of buses used on public transport routes adapted for PWD, primarily those using wheelchairs[334]</li></ul></td></tr>
</table>

[332] ibid 2.
[333] ibid.
[334] ibid 4 para 16; it worth noting that the BHR Chapter's title may be translated 'ensuring corporate respect for human rights' (забезпечення корпоративної поваги до прав людини), however the literal translation – 'Ensuring human rights in the course of conducting business activity' (забезпечення дотримання прав людини в процесі ведення господарської

Before all else, the first strategic goal refers to the application of the human rights-based approach *(HRBA)* by businesses. According to the OHCHR,

> A [HRBA] is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights [which] identifies rights-holders and their entitlements and corresponding duty-bearers and their obligations, and works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.[335]

As observed, although HRBA as a methodological framework is mainly applied to development assistance by the UN and other organisations, human rights-based terminology has entered through UN Global Compact and UNGPs the language of larger business undertakings.[336] In any case, it should be underlined that HRBA is a broad conceptual/ methodological framework that does not specifically design to be used by business enterprises. Instead, the PRR Framework operationalised via UNGPs and the following soft and hard law instruments serves this purpose. Therefore, it is unclear why the BHR Chapter refers to HRBA and what meaning is assigned to it within the BHR context. This makes it problematic to draw a correlation between this first strategic goal and other elements of the BHR Chapter, especially considering that another strategic goal along with some objectives, expected outcomes and indicators may virtually fall within that broad scope of the HRBA.

Turning to the second strategic goal – access to an effective remedy for victims of business-related human rights violations – it should firstly be noted that it practically does not address the determined problem: business-related human rights violations. Instead, it aims at achieving something that should follow such violations, namely access to remedy. The strategic goal would have addressed the problem had it aimed at both preventing violations and achieving access to justice. This discrepancy is especially visible when it comes to the first objective – the UNGPs' implementation – as one of the underlying principles of the UNGPs, the prevention of business-related human rights, should have appeared among strategic goals. This would create a clear link between them and the problem they are arguably aimed at addressing.

The use of the term 'citizens' in framing the last objective on providing access to judicial and non-judicial remedies is concerning since such access should be ensured to any rights-holder, not only the Ukrainian nationals. This aspect seems to be especially troubling in the context of extraterritorial liability of the Ukrainian parent companies', which, if ever imposed, would most probably be triggered by violations of non-citizens' human rights.

Moving forward, although the 'access to remedy' goad has a correlative expected outcome (access to remedy is provided), the seemingly correlative key indicator for it

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діяльності) – was preferred to highlight that the HR Strategy does not yet adopts terms that are more common for the BHR field; similarly, the phrase 'standards of ensuring human rights while conducting business' (стандарти дотримання прав людини під час ведення господарської діяльності) is used instead of 'business and human rights standards' (стандарти бізнесу та прав людини).

[335] 'Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation' (*OHCHR*, December 2006) 15 <https://unsdg.un.org/resources/frequently-asked-questions-human-rights-based-approach-development-cooperation> accessed 20 May 2021.

[336] Morten Broberg and Hans-Otto Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 The International Journal of Human Rights 664, 667, 676.

(number of complaints to the state authorities on business-related human rights violations) is simply insufficient. The number of companies just does not reflect the number of actual instances of violations. It is easy to imagine a situation where a violation has not been followed by a complaint. To support this statement, the following two scenarios may be considered: 1) a company early settles an issue with a victim to prevent her from filing a complaint with the respective state authority (in this case, a victim may presumably accept a lower 'compensation' than she could potentially be awarded by a court); 2) a victim simply does not complain: for example, as of fall 2020, 40% of Ukrainians have not even tried to protect their rights when they were violated.[337]

In addition, although both the HRBA and the UNGPs frameworks envision the inclusion of vulnerable groups[338] or 'groups in vulnerable situations'[339], it remains puzzling why as many as four out of seven key indicators within the BHR Chapter address one specific group (PWD) in particular. Again, the link between these indicators and the strategic goal on HRBA and an objective on the UNGPs' implementation may theoretically be drawn, but overall, the indicators in question do not seem to align with other elements of the BHR Chapter.[340]

The above-considered examples demonstrate that the BHR Chapter suffers from internal incoherence. On the bright side, that the HR Strategy calls for access to remedy, implementation of the UNGPs and the CoE BHR Recommendation and updating corporate policies to meet BHR standards is promising. In particular, because the HRDD and its interplay with the state duty to protect and the access to remedy is likely to receive assiduous attention of the state, the business and the rights-holders in the nearest future.

Finally, the updated *Draft HR Action Plan* includes lists two measures aimed at implementation of the BHR Chapter as opposed to four measures stipulated by the original draft published in early January 2021. Below respective actions points are presented as they feature(d) in the draft before and after its update following the HR Strategy's approval:

| Draft HR Action Plan | |
|---|---|
| Original as of January 4, 2021 | Updated as of May 24, 2021 |
| 51. Conducting a study on the best practices of implementation of the UNGPs, the Ten Principles of the UNGC, the CoE BHR Recommendation | 71. Conducting a study on the best practices of implementation of the UNGPs, Ten Principles of the UNGC, the CoE BHR Recommendation |

[337] Ilko Kucheriv Democratic Initiatives Foundation, 'Human Rights Observance in Ukraine: What Ukrainians Know and Think of Human Rights. Progress Study 2020' (2020) 3 <https://www.ua.undp.org/content/ukraine/en/home/library/democratic_governance/what-ukrainians-know-and-think-about-human-rights--assessment-of.html> accessed 24 May 2021; furthermore, among those who tried protecting their rights, just 15.8% (against 26.4% in 2016) appeal to court while 13.8% (17.3%) to local authorities, 11.5% (19.7%) contact the police, and 6.9% (11.3%) appeal to the Prosecutor's Office, ibid 4.

[338] Under the HBRA's non-discrimination principles, vulnerable groups should be protected against discrimination, 'Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation' (n 335) 7, 12; the Guiding Principles 'should be implemented in a non-discriminatory manner, with particular attention to [...] individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men', UNGPs general principles.

[339] This term is used by the OHCHR, 'Non-Discrimination: Groups in Vulnerable Situations' (*OHCHR*) <https://www.ohchr.org/EN/Issues/Health/Pages/GroupsInVulnerableSituations.aspx> accessed 24 May 2021.

[340] These indicators would rather belong to the 'Preventing and combating discrimination' Chapter of the HR Strategy, National Human Rights Strategy 2021-2023 s 4 para 8.

| | |
|---|---|
| 52. *Consultations* with business representatives and state authorities on the implementation of the UNGPs, Ten Principles of the UNGC, the ILO Tripartite Declaration, the CoE BHR Recommendation | (no action point) |
| 53. Developing *guidance* for business enterprises to ensure compliance of internal strategies, policies and operations with international human rights standards including the UNGPs, Ten Principles of the UNGC, the CoE BHR Recommendation | (no action point) |
| 54. Development and submission for the Government's consideration a draft law on introduction of economic incentives for business entities implementing the standards of ensuring human rights in the course of conducting business.[341] | 72. Development and submission for the Government's consideration a draft law on introduction of economic incentives for business entities implementing the standards of ensuring human rights in the course of conducting business.[342] |

Two out of four action points have been evidently stroked out from the Draft HR Action Plan in the course of its update, namely 'consultations with business representatives and state authorities' and 'development of the guidance for business enterprises to ensure compliance…with [the BHR standards]'. It is a deeply concerning development considering the above underlined significant importance of stakeholder consultation (not only with businesses but also with other stakeholders, such as rights-holders) in the BHR context.[343] The guidance on BHR standards is also critical for bringing about change in corporate conduct. For example, as previously noted, the lack of guidance from the state on the HRDD duties was one of the French Law's shortcomings, while the drafters of the Dutch Bill learned the lesson and suggested empowering public regulator to provide companies with guidance on their HRDD duty.

Turning to the action points which have remained in the plan, the study on the best practices of BHR standards' implementation is undoubtedly needed to enable further policy interventions, namely constructing an effective national mHRDD regime. Moreover, it would contribute to achieving the BHR Chapter's objective of capacity building of state and local authorities for the UNGPs' and the CoE BHR Recommendation's implementation. It would most likely also contribute to the awareness-raising of the UNGPs among business entities and associations, trade unions and civil society institutions. Finally, it would serve as a sound foundation for reaching the Ukrainian legislation and state policy's compliance with the BHR standards. As regards the development of the draft law on economic incentives for responsible businesses, it *partly* correlates with the BHR Chapter's objective on updating corporate policies to align them with the UNGPs and other international human rights instruments (and with the respective expected outcome). 'Partly' because the BHR Chapter is

[341] Cabinet of Ministers of Ukraine, Draft Instruction 'On the Implementation of the National Human Rights Strategy 2021-2023 (Проект Плану дій з реалізації Національної стратегії у сфері прав людини на 2021–2023 роки), 01.04.2021 paras 51–54 (emphasis added).
[342] Cabinet of Ministers of Ukraine, Draft Instruction 'On the Implementation of the National Human Rights Strategy 2021-2023 (Проект Плану дій з реалізації Національної стратегії у сфері прав людини на 2021–2023 роки), 24.05.2021 paras 71, 72.
[343] It also goes against the MoJ's public commitment made at the 2020 UN BHR Forum, as stated in the previous section.

not limited to any specific category of 'business entities' while this law would by design be applied to only those companies that seek economic stimuli from the state. Nonetheless, it is a highly promising action point, which is further discussed in section 4.7.3.

Finally, it worth noting that under the Presidential Decree, the Draft HR Action Plan should be approved by June 24, 2021. Therefore, there is still time for public consultation (mandatory in this case) on the updated version of the draft: the minimal timeframe for conducting such consultation is 15 calendar days.[344]

[344] Cabinet of Ministers of Ukraine, Resolution 'On Ensuring Public Participation in the Formulation and Implementation of Public Policy' (Про забезпечення участі громадськості у формуванні та реалізації державної політики), 03.10.2010 No 996 Annex para 12.

# 4 Due diligence legislation and liability regimes in Ukraine

## 4.1 Due diligence

At the outset, it worth noting that as much as their foreign counterparts, Ukrainian businesses are familiar with various kinds of transactional due diligence, including, for instance, financial, tax, commercial, legal, integrity and even IT due diligence.[345] Section 2.1 has explained that the concept of HRDD was founded by SRSG mainly on the transactional due diligence aimed at assessing, mitigating, managing risks and commonly used 'for a new acquisition, partnership or investment'.[346] At the same time, the NBA Report identified in early 2019 that Ukrainian legislation does not require businesses to carry out HRDD. Although this has not changed since then, the underlying concept of due diligence[347] and other risk-based approaches are evidently not alien to Ukrainian legal frameworks. This section considers several examples in support of this statement.

The focus is not exclusively on transactional due diligence, though. The section rather attempts to draw various domains where due diligence is applied into the light. It begins with domestic violence prevention following another SRSG's finding that due diligence was also adopted in public international law to gender-based violence[348] (and eventually got reflected in national laws). It then proceeds to contractual relationships while due diligence in non-contractual relationships, mainly defence mechanisms in delict-based liability regimes, is discussed in much detail in section 4.2.1. Lastly, this section deliberates on anti-corruption and anti-money laundering due diligence to advance the argument that Ukrainian legislation indeed envisages due diligence regimes comparable by some elements to the foreign HRDD ones and therefore offers a foundation to build on a national mHRDD framework.

### 4.1.1 Due diligence in domestic violence prevention

Under Article 4 of the Law of Ukraine[349] 'On Prevention of Domestic Violence', one of the underlying principles of preventive measures against domestic violence is '*due diligence* regarding every instance of [such] violence […]'. However, probably because the due diligence concept is not common in Ukraine, the Ukrainian term used by the law is 'due attention' *(належна увага)* while the same concept is elsewhere translated as 'due

[345] 'Due Diligence' (*KPMG*, 11 February 2021) <https://home.kpmg/ua/en/home/services/deal-advisory/transaction-services/due-diligence.html> accessed 13 May 2021.
[346] Ruggie, 'Letter from John Ruggie to German Ministers Regarding Alignment of Draft Supply Chain Law with the UNGPs' (n 124) 3.
[347] It worth noting that it is quite common for Ukrainian laws to refer to the same idea using several or even a wide range of words and expressions. This is particularly noticeable with 'due diligence' since the term may be translated using many different words with similar meaning, as further demonstrated.
[348] State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries, Addendum to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/35/Add.1 (2007) para 27.
[349] The term 'Law' is henceforth used to refer to a 'Law of Ukraine' unless otherwise stated.

conscientiousness' *(належна сумлінність)* and 'due diligence' *(належна обачність)*,[350] the literal translation.[351]

The cited provision on domestic violence prevention refers to the state duty in relation to private individuals, not companies, but the underlying concept embodies the same idea – exercising due diligence to prevent human rights violations or 'adverse impacts', in UNGPs' language. This observation begs the adoption of the single translation for 'HRDD' as a technical but instrumental contribution to raising awareness and building understanding of the HRDD concept in Ukraine.

### 4.1.2 Due diligence in contractual relations

First and foremost, Article 3 of the Civil Code of Ukraine *(CCU)* lists fairness, good faith, and reasonableness among general principles of civil law. The closely aligned Article 509 CCU prescribes that an obligation shall be based on the principles of good faith, reasonableness, and fairness. Then, according to Article 614(2) CCU, a person[352] shall bear no fault[353] 'if she proves that she has taken *all measures dependent on her to properly fulfil an obligation*'. Considering that the words 'properly' and 'duly' share a translation into the Ukrainian language *(належно/належним чином)*, the provision in question to a considerable extent resembles the common definition of 'due diligence' cited in one of SRSG's reports: 'diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation'.[354] Thus, the formulation of the Article 614(2) CCU can be rephased as: '…if she has taken *all reasonable measures to discharge a contractual obligation*'.[355] For instance, this is how the Supreme Court interprets this article in conjunction with Article 509 CCU:

> '[b]ased on these general principles [of good faith, reasonableness and fairness], the existence or absence of fault must be established: a person shall bear no fault *if she has taken all measures to properly fulfil an obligation with the degree of care and diligence* required of her by the nature of the obligation and the terms of turnover'.[356]

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[350] Hanna Khystova, 'The Doctrine of Positive Human Rights Obligations of the State: Doctoral Thesis' (Yaroslav Mudryi National Law University 2019) 72 <http://nauka.nlu.edu.ua/download/diss/Xristova/d_Xristova.pdf> accessed 12 May 2021.
[351] It features, for example, in the 2018 Ukrainian translation of the Guiding Principles by Kharkiv University and in the NBA Report, while the Ukrainian translation of the OECD Due Diligence Guidance for RBC uses both the term 'due audit' (належна перевірка) and 'comprehensive assessment "due diligence"' (комплексна оцінка «дью діліджанс»), *see* Olena Uvarova (ed), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (Kateryna Buriakovska and others trs, Pravo 2018); Uvarova, 'NBA Report. Full Text' (n 316); OECD Due Diligence Guidance for Responsible Conduct (Настанови ОЕСР стосовно процедур належної перевірки у практиці відповідального ведення бізнесу) 2018.
[352] To avoid using three pronouns, *'it'* for a legal person and *'he or she'* for a natural person, an employee, a customer etc. the word *'she'* is henceforth used to refer to any person. Besides, the Ukrainian word 'person' *(особа)* is a female noun.
[353] Under the general rule, both contractual and non-contractual liability in Ukraine is fault-based. The notion of fault is extensively discussed in section 4.2.1 on liability regimes.
[354] Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/11/13 (2009) para 71.
[355] This conclusion is partly drawn from the assertions on the resemblance between civil law and common law systems and between the 'fault' as element of delict/tort and the 'due diligence' concept presented in section 4.2.1.
[356] *Resolution of the Supreme Court, 15.08.2018, case No 910/11049/17* (emphasis added); the term 'Supreme Court' is henceforth used to refer to the Supreme Court of Ukraine unless otherwise stated. The 2016 judicial reform left the highest court's official title without the words 'of Ukraine'. Constitution of Ukraine, 28.06.1996 art 125.

Secondly, Article 652 CCU prescribes conditions upon which if parties have not come to an agreement, a court may modify or terminate a contract in connection with a substantial change of circumstances. One of the conditions reads 'the change of circumstances is due to reasons that an interested party could not eliminate after their occurrence despite all *due care and diligence* required of it'.[357]

Thirdly, pursuant to Article 1016(3) CCU which regulates the performance of an agreement between a commissioner and a third party, '[a] commissioner shall not be liable…for a third party's failure to perform an agreement…unless [she] was *negligent* in selecting this person […]'. In other words, this clause entitles a commissioner with due diligence mechanism against contractual liability.

Fourthly, Article 1043(1) CCU provides for the analogous due diligence mechanism, namely a property manager who has exercised '*due care* as regards the interests of the management settler or the beneficiary while managing the property[358] shall not be liable for the caused damage or the lost profit.

Finally, under Article 112 of the Tax Code of Ukraine, which determines general conditions of financial liability for tax offences, a taxpayer is deemed to follow tax rules and regulations 'if the supervisory authority does not prove that by committing certain actions or inaction for which liability is provided, the taxpayer acted unreasonably, in bad faith and without *due diligence*'.[359] As observed, this virtually represents tax due diligence *(належна податкова обачність)* – a separate audit implying detailed analysis of tax risks.[360]

### 4.1.3 Anti-corruption due diligence

The entire Section X of the Law 'On Prevention of Corruption' is devoted to corruption prevention in legal entities' activities. In short, the law obliges certain companies[361] to develop and take measures to prevent and combat corruption through regular corruption risks assessment, conducting an anti-corruption audit (including by external experts), putting in place an anti-corruption programme and appointing a commissioner in charge of its implementation (and reporting before shareholders). The law prescribes set of detailed recommendations as to the content of an anti-corruption programme and requires it to be communicated to employees. The law also requires that an obligation to comply with its anti-corruption provisions should be incorporated into employment contracts, company's policies and may be included in contracts with third parties.[362]

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[357] The Ukrainian term used here is 'належна турботливість та обачність', the literal translation of 'due care and diligence', Civil Code of Ukraine (Цивільний кодекс України), 16.01.2003 No 435-IV art 652(2)(2) (emphasis added).
[358] The Ukrainian term used here is 'належна турботливість', the literal translation of 'due care'.
[359] The Ukrainian term used here is 'належна обачність', the literal translation of 'due diligence': this is the only identified case of using such translation in the Ukrainian legislation.
[360] Danylo Hloba, 'Tax aspects of due diligence in the relationship with the counterparty' (*PRAVO.UA*, 24 February 2021) <https://pravo.ua/podatkovi-aspekti-nalezhnoi-obachnosti-u-vidnosinah-z-kontragentom/> accessed 13 May 2021.
[361] Including state and communal enterprises, business enterprises (where the state or communal share exceeds 50%), with at least 50 employees, and gross income of at least UAH 70 mln as well as legal entities-bidders for public procurement contracts worth at least UAH 20 mln, Law of Ukraine 'On Prevention of Corruption' (Про запобігання корупції), 14.10.2014 No 1700-VII art 62(2).
[362] ibid arts 61-64; as reported in 2019, only 'some companies' refer to anti-corruption programmes, commissioners and communication channels in their management reports while the level of reporting on implementation of such programmes is 'low', Corporate Governance Professional Association and Centre for CSR Development Ukraine, 'Company Transparency Index 2019 – Ukraine' (2019) 8 <https://cgpa.com.ua/wp-content/uploads/2020/10/Transp_index_2019_en_web.pdf> accessed 13 May 2021.

A close look at the anti-corruption requirements for companies reveals a strong similarity with HRDD requirements which equally encompasses an ongoing process that includes risk assessment, taking preventive measures, communication, and reporting. HRDD is also carrying out to implement certain programme – human rights policy. Moreover, anti-corruption audit in practice is often treated as 'anti-corruption due diligence'.[363] As one commentator explained regarding the upcoming mHRDD, '[it] would look similar to the anti-corruption "adequate procedures" approach'.[364] The key difference between the two sets of measures is probably the nature of risks at stake. Once again, HRDD aims at addressing *risks to human rights*, while anti-corruption is meant to address corruption *risks to the company*.

Nevertheless, there is interconnection. In recent years the nexus between corruption and human rights is getting more attention[365] while WG BHR notably considers this matter among those in focus and had its last report entirely devoted to connecting BHR and anti-corruption agendas. The Working Group recommends states to, inter alia, '[i]ntroduce regulations that require [HRDD] by business enterprises in line with the Guiding Principles, and provide guidance clarifying the connection between corruption and human rights risks and impacts'.[366] At the same time, businesses are advised, in particular, to '[c]onsider how addressing corruption risks and business-related human rights abuses with a risk-to-people approach rather than a risk-to-business approach could help drive a corporate integrity culture'.[367] These recommendations aptly conclude this section.

### 4.1.4 Anti-money laundering due diligence

The Law on anti-money laundering/counter-terrorist financing prescribes financial monitoring to be built on the risk-based approach entailing risk assessment and taking appropriate risk management measures to mitigate identified risks.[368] The application of this approach should be regulated by a subject of primary financial monitoring[369] in its internal policies and should be proportional to the nature and scope of its activities. The risks must be regularly reassessed while the information on them should be updated so the subject could 'show its understanding of risks posed by its clients'.[370] Finally, the subject of financial

[363] Svitlana Kheda, 'Bribery & Corruption Laws and Regulations | Ukraine' (*GLI - Global Legal Insights*) <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/ukraine> accessed 12 May 2021.
[364] Vera Cherepanova, 'Get Ready for Mandatory Human Rights Due Diligence' (*The FCPA Blog*, 23 November 2020) <https://fcpablog.com/2020/11/23/get-ready-for-mandatory-human-rights-due-diligence/> accessed 13 May 2021.
[365] Eg *see* Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 'The Nexus between Corruption and Human Rights' <https://referenceworks.brillonline.com/entries/international-year-book-and-statesmens-who-s-who/*-SIM_org_39387> accessed 13 May 2021; Anne Peters, 'Corruption as a Violation of International Human Rights' (2018) 29 European Journal of International Law 1251; Philip Alston and Nikki Reisch (eds), *Tax, Inequality, and Human Rights* (Oxford University Press 2019).
[366] Connecting the business and human rights and the anticorruption agendas, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/44/43 (2020) para 77(c).
[367] ibid 78(b).
[368] Law of Ukraine 'On Preventing and Counteracting to Legalization (Laundering) of the Proceeds of Crime, Terrorism Financing, and Financing Proliferation of Weapons of Mass Destruction' (Про запобігання та протидію легалізації (відмиванню) доходів, одержаних злочинним шляхом, фінансуванню тероризму та фінансуванню розповсюдження зброї масового знищення), 06.12.2019 No 361-IX art 1(1)(53).
[369] Subjects of primary financial monitoring along with banks and financial institutions include certain business enterprises, in particular, audit, accounting, tax consultancy and law firms, digital assets-related service providers and other companies providing certain financial services, ibid art 6.
[370] ibid art 7.

monitoring must, in specific cases, carry out customer due diligence, including identification, verification and monitoring.[371]

Just as with anti-corruption due diligence, a specific kind of *risks to the company/entity* is at stake. Notwithstanding, the risk-based approach,[372] ongoing due diligence process and the 'know and show' principle strongly resemble the HRDD concept.

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The anti-corruption and anti-money laundering due diligence serves as the most illustrative examples of the application of the due diligence regime closely comparable by its constitutive elements to mHRDD regimes under previously discussed soft and hard law instruments. The crucial difference in the type of risks remains, but as ILO puts it about the introduction of HRDD practices, companies need 'to focus outward [hence] use a process with which they are familiar, for a purpose with which they may not be'.[373]

Ultimately, the considered examples of implementation of the due diligence concept, along with lessons learned from the setting up HRDD regimes in European countries, provide a decent foundation for mHRDD in Ukraine. Moreover, as demonstrated in the following sections, certain elements of HRDD have already been implemented.

## 4.2 Liability regimes

> The well-known Latin maxim *Ubi jus, ibi remedium* – meaning 'where there is a right, there is a remedy', postulates that where law has established a right there should be a corresponding remedy for its breach. The right to a remedy is one of the fundamental rights historically recognized in all legal systems.[374]

In other words, no remedy – no right. Indeed, it is hard to overestimate the significance of remedy, specifically, in the context of this paper, a liability regime under or related to the HRDD legislation aiming at protecting rights-holders from adverse impacts on their rights by companies. For example, it is telling that of 35 cases brought within the last decade against EU-based companies in their home states for human rights harms in third countries, only a few resulted in finding the defendant company liable or were settled out of the court while just one case led to compensation for victims of unfair dismissal.[375]

Considering that for years victims have been struggling to get redress for the abuses they went through because of irresponsible corporate conduct, *access to remedy, particularly the corporate civil liability for harm, is currently the most critical BHR issue.* This section discusses whether and how civil liability for business-related harm to human rights and the environment is framed under Ukrainian legislation and how it correlates with the existing

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[371] ibid arts 1(1)(34), 11; here the law uses yet another translation: 'належна перевірка' ('due audit').
[372] Along these lines, the NBA Report also draws attention to legislation on the state supervision (control) in the field of economic activity which also employs a risk-based approach for supervisory authorities to assess risks posed by business entities and yet right-holders do not feature in target audience of the risk assessment, Uvarova, 'NBA Report. Full Text' (n 316) 33, 134–135.
[373] ILO, 'Achieving Decent Work in Global Supply Chains, Report for Discussion at the Technical Meeting on Achieving Decent Work in Global Supply Chains (Geneva, 25–28 February 2020)' (2020) para 61.
[374] R Rajesh Babu, *Remedies under the WTO Legal System* (Martinus Nijhoff Publishers 2012) 1.
[375] European Parliament, Directorate-General for External Policies, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries' (2019) 5, 21 <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf> accessed 5 May 2021.

foreign liability regimes considered in Chapter 2. It also considers other liability regimes applicable to Ukrainian companies, which may be instructive for the civil liability regime's improvement.

### 4.2.1 Civil liability

Ukrainian civil law envisages two broad categories of civil liability: contractual and non-contractual (delict/tort)[376] liability. The latter refers to compensation for two kinds of damage: pecuniary and moral (non-pecuniary). This section considers principal civil liability regimes which may be instructive to future modelling of a liability in the BHR context, namely general delict liability, vicarious liability, accessory liability labour-, discrimination-, environment-related delict liability, and mentions product liability. In addition, the recent development on the upcoming major reform of civil legislation is touched upon.

#### 4.2.1.1 General delict liability

The general rule for pecuniary damage set in Article 1166(1) CCU prescribes that the damage caused by wrongful decisions, actions or omissions to personal non-property rights or the assets of a natural or legal person shall be fully compensated by the person who caused it.[377] The latter person *(tortfeasor)* shall be exempt from compensation if she proves that the damage was not caused by her fault (Article 1166(2) CCU). In a similar fashion, under Article 1167(1), in case of her fault, a person who caused moral damage to a natural or legal person by its wrongful decisions, acts or inactivity, shall compensate it.[378]

The pecuniary damage encompasses both actual damage and the lost benefit,[379] while the physical pain and suffering, mental suffering, degradation of honour and dignity of a natural person, and reputational damage to a legal person qualify as moral damage.[380] Karnaukh points out that narrow definition of pecuniary damage and the use of 'quite a strong word – "suffering"' to define moral damage coupled with civil procedure rules and the predominant case-law leads to practical difficulties, including excessively rigid requirements of proof and formal non-recognition of certain kinds of harm to human rights as damage.[381]

According to the behavioural approach to the notion of a legal person's fault, reflected in previously discussed Article 614 CCU that regulates contractual liability, a person bears no fault 'if she proves that she has taken all measures dependent on her to properly fulfil an

[376] The term 'delict' is henceforth used as it is applied in civil law systems (followed by Ukraine) as equivalent to 'tort' in common law systems, eg *see* Gert Brüggemeier, 'The Civilian Law of Delict: A Comparative and Historical Analysis' (2020) 7 European Journal of Comparative Law and Governance 339; it worth noting that many secondary sources cited above nevertheless use 'tort' when discuss other European civil law counties, such as France.
[377] As regards personal non-property rights, this provision corresponds with Article 280 CCU which prescribes another general rule: where a violation of personal non-property right resulted in pecuniary and (or) moral damage, such damage shall be compensated, Civil Code of Ukraine (Цивільний кодекс України), 16.01.2003 No 435-IV art 280.
[378] The second paragraph of the same article provides for exceptions under which a tortfeasor is liable regardless of her fault. These include extreme cases, for instance, where the damage results from health injuries or death from the source of increased danger or where it resulted from illegal: conviction, criminal prosecution, precautionary measure, detention, administrative arrest or correctional labour, ibid art 1167(2).
[379] ibid art 22(2).
[380] ibid art 23(2).
[381] Karnaukh, 'Tort Law and Human Rights in Ukraine' (n 247) 8–9.

obligation'.[382] Tretyak contends that if in Article 1166(1) CCU, the words *'that the damage was not caused by her fault'* are replaced by *'that she has taken all measures dependent on her to prevent harm'*, this would not change the grounds for compensation of damage. He concludes that 'faulty [negligent] behaviour is a breach of the general obligation to adhere to the requirements of due care and diligence'.[383] Consequently, in the context of delict law, 'fault occurs whenever the person has not taken all the measures in his or her power to avoid infliction of harm'.[384] Brüggemeier explains that a company's negligence means organisational fault with a focus on its activities and the way it is organised and structured.[385] This exemplifies 'civil quasi-strict liability [based on the determination of] what was possible and reasonable – from a financial, technical and organisational perspective – for the enterprise to prevent the injury'.[386]

Then, Karnaukh observes that the four elements of delict – wrongfulness, damage, causation, and fault – are not explicitly listed in the law, but the courts consider Article 1166 CCU to imply them. He also emphasises that 'wrongfulness has to be proven separately…the plaintiff has to identify clearly the provisions of the law that have been violated by the defendant, or else the claim will be rejected'.[387] Along with wrongfulness, the plaintiff has to prove the damage and causation between the defendant's wrongful conduct and the damage. Once the plaintiff has proved these three elements of delict, 'the presumption of fault comes into play and the baton is passed to the defendant': to avoid liability, the defendant has to prove that damage occurred despite the fact that she has done everything in her power to prevent it.[388]

If compared to western European jurisdictions considered above, Ukrainian civil law provides for a more advanced scheme in terms of the burden of proof distribution. However, this advantage is relative and should be considered in light of the difference and correlation of constitutive elements of delict in civil law and a tort in the common law. According to Karnaukh, in both systems, the same set of circumstances has to be investigated by courts. The only difference is how these circumstances are distributed between the respective elements: wrongfulness, damage, causation, and fault (in a general delict) and duty of care, breach of duty, and resulting damage (in a tort of negligence). For example, unlike in general delict, the issue of fault lacks as a separate element of the tort of negligence and yet it is considered within mainly the breach of duty but also discussed within the remaining two

[382] Valentyna Zhornokyi, 'The Fault of a Legal Entity: The Contemporary State of Ism' (2020) Entrepreneurship, Economy and Law 160, 161.
[383] Taras Tretyak, 'The Obligation to Ensure the Appropriate Level of Care and Diligence as a Criterion of Acceptability of Impact on Neighboring Land Plot (Обов'язок Забезпечення Належного Рівня Дбайливості Та Обачності Як Критерій Прийнятності Впливу На Сусідню Земельну Ділянку)' (2015) 3 The Law and the civil society 260, 265–266.
[384] Karnaukh, 'Tort Law and Human Rights in Ukraine' (n 247) 12.
[385] Brüggemeier (n 376) 357.
[386] ibid 376.
[387] Karnaukh, 'Tort Law and Human Rights in Ukraine' (n 247) 4.
[388] ibid 4; notably, the law regulating compensation for damage cause by defects in goods explicitly states that the victim has to prove damage, defect in the product (breach), and causation, while fault does not feature because liability is strict; instead a manufacturer may avoid liability if she proves one of the conditions prescribed by law, such as she did not put products into circulation Law of Ukraine 'On Liability for Damages Caused by Defects in Goods' (Про відповідальність за шкоду, завдану внаслідок дефекту в продукції), 19.05.2011 No 3390-VI arts 6(1), 9(1).

elements.[389] In general, the reason for this similarity, he asserts, lies in the same underlying principles of delict/tort liability in both legal systems due to 'immanent reasonableness-rationality of law'.[390]

In light of the previously discussed French, Swiss and Dutch liability regimes, it should be underlined that Ukrainian delict law establishes *fault-based liability for harm with a statutory presumption of a tortfeasor's fault*. At the same time, considering that the fault is defined as failure to take all necessary measures to prevent harm, disproval of fault virtually partly performs the role of due diligence defence. Accordingly, had the Ukrainian law or case law provide for the presumption of wrongfulness as much as of fault,[391] *disproval of both fault and wrongfulness would virtually perform the role of due diligence defence*. In that case, the respective delict liability would closely resemble a strict liability with due diligence defence established by the Swiss Proposal.

Ultimately, in the BHR context, the existing Ukrainian model of the general delict liability has several limitations for holding companies accountable: 1) they are liable for only their own activities (decisions, actions or omissions) and not for their business relationships; 2) until there is a legal corporate duty to respect human rights, the rights-holders would find proving wrongfulness close to impossible since it requires them to pinpoint a specific provision of law that a company has violated by its human rights abuse (this does not prevent them from attempts to hold companies liable for damage caused by violation of existing legal right not always expressly framed in human rights terms, as further discussion demonstrates); 3) overall, the burden of proof lies too heavily on the victim's shoulders as proving wrongfulness, the damage and causation would require collecting evidence usually held by the company; Ukrainian legislation share this limitation with the French Law but the situation is exacerbated by the comparatively lower level of corporate transparency in Ukraine.

#### 4.2.1.2 Vicarious liability

Historically, vicarious liability emerged as an employer's liability based on the legal principle of 'liability for others': where an employee has committed a classic delict 'on the job' the employer/enterprise for which she does the work, is liable for the damage caused to third parties. Accordingly, vicarious liability connects previously mentioned fault-based liability (in this case, of an employee) with a strict liability (of an employer).[392]

Article 1172 CCU reads,

> 1. A legal or natural person shall compensate for the damage caused by their employee during the performance of their labour (official) duties.
> 2. A customer[393] shall compensate for the damage caused to another person by a contractor if it acted upon a customer's assignment.
> 3. Companies, cooperatives shall compensate for the damage caused by their shareholder (member) while undertaking business or other activities on behalf of the company or cooperative.

[389] Bohdan Karnaukh, 'General Delict v. Tort of Negligence: We Are Not as Different as Commonly Believed' (2012) 1–2 Comparative Legal Studies 229, 234.
[390] ibid 235.
[391] This idea is discussed in the following section.
[392] Brüggemeier (n 376) 353.
[393] The term refers to a legal or natural person as a customer of work performed by a contractor under a contract agreement.

For the purposes of this paper, the first two provisions are further discussed: the employer's liability for an employee and the customer's liability for its contractor. Article 1172 CCU provides an exception from the general fault-based liability for damage set by Article 1166 CCU. Thus, the employer's and customer's fault are not a necessary condition for establishing their liability. Following the above historical reference, these persons are then strictly liable for the damage caused by a person carrying out work or providing service in the discharge of labour or contractual duty before them.

As Karnaukh explains, Article 1172 CCU stipulates a special kind of delictual duty between a victim and a person who has not inflicted the harm, contrary to a general delict where a person who has inflicted the damage owes a duty to compensate towards a victim. Another crucial point is that an additional element – the link between the damage and the person statutory liable for it – complements the existing four elements of a delict.[394] Finally, once a person compensates for the damage caused by the third party, it is entitled to make regress demand (counterclaim) to this third party. If such demand is made, unlike an employee whose material liability is limited to her average monthly salary due to labour law guarantees, a contractor would be obliged to meet the regress demand in full.[395] As Karnaukh rightly notes, this begs the question of whether would not it be easier for a victim to bring an action against the contractor directly considering that the latter risks receiving a regress demand for payment of the equivalent of compensation? Moreover, in some cases, a contractor may have a better economic position hence be a more desirable defendant in a victim's eyes. Thus, where the sum of original and regress demands is equal, it would make sense for a victim to have a right to choose whom to bring a case against.[396]

It worth reminding that one of the most robust liability regimes under HRDD legislative proposals – the Swiss Proposal's civil liability of controlling companies for harm inflicted by their subsidiaries – was modelled on the tortious liability of employers.[397] Interestingly, although Article 1172(2) CCU does not mention 'control' as a condition giving rise to vicarious liability of a customer, the Supreme Court has nevertheless concluded that this article is applied where the contractor act not only upon an assignment but also 'under control' of the customer (Ruling of 16.04.2020, case No 904/5489/18).[398] A closer look at this ruling reveals that the interpretation applied in it has its roots in a strand of similar cases going back as far as April 2011 when the respective legal position was formulated in the case No 6-13344св10. In that case, the court ruled that Article 1172 (2) CCU does not apply where the damage to a third party was caused by the contractor while performing work under the contract agreement if the latter does not provide for control of the customer over the compliance of the performed work with existing rules and regulations.[399] Ten years later, in April 2021, the Supreme Court arrived at practically the same conclusion: 'the customer

[394] Bohdan Karnaukh, 'Compensation of Damage Caused by a Third Party (Article 1172 of the Civil Code of Ukraine)' (2020) Entrepreneurship, Economy and Law 29, 31.
[395] ibid 32.
[396] ibid.
[397] Palombo (n 129) 283.
[398] Karnaukh, 'Compensation of Damage Caused by a Third Party (Article 1172 of the Civil Code of Ukraine)' (n 394) 31, 33.
[399] *Ruling of the Supreme Court of Ukraine, 06.04.2011, case No 6-13344св10.*

compensates the damage caused to another person by the contractor if it had acted upon the customer's assignment and under her control over the safe performance of work'.[400]

Thus, if a customer does not control a contractor despite the work is being performed upon the former's assignment – the vicarious liability does not occur. Virtually, the Supreme Court over the years set in stone an extension of the existing statutory rule[401] under Article 1172(2) CCU by adding another condition for liability: the customer shall compensate the damage caused to another person by the contractor if it acted upon a customer's assignment *and under her control*.

Finally, another reminder of the Swiss Proposal should be provided. As previously discussed, it provided for a liability regime in which the burden of proof was partly reversed: a victim had to prove the harm, causality, and the control relationship between the business entities while the breach was presumed and had to be disproved by the allegedly controlling company. To establish vicarious liability under Ukrainian law, a victim needs to prove wrongfulness, damage, causation, and connection (via assignment and control) between the damage and a person statutory responsible for it. Despite the presumption of fault (of a person who caused damage), proving of remaining elements appears to be too onerous for victims. Thus, the situation resembles the French Law approach where victims are also overly burdened rather than the Swiss one.

However, a possible path to the partial reversal of the burden of proof, comparable to the one under the Swiss Proposal, is likely to have already been framed by two dissenting opinions pronounced by the Supreme Court justices in 2019. Concerning the basic four elements of a delict, they call for an alternative allocation of the burden of proof 'namely that the plaintiff should only prove damage and causation, while the defendant should disprove not only fault but wrongfulness as well'.[402] The argument goes as follows: since Article 1166(2) imposes the presumption of fault on *'a person that caused the damage'*, then it has to be rebutted if only it is established that the damage resulted from actions or omissions of a *particular person*. Therefore, only if such person has been identified, the burden of proof allocation takes place: the plaintiff has to prove the infliction of damage and causal link while the defendant proves that there were neither wrongfulness nor fault.[403] Essentially, the application of the presumption of wrongfulness along with one of fault is suggested.

Consequently, in cases concerning vicarious liability, the plaintiff would have to prove the damage, causation and connection between the damage and a person statutory responsible for it, while the defendant would have to disprove both wrongfulness and fault. Hopefully, those dissenting opinions are the ones that 'speak over the head of the majority to the public at large, indicating room for possible legal change, and motivating social movements to achieve it'.[404] Even if the suggested change does not make its way into the

[400] *Resolution of the Supreme Court, 14.04.2021, case No 753/6519/19*.
[401] That the Supreme Court taking on legislative function is concerning since under Article 6 of the Ukrainian Constitution, state power is exercised on the principles of its separation between legislative, executive and judicial branches of powers.
[402] Karnaukh, 'Tort Law and Human Rights in Ukraine' (n 247) 5.
[403] *Dissenting Opinion by the Supreme Court Justice Krat VI, 06.03.2019, case No 522/1781/16-ц*.
[404] Thomas B Bennett and others, 'Divide & Concur: Separate Opinions & Legal Change' (2018) 103 Cornell Law Review 62, 862.

general rule, it may well be used to construct special rules for corporate liability for human rights abuse enabling greater access to justice for victims.

Thus, the vicarious liability under Article 1172 CCU and its interpretation by the Supreme Court, as well as dissenting opinions regarding the partial reversal of the burden of proof, deserve close attention while considering a possible design of the Ukrainian corporate civil liability regime. Besides, the customer's vicarious liability, in particular, requires further careful inquiry considering emerging mHRDD regimes, such as the French one, which provides for holding companies accountable for extraterritorial harm via their contractors. Some of the issue's worth further investigation are: 1) under what circumstances, Article 1172 CCU would allow a victim of damage caused in Ukrainian territory by the foreign customer's contractor to sue such a foreign customer?; 2) what bearing does Article 1172 CCU, the Law 'On Private International Law' and bilateral interstate treaties might have on such victim's effort to sue the respective foreign company under its home state's law.

#### 4.2.1.3 Accessory liability

Under Article 1190 CCU, where persons' joint actions or omissions caused the damage, they shall bear solidary liability to the victim who is entitled to ask the court to determine each person's liability depending on the degree of their fault.

As Karnaukh underlines, the central issue is whether the actions were indeed joint or not. With yet no common approach in case law, the Ukrainian courts nevertheless highlight that the damage 'has to be indivisible, and the actions have to be interdependent and collective or committed with common intent'. In consequence, thus far, Article 1190 CCU has been predominantly applied in cases regarding the damage resulted from a criminal offence, damage inflicted by several defendants in concert or by two colliding vehicles.[405]

The Guiding Principles explicitly mention that a business enterprise's (alleged) contribution to adverse human rights impacts caused by a third party may give rise to the questions of its complicity, particularly through civil actions which, however 'may not be framed in human rights terms'.[406] In this regard, the accessory liability under Article 1190 CCU makes an illustrative example of a legal clause that may address the issue of alleged contribution to human rights impact (damage) framed in terms different than human rights.

According to the Interpretative Guide to RtR, a company may contribute to the adverse human rights impact 'through its own activities – either directly or through some outside entity (Government, business or other)'.[407] In the latter case, a company and a third party's actions cumulatively cause damage. Following the Ukrainian courts' approach that such damage has to be indivisible and caused by interdependent, collective or actions with common intent – it may be argued that joint tortfeasors are likely to be subjected to accessory liability for the damage to human rights.

Another case, as interpreted, '[a company] may neither cause nor contribute to the impact, but be involved because the impact is caused by an entity of its business relationship and is linked to its own operations, products or services'.[408] For example, a company may be

[405] Karnaukh, 'Tort Law and Human Rights in Ukraine' (n 247) 6–7.
[406] UNGPs commentary to principle 17.
[407] OHCHR, The Corporate Responsibility To Respect Human Rights: An Interpretive Guide 15–16.
[408] ibid.

direct linked to human rights damage via its subcontractors. Among other issues, so-called predatory purchasing practices 'including price, are a major contributor to adverse impacts in the supply chain'.[409] Again, it may be argued that where a company's purchasing practices make its subcontractor violate human rights standards which result in the damage, then the latter was arguably caused by joint actions of both a company and its subcontractor; hence accessory liability[410] may be triggered.

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### Recodification of the civil law

The ideas to change existing approaches in delict law, particularly regarding special delicts, may be found not only in the dissenting opinions of the Supreme Court justices. Since last year, the governmental working group on recodification (updating) of Ukrainian civil legislation has been exploring ways to improve this fundamental legal area. The Concept of Updating the CCU *(Recodification Concept)* provides for inter alia substantial reconsideration of general conditions of delictual liability, including the definitions of basic principles of liability, damage, causation, and fault. Regarding the latter, it is called necessary 'to objectify the provision on generally accepted norms of conduct (required standard of conduct)'.[411] In addition, the concept considers the possibility of introducing new special delicts, for example, compensation for environmental damage, compensation for damage caused by artificial intelligence, compensation for damage caused by abuse of rights.[412] Besides, the objectivation of the class action under the CCU is under consideration.[413] Finally, according to the Recodification Concept, 'the fault of a legal person' features among issues that require radical rethinking within the recodification efforts related to non-contractual duties.[414]

The ongoing recodification process opens a relatively wide window of opportunities to adopt existing BHR approaches to the outlined issues of delictual liability. For instance, by clarifying definitions of elements of a delict, reversing the burden of proof to alleviate the existing hurdles faced by victims and introducing *a special delict of compensation for business-related damage to human rights and the environment*. Moreover, the governmental working group has a unique chance to follow the abovementioned OHCHR guidance on improving corporate accountability and access to remedy for victims of business-related human rights abuse and the CoE BHR Recommendation. The latter's implementation, along with the implementation of the Guiding Principles, as already discussed, is directly listed among the strategic objectives of the BHR Chapter of the HR Strategy.[415]

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[409] Smit and others (n 4) 83–86.

[410] In the context of corporate liability for gross violations of human rights, Zerk similarly argues that a parent company might potentially be liable for its subsidiaries' actions under '[the] legal principles of accessory liability…if it ordered, incited, organized, assisted or facilitated the offences', Dr Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses – Towards a Fairer and More Effective System of Domestic Law Remedies' (2012) 37 <https://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomesticelawremedies.pdf> accessed 6 May 2021.

[411] Working Group, *The Concept of Updating of the Civil Code of Ukraine (Концепція Оновлення Цивільного Кодексу України)* (ArtEk Publishing House 2020) para 5.39.

[412] ibid 5.42; the term 'human rights abuses' should not be confused with the 'abuse of rights' which implies that a person exercises her right with an intention to harm another person (Article 13(3) CCU).

[413] ibid 5.43.

[414] ibid 5.45.

[415] National Human Rights Strategy 2021-2023 s 4 para 16.

#### 4.2.1.4 Labour-related delict liability

The Code of Labour Laws of Ukraine *(LCU)* specifies two kinds of damage to an employee: the damage caused by injury or other health damage related to carrying out labour duties (Article 173) and the moral damage resulted from a violation of her legal rights (Article 237-1). Both articles refer to the compensation in a manner 'prescribed by law'.

According to Article 9 of the Law 'On Occupational Health and Safety' *(OHS Law)*, the compensation for health damage or death of an employee is provided by the Social Security Fund of Ukraine under the special law.[416] That this kind of damage is compensated by the state fund through the social insurance mechanism and not by an employer via delictual liability rules differentiates Ukraine from the UK and the US where, for instance, asbestos cases were based on the tort of negligence.[417] Notably, in a seminal *Chandler v Cape plc* case in the UK, the courts in 2011 and 2012 have found the parent company liable 'through negligence for asbestos-related illness suffered by the claimant as a result of his employment in a subsidiary'.[418]

The compensation for moral (non-pecuniary) damage to victims of occupational accidents or diseases and their family members is not considered a social insurance payment. Hence, the 'prescribed by law' provisions for such compensation are the ones of the general delict law. However, Karnaukh discusses the 2018 Supreme Court judgment where it held that Article 237-1 LCU was a basis for a strict liability which is dependent neither on the employer's fault, nor causation '(and, consequently, [nor] the wrongfulness of the employer's actions)'. He underlines that the article presupposes 'violation of the employee's rights', which was not the case since the health damage was due to the employee's own actions. Therefore, the court's interpretation went 'far beyond the text of [Article 237-1 LCU]'. Ultimately, the approach to compensation taken in this case resembles an insurance mechanism in which an employer features as an assurer.[419]

A remark should be made here. As previously emphasised, Article 237-1 LCU does not contain a substantive rule on compensation procedure. Instead, it refers to the one 'prescribed by law', and the latter should therefore be Article 1167 CCU (general rule for compensation for moral damage). Despite this, in the mentioned case, the Supreme Court essentially interprets Article 237-1 LCU as *lex specialis* and distributes the burden of proof differently. A suggested scheme where a plaintiff has to prove just one element of delict (damage) to hold a company liable for moral damage resulting from a violation of an employee's rights[420] seems imbalanced if an employer's conduct has not caused the injury.

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[416] Law of Ukraine 'On Compulsory State Social Insurance' (Про загальнообов'язкове державне соціальне страхування), 23.09.1999 No 1105-XIV.

[417] Karnaukh, 'Tort Law and Human Rights in Ukraine' (n 247) 21.

[418] Muchlinski (n 217) 308–309.

[419] Karnaukh, 'Tort Law and Human Rights in Ukraine' (n 247) 22.

[420] It worth noting that the Draft Labour Code of Ukraine adds other grounds for compensation of moral damage in labour relations inter alia if an employer fails to respect an employee's honour, dignity and other personal non-property rights. At the same time, the draft explicitly requires that employee under the burden of proof on moral damage. Thus, provides that the other elements of delict lie on the employer's shoulders. Such approach essentially aligns with the Supreme Court's said controversial judgment, Draft Labour Code of Ukraine (Проект трудового кодексу України), 08.11.2019 No 2410 art 366; for the background behind the developments of the new Labour Code and the UN Position Paper on the preceding similar drafts, *see* 'Ukraine on Its Way to Reform 50-Year-Old Labour Law' (*ILO*, 5 November 2020) <http://www.ilo.org/budapest/whats-new/WCMS_760075/lang--en/index.htm> accessed 10 May 2021.

Interestingly, Article 26 OHS Law prescribes compensation for damage caused not only to employees but also third parties:

> The employer shall compensate for damage caused by violation of the OHS requirements *to other* legal and *natural persons* as well as the state, *on the general grounds* prescribed by law. The employer compensates *the costs of rescuing victims at the time of the accident and during the elimination of its consequences* […] and other costs provided by law.

This clause appears to refer to the possibility for a third party to claim damages under general delict and vicarious liability provisions against a company that caused damage through violation of OHS requirements by its own or its employee's actions or omissions. The scares number of judgments where Article 26 OHS Law was applied indicates that courts interpret this norm as obliging employers to compensate damage not related to one covered by social insurance, which seems correct. However, all identified cases relate exclusively to damage caused *to an employee*, particularly moral damage under Article 237-1, *not a third party*.[421] Probably, this is due to the same hurdles, such as the heavy burden of proof faced by victims in similar cases already touched upon above. Another possible reason is that an individual, a third party, is already entitled under general delict rules to claim compensation for damage caused by any company causing damage regardless of whether it resulted from a violation of the OHS requirements. At the same time, Article 26 OHS Law provides additional ground to file such a claim.

When considering this mechanism of compensation for damage by a company to a third party in the BHR context, it echoes the long-lasting debate and the decades of litigation efforts by victims to hold parent companies accountable for their exterritorial (via their supply chains) human rights abuses. Two seminal judgments from February 2021 worth mentioning in this regard:

- *Four Nigerian Farmers and Milieudefensie v. Shell* – the Dutch appellate court for the first time held 'a parent liable for the breach a duty of care with regard to foreign claimant';[422]
- *Okpabi et al. v Shell* – the UK Supreme Court held that two Nigerian communities affected by oil spills that resulted from Shell's subsidiary's negligence could sue the parent company in English courts based on its arguable duty of care towards them.[423]

Although Article 26 OHS Law applies to companies' own activity primarily within Ukrainian territory, it nevertheless essential to highlight the following. Together with the general provisions of CCU, it may theoretically serve as a ground to hold a company liable

[421] *Ruling of the High Specialised Court of Ukraine for Civil and Criminal Cases, 18.04.2012, case No 6-19500св11*; among the identified 15 decisions for the last 10 years the cited ruling is the only relevant one issued by the court of cassation.
[422] Lucas Roorda, 'Wading through the (Polluted) Mud: The Hague Court of Appeals Rules on Shell in Nigeria' (*Rights as Usual*) <https://rightsasusual.com/?p=1388> accessed 8 May 2021.
[423] Ekaterina Aristova and Carlos Lopez, 'UK Okpabi et al v Shell: UK Supreme Court Reaffirms Parent Companies May Owe a Duty of Care Towards Communities Impacted by Their Subsidiaries in Third Countries' (*Opinio Juris*, 16 February 2021) <https://opiniojuris.org/2021/02/16/uk-okpabi-et-al-v-shell-uk-supreme-court-reaffirms-parent-companies-may-owe-a-duty-of-care-towards-communities-impacted-by-their-subsidiaries-in-third-countries/> accessed 8 May 2021.

for damages caused by violation of the OSH requirements or even by the consequences of industrial accidents.[424]

#### 4.2.1.5 Discrimination-related delict liability

Under Ukrainian anti-discrimination laws, a person is entitled to compensation in a manner prescribed by CCU and other laws for pecuniary and moral damage resulting from discrimination[425] and gender-based discrimination, sexual harassment or other gender-based violence.[426] Moral damage shall be compensated regardless of the pecuniary damage and the amount thereof.[427]

Again, like the LCU, these laws do not establish special rules but refer to the general provision of civil delict liability. Besides, similarly to Article 237-1 LCU (compensation for moral damage caused by violation of employee's rights), the relevant provisions of anti-discrimination laws seem also to be rarely applied as grounds for compensation for moral damage. To be specific, the Legal Aid Coordination Centre reports that within ten years into the Law 'On Ensuring Equal Rights and Opportunities for Women and Men' being in force, none of its provisions was applied in identified 11 cases directly or indirectly related to sexual harassment at workplace and compensation for moral damage.[428]

Furthermore, the considered limitations related to the burdensome threshold of proving elements of a delict make another hurdle equally pertinent to discrimination-related cases. However, the most recent Draft Labour Code of Ukraine suggests entitling victims of labour-related discrimination and pecuniary and moral damage resulted from it to compensation.[429] More importantly, the draft specifies that a victim would have to allege instances of discrimination while the employer bears the burden of proof that no such instances have taken place.[430] The principle that a victim proves the damage and causation while an employer disproves fault and wrongfulness (instances of discrimination) mirrors the one advanced in the previously discussed dissenting opinions. It worth welcoming since it virtually represents a strict liability with due diligence defence, which alleviates the burden of proof for the victim.

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[424] An oil spill, for example, under the official national taxonomy, could probably fall within the scope of the accidents of oilfield, drilling, exploration, and refining equipment which feature among the causes of industrial accidents, Cabinet of Ministers of Ukraine, Resolution 'On Approval of the Procedure for Investigation and Accounting of Occupational Accidents, Occupational Diseases, and Industrial Accidents' (Про затвердження Порядку розслідування та обліку нещасних випадків, професійних захворювань та аварій на виробництві), 17.04.2019 No 337 Annex 9, codes 366, 368.
[425] Law of Ukraine 'On Principles of Prevention and Combating Discrimination in Ukraine' (Про засади запобігання та протидії дискримінації в Україні), 06.09.2012 No 5207-VI art 15.
[426] Law of Ukraine 'On Ensuring Equal Rights and Opportunities for Women and Men' (Про забезпечення рівних прав та можливостей жінок і чоловіків), 08.09.2005 No 2866-IV art 23.
[427] ibid.
[428] Legal Aid Coordination Centre (Ministry of Justice of Ukraine), Order 'On Approval of the Guidelines for the Identification of Cases of Gender Discrimination and the Mechanism for Providing Legal Aid (Про затвердження Методичних рекомендації щодо ідентифікації випадків ґендерної дискримінації та механізм надання правової допомоги), 12.03.2019 No 33 s III, para 39; in should be noted that the law in question was amended in 2017, however Article 23 has not been significantly changed: the words 'other gender-based violence' was added to the text – thus, that change is not substantial in the context of the above discussion, Law of Ukraine 'On Ensuring Equal Rights and Opportunities for Women and Men' (Про забезпечення рівних прав та можливостей жінок і чоловіків), 08.09.2005 No 2866-IV (original edition).
[429] Draft Labour Code of Ukraine (Проект трудового кодексу України), 08.11.2019 No 2410 art 2(1)(3).
[430] ibid art 3(3).

#### 4.2.1.6 Environment-related delict liability

According to Article 69 of the Law 'On Environmental Protection', damage caused as a result of a violation of environmental legislation shall be fully compensated while affected persons are entitled to compensation for unearned income for the time necessary to restore health, the quality of the environment, and natural resources to a condition suitable for their intended use.

As observed, this provision prima facie set up a special delict. However, in practice, 'the mechanism resembles a fine, rather than [delict] liability' with the State Environmental Inspectorate bringing actions against, for example, polluters to make them pay into special environment protection funds.[431] Such an approach appears to represent a quite distorted application of the 'polluter pays' principle, which features, according to Muchlinski, among 'guiding principles of national environmental laws'.[432] This principle, as further explained,

> seems particularly well suited to cases where the enterprise, by virtues of its technical expertise, is likely to know the pollution risks it undertakes. This puts it in the best position to discharge the duty of care not to pollute. Where the enterprise fails to discharge that duty, it must compensate those who have suffered consequential loss and/or injury.[433]

Instead of compensating damage to those who have suffered them directly, as the 'polluter pays' principle suggests, the existing Ukrainian legal framework provides for administrative sanctioning of polluters to fill state and local funds financing environmental protection measures.[434] Accordingly, victims have to recourse to other legal remedies.

Despite that CCU yet lacking special delict on environmental damage, Karnaukh notes that individuals can file claims for damage resulting from a violation of their environmental rights under general CCU's provisions on non-property rights[435] and compensation for damage along with special ones on compensation for damage caused by the source of increased danger. However, he underlines that such claims tend 'to be rather rare not least because of difficulties with proving causation and the exact amount of damages'. Neither widespread became claims filed by Ukrainian NGOs for violating environmental legislation under Article 9 of the Aarhus Convention[436] ratified by Ukraine.[437] Regarding the latter, the Supreme Court justices recently reported that the highest court is currently tackling controversial application by courts of the respective conventional provisions. For example, the last year witnessed two cases (No 826/11374/15 and No 821/837/17) in which the

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[431] Karnaukh, 'Tort Law and Human Rights in Ukraine' (n 247) 19.
[432] Muchlinski (n 217) 613; the 'polluter pays' principle complements the prevention principle and precautionary approach discussed below.
[433] ibid 614.
[434] Law of Ukraine 'On Environmental Protection' (Про охорону навколишнього природного середовища), 25.06.1991 No 1264-XII art 47.
[435] For example, every natural person has the right, in particular, to a safe for life and health environment, the right to reliable environmental information, and the right to demand in court to stop activities that harm the environment, Civil Code of Ukraine (Цивільний кодекс України), 16.01.2003 No 435-IV art 293(1, 2).
[436] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
[437] Karnaukh, 'Tort Law and Human Rights in Ukraine' (n 247) 19.

Supreme Court confirmed that individuals might exercise their rights under Article 9 Aarhus Convention either personally or jointly through associations of citizens.[438]

The compensation for environmental damage featured in the Recodification Concept may sooner or later become a new special delict with a more balanced distribution of the burden of proof. When this happens, it would potentially fill the said gap, which renders victims reluctant to bring claims for damage caused by violation of their environmental rights under existing provisions of the CCU.

### 4.2.2 Sanctions

In mid-2014, almost six months into tackling Russian military aggression, the Law 'On Sanctions' *(Sanctions Law)* was adopted aiming at protecting Ukrainian national interests, in particular, guaranteeing constitutional human rights and freedoms, protecting sovereignty and territorial integrity.[439] Under Article 3(1) Sanctions Law, special economic and other restrictive measures (sanctions) may be imposed on the following grounds:

> 1) actions of a foreign state, *foreign legal* or natural *person*, other entities that pose real and/or potential threats to national interests, national security, sovereignty and territorial integrity of Ukraine, promote terrorist activities and/or *violate human rights and freedoms*, the interests of society and the state, lead to the occupation of territory, expropriation or restriction of property rights, infliction of property loss, creating obstacles to sustainable economic development, the full exercise *of their rights and freedoms by citizens of Ukraine;* […]
> 4) *instances of violation of the Universal Declaration of Human Rights*, the UN Charter.[440]

Thus, sanctions may be imposed on a foreign legal person that violates human rights and freedoms, or creates obstacles to the full exercise of rights and freedoms by citizens of Ukraine, or just based on violations of the UDHR. Accordingly, it can be argued that the scope of this article covers business-related human rights abuse hence a legal person behind such abuse is subject to sanctions. The law specifies 25 types of administrative sanctions, including the freezing of a company's assets, restricting trade operations, prevention of capital outflows outside Ukraine, cancellation or suspension of a company's licenses, ban from public procurement and privatisation.[441] According to Article 5(3) Sanctions Law, a decision to impose sanctions against foreign legal entities has to be adopted by the National Security and Defence Council of Ukraine and then approved by the President of Ukraine.

Khavroniuk observes that from mid-2014 to early March 2021, the National Security and Defence Council of Ukraine has imposed sanctions more than 20 times, including on foreign legal persons. At the same time, he warns that the Sanctions Law's lacks 'any mechanisms for monitoring and control of the implementation of the decisions [on imposing sanctions] hence effectiveness of the Law can hardly be evaluated'. Neither is it clear which

[438] Hanna Vronska and Serhii Burlakov, 'Facilitating Judicial Proceedings Related to the Public Interests in Environmental Protection' (Kyiv, 15 February 2021) 8 <https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/ENG_Environment_Presentation.pdf> accessed 7 May 2021; justices also emphasise that the low citizens' awareness of their rights under the Aarhus Convention is one of the problems behind its infrequent use as a basis for a lawsuit, ibid 2.
[439] Law of Ukraine 'On Sanctions' (Про санкції), 14.08.2014 No 1644-VII preamble.
[440] ibid arts 3(1)(1, 4).
[441] ibid art 4(1).

of 25 types of sanctions and on what specific grounds may/should be applied to, for instance, a legal foreign person.[442]

In late March 2021, sanctions were imposed on 80 Russian companies. Even though the grounds were not explicitly human rights-related, it indicated that the legal mechanism under the Sanctions Law works.[443] As recent as May 21, it was utilised again on 138 legal persons associated with the aggression of the Russian Federation against Ukraine. Strikingly, from five to seventeen different types of sanctions were imposed on each entity in the list,[444] including all of mentioned above, particularly ban on public procurement and privatisation.

The Sanctions Law was originally enacted mainly to fight against Russian aggression. This distinguishes the Ukrainian sanctions regime from, for instance, the EU Global Human Rights Sanctions Regime adopted in late 2020 that 'enables the EU to target individuals, entities and bodies – including state and non-state actors – responsible for, involved in or associated with serious human rights violations and abuses worldwide, no matter where they occurred'.[445] Nonetheless, there is little doubt that Sanctions Law can potentially be applied to put restrictive measures on legal persons for their abuse of human rights.

This suggestion may appear too far-reaching until one is reminded about the inspiring story of the Alien Tort Statute, an eighteen-century US statute that prima facie is not fit for addressing human rights violations. This statute has yet been authorising 'human rights litigation against corporations' since the 1990s till 2013, when it was 'sharply narrowed' by the US Supreme Court. Although the statute originally granted the US district courts jurisdiction over civil actions by aliens exclusively for torts violating international law and the US treaties, it was innovatively used to hold corporations accountable for human rights abuse. Despite most attempts turned out to be unsuccessful, this statute represents considerable impetus behind the movement towards stronger corporate accountability.[446]

In conclusion, history teaches that human rights protection may require creative legal thinking, of which the use of sanctions to address corporate abuse of human rights may be a good example. In general, the aim at stake certainly worth the effort.

## 4.3 Non-financial reporting

The legal basis for non-financial reporting in Ukraine consists of several provisions of the Law 'On Accounting and Financial Reporting'[447] *(NFR Clauses)* and the accompanying

[442] 'On "sanctions" as special restrictive measures: regulation and risks of application' (*RPR*, 1 March 2021) <https://rpr.org.ua/news/pro-sanktsii-iak-spetsial-ni-obmezhuval-ni-zakhody-rehlamentatsiia-i-ryzyky-zastosuvannia/> accessed 27 May 2021.
[443] 'Ukraine Imposes a New Set of Anti-Russian Sanctions' (*Sanctions & Export Controls Update*, 29 March 2021) <https://sanctionsnews.bakermckenzie.com/ukraine-imposes-a-new-set-of-anti-russian-sanctions/> accessed 27 May 2021.
[444] President of Ukraine, Decree 'On the Decision of the National Security and Defence Council of Ukraine of 14 May 2021 'On the application of personal special economic and other restrictive measures (sanctions)' (Про рішення Ради національної безпеки і оборони України від 14 травня 2021 року 'Про застосування персональних спеціальних економічних та інших обмежувальних заходів (санкцій)'), 21.05.2021 No 203/2021 Annex 2.
[445] 'Key Provisions of EU Global Human Rights Sanctions Regime' (*European Commission*, December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2419> accessed 27 May 2021.
[446] Ben Stephens, 'The Rise and Fall of the Alien Tort Statute' in Surya Deva and David Birchall, *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) 46–48.
[447] Law of Ukraine 'On Accounting and Financial Reporting in Ukraine' (Про бухгалтерський облік та фінансову звітність), 16.07.1999 No 996-XIV *(hereinafter – Accounting and Financial Reporting Law)*.

Procedure for the submission of financial statements[448] *(NFR Procedure)* and Guidance on compiling a management report[449] *(NFR Guidance)*. As noted in the NBA Report, the introduction of non-financial reporting in 2017 was aimed at aligning national legislation with the EU NFR Directive.[450] However, that effort dismally failed, even more so than the EU NFR Directive itself.

The NFR Clauses require public-interest and medium companies to submit together with their financial statements a management report containing both financial and non-financial information that characterises their status and prospects and revealing key risks and uncertainties of their activities.[451] Medium companies are strangely allowed not to include non-financial information in their management reports.[452] This practically means that only public-interest companies, which include large companies,[453] publicly listed companies, and financial institutions,[454] are obliged to provide non-financial information in their reports.

It should be noted that the NFR Clauses specify that management reports should be *submitted together with* financial statements and *according to the procedure* stipulated for them. Considering that management reports are nevertheless separate documents, this provision creates uncertainty as to whether the procedural rules applied to financial statements concerned with matters other than their submission are also applied to management reports. Specifically, whether the latter should also be published and audited as financial statements. Regarding the first aspect, the NFR Procedure clarifies that eligible companies must publish managements reports alongside financial statements (with respective audit reports) on their web page/site.[455] In regard to the second aspect, both the NFR Clauses and NFR Procedure mentions audit only concerning financial statements. In addition, under Ukrainian legislation, an audit of financial statements addresses only their consistency with the management report and the possible distortions therein.[456] To figure these out, an auditor

[448] Cabinet of Ministers of Ukraine, Resolution 'On Approval of the Procedure for the Submission of Financial Statements' (Про затвердження Порядку подання фінансової звітності), 28.02.2000 No 419.
[449] Ministry of Finance of Ukraine, Decree 'On Approval of the Guidance on Compiling a Management Report' (Про затвердження Методичних рекомендацій зі складання звіту про управління), 07.12.2018 No 982 Annex *(hereinafter – Non-Financial Reporting Guidance)*.
[450] Uvarova, 'NBA Report. Full Text' (n 316) 119.
[451] Accounting and Financial Reporting Law arts 1, 11(7).
[452] ibid art 11(7).
[453] For its purposes, the law introduced new classification of companies based on several criteria. In terms of number of employees, the threshold for large enterprises is 250 employees, ibid art 2; statistically, as of 2019 there were 518 large enterprises in Ukraine (excluding those located in temporarily occupied territories), 'Activities of Enterprises: Number of Large, Medium, Small and Micro Enterprises by Types of Economic Activity (2010-2019)' (*State Statistics Service of Ukraine*) <http://www.ukrstat.gov.ua/operativ/menu/menu_u/sze_20.htm> accessed 6 May 2021; however, it is crucial to point out that, unlike the EU, Ukraine uses a slightly broader definition of SMEs, in particular, an enterprise with 'more than 250 employees, but with income below 50 million euro (recalculated in hryvnia)' is considered a medium enterprise in Ukraine, but a large one in the EU, Hlib Vyshlinsky, Dmytro Yablonovskyy and Bohdan Prokhorov, 'How Can Ukrainian SME Grow into National and Global Champions?' (2019) Policy Paper 7 <https://ces.org.ua/en/how-can-ukrainian-sme-grow-into-national-and-global-champions/> accessed 6 May 2021; consequently, the statistics from the European Commission show quite different numbers: 2347 large enterprises in Ukraine in 2017 against 399 for that year according to the Ukrainian Statistics Service, '2019 SBA Fact Sheet UKRAINE' <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/sba-fs-2019_ukraine.pdf> accessed 6 May 2021.
[454] Accounting and Financial Reporting Law art 1.
[455] Cabinet of Ministers of Ukraine, Resolution 'On Approval of the Procedure for the Submission of Financial Statements' (Про затвердження Порядку подання фінансової звітності), 28.02.2000 No 419 Annex para 2.
[456] Law of Ukraine 'On the Audit of Financial Statements and Auditing Activities' (Про аудит фінансової звітності та аудиторську діяльність), 21.12.2017 No 2258-VIII art 14.3(5); besides, the concern expressed in relation to public companies that the lack of methodologies for audit of their non-financial reporting in Ukraine may adversely affect corporate transparency, is unfortunately still valid, Inna Makarenko, 'Public Companies Non-Financial Reporting and Audit in Ukraine: Challenges and Prospects' (2017) 1 Accounting and Financial Control 32, 37.

would arguably just need to analyse financial information from management report leaving non-financial information without verification.

Currently, neither NFR Clauses nor NFR Procedure provides companies with a standard form of the management report. As observed regarding agricultural enterprises, this leads to disclosing 'arbitrary information, which, for the most part, positively characterizes their activities'.[457] Notwithstanding, NFR Guidance provides non-binding recommendations as regards the content of a management report. It overall instructs companies to cover in their management reports environmental matters, social matters, and personnel policy (including respect for human rights, education and training, anti-corruption measures) and corporate governance (for publicly listed companies).[458] Virtually, these are areas through reporting on which companies are expected to account for their human rights performance.

The NFR Guidance instructs large companies with at least 500 employees to additionally report on their business models, policies on environmental and social matters, human rights and anti-corruption, along with vital non-financial indicators. Most importantly, they are advised to disclose information on the key risks related to their operations 'including *(where appropriate)* business relationships, products or services that may cause adverse effects in these areas, and how the enterprise manages these risks'.[459] Finally, companies may choose not to report *if* they do not pursue respective policies.[460]

Although the above-presented rules on non-financial reporting incorporated some aspects of the EU NFR Directive, there are several serious discrepancies. The main flaw is probably that Ukrainian legislation on non-financial reporting makes no explicit reference to HRDD, nor does it properly employ the notion of human rights risks. Besides, legally binding provisions remain largely vague while the non-binding guidance, although it provides some clarity, contains an opt-out 'where appropriate' clause while the 'comply-or-explain' clause applies to large companies with 500 employees[461]. Moreover, there is no explicit requirement to conduct an audit (assurance) of non-financial information.

It worth noting that the situation is slightly better when it comes to special rules for banks. Large banks with more than 500 employees are required to disclose inter alia employment, respect for human rights and anti-corruption matters under the legally binding

[457] Valerii Zhuk and others, 'Development of Non-Financial Reporting of Agricultural Enterprises of Ukraine' (2020) 6 Agricultural and Resource Economics: International Scientific E-Journal 76, 82; the authors further admit that non-financial reporting in a standardised form is the most convenient in ensuring indicators' comparability. At the same time, due to the low level of implementation of non-financial reporting in Ukraine, they consider optimal reporting in an arbitrary form, ibid 86; this argument does not seem compelling since setting clear standards for reporting should rather be among measures towards a higher level of such implementation. For example, as mentioned above, the reform of the EU NFR Directive includes the requirement to provide information in the machine-readable format following specific standards.

[458] Non-Financial Reporting Guidance s II para 2; s III paras 4, 5, 10; the guidance also mentions 'development prospects' area where companies are recommended to report on 'risks and challenges in carrying out activities', however, as evident from another area titled 'risks' it refers to risks posed to the company, not those posed by it to human rights or the environment, ibid s III paras 7, 9.

[459] Non-Financial Reporting Guidance s II para 4 (emphasis added).

[460] ibid s II para 4.

[461] The fact that 'comply-or-explain' clause appears in non-binding instead of a binding instrument could have been a positive difference since under the law companies do not have an option not to report on non-financial matters. However, considering the vagueness of the law's requirement this does not really change the situation.

instruction regulating non-financial reporting for banks.[462] Furthermore, unlike general audit requirements, an audit report about a bank's financial statements should reflect additional information, namely whether the management report follows legal requirements.[463] Yet, since the legislation remains vague, this provision currently does not make much of a change. At the same time, if legally binding rules on the content of a management report are put in place, they would potentially be applied to issue a negative audit conclusion.

Lastly, another provision regarding non-financial reporting may be found among special rules applying to management reports of publicly listed companies. Such reports should provide a reliable overview of, among other things, the 'risks and uncertainties' faced by companies.[464] Although human rights are not mentioned, there exist further requirement for companies while describing their business to reflect information on 'environmental issues that may affect the use of enterprise assets'.[465] However, as reported, 'few large Ukrainian companies are actually listed on a stock exchange and many adopt the legal form of a limited liability company, thus, avoiding any disclosure requirements'.[466] Thus, nothing considerable again, but this is another instrument that may be reconstructed to ensure more meaningful non-financial reporting for at least a specific category of companies.

Ultimately, not only the Ukrainian corporate reporting legislation suffers from the previously discussed typical flaws of the first-generation HRDD laws it also remains significantly underdeveloped, vague, and incoherent. Therefore, non-financial reporting requirements in Ukraine appear to be extremely weak.

## 4.4 Corporate governance and directors' duties

The Ukrainian company law regulating corporate governance and directors' duties consist of numerous legal instruments, including the CCU, the Commercial Code of Ukraine[467] and special laws on specific types of legal entities, such as the Law 'On Limited Liability and Additional Liability Companies' *(LLC Law)* and the Law 'On Joint Stock Companies' *(JSC Law)*. Prior to considering relevant legal provisions, a closer look is taken at a few highly authoritative ground rules in this field.

The 2015 OECD Principles of Corporate Governance prescribes inter alia the following responsibilities of the board,

> A. Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.
> […] the two key elements of the fiduciary duty of board members:

[462] Board of the National Bank of Ukraine, Resolution 'On Approval of the Instruction on the Procedure for Preparation and Publication of Financial Statements of Banks of Ukraine' (Про затвердження Інструкції про порядок складання та оприлюднення фінансової звітності банків України), 24.10.2011 No 373 Annex s IV para 4.
[463] ibid Annex s IV para 11.
[464] National Commission on Securities and Stock Market of Ukraine, Decision 'On approval of the Regulations on disclosure of information by issuers of securities' (Про затвердження Положення про розкриття інформації емітентами цінних паперів), 03.12.2013 No 2826 Annex s III c 4 paras 1, 2.
[465] ibid Annex appendix 38 s III para 18.
[466] OECD (ed), *OECD Investment Policy Reviews: Ukraine 2016* (OECD Publishing 2016) 188–189.
[467] The idea to adopt the Commercial Code, in parallel to the CCU, has been heavily criticised both before and after these codified acts were adopted in 2003. According to the governmental working group, the Commercial Code has been 'antagonistic to private law' and has 'virtually blocked' the CCU's effect on private law business relationships. Therefore, its repeal appears as the first step in the reform of civil law, Working Group (n 411) 7, 67.

- the duty of care [requiring] board members to act on a fully informed basis, in good faith, with due diligence and care;
- the duty of loyalty [underpinning] effective implementation of other principles [including] the equitable treatment of shareholders, monitoring of related party transactions […].

C. The board should apply high ethical standards. It should take into account the interests of stakeholders.[468]

Although the Ukrainian legal framework does not explicitly provide for 'duty of care' and 'duty of loyalty', Zhornokyi explains that these fiduciary duties essentially fall under the scope of the previously mentioned general principles of civil law, namely reasonableness and good faith, which have evaluative nature. For a legal entity's governing bodies, such reasonableness and good faith involve developing optimal usual business risk-based management decisions.[469] However, not only the directors' duties under Ukrainian legislation are framed in different terminology they also have considerably limited scope, notably missing both the monitoring of related party transactions and taking into account the interests of stakeholders, as further demonstrated.

Under the general rule set by Article 92 CCU, a governing body or a person acting on a legal entity's behalf is obliged to act in the legal entity's interests, in good faith, reasonably and not to exceed her powers. Closely aligned Article 40 LLC Law obliges supervisory boards and governing bodies' members to act in good faith, reasonably and in the company's interests. The corresponding provision of the Model Charter (Articles of Association) of the LLC adds '[to] duly perform their duties under the law, the Charted or the relevant contract'.[470] Similar wording appears in Article 63 JSC Law, which requires company officials to act in the interests of the company, comply with the requirements of the law, the provisions of the charter and other documents of the company.

Unlike legislative acts, the 2014 Principles of Corporate Governance *(PCG)* adopted by the national securities regulator feature several provisions (including the preamble of the section on supervisory board and governing body) that refer to the latter duties towards not only the interests of the company but also its shareholders.[471] At the same time, under the 'Loyalty and Liability' principle, the company's governing bodies and officials are instructed to act in good faith, reasonably and in the company's best interests. Notably, the PCG clarifies that doing so means exercising due care and diligence, which are reasonably expected of a person making informed decisions in an analogous situation.[472]

In 2020, the same regulator adopted 'The Corporate governance code: the key requirements and the recommendations'. It prescribes the following fiduciary duty of loyalty of the supervisory board: to be responsible, efficient and accountable and act solely in the

[468] OECD (ed), *G20/OECD Principles of Corporate Governance* (OECD 2015) principles VI.A, VI.C.
[469] Valentyna Zhornokyi, 'Reasonableness and Good Faith: The World Practice of Application in Relation to the Shareholders' Liability for Company's Debts (Розумність Та Добросовісність: Світова Практика Застосування Щодо Відповідальності Членів Органів Акціонерного Товариства За Його Борги)' (2019) 2 Entrepreneurship, Economy and Law 24, 25–26.
[470] Cabinet of Ministers of Ukraine, Resolution on 'Some Issues of Deregulation of Economic Activity' (Деякі питання дерегуляції господарської діяльності), 27.03.2019 No 367 Annex para 38.
[471] National Commission on Securities and Stock Market of Ukraine, Decision 'On Approval of the Principles of Corporate Governance' (Про затвердження Принципів корпоративного управління) 22.07.2014 No 955 s 3 preamble.
[472] ibid 3.3.

interests of the company and its shareholders.[473] As noted, that this code, for the first time, uses the term 'fiduciary duties' and refers explicitly to both company's and shareholders' interests (like the PCG inconsistently does) supposedly stem from couching this instrument on the 2015 OECD Principles of Corporate Governance.[474]

It is evident from the above analysis that the Ukrainian legal framework for corporate governance and directors' duties suffers from fragmentation and incoherence. Nevertheless, if combined, directors' duties in Ukraine feature:

- acting in good faith, reasonably and solely in the best interests of the company and its shareholders (exercising due care and diligence)
- being responsible, efficient, and accountable
- duly performing their duties under the law, the Charter, other documents of the company and the relevant contract
- not exceeding their powers

As one commentator emphasises, Ukrainian courts largely remain reluctant to engage with such notions as 'good faith', 'reasonableness', 'interests of the company', 'abuse of power'. Instead, when they apply, for instance, Article 92 CCU, they only address the formal aspect of the issue, namely directors' compliance with the law, the Charter, general meeting resolutions, etc.[475]

One thing is clear, Ukrainian law currently adopts the 'shareholder approach' or shareholders' primacy[476] as corporate directors must solely consider shareholders'/ company's interests while no legal provision requires them to have regard of other stakeholders. On the positive side, a completely new Draft Law 'On Joint Stock Companies' couched on the 'enlightened shareholder value approach' passed the first reading in mid-2020.[477] Article 85 on directors' duties of this Draft Law virtually mirrors sections 171-177 of the 2006 UK Companies Act (as amended in 2017).[478] In particular, the duty to promote the success of the company is introduced under Article 85(3), which literally reproduces section 172 obliging directors to have regard of stakeholders' interests, in particular, the interests of the company's employees and the impact of the company's operations on the community and the environment. Another example is Article 85(5), the literal translation of section 174, which introduces the duty to exercise reasonable care, skill, and diligence.

This development undoubtedly worth welcoming, and yet, two considerable reservations should be made (besides utilisation of somewhat questionable legislative drafting technique). First, the draft in question does not suggest amending Article 92 CCU nor Article

[473] National Commission on Securities and Stock Market of Ukraine, Decision 'Regarding the Generalisation of the Practice of Corporate Governance Legislation Application' (Щодо узагальнення практики застосування законодавства з питань корпоративного управління), 12.03.2020 No 118 Annex para 3.2.
[474] Zarina Khalimon and Oksana Daskaliuk, 'Content and Legal Regulation of Fiduciary Duties of the Director (In Ukrainian)' (*Sayenko Kharenko*, 14 August 2020) <https://sk.ua/publications/content-and-legal-regulation-of-fiduciary-duties-of-the-director-in-ukrainian/> accessed 15 May 2021.
[475] Ruslan Yurchenko, 'Trust, but check: what are the fiduciary duties of directors' (*Mind.ua*) <https://mind.ua/openmind/20214664-doviryaj-ale-pereviryaj-shcho-take-fiduciarni-obovyazki-direktoriv> accessed 18 May 2021.
[476] Robé (n 218) 5.
[477] Draft Law of Ukraine 'On Joint Stock Companies' (Проект Закону України 'Про акціонерні товариства'), 25.11.2019 No 2493.
[478] UK Companies Act 2006 ss 171–177.

40 LLC Law,[479] hence keeping 'shareholder approach' as the underlying principle of corporate governance for companies other than joint-stock ones. This would result in yet another inconsistency. Second, as noted before, it should be kept in mind that the discussed directors' duties alone cannot ensure that the company will carry out meaningful HRDD. If such HRDD duty is imposed, the *directors'* and *company's* legal duties should be aligned.

## 4.5 Environmental protection

Previous sections of this paper touched upon mandatory human rights and environmental due diligence or, in other words, mandatory due diligence as regards human rights and the environment. This section, prior to exploring Ukrainian environmental legislation in search of HRDD-related or comparable requirements, firstly provide important background on the relationship between human rights and the environment in light of the voluntary and mandatory BHR standards.

Although the Guiding Principles hardly mentions the environment, they still make two references relevant for the following discussion. First, they list ensuring the effectiveness of environmental laws, which may, directly and indirectly, regulate corporate respect for human rights among possible steps towards meeting the state duty to protect human rights.[480] Second, they emphasise that companies can incorporate HRIA within their existing processes, in particular EIA, while HRIA should still cover 'all internationally recognised human rights as a reference point, since enterprises may potentially impact virtually any of these rights'.[481]

Based on the latter point, Bueno draws a connection between human rights and environmental issues neglected by the Guiding Principles: HRDD concerns all internationally recognised human rights; therefore, it should concern environmental aspects of these rights. He goes on by highlighting that OECD Guidelines' chapter on environment protection focuses for the most part 'on human rights and human rights-related environmental due diligence'.[482] Along these lines, it worth reminding that the French Law, the Swiss Proposal, and the Dutch Bill all refer to both human rights and the environment when defining the content of due diligence duties, while the EU DD Initiative adds good governance into the equation.

Macchi, another proponent of interlinkage between human rights and environmental impacts, based on the growing body of climate change litigation, argues for 'a holistic approach to [HRDD that identify] an emerging climate due diligence [as its] inherent dimension'.[483] Does this mean that environmental due diligence as a wider category should also be deemed HRDD's dimension? Moreover, does EIA as the first phase of environmental due diligence *(EIA-phase)* under the mHRDD legislation and legislative proposals differ from stand-alone EIA under environmental legislation? For example, had the Guiding Principles

[479] Draft Law of Ukraine 'On Joint Stock Companies' (Проект Закону України 'Про акціонерні товариства'), 25.11.2019 No 2493 s XIX.
[480] UNGPs commentary to principle 3.
[481] ibid commentary to principle 18.
[482] Bueno, 'The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability' (n 149) 2.
[483] Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"' (2021) 6 Business and Human Rights Journal 93.

elaborate on environmental issues too, would they similarly guide companies to incorporate EIA-phase within already existing stand-alone EIA, or would they simply suggest that the latter alone would suffice as the first step of the HRDD process? Following her holistic approach to HRDD, Macchi contends that HRIA and ESIA should be integrated.[484]

Drawing from this suggestion, what would happen if EIA-phase and stand-alone process EIA remain separate? The companies would apparently need to put in place both processes. At the same time, while stand-alone EIA is legally binding in many countries, HRDD and its EIA-phase are not. Consequently, the companies are likely to be discouraged from implementing two separate processes as too burdensome exercise. Instead, they would prefer only to conduct a process required under the environmental law – stand-alone EIA.

Notwithstanding, the crucial point is that in pursuing stronger corporate respect for human rights and the environment, it is indeed essential to building on the connection between the two. This is well demonstrated by Smit et al. in the 2020 comprehensive study on due diligence requirements through the supply chain. They emphasise the similarity between the concept of due diligence and certain principles of environmental protection laws – the relation to 'pre-hoc decision making and risks management'. Specifically, the principle of prevention resembles the principle of irremediable harm prevention under the UNGPs. The former is equally couched on the idea of prevention or minimising risks 'which may otherwise be irremediable through penalties and civil liability' that motivate more careful corporate behaviour. Likewise, the precautionary approach aligns with the idea of obliging those behind potentially damaging activities to ensure that no harm is inflicted. Importantly, under environmental laws, the compliance of operators of such activities is usually 'monitored and enforced by the competent public authority'. Lastly, the precautionary approach also aligns with the prioritisation of potentially severe risks.[485]

Keeping in mind just presented similarities, this section further shows that Ukrainian environmental laws being equally based on the principle of prevention and the precautionary approach share the same resemblance with the HRDD concept as defined under the Guiding Principles and elaborated in certain HRDD laws. To this end, several examples from national environmental protection legislation are provided. Since it is unusually comprehensive, as noted by the NBA Report,[486] the focus is on impact assessment, preventive measures, and enforcement.

First and foremost, 'prevention and elimination of the negative impact of economic and other activities on the environment' is one of the purposes of the fundamental Law 'On Environmental Protection'.[487] The essential principles of environmental protection include the preventive nature of protective measures, the mandatory character of EIA, compensation for damage caused by violation of environmental legislation.[488] Companies and other users of

[484] ibid 21.
[485] Smit and others (n 4) 182–183.
[486] The report lists inter alia the fundamental law on environmental protection, a series of codified acts covering specific component of the environments (water, land, forest, air, subsoil) as well as laws on atmospheric air protection, on environmental impact assessment, on strategic environmental assessment, on drinking water and drinking water supply, on waste, Uvarova, 'NBA Report. Full Text' (n 316) 57–59.
[487] Law of Ukraine 'On Environmental Protection' (Про охорону навколишнього природного середовища), 25.06.1991 No 1264-XII art 1.
[488] ibid art 3(в, е, і).

natural resources must observe environmental requirements. Among other things, they must implement 'measures to prevent damage, pollution, depletion of natural resources, negative impact on the environment'[489] and compensate for caused environmental damage.[490] These principles are further reflected in special laws.

The Law 'On Environmental Impact Assessment' *(EIA Law)*, another overarching instrument, was adopted in 2017 within the process of approximation of the Ukrainian legislation to one of the EU.[491] The EIA Law introduces the European EIA model,[492] which implies the identification of the impacts of certain kinds of planned economic activity that may have a significant environmental impact.[493] In short, companies that plan such activity are obliged to prepare an EIA report, participate in and pay for public consultation on the report, and consequently submit it to the competent authority whose conclusion serves to inform the final decision as regards the planned activity.[494] Ideally, considering that EIA must be conducted before making the final decision on whether to commence planned activity,[495] it should ensure the most environmentally sound decision preventing or reducing negative environmental impacts. Where a permit for planned activity is granted, the project implementation should be implemented and put to a halt had the damage that was not assessed within EIA been caused.[496] Besides, various sanctions may be imposed on companies for non-compliance, including, in the most extreme cases, temporary suspension or even termination of the company's activity, which violates environmental requirements.[497]

It worth noting that the current Ukrainian environmental policy strategy aims inter alia at 'ensuring the inevitability of liability for violations of environmental legislation' through 'encouraging environmentally responsible business', stimulating corporate environmentally friendly practices via tax benefits and 'strengthening liability for environmental damage pursuant to Ukraine's international obligations'.[498] In addition, according to the RBC Concept 2030, the Government pledged to pursue the reduction of the production activities' environmental impacts and biodiversity preservation through corporate innovation and the development of an environmental management system.[499] Finally, in the

[489] ibid art 40(1)(б).
[490] ibid art 41(e).
[491] Along with several other laws, in particular, the Law of Ukraine 'On strategic environmental assessment', Uvarova, 'NBA Report. Full Text' (n 316) 58.
[492] Despite being a progressive step towards higher standards of EIA, experts warn that the EIA Law still suffers from a number of shortcomings, including definitional unclarities that lead to confusion as regards whether EIA should apply to certain potentially dangerous activities, such as agricultural ones or deforestation, or what exactly are the roles of competent authorities and the public in EIA process, National Environmental Centre of Ukraine, 'Implementation of Environmental Impact Assessment in Ukraine: Risk Analysis and Prospects (Public Vision)' (2019) 10–23 <https://bit.ly/3gRCpjZ> accessed 30 April 2021.
[493] Law of Ukraine 'On Environmental Impact Assessment' (Про оцінку впливу на довкілля), 23.05.2017 No 2059-VIII art 1(1)(1, 3).
[494] ibid arts 2(1), 7(8), 11.
[495] This resembles the Guiding Principles' recommendation to conduct HRIA prior to new activity or major decision, like a product launch, *see* UNGPs commentary to principle 18.
[496] Law of Ukraine 'On Environmental Impact Assessment' (Про оцінку впливу на довкілля), 23.05.2017 No 2059-VIII art 13.
[497] ibid arts 15, 16.
[498] Law of Ukraine 'On Fundamental Principles (Strategy) of the State Environmental Policy of Ukraine for the Period until 2030' (Про Основні засади (стратегію) державної екологічної політики України на період до 2030 року), 28.02.2019 No 2697-VIII Annex ss I, III; it is interesting to note that the strategy refers to 'environmentally responsible business' rather than mentions just 'corporate social responsibility' like the former policy did, as NBA findings show, Uvarova, 'NBA Report. Full Text' (n 316) 29.
[499] Responsible Business Conduct Concept 2030 Annex Expected outcomes.

recently adopted National Economic Strategy 2030, the Government set 2060 climate neutrality target.[500] These policy documents send a positive signal in terms of further alignment of national legislation with the rapidly improving EU legal regime on BHR, including an upcoming directive on corporate due diligence and corporate accountability.

In summary, as many foreign environmental protection laws, the Ukrainian ones are based on the prevention principle and precautionary approach, which in their turn are couched on the same underlying ideas as the HRDD concept is. EIA is particularly comparable with HRIA. Besides, specific other approaches are also helpful, for instance, offering economic stimuli for business to bring about more environmentally responsible conduct. Thus, the lessons of the implementing environmental protection regime have considerable potential in contributing to the design of the Ukrainian mHRDD framework.

## 4.6 Stakeholder engagement

Effective and meaningful consultations with relevant stakeholders is a vital BHR standard critical to reaching a sound HRDD process.

As previously mentioned, the French Law, for example, suggests that setting up a vigilance plan may involve stakeholders, particularly multi-stakeholder initiatives. Both internal (CSR, legal, sustainable, and other departments alongside employees and trade unions) and external (consumers, local communities, NGOs, subcontractors, and suppliers) stakeholders[501] can be engaged in the process. Similarly, the EU DD Initiative requires meaningful stakeholder participation (including trade unions and workers' representatives) in developing and implementing an HRDD strategy and emphasise adequate access of stakeholders to corporate grievance mechanisms to timely raise concerns over adverse impacts. Following the above-applied approach, stemming from the lack of HRDD requirements in Ukraine, this section considers stakeholder engagement under the existing regulatory frameworks couched on the same underlying principles.

Firstly, where a company must have an anti-corruption programme, its adoption should be preceded by consultation with employees representing internal stakeholders. Regarding the external stakeholders, there is a general provision that public associations and individual citizens are entitled to exercise public control over the implementation of corruption prevention laws using forms of control that do not contradict legislation.[502] Considering that adoption and implementation measures for specific companies are required by law, third parties may file complaints against, for example, a state enterprise that fails to follow this requirement. No remedy is attached yet to the rule on an anti-corruption programme, which renders it and the clause on public control largely ineffective.

Secondly, the previous section has noted that public consultation on the EIA report is a mandatory phase of the EIA process. Through prior public consultation, a company behind the planned activity engages with external stakeholders to identify, collect and consider their

[500] Cabinet of Ministers of Ukraine, Resolution 'On Adoption of the National Economic Strategy for the Period until 2030' (Про затвердження Національної економічної стратегії на період до 2030 року), 03.03.2021 No 179 Annex Mission and purpose of the Strategy.
[501] Bright and others (n 161) 33.
[502] Law of Ukraine 'On Prevention of Corruption' (Про запобігання корупції), 14.10.2014 No 1700-VII art 21(1)(8).

comments and suggestions regarding the activity in question.[503] However, the NBA Report underlines several significant limitations of public consultations within EIA in Ukraine. No requirement is placed on companies to obtain the community's approval for project implementation. Besides, there is no requirement to ensure stakeholder consultations at the project implementation phase or consultations with indigenous peoples where projects are planned for implementation at the areas of their compact settlement.[504] Due to these flaws, the existing mechanism cannot bring about effective and meaningful consultations.

The LCU does not provide much for consultations with employees in the decision-making process beyond broader stakeholder participation in collective bargaining[505] and trade union activities.[506] Under the general rule, the owner (employer) is obliged to create conditions ensuring employees *participation* in the company's management while its officials must promptly consider employee's critical remarks and suggestions and inform them of the measures taken.[507] At the same time, the only two clauses explicitly referring to *consultations* are those requiring consultations with trade unions on dismissal prevention, minimisation, and mitigation of their consequences when it comes to massive dismissals.[508] Eventually, according to the NBA Report, current legislation is characterised by 'poor guarantees on consulting with employees before making important management decisions, providing them with necessary information regarding corporate management'.[509]

In addition, the NBA Report emphasises the need to align Ukrainian labour legislation and a Draft Labour Code of Ukraine with the respective EU Directive 2002/14.[510] The UN Ukraine likewise emphasises the importance of anchoring the drafting process on effective consultations with representative employers' and workers' organisations and following the EU Acquis, the international labour standards and best practices.[511] Despite these calls, another most recent Draft Labour Code of Ukraine has not adopted the definition of 'consultation' either the requirement to informing and consultations as prescribed under the mentioned EU Directive.[512]

Ultimately, the above examples demonstrate that stakeholder consultations mechanisms in Ukraine have yet to be improved[513] to become effective and meaningful

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[503] Law of Ukraine 'On Environmental Impact Assessment' (Про оцінку впливу на довкілля), 23.05.2017 No 2059-VIII art 7(1).
[504] Uvarova, 'NBA Report. Executive Summary' (n 13) 8; the procedure of public hearings (a form of consultations) is regulated by the Government; besides, there exist special rules (including separate public hearings procedure) on public consultations over urban planning activities but they lack clarity on how exactly should the public be informed about upcoming projects, Uvarova, 'NBA Report. Full Text' (n 316) 69–70.
[505] Code of Labour Laws of Ukraine (Кодекс законів про працю України), 10.12.1971 No 322-VIII c II.
[506] ibid XVI.
[507] ibid art 245.
[508] ibid arts 49-2, 49-4.
[509] Uvarova, 'NBA Report. Executive Summary' (n 13) 5.
[510] Uvarova, 'NBA Report. Full Text' (n 316) 44.
[511] UN Ukraine, 'UN Position Paper on Labor Code' (2020) 3 <https://ukraine.un.org/sites/default/files/2020-10/UN%20Position%20Paper%20on%20Labour%20Code_final%20version.pdf> accessed 10 May 2021.
[512] Conclusion of the EU Integration Parliamentary Committee on the Draft Labour Code of Ukraine (Проект трудового кодексу України), 08.11.2019 No 2410 12–13.
[513] In the meantime, businesses across sectors may well utilise the mentioned above OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector which contains many general guidance irrespective of the sector. The Ukrainian translation of this and other OECD guidance since recently are available on the 'Diia Business' portal rendering at least the language barrier excuse irrelevant, 'Cases and News | Business Process Systematisation' (*business.diia.gov.ua*) <https://business.diia.gov.ua/cases/sistematizacia-biznes-procesiv> accessed 16 May 2021; *See also*

(ongoing, two-way, conducted in good faith, and responsive) capable of bringing diverse perspectives into the decision-making on activities bearing adverse human rights impacts.

## 4.7 Economic stimuli

### 4.7.1 Public procurement

Chapter 2 has mentioned that under the Guiding Principles, states should foster corporate respect for human rights. To this end, they should ensure through adequate oversight that service providers who have been awarded public contracts respect service users' human rights. Besides, states should employ their procurement activities inter alia by framing terms of contracts in a way that would require their contractors to get aware of and respect human rights.[514]

Mares observes that 'public procurement is a key contractual means through which states, as economic actors, can influence corporate behaviour'.[515] He further explains that upon respective contract provisions, 'one party communicates its codes of conduct and expectations, outlines due diligence measures and provides that non-compliance can be a ground for termination of contract'.[516] In light of the previously discussed content of HRDD duty, the decision to award public contracts to a specific company may depend on whether the latter has embedded HRDD as such or certain its elements, including supply chain transparency or non-financial reporting.[517] Otherwise, the state risks getting tied up with human rights abuses. Through their purchasing relationships, states 'have been linked, for instance, to forced labour, child labour, excessive working hours, unsafe working conditions and suppression of freedom of association and expression, across sectors […]'.[518]

According to Martin-Ortega and O'Brien, it is nevertheless still common for procurement law frameworks to rank obtaining goods and services at the lowest price as a primary policy objective of procurement over the secondary, including 'economic development, environmental protection, or social inclusion and protection of vulnerable groups'. The authors argue strongly against such ranking because subordinating public buyers' human rights duties to price contradicts their mandatory nature.[519]

In practice, Article 57 of the EU Public Procurement Directive 2014/24/EU, for example, sets exclusion grounds upon which a company (economic operator) shall be excluded from participation in a procurement procedure. These criteria hinge upon whether 'a

'Barrier-Free Environment in Business: A New Section on the Diia.Business Portal' (*UNDP*) <https://www.ua.undp.org/content/ukraine/en/home/presscenter/pressreleases/2021/barrier-free-business--a-new-section-on-the-diia-business-portal.html> accessed 16 May 2021.

[514] UNGPs principles 5, 6.

[515] Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' (n 219) 21.

[516] ibid 22.

[517] International Learning Lab on Public Procurement and Human Rights, 'Public Procurement and Human Rights: A Survey of Twenty Jurisdictions' (2016) 9, 11 <https://www.hrprocurementlab.org/wp-content/uploads/2016/06/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf> accessed 11 May 2021.

[518] Olga Martin-Ortega and Claire Methven O'Brien, 'Public Procurement and Human Rights: Interrogating the Role of the State as Buyer' in Olga Martin-Ortega and Claire Methven O'Brien, *Public Procurement and Human Rights* (Edward Elgar Publishing 2019) 3.

[519] ibid 5–6.

member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control […] has been the subject of a conviction by final judgment' for certain reasons, including inter alia corruption and child labour and other forms of trafficking in human beings.[520]

Article 67 of this directive anchors contract award criteria on 'the price or cost, using a cost-effectiveness approach' but also links it to the 'environmental and/or social aspects', which may impact the best price-quality ratio assessment depending on the subject matter of the public contract at stake.

The key piece of the Ukrainian legislation in this area is the overarching Law 'On Public Procurement' *(PP Law)*.[521] The NBA Report identified in early 2019 that while public procurement makes the annual volume of 13% of Ukrainian GDP, no requirements to respect human rights are placed by the state to goods and services providers.

Still, for contracts worth UAH 20 mln or more, PP Law precludes a company from taking part in public procurement if it lacks an anti-corruption programme or a commissioner in charge of its implementation.[522] However, it could be argued that neither the very existence of a corporate anti-corruption programme nor commissioning an employee responsible for its implementation means that anti-corruption measures are, in fact, being implemented.[523] Similarly to corporate reporting requirements, which does not oblige to carry out HRDD, this one does not require *taking* anti-corruption measures. Therefore, effective implementation of the anti-corruption programme should make part of this type of requirement to bidders for public contracts.

In late 2019 the revised edition of PP Law was adopted: the list of disqualifying criteria has undergone a substantive change. In particular, the scope of the anti-corruption programme/responsible person provision was cut by removing non-residents from it.[524] More notably, two new disqualifying criteria[525] were introduced: 1) if a person was sanctioned in the form of a ban from public procurement under the Law 'On Sanctions',[526] 2) if a bidder's representative official or a bidder-natural person has been a subject of conviction by final judgment for committing an offence related to child labour or other forms of human trafficking.[527]

If sanctions in question were imposed for human rights violations, the possibility of which was asserted in section 4.2.2, then respective Article 17(11) PP Law would serve as an example of a disincentive placed by the state to change corporate behaviour, just as previously mentioned recommendations on a 'smart mix' of measures suggest.

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[520] Directive 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC art 57(1)(b, f).
[521] Law of Ukraine 'On Public Procurement' (Про публічні закупівлі), 25.12.2015 No 922-VIII *(hereinafter – Public Procurement Law)*.
[522] Uvarova, 'NBA Report. Executive Summary' (n 13) 13, 15.
[523] Others more straightforward corruption-based disqualifying grounds include: if a bidder was included into the state register of corrupted persons or if a bidder's representive official or a bidder-natural person has been the subject of a conviction by final judgment, Public Procurement Law art 17(2, 3, 5, 6).
[524] ibid art 17 (10).
[525] Technically, 'debts on tax and social security contributions' was another criterion added to the list, however it was no completely new, since it featured as an optional criteria in the law' previous edition ibid art 17(13).
[526] ibid art 17(11).
[527] ibid art 17(12).

As regards the modern slavery-based ground, it bears inherent limitations. Firstly, according to the official guidance on the application of disqualifying grounds under Article 17 PP Law, to disprove connection with child labour or human trafficking, a bidder should submit a statement in arbitrary form while a winner should provide a certificate on its representative's criminal record issued by the Ministry of Internal Affairs, again, in an arbitrary form.[528] Secondly, companies may simply select an official with no respective criminal record on those offences to represent them. Therefore, this disqualifying criterion appears to be extremely weak and incapable of contributing to combating child labour and human trafficking, although it might indeed allow the state to avoid links to them.

Finally, the PP Law lists 'maximum economy, efficiency and proportionality' and non-discrimination and equality of bidders among principles of public procurement[529] while 'price' features as the first award criterion for a public contract followed by a 'life cycle cost'. Only then comes the combination of these two with other criteria, including 'taking environmental and/or social protection measures related to the subject of the procurement'.[530]

Therefore, not only the PP Law does not place any requirement on contractors as regards HRDD, the existing disqualification grounds based on criminal record on corruption, child labour, or human trafficking are flawed. Moreover, the law suffers from the ranking approach rendering the lowest price a primary objective of procurement over secondary environmental and social protection. At the same time, if well-constructed public procurement legislation may be another effective tool containing both incentives and disincentives enabling corporate respect by contractors under public contracts.

### 4.7.2 State aid

Under the Guiding Principles, states should utilise their regulatory function to enable corporate respect for human rights. Along with contractual provisions behind procurement activities, a state may use other tools such as regulation of the provision of state support to meet that goal. Section 4.5 has touched upon the state aid for environmental protection. Below, other examples related to human rights are considered.

The Ukrainian legal framework for state aid was developed for the first time within the broader efforts to align national legislation with one of the EU. The Law 'On State Aid to Business Entities' established the general rule that state aid is considered incompatible with competition. As an exception, where it has specific objectives such as promotion of social, economic or cultural development, state aid may be considered compatible if it meets compatibility criteria set by the Government for certain categories of aid. The assessment of these criteria as regards individual notifications on the provision of state aid makes part of the verification process conducted by the national anti-monopoly authority.[531]

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[528] Ministry of Economic Development, Trade and Agriculture, Generalised response regarding application of Article 17 of the Law (Узагальнена відповідь щодо застосування статті 17 Закону), 03.06.2020 No 3304-04/34835-06 Annex.
[529] Public Procurement Law art 5(1)(2, 4).
[530] ibid art 29(3).
[531] Law of Ukraine 'On State Aid to Business Entities' (Про державну допомогу суб'єктам господарювання), 01.07.2014 No 1555-VII arts 2, 6(1, 2, 4); for a detailed summary of state aid legal framework in Ukraine, *see* Igor Svechkar and Sergiy Glushchenko, 'State Aid in Ukraine' (*Lexology*, July 2019) <https://www.lexology.com/library/detail.aspx?g=e65d7e9b-f31c-43db-8117-99fe3fd2ea8f> accessed 12 May 2021.

In 2018, the Government approved compatibility criteria for the state aid to business entities for employment of certain disadvantaged categories of employees, including uninsured and long-termed unemployed persons, persons with disabilities *(PWD)*, and those who served their sentence or passed involuntary treatment. Business entities across sectors offering employment to these people may receive state aid to cover labour costs, costs for working environment adaption for PWD and other relevant expenses.[532]

Interestingly, the Law 'On Environmental Protection' provides for 'economic measures to ensure environmental protection' (Article 41) and 'stimulation of rational use of natural resources and environmental protection' (Article 49). These provisions prescribe, among other economic stimuli, tax benefits, preferential loans and other incentives for implementing environmental protection measures.[533] The law also stipulates the imposition of an environmental tax[534] for certain kinds of pollution.[535] However, according to a recent ministerial report, unlike the environmental tax, the tax and other benefits have practically not been implemented.[536] Strikingly, although national legislation provides for state aid for environmental protection, the Government has not yet approved compatibility criteria for this category of aid, making it impossible to properly use the tool.[537] Notwithstanding, in early 2021, the compatibility criteria for state aid for business entities in the coal industry were approved. They include inter alia 'reducing the environmental impact of coal mining by coal business entities, which are provided with aid for termination (liquidation)'.[538]

In conclusion, state aid can be seen as another tool in states' disposal for enhancing corporate respect for human rights. In the presented first case, by offering companies the economic incentive in the form of state aid enabling more inclusive recruitment practices, the state enables them to advance equality in employment. In the second case, the state provides state aid to enables the termination of coal mining harmful to the environment and therefore prevents further environmental damage by a mining company. Although the regulation in question does not require companies receiving state support to carry out HRDD, it nevertheless stimulates them to take measures (that is effectively the second phase of the HRDD process) upon specific human rights issue (employment inequality, environmental damage) even though it was not pre-identified by internal HRIA.

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[532] Cabinet of Ministers of Ukraine, Resolution 'On Approval of the Compatibility Assessment Criteria for the Stare Aid to Business Entities for Employment of Certain Categories of Workers and Creation of New Jobs' (Про затвердження критеріїв оцінки допустимості державної допомоги суб'єктам господарювання на працевлаштування окремих категорій працівників та створення нових робочих місць), 31.01.2018 No 33 Annex paras 1-4; for more detailed overview of this resolution, *see* Uvarova, 'NBA Report. Full Text' (n 316) 127–129.

[533] Law of Ukraine 'On Environmental Protection' (Про охорону навколишнього природного середовища), 25.06.1991 No 1264-XII arts 41(д), 48(а, б).

[534] ibid art 3(л).

[535] Tax Code of Ukraine (Податковий кодекс України), 02.12.2010 No 2755-VI s VIII.

[536] Ministry of Environmental Protection and Natural Resources of Ukraine, 'Report on Incentive Tools for Green Modernization of Industrial Enterprises in the EU Countries and in Ukraine' (2021) 46–72 <https://mepr.gov.ua/files/%D0%B7%D0%B2%D1%96%D1%82.pdf> accessed 30 April 2021.

[537] ibid 60–61, 63; at the same time, theoretically, this could be a case for direct application of certain provisions of the EU-Ukraine AA on state aid mentioned in section 3.2.

[538] Cabinet of Ministers of Ukraine, Resolution 'On Approval of the Compatibility Assessment Criteria for the State Aid to Business Entities in Coal Industry' (Про затвердження критеріїв оцінки допустимості державної допомоги суб'єктам господарювання у вугільній галузі', 17.04.2019 No 337 Annex para 1.

### 4.7.3 Upcoming draft law on economic stimuli[539]

The recently updated Draft HR Action Plan contains the crucial action point No 72 requiring the Ministry of Economy of Ukraine, MoJ and the Ombudsperson (upon her consent) to develop and submit to the Government a draft law on the introduction of economic incentives for business enterprises implementing the standards of ensuring human rights in the course of conducting business *(Economic Stimuli Draft Law)*. The performance indicator is the submission of the respective draft law to the Parliament by March 2023.[540]

First and foremost, this action point bears a significant potential to bring about another law, along with flawed PP Law and not fully implemented State Aid Law, to enhance corporate respect for human rights by companies seeking economic incentives from the state. The Economic Stimuli Draft Law would most likely follow the approach by the PP Law's and the legislative acts on state aid of establishing awarding criteria for businesses applying for economic stimuli. This is where the draft's potential lies: *awarding criteria may be employed as a vehicle for imposing an HRDD duty on companies.* Virtually, the drafters have an opportunity to take account on all of the existing mHRDD regimes, particularly those considered in Chapter 2 (as well as on the prior comprehensive studies, lessons from laws' implementation processes and rich academic scholarship), to construct provisions that would require companies to carry out specific HRDD duties in order to be eligible for economic stimuli. In so doing, the constitutive elements of the mHRDD should be instructive for their endeavour, as further elaborated.

In terms of the *nature* of the mHRDD regime, if adopted, Economic Stimuli Draft Law would represent a unique instance as it would not be a civil, company, consumer protection, or international private law traditionally utilised for the outlined purposes.

Regarding the *scope* of the legal regime, to meet objectives and achieve expected outcomes of the HR Strategy's BHR Chapter covering all business entities, it would be most advantageous for the Economic Stimuli Draft Law to follow the Guiding Principles and extend its scope to any business entity. It would incentivise businesses of all sizes, sectors, ownership, and structure to fulfil HRDD duties in order to become eligible for the stimuli.

The drafters should pay scrupulous attention to the design of the *HRDD duties* under the upcoming Economic Stimuli Draft Law. To fulfil its promising potential, the draft should encompass a wide range of protected values, specifically all internationally recognised human rights (as defined under the UN and OECD frameworks), the environment,[541] the decent work, including health and safety.[542] It might probably not yet include good governance,[543]

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[539] The idea for this section comes from the previously mentioned conversation with Dirk Hoffman, senior advisor at the DIHR, who emphasised to the author of this thesis that the action point on the economic stimuli draft law brings an opportunity to use it as a tool to foster corporate respect for human rights, in particular, by defining what measures would such respect imply.

[540] Updated Draft Human Rights Action Plan para 72.

[541] This would serve implementing economic stimuli envisioned under arts 41, 48 of the Law 'On Environmental Protection', discussed above.

[542] This would contribute to Ukraine's cooperation with the ILO under the current mid-term programme, 'Decent Work Country Programme Ukraine 2020-2024' (*ILO*, 3 February 2021) <http://www.ilo.org/budapest/what-we-do/decent-work-country-programmes/WCMS_774454/lang--en/index.htm> accessed 27 May 2021; it would also turn the ILO Tripartite Declaration agenda back into the equation after it was stroke out as a result of the Draft HR Action Plan updating.

[543] The reason for that stems from the previously explained Ukrainian context, in particular, plenty of grave problems and challenges faced by Ukraine, such as underdeveloped democratic traditions, weak rule of law (undermined by rampant

rather anti-corruption (through its nexus with human rights)[544]. About the content of the HRDD duties, practice shows that it should stipulate an entire range of HRDD duties, including impact assessment, taking action upon its findings, monitoring responses to action taken and finally, corporate reporting. It would be beneficial to follow the French Law and EU DD Initiative example and require companies to set up, disclose and effectively implement a monitoring plan/HRDD strategy. Then, the Economic Stimuli Draft Law should extend to both eligible companies' own operations and their business relationships (entire supply chains, specifically covering controlled companies and long-standing subcontractors and suppliers). Drawing on the Norwegian Proposal discussed in section 2.3.1, the drafters of the Economic Stimuli Draft Law should also consider including an entitlement for third parties to request information about a company's negative impacts and HRDD practice once it has been awarded the economic stimulus.

Two arguably inherent limitations of the Economic Stimuli Draft Law should be highlighted. Firstly, it would only be applied to companies seeking economic stimuli from the state. Respectively, any *enforcement mechanism* would only apply to eligible companies who received respective economic benefits under the law. Secondly, due to the 'awarding criteria' nature of the provision at stake, it is not feasible that it can somehow attach any *liability regime* for the failure to comply with HRDD duties had they been imposed. Instead, such failure would serve as a ground to reject the company's application for economic stimuli. It may similarly be a ground to terminate an agreement entered into to get the awarded stimulus. These limitations render the potential mHRDD under the Economic Stimuli Draft Law 'reduced' in comparison to foreign regimes couched on the civil, company or consumer laws.

As regards establishing corporate civil liability, another parallel legislative process may be launched to this end. However, there is already a better option on the table: to introduce corporate civil liability for business-related human rights abuse within existing legislative efforts to recodify CCU and incorporate an 'enlighten stakeholder value approach' via draft JSC Law. Both legislative acts may be considered as potential hosts of the civil liability provision. Along these lines, the Economic Stimuli Draft Law would also be of use for amending the PP Law's to correct its shortcomings. Crucially, all these legislative efforts should be well-concerted.

Regarding the timeframe, the Economic Stimuli Draft Law should be submitted to Parliament by March 2023. Prima facie, it is an unjustifiably delayed deadline. Nonetheless, one should keep in mind that the study on the best practices on implementing the UNGPs, UNGC and the CoE BHR Recommendation, which logically precedes the development of the Economic Stimuli Draft Law to inform it, is due by February 2022.[545] Moreover, to 'prepare' businesses for this 'reduced' yet potentially ambitious mHRDD regime, the Government should first pursue other objectives, especially those on awareness-raising and updating corporate policies.

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corruption and oligarchic rule), weak institutions (including dependent courts), and the low public trust in them. This evidently indicates that good governance of the state has not been yet established, therefore it can hardly be considered a value to protect.

[544] It was touched upon in the section 4.1.3.

[545] Updated Draft Human Rights Action Plan para 71.

Of significant importance is that the effectiveness of the Economic Stimuli Draft Law, if adopted, would ultimately largely hinge upon how advantageous economic stimuli from the state would be. Only if they can bring actual economic benefits, the businesses would seek them hence attempt to satisfy awarding criteria that eventually might enable change in their corporate practices.

Finally, the implementation factor is another commonly decisive one, especially in states alike Ukraine, which does not fully maintain the rule of law, neither has yet built strong institutions.

On top of that, there is an 'anti-development' sentiment. As Deva underlines,

> A hard reality is that the current model of (economic) development is not rights-based. States treat human rights as a 'speed breaker to development'. States not only focus on rising up the 'ease of doing business' rankings – which do not consider human rights as a variable – to attract foreign investment, but also label as 'anti-development' (and therefore 'anti-national') communities and CSOs resisting development projects. […] Despite all the rhetoric about sustainable development, the current model of development is neither sustainable nor inclusive: there lies a significant difference between 'talking' sustainability and 'doing' sustainability […] Unless this tension between human rights and development is resolved by transforming the current model of development, the BHR project will continue just to scratch the surface of the problem […][546]

This passage is strikingly well suited to be a critical comment on the National Economic Strategy 2030 *(NES)*, adopted by the Ukrainian Government in early March 2021.[547] Among plenty of others, the NES sets an objective to implement a number of initiatives to improve Ukraine's position in the Ease of Doing Business Index to the TOP-30.[548] Besides, under the label 'unacceptable steps, prohibited directions of movement, which are critical obstacles to economic development ("red lines")', the NES, inter alia, lists:

- cessation of structural reforms
- *increasing business over-regulation*
- non-fulfilment of the EU-Ukraine Association Agreement
- deterioration of the environment[549]

The second item is particularly concerning for the BHR agenda because it provides the Government with leeway for treating specific legislative initiatives as ones that increase business over-regulation. Considering the very nature of the mHRDD, it is indeed a regulation of business; however, it should not be treated as an over-regulation in light of this

[546] Surya Deva, 'From "Business or Human Rights" to "Business and Human Rights": What Next?' in Surya Deva and David Birchall (eds), *Research handbook on human rights and business* (Edward Elgar Publishign 2020) 12.
[547] Notably, on eve of the NES' adoption, the UN Development Programme in Ukraine published a timely blog post arguing for the UNGPs implementation and its benefits for social and economic development, Dafina Gercheva and Nicolaj Sonderbye, 'Responsible Business Conduct Accelerates Social and Economic Development' (*UNDP*, February 2021) <https://www.ua.undp.org/content/ukraine/en/home/blog/2021/responsible-business.html> accessed 3 April 2021; without prejudice to the arguments' soundness, it should be noted that the Ukrainian version of the blog uses the rather unclear translation of HRDD as 'decent care as regards human rights' (гідна турбота про права людини). As was argued before, consistent use of terminology should be seen as a factor contributing to the success of awareness-raising and implementation efforts in regard to the BHR standards. Thus, HRDD should rather be translated literally as 'due diligence as regards human rights' (належна обачність щодо прав людини).
[548] Cabinet of Ministers of Ukraine, Resolution 'On Adoption of the National Economic Strategy for the Period until 2030' (Про затвердження Національної економічної стратегії на період до 2030 року), 03.03.2021 No 179 Annex Strategic course of development policy comfortable regulatory environment.
[549] ibid Annex Mission and purpose of the Strategy (emphasis added).

strategic ‘red line’, especially taking into account that to avoid crossing the other three ‘red lines’ would require strengthening corporate respect for human rights. Without a well-constructed BHR regulation, companies hardly take any voluntarily measures to change their harmful corporate practices, as was highlighted above.

The Ease of Doing Business’ objective and the cited ‘red lines’ witness that the NES reflect treating human rights as a ‘speed breaker to development’ and state’s focus on rising up the ‘ease of doing business’ rankings warned against by Deva. Therefore, the NES appears to incorporate an ‘anti-development’ sentiment. It is deeply worrying in light of the designing the Economic Stimuli Draft Law as it might be blocked by labelling as ‘over-regulating’/ ‘anti-development’.

Besides, it should be reminded that achieving SDGs and implementing the BHR standards are not mutually exclusive endeavours vice versa, they are complementary. The DIHR assertion should be emphasised once again: the UNGPs’ implementation can be ‘the single most important contribution to the realisation of the SDGs’.[550] This argument is based on extensive research on the interrelation between the two agendas, as specified in section 2.2.2. Uvarova likewise emphasises that the Government seems to try balancing between people expectations for economic development and approximation of Ukrainian legal and market standards to ones of the EU. She argues that a starting point should be the explanation that these two goals are correlated: BHR implementation should contribute to sustainable economic development and democracy in Ukraine’.[551]

To sum up, the Economic Stimuli Draft Law bears considerable potential for bringing about legal duty to conduct HRDD for companies seeking economic stimuli from the state. Due to this draft law’s nature, it may lead to establishing the ‘reduced’ yet ambiguous national mHRDD regime, which would need to be complemented by an enforcement mechanism and imposing legal rules on corporate civil liability for business-related human rights abuse. The drafting process in all cases should be informed by the extensive collection of the existing and proposed foreign mHRDD regimes, prior comprehensive studies, rich academic scholarship and the lessons’ from one laws’ implementation processes. The drafting process should not fall victim to the ‘anti-development’ sentiment arguably incorporated by the recently adopted NES.

Lastly, it is true that this section largely pictures the best case scenario with developing a solid draft law. At the same time, taking into account the experience with French and Swiss legislative endeavours, once HRDD legislative initiatives are presented, they automatically face the risk of being watered down or be substituted by a counterproposal suggesting a weaker legal regime. Thus, the initial draft should be as ambitious as possible.

[550] Morris and others (n 100) 9.
[551] New University, *Academic Forum of the New University: Business and Human Rights in Central and Eastern Europe (Speech by Olena Uvarova)* (2021) <https://www.nova-uni.si/en/academic-forum-of-the-new-university-business-and-human-rights-in-central-and-eastern-europe/> accessed 27 May 2021.

# 5 Conclusions and recommendations

This thesis has demonstrated that within almost ten years into the Guiding Principles' implementation, the HRDD process originated from transactional due diligence processes had become a must for any company claiming to respect human rights. Closely aligned UN and OECD frameworks and other soft law instruments currently provide business with elaborative guidance on how to 'know and show' that respect through the HRDD: by identifying adverse human rights impacts, taking action, tracking responses, and communicating on their corporate practice. Steps aimed at remediating damage to right-holders if it was nevertheless inflicted should also be taken. At the same time, states are expected to efficiently use their regulatory and policy functions to enable corporate respect for human rights through, for example, public procurement, state aid, and other incentives and disincentives. Both businesses and states should contribute to greater access to remedy for victims of business-related human rights abuse who seek justice.

During the same period, mHRDD legislation in Europe has gradually turned into a legislative trend, followed by states declaring their serious commitment towards stronger corporate accountability. From formal corporate reporting legal obligations, the focus has now been moved on to obliging companies to carry out full-scale HRDD. Moreover, in the best case scenarios, mHRDD legislation links civil liability regimes to a failure to comply appropriately with corporate due diligence duties. The 2017 French Duty of Vigilance Law stands out as the only law currently in force attaching existing fault-based liability for such failure. A similar model is likely to be introduced by the recent Dutch Bill on responsible business conduct, while a recently rejected Swiss Proposal was aimed at establishing a new kind of strict liability with due diligence defence. The latter model also features in the European Parliament's legislative report on corporate due diligence and corporate accountability, which thus far is arguably the most advanced mHRDD legislative initiative since the liability it suggests implies a long-awaited reversal of the burden of proof on breach of the HRDD duty from a victim to a company. The EU concurrently has set in motion legislative processes to create new rules on sustainability reporting and sustainability corporate governance, which, alongside mHRDD, represent its broader efforts to meet the European Green Deal goals. Eventually, this paper has outlined essential mHRDD regime's elements, such as its nature and scope, due diligence duties, enforcement, and civil liability.

In ten years, the HRDD has passed a sinuous path from uncertainty to a standard of expected conduct under the mainstream mHRDD legislation.

This study has also shown that despite Ukraine having just recently stepped into the long way towards ensuring corporate respect for human rights, it had already passed several important milestones.

In 2014, Ukraine entered into the Association Agreement with the EU aimed at political and economic integration and requiring legal approximation (alignment) of the Ukrainian legislation to one of the EU. Even though the EU-Ukraine Association Agreement

only refers to pre-UNGPs soft law instruments, it contains a so-called ‘social clause’ obliging parties to pursue trade favouring sustainable development following the fair and ethical trade schemes alongside CSR and accountability principles. Moreover, the Association Agreement prescribes a mechanism allowing Ukraine to approximate its legislation to the EU acquis falling outside the agreement’s scope. It enables the Ukrainian Government to align national legislation with the EU directives and regulations on sustainability reporting, corporate due diligence and sustainable corporate governance in future. Such a move would be beneficial considering that a growing number of Ukrainian companies exporting goods and services to the EU would fall under the rules recently suggested by the European Parliament in its legislative report on corporate due diligence and corporate accountability.

Years 2017-2020 mark the emergence of the academia-driven BHR agenda in Ukraine, resulting in the establishment of a thematic annual international forum, raising awareness of BHR with academic contributions, state pledging adherence to the OECD Guidelines and setting up respective National Contact Point, adopting state policies promoting responsible business conduct and the SDGs’ implementation, mainstreaming BHR within Ombudsperson’s activities, conducting comprehensive National Baseline Assessment on BHR, and finally making a public commitment at the authoritative UN fora to pursue implementation of the Guiding Principles.

In 2021, the new three-year National Human Rights Strategy was adopted, featuring for the first time the BHR Chapter aimed at, among other things, implementing the Guiding Principles and the 2016 Council of Europe Recommendation on BHR as well as improving access to judicial and non-judicial remedies for business-related human rights violations. Despite being internally incohesive, this chapter is a critical step toward constructing a legal framework for corporate respect for human rights. Furthermore, as of late May 2021, the Draft National Human Rights Action Plan encompasses the development of a draft law on economic stimuli for business entities that follow BHR standards. If well-constructed, this draft law may become a unique vehicle to bring about legal HRDD duties for companies seeking incentives from the state.

Thus, it took Ukraine about five years to turn ‘nothing’ about BHR into a quite considerable ‘something’ worth celebrating and developing further.

This paper has, as well, identified that the Ukrainian legal and policy frameworks are far from being alien to the due diligence concept and HRDD-comparable requirements. Along with transactional due diligence traditionally familiar to businesses, examples of employing due diligence in domestic violence prevention, contractual and non-contractual relationships, anti-corruption and anti-money laundering were provided to support the above assertion. In addition, the analysis of the current Ukrainian legislation indicates that it covers some elements of HRDD, such as corporate (non-financial) reporting and the key HRDD-related issues, such as stakeholder engagement and corporate governance and directors’ duties. The legal frameworks for public procurement and state aid also contain provisions referring to HRDD-comparable practices requiring companies-bidders to set up and implement an anti-corruption programme or allowing companies that hire disadvantaged employees to receive state aid. The close relationships between strengthening environmental protection and corporate respect for human rights was identified. Ukrainian environmental

laws follow the well-established principle of prevention and the precautionary approach, while stand-alone environmental impact assessment under environmental laws resembles the one as a phase of HRDD as regards the environment.

Importantly, this study has revealed both significant differences and remarkable similarities between the Ukrainian liability regimes and those under the discussed mHRDD regimes in France, Switzerland, the Netherlands, and the EU. It was argued that the Ukrainian civil law provides for a more advanced delict (tort) law regime in terms of the burden of proof distribution. Ukrainian legislation establishes fault-based liability for harm with a statutory presumption of the tortfeasor's fault. Once a victim has proved wrongfulness, damage and causation, the tortfeasor's fault is presumed and can only be rebutted by proving that damage occurred despite all necessary measures taken to prevent it. Interestingly, since the fault is defined as failure to take such measures, disproval of fault partly performs due diligence defence similarly to the liability schemes in the Swiss Proposal and the European Parliament' legislative report on corporate due diligence and corporate accountability**.** In addition to civil liability, the recently actively utilised sanctions' regime also bear unfulfilled potential as a tool for addressing corporate abuse for human rights by foreign companies.

Ultimately, the Ukrainian legislation, to a considerable extent, reflects HRDD and HRDD-comparable practices alongside the regulating of multiple closely related issues.

Lastly, this thesis has elucidated the immense significance of a 'smart mix' for states seriously committed to bringing change in corporate behaviour and achieving greater corporate accountability. In order to improve corporate human rights performance, states should implement a regulatory 'smart mix' of measures inclusive of national voluntary and mandatory actions as well as international voluntary and mandatory actions. The former may take the form of the Ukrainian Government's guidance on HRDD and imposing mHRDD legislation accordingly. The latter may be achieved by state support for international multi-stakeholder initiatives promoting corporate respect for human rights and Ukraine's engagement in the international BHR treaty process accordingly. Furthermore, policy coherence throughout national laws and policies should be preserved (even terminological consistency matters). In particular, the current major reformative efforts regarding recodification of the Civil Code, improving the draft of the Labour Code and refinement of the progressive draft of the Joint Stock Company Law as well as the BHR Chapter and the strategic objective to draft a law on economic stimuli should all be concerted not siloed. At the same time, the New Economic Strategy 2030 and its 'anti-development' sentiment should not become a resort to hinder these efforts.

Indeed, the state has a rich 'regulatory toolbox' at its disposal, and it should decisively and effectively use it to enable and enhance corporate respect for human rights.

To sum up, Ukraine is well-positioned to take vital steps towards mHRDD following the legislative mainstream, which is getting hard to resist. Fortunately, no need to resist.

# Bibliography

## Primary sources

### Official documents

#### UN

Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/11/13 (2009)

CESCR, General comment No 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (2017)

Charter of the United Nations, 26.06.1945

Clarifying the Concepts of "Sphere of influence" and "Complicity", Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, A/HRC/8/16 (2008)

Commentary for the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft), E/CN.4/Sub.2/2003/38 (2003)

Connecting the business and human rights and the anticorruption agendas, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/44/43 (2020)

Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31 (2011)

Human rights and corporate law: trends and observations from a crossnational study conducted by the Special Representative, Report of the Special Representative of the SecretaryGeneral on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31/Add.2 (2011)

Human rights and transnational corporations and other business enterprises, Resolution adopted by the Human Rights Council, A/HRC/RES/17/4 (2011)

Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms, Addendum 3 to the Report, A/HRC/4/35/ Add.3 (2007)

Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/RES/2005/69 (2005)

OEIGWG, Second revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises 2020

OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse, A/HRC/32/19 (2016)

OHCHR, Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability, A/HRC/38/20/Add.2 (2018)

Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5 (2008)

State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries, Addendum to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/35/Add.1 (2007)

Territorial integrity of Ukraine, Resolution of the UN General Assembly, A/RES/68/262 (2014)

The business and human rights dimension of sustainable development: Embedding “Protect, Respect and Remedy” in SDGs implementation (10 key recommendations to Governments and businesses from the UN Working Group on Business and Human Rights) 2017

The Corporate Responsibility To Respect Human Rights: An Interpretive Guide 2012

The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft), E/CN.4/Sub.2/2003/12/Rev.2 2003

Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1 (2015)

## EU

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2014] OJ L161

Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states on human rights and business

Directive 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups

European Commission proposal of 21 April 2021 for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM(2021)189 final

European Commission, A renewed strategy 2011-14 for Corporate Social Responsibility COM(2011) 681 final 2011

European Commission, The European Green Deal, 11.12.2019, COM(2019) 640 final

European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability 2020/2129(INL)

European Parliament resolution of 17 December 2020 on sustainable corporate governance (2020/2137(INI))

European Parliament resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL))

European Parliament resolution of 26 March 2019 on financial crimes, tax evasion and tax avoidance (2018/2121(INI))

## OECD

OECD Declaration and Decisions on International Investment and Multinational Enterprises 1976

OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector 2017

OECD Due Diligence Guidance for Responsible Business Conduct 2018

OECD Due Diligence Guidance for Responsible Conduct (Настанови ОЕСР стосовно процедур належної перевірки у практиці відповідального ведення бізнесу) 2018

OECD Guidelines for multinational enterprises 1976

OECD Guidelines for Multinational Enterprises 2011

## Ukraine

Board of the National Bank of Ukraine, Resolution ‘On Approval of the Instruction on the Procedure for Preparation and Publication of Financial Statements of Banks of Ukraine’ (Про затвердження Інструкції про порядок складання та оприлюднення фінансової звітності банків України), 24.10.2011 No 373

Cabinet of Ministers of Ukraine, Draft Instruction ’On the Implementation of the National Human Rights Strategy 2021-2023 (Проект Плану дій з реалізації Національної стратегії у сфері прав людини на 2021–2023 роки), 01.04.2021

Cabinet of Ministers of Ukraine, Draft Instruction ’On the Implementation of the National Human Rights Strategy 2021-2023 (Проект Плану дій з реалізації Національної стратегії у сфері прав людини на 2021–2023 роки), 24.05.2021

Cabinet of Ministers of Ukraine, Instruction ‘On Approval of the Concept for the Implementation of State Policy in the Field of Promoting the Development of Socially Responsible Business in Ukraine for the Period until 2030’ (Про схвалення Концепції

реалізації державної політики у сфері сприяння розвитку соціально відповідального бізнесу в Україні на період до 2030 року), 24.01.2020 No 66-р

Cabinet of Ministers of Ukraine, Order 'On Holding the Kharkiv International Legal Forum' (Про проведення Харківського міжнародного юридичного форуму) 19.09.2018 No 656-р

Cabinet of Ministers of Ukraine, Resolution 'On Adoption of the National Economic Strategy for the Period until 2030' (Про затвердження Національної економічної стратегії на період до 2030 року), 03.03.2021 No 179

Cabinet of Ministers of Ukraine, Resolution 'On Approval of the Compatibility Assessment Criteria for the Stare Aid to Business Entities for Employment of Certain Categories of Workers and Creation of New Jobs' (Про затвердження критеріїв оцінки допустимості державної допомоги суб'єктам господарювання на працевлаштування окремих категорій працівників та створення нових робочих місць), 31.01.2018 No 33

Cabinet of Ministers of Ukraine, Resolution 'On Approval of the Compatibility Assessment Criteria for the State Aid to Business Entities in Coal Industry' (Про затвердження критеріїв оцінки допустимості державної допомоги суб'єктам господарювання у вугільній галузі', 17.04.2019 No 337

Cabinet of Ministers of Ukraine, Resolution 'On Approval of the Procedure for Investigation and Accounting of Occupational Accidents, Occupational Diseases, and Industrial Accidents' (Про затвердження Порядку розслідування та обліку нещасних випадків, професійних захворювань та аварій на виробництві), 17.04.2019 No 337

Cabinet of Ministers of Ukraine, Resolution 'On Approval of the Procedure for the Submission of Financial Statements' (Про затвердження Порядку подання фінансової звітності), 28.02.2000 No 419

Cabinet of Ministers of Ukraine, Resolution 'On Ensuring Public Participation in the Formulation and Implementation of Public Policy' (Про забезпечення участі громадськості у формуванні та реалізації державної політики), 03.10.2010 No 996

Cabinet of Ministers of Ukraine, Resolution on 'Some Issues of Deregulation of Economic Activity' (Деякі питання дерегуляції господарської діяльності), 27.03.2019 No 367

Civil Code of Ukraine (Цивільний кодекс України), 16.01.2003 No 435-IV

Code of Labour Laws of Ukraine (Кодекс законів про працю України), 10.12.1971 No 322-VIII

Commercial Code of Ukraine (Господарський кодекс України), 16.01.2003 No 436-IV

Conclusion of the EU Integration Parliamentary Committee on the Draft Labour Code of Ukraine (Проект трудового кодексу України), 08.11.2019 No 2410

Constitution of Ukraine, 28.06.1996

Draft Labour Code of Ukraine (Проект трудового кодексу України), 08.11.2019 No 2410

Draft Law of Ukraine 'On Joint Stock Companies' (Проект Закону України 'Про акціонерні товариства'), 25.11.2019 No 2493

Law of Ukraine ‘On Accounting and Financial Reporting in Ukraine’ (Про бухгалтерський облік та фінансову звітність), 16.07.1999 No 996-XIV

Law of Ukraine ‘On Amending to the Law of Ukraine “On Accounting and Financial Reporting in Ukraine”’ (Закону України “Про бухгалтерський облік та фінансову звітність в Україні” (щодо удосконалення деяких положень)), 05.10.2017 No 2164-VIII

Law of Ukraine ‘On Compulsory State Social Insurance’ (Про загальнообов’язкове державне соціальне страхування), 23.09.1999 No 1105-XIV

Law of Ukraine ‘On Ensuring Equal Rights and Opportunities for Women and Men’ (Про забезпечення рівних прав та можливостей жінок і чоловіків), 08.09.2005 No 2866-IV

Law of Ukraine ‘On Environmental Impact Assessment’ (Про оцінку впливу на довкілля), 23.05.2017 No 2059-VIII

Law of Ukraine ‘On Environmental Protection’ (Про охорону навколишнього природного середовища), 25.06.1991 No 1264-XII

Law of Ukraine ‘On Fundamental Principles (Strategy) of the State Environmental Policy of Ukraine for the Period until 2030’ (Про Основні засади (стратегію) державної екологічної політики України на період до 2030 року), 28.02.2019 No 2697-VIII

Law of Ukraine ‘On Liability for Damages Caused by Defects in Goods’ (Про відповідальність за шкоду, завдану внаслідок дефекту в продукції), 19.05.2011 No 3390-VI

Law of Ukraine ‘On Occupational Health and Safety’ (Про охорону праці), 14.10.1992 No 2694-XII

Law of Ukraine ‘On Preventing and Counteracting to Legalization (Laundering) of the Proceeds of Crime, Terrorism Financing, and Financing Proliferation of Weapons of Mass Destruction’ (Про запобігання та протидію легалізації (відмиванню) доходів, одержаних злочинним шляхом, фінансуванню тероризму та фінансуванню розповсюдження зброї масового знищення), 06.12.2019 No 361-IX

Law of Ukraine ‘On Prevention of Corruption’ (Про запобігання корупції), 14.10.2014 No 1700-VII

Law of Ukraine ‘On Principles of Prevention and Combating Discrimination in Ukraine’ (Про засади запобігання та протидії дискримінації в Україні), 06.09.2012 No 5207-VI

Law of Ukraine ‘On Public Procurement’ (Про публічні закупівлі), 25.12.2015 No 922-VIII

Law of Ukraine ‘On Sanctions’ (Про санкції), 14.08.2014 No 1644-VII

Law of Ukraine ‘On State Aid to Business Entities’ (Про державну допомогу суб’єктам господарювання), 01.07.2014 No 1555-VII

Law of Ukraine ‘On the Audit of Financial Statements and Auditing Activities’ (Про аудит фінансової звітності та аудиторську діяльність), 21.12.2017 No 2258-VIII

Law of Ukraine ’On the Execution of Judgments and Application of the Practice of the European Court of Human Rights (Про виконання рішень та застосування практики Європейського суду з прав людини), 23.02.2006 No 3477-IV

Legal Aid Coordination Centre (Ministry of Justice of Ukraine), Order ’On Approval of the Guidelines for the Identification of Cases of Gender Discrimination and the Mechanism for Providing Legal Aid (Про затвердження Методичних рекомендації щодо ідентифікації випадків ґендерної дискримінації та механізм надання правової допомоги), 12.03.2019 No 33

Ministry of Finance of Ukraine, Decree ‘On Approval of the Guidance on Compiling a Management Report’ (Про затвердження Методичних рекомендацій зі складання звіту про управління), 07.12.2018 No 982

National Commission on Securities and Stock Market of Ukraine, Decision ‘On Approval of the Principles of Corporate Governance’ (Про затвердження Принципів корпоративного управління) 22.07.2014 No 955

National Commission on Securities and Stock Market of Ukraine, Decision ‘On approval of the Regulations on disclosure of information by issuers of securities’ (Про затвердження Положення про розкриття інформації емітентами цінних паперів), 03.12.2013 No 2826

National Commission on Securities and Stock Market of Ukraine, Decision ‘Regarding the Generalisation of the Practice of Corporate Governance Legislation Application’ (Щодо узагальнення практики застосування законодавства з питань корпоративного управління), 12.03.2020 No 118

OECD Due Diligence Guidance for Responsible Conduct (Настанови ОЕСР стосовно процедур належної перевірки у практиці відповідального ведення бізнесу) 2018

President of Ukraine, Decree ‘On National Human Rights Strategy’ (Про Національну стратегію у сфері прав людини), 24.03.2021 No 119/2021

President of Ukraine, Decree ‘On Sustainable Developments Goals of Ukraine for the period until 2030’ (Про Цілі сталого розвитку України на період до 2030 року), 30.09.2019 No 722/2019

President of Ukraine, Decree ’On the Decision of the National Security and Defence Council of Ukraine of 14 May 2021 ‘On the application of personal special economic and other restrictive measures (sanctions)’ (Про рішення Ради національної безпеки і оборони України від 14 травня 2021 року ’Про застосування персональних спеціальних економічних та інших обмежувальних заходів (санкцій)’), 21.05.2021 No 203/2021

Tax Code of Ukraine (Податковий кодекс України), 02.12.2010 No 2755-VI

## Others

IFC Performance Standards on Environmental and Social Sustainability 2012
ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at is 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions
Performance Standards on Environmental and Social Sustainability 2012

UK Companies Act 2006

Visit to Georgia, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/44/43/Add.1 (2020)

## Case law

Dissenting Opinion by the Supreme Court Justice Krat VI, 06.03.2019, case No 522/1781/16-ц

Resolution of the Supreme Court, 14.04.2021, case No 753/6519/19

Resolution of the Supreme Court, 15.08.2018, case No 910/11049/17

Ruling of the High Specialised Court of Ukraine for Civil and Criminal Cases, 18.04.2012, case No 6-19500св11

Ruling of the Supreme Court of Ukraine, 06.04.2011, case No 6-13344св10

# Secondary sources

## Books

Alston P and Reisch N (eds), *Tax, Inequality, and Human Rights* (Oxford University Press 2019)

Babu RR, *Remedies under the WTO Legal System* (Martinus Nijhoff Publishers 2012)

Baker McKenzie, *Conducting Business in Ukraine 2021* (Baker McKenzie 2021) <https://www.bakermckenzie.com/en/insight/publications/guides/doing-business-in-ukraine> accessed 19 May 2021

Bernaz N, *Business and Human Rights: History, Law and Policy: Bridging the Accountability Gap* (Routlege 2017)

Morris D and others, *Responsible Business Conduct as a Cornerstone of the 2030 Agenda: A Look at the Implications* (Danish Institute for Human Rights 2019)

Muchlinski P, *Multinational Enterprises and the Law* (Third edition, Oxford University Press 2021)

O'Brien CM, *Business and Human Rights. A Handbook for Legal Practitioners* (Strasbourg: Council of Europe (Non-peer-reviewed) 2019)

OECD (ed), *G20/OECD Principles of Corporate Governance* (OECD 2015)

—— (ed), *OECD Investment Policy Reviews: Ukraine 2016* (OECD Publishing 2016)

Razmetaieva Y, *The Doctrine and Practice of Human Rights Protection. Textbook* (FOP Holembovska OO 2018)

Ruggie JG, *Just Business: Multinational Corporations and Human Rights* (W W Norton & Company 2013)

Uvarova O (ed), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (Kateryna Buriakovska and others trs, Pravo 2018)

——, *Business and Human Rights in Times of COVID-19* (2020) <https://ombudsman.gov.ua/files/2020/UN/BHR_covid19_eng.pdf> accessed 3 April 2021

——, *Business and Human Rights: Syllabus* (Pravo 2018)

Uvarova O and Buriakovska K, *Business and Human Rights. Textbook* (FOP Holembovska OO 2019)

Uvarova O and Razmetaieva Y (eds), *Business and Human Rights in Ukraine: Pilot Report* (Pravo 2017)

Van der Loo G, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration without Membership* (Brill Nijhoff 2016)

Working Group, *The Concept of Updating of the Civil Code of Ukraine (Концепція Оновлення Цивільного Кодексу України)* (ArtEk Publishing House 2020)

## Book chapters

Bueno N, 'The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability' in Liesbeth FH Enneking and others (eds), *Accountability, international business operations and the law: providing justice for corporate human rights violations in global value chains* (Routledge, Taylor & Francis Group 2020)

Deva S, 'From "Business or Human Rights" to "Business and Human Rights": What Next?' in Surya Deva and David Birchall (eds), *Research handbook on human rights and business* (Edward Elgar Publishign 2020)

Jochnick C and Bickford L, 'The Role of Civil Society in Business and Human Rights' in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and human rights: from principles to practice* (Routledge 2016)

Karnaukh B, 'Tort Law and Human Rights in Ukraine' in Ekaterina Aristova and Ugljesa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions (Hart Publishing 2021) (forthcoming)*

Lukas K, ‘Human Rights in the Supply Chain: Influence and Accountability’ in Radu Mares and Karin Lukas (eds), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation.* (BRILL 2011)

Macchi C and Bright C, ‘Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation’ in Martina Buscemi and others (eds), *Legal Sources in Business and Human Rights* (Brill | Nijhoff 2020)

Mares R, ‘Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress’ in Radu Mares and Karin Lukas (eds), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation.* (BRILL 2011)

——, ‘“Respect” Human Rights: Concept and Convergence’ in Robert Bird, Daniel Cahoy and Jamie Prenkert, *Law, Business and Human Rights* (Edward Elgar Publishing 2014) <http://www.elgaronline.com/view/9781782546610.00007.xml> accessed 23 March 2021

Martin-Ortega O and Methven O’Brien C, ‘Public Procurement and Human Rights: Interrogating the Role of the State as Buyer’ in Olga Martin-Ortega and Claire Methven O’Brien, *Public Procurement and Human Rights* (Edward Elgar Publishing 2019)

Melish TJ and Meidinger E, ‘Protect, Respect, Remedy and Participate: “New Governance” Lessons for the Ruggie Framework’ in Radu Mares and Karin Lukas (eds), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation.* (BRILL 2011)

Ruggie JG, ‘The Social Construction of the UN Guiding Principles on Business and Human Rights’ in Surya Deva and David Birchall (eds), *Research handbook on human rights and business* (Edward Elgar Publishing 2020)

Stephens B, ‘The Rise and Fall of the Alien Tort Statute’ in Surya Deva and David Birchall, *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020)

Taylor MB, ‘Human Rights Due Diligence in Theory and Practice’ in Surya Deva and David Birchall (eds), *Research handbook on human rights and business* (Edward Elgar Publishing 2020)

Wettstein F, ‘The History of “Business and Human Rights” and Its Relationship with Corporate Social Responsibility’ in Surya Deva and David Birchall (eds), *Research handbook on human rights and business* (Edward Elgar Publishing 2020)

## Journal articles

Bennett TB and others, ‘Divide & Concur: Separate Opinions & Legal Change’ (2018) 103 Cornell Law Review 62

Brabant S, Michon C and Savourey E, ‘The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance’ (2017) 50 Revue Internationale de la Compliance et de l’Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires

Brabant S and Savourey E, ‘France’s Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies’ (2017) 50 Revue Internationale de la Compliance et de l’Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires

Bright C and others, ‘Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?’ (2020) 22 Business & Politics 667

Broberg M and Sano H-O, ‘Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences’ (2018) 22 The International Journal of Human Rights 664

Brüggemeier G, ‘The Civilian Law of Delict: A Comparative and Historical Analysis’ (2020) 7 European Journal of Comparative Law and Governance 339

Bueno N and Bright C, ‘Implementing Human Rights Due Diligence Through Corporate Civil Liability’ (2020) 69 International and Comparative Law Quarterly 789

Chambers R and Vastardis AY, ‘Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability’ (2021) 21 Chicago Journal of International Law 323

Cossart S, Chaplier J and Beau De Lomenie T, ‘The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’ (2017) 2 Business and Human Rights Journal 317

Danilenko GM, ‘Implementation of International Law in CIS States: Theory and Practice.’ (1999) 10 EJIL 51

Graetz G and Franks DM, ‘Incorporating Human Rights into the Corporate Domain: Due Diligence, Impact Assessment and Integrated Risk Management’ (2013) 31 Impact Assessment and Project Appraisal 97

Karnaukh B, ‘General Delict v. Tort of Negligence: We Are Not as Different as Commonly Believed’ (2012) 1–2 Comparative Legal Studies 229

——, ‘Compensation of Damage Caused by a Third Party (Article 1172 of the Civil Code of Ukraine)’ (2020) Entrepreneurship, Economy and Law 29

Landau I, ‘Human Rights Due Diligence and the Risk of Cosmetic Compliance’ (2019) 20 (1) Melbourne Journal of International Law 221

Macchi C, ‘The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of “Climate Due Diligence”’ (2021) 6 Business and Human Rights Journal 93

Makarenko I, ‘Public Companies Non-Financial Reporting and Audit in Ukraine: Challenges and Prospects’ (2017) 1 Accounting and Financial Control 32

Mares R, ‘Corporate Transparency Laws: A Hollow Victory?’ (2018) 36 Netherlands Quarterly of Human Rights 189

Martin-Ortega O, ‘Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?’ (2014) 32 Netherlands Quarterly of Human Rights 44

Möslein F and Sørensen KE, ‘Sustainable Corporate Governance: A Way Forward’ (2021) 18 European Company Law 7

Muchlinski P, ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation’ (2012) 22 Business Ethics Quarterly 145

Orbie J, Vos H and Taverniers L, ‘EU Trade Policy and a Social Clause: A Question of Competences ?’ (2005) n° 17 Politique europeenne 159

Palombo D, ‘The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals’ (2019) 4 Business and Human Rights Journal 265

Peters A, ‘Corruption as a Violation of International Human Rights’ (2018) 29 European Journal of International Law 1251

Ramasastry A, ‘Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability’ (2015) 14 Journal of Human Rights 237

Robé J-P, ‘The Legal Structure of the Firm’ (2011) 1 Accounting, Economics, and Law

Roe M and others, ‘The Sustainable Corporate Governance Initiative in Europe’ (2021) Yale Journal on Regulation Online Bulletin. 7. 133

Sauvant KP, ‘The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned’ (2015) The Journal of World Investment & Trade 11

Savourey E and Brabant S, ‘Scope of the Law on the Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations’ (2017) 50 Revue Internationale de la Compliance et de l’Éthique des Affaires – Supplément à la Semaine Juridique Entreprise et Affaires

——, ‘The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption’ (2021) 6 Business and Human Rights Journal 141

Shveda Y and Park JH, ‘Ukraine’s Revolution of Dignity: The Dynamics of Euromaidan’ (2016) 7 Journal of Eurasian Studies 85

Taylor MB, ‘The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility’ (2011) 5 Etikk i praksis - Nordic Journal of Applied Ethics 9

Tretyak T, ‘The Obligation to Ensure the Appropriate Level of Care and Diligence as a Criterion of Acceptability of Impact on Neighboring Land Plot (Обов’язок Забезпечення Належного Рівня Дбайливості Та Обачності Як Критерій Прийнятності Впливу На Сусідню Земельну Ділянку)’ (2015) 3 The Law and the civil society 260

Zhornokyi V, ‘Reasonableness and Good Faith: The World Practice of Application in Relation to the Shareholders’ Liability for Company’s Debts (Розумність Та Добросовісність: Світова Практика Застосування Щодо Відповідальності Членів Органів Акціонерного Товариства За Його Борги)’ (2019) 2 Entrepreneurship, Economy and Law 24

——, ‘The Fault of a Legal Entity: The Contemporary State of Ism’ (2020) Entrepreneurship, Economy and Law 160

Zhuk V and others, ‘Development of Non-Financial Reporting of Agricultural Enterprises of Ukraine’ (2020) 6 Agricultural and Resource Economics: International Scientific E-Journal 76

## Blog posts

Aristova E and Lopez C, ‘UK Okpabi et al v Shell: UK Supreme Court Reaffirms Parent Companies May Owe a Duty of Care Towards Communities Impacted by Their Subsidiaries in Third Countries’ (*Opinio Juris*, 16 February 2021) <https://opiniojuris.org/2021/02/16/uk-okpabi-et-al-v-shell-uk-supreme-court-reaffirms-parent-companies-may-owe-a-duty-of-care-towards-communities-impacted-by-their-subsidiaries-in-third-countries/> accessed 8 May 2021

Bueno N, ‘Mandatory Human Rights Due Diligence Legislation’ (*Teaching Business and Human Rights Forum*, 22 October 2019) <https://teachbhr.org/resources/teaching-bhr-handbook/mandatory-human-rights-due-diligence/> accessed 19 April 2021

——, ‘Human Rights Due Diligence Legislation in Switzerland: The State-of-Play after the Swiss Responsible Business Initiative’ (*NOVA BHRE Blog*, 1 February 2021) <https://novabhre.novalaw.unl.pt/human-rights-due-diligence-switzerland/> accessed 19 April 2021

Buhmann K, ‘Human Rights Due Diligence’ (*Teaching Business and Human Rights Forum*, 6 November 2018) <https://teachbhr.org/resources/teaching-bhr-handbook/teaching-notes/human-rights-due-diligence/> accessed 12 April 2021

Černič JL, ‘Mapping Business and Human Rights in Central and Eastern Europe’ (*Cambridge Core Blog*, December 2020) <https://www.cambridge.org/core/blog/2020/12/11/mapping-business-and-human-rights-in-central-and-eastern-europe/> accessed 19 May 2021

Chatelain L, ‘Corporate Due Diligence and Civil Liability: Comment from Multi-Stakeholders’ (*NOVA BHRE Blog*, 3 March 2021) <https://novabhre.novalaw.unl.pt/corporate-due-diligence-civil-liability-comment-from-multi-stakeholders/> accessed 5 May 2021

Cherepanova V, ‘Get Ready for Mandatory Human Rights Due Diligence’ (*The FCPA Blog*, 23 November 2020) <https://fcpablog.com/2020/11/23/get-ready-for-mandatory-human-rights-due-diligence/> accessed 13 May 2021

Edmans A, Enriques L and Thomsen S, ‘EC Corporate Governance Initiative Series: Call for Reflection on Sustainable Corporate Governance’ (*Oxford Law Faculty*, April 2021) <https://www.law.ox.ac.uk/business-law-blog/blog/2021/04/ec-corporate-governance-initiative-series-call-reflection-sustainable> accessed 26 April 2021

‘First Court Decision in the Climate Litigation against Total: A Promising Interpretation of the French Duty of Vigilance Law’ (*SHERPA*) <https://www.asso-sherpa.org/first-court-decision-in-the-climate-litigation-against-total-a-promising-interpretation-of-the-french-duty-of-vigilance-law> accessed 25 May 2021

Gercheva D and Sonderbye N, ‘Responsible Business Conduct Accelerates Social and Economic Development’ (*UNDP*, February 2021) <https://www.ua.undp.org/content/ukraine/en/home/blog/2021/responsible-business.html> accessed 3 April 2021

Grabosch R, ‘The German Supply Chain Due Diligence Act in the Making – What to Expect’ (*NOVA BHRE Blog*, 15 February 2021) <https://novabhre.novalaw.unl.pt/german-supply-chain-due-dligence-act-what-to-expect/> accessed 23 April 2021

‘Indigenous Organisations and NGO Coalition Warn Top French Supermarket Casino: Do Not Sell Beef from Deforestation in Brazil and Colombia – or Face French Law’ (*SHERPA*) <https://www.asso-sherpa.org/indigenous-organisations-and-ngo-coalition-warn-top-french-supermarket-casino-do-not-sell-beef-from-deforestation-in-brazil-and-colombia-or-face-french-law-stop-gambling-with-our-forests> accessed 25 May 2021

Khalimon Z and Daskaliuk O, ‘Content and Legal Regulation of Fiduciary Duties of the Director (In Ukrainian)’ (*Sayenko Kharenko*, 14 August 2020) <https://sk.ua/publications/content-and-legal-regulation-of-fiduciary-duties-of-the-director-in-ukrainian/> accessed 15 May 2021

Kheda S, ‘Bribery & Corruption Laws and Regulations | Ukraine’ (*GLI - Global Legal Insights*) <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/ukraine> accessed 12 May 2021

McCorquodale R, ‘Some Concluding Remarks on Business and Human Rights in Switzerland’ (*NOVA BHRE Blog*, 28 February 2021) <https://novabhre.novalaw.unl.pt/concluding-remarks-bhr-switzerland/> accessed 22 April 2021

Morrison & Foerster LLP, ‘German Federal Government Agrees On Act On Human Rights Due Diligence Obligations Of Companies’ (*JD Supra*)

<https://www.jdsupra.com/legalnews/german-federal-government-agrees-on-act-9488832/> accessed 23 April 2021

MVO Platform, 'Update: Frequently Asked Questions about the New Dutch Child Labour Due Diligence Law' (*MVO Platform*, 3 June 2019) <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/> accessed 22 April 2021

——, 'Dutch Bill on Responsible and Sustainable International Business Conduct a Major Step towards Protecting Human Rights and the Environment Worldwide' (*MVO Platform*, 11 March 2021) <https://www.mvoplatform.nl/en/dutch-bill-on-responsible-and-sustainable-international-business-conduct-a-major-step-towards-protecting-human-rights-and-the-environment-worldwide/> accessed 22 April 2021

'On "sanctions" as special restrictive measures: regulation and risks of application' (*RPR*, 1 March 2021) <https://rpr.org.ua/news/pro-sanktsii-iak-spetsial-ni-obmezhuval-ni-zakhody-rehlamentatsiia-i-ryzyky-zastosuvannia/> accessed 27 May 2021

Roorda L, 'Wading through the (Polluted) Mud: The Hague Court of Appeals Rules on Shell in Nigeria' (*Rights as Usual*) <https://rightsasusual.com/?p=1388> accessed 8 May 2021

Ruggie J, 'Transcript of the Keynote Speech Delivered at the Webinar on Corporate Due Diligence and Civil Liability, Organised by the Nova Centre on Business, Human Rights and the Environment with the Support of the Portuguese Presidency of the Council of the EU' (*NOVA BHRE Blog*, 23 February 2021) <https://novabhre.novalaw.unl.pt/transcript-keynote-speech-john-ruggie/> accessed 26 April 2021

Svechkar I and Glushchenko S, 'State Aid in Ukraine' (*Lexology*, July 2019) <https://www.lexology.com/library/detail.aspx?g=e65d7e9b-f31c-43db-8117-99fe3fd2ea8f> accessed 12 May 2021

Taylor M, 'Mandatory Human Rights Due Diligence in Norway – A Right to Know' (*Blogging for Sustainability*, April 2021) <https://www.jus.uio.no/english/research/areas/companies/blog/companies-markets-and-sustainability/2021/mandatory-human-rights--taylor.html> accessed 23 April 2021

Triponel A, 'Business and Human Rights Legislation: An Overview' (*Triponel Consulting*, 14 October 2019) <https://triponelconsulting.com/business-and-human-rights-legislation/> accessed 15 April 2021

Uvarova O, 'Implementing the UNGPs in Eastern Europe: Is Ukraine the Example to Follow?' (*Rights as Usual*) <https://rightsasusual.appspot.com/?p=1404> accessed 1 April 2021

Wilde-Ramsing J, Wolfkamp M and Ollivier de Leth D, 'The next Step for Corporate Accountability in the Netherlands: The New Bill for Responsible and Sustainable

International Business Conduct' (*NOVA BHRE Blog*, 18 March 2021) <https://novabhre.novalaw.unl.pt/new-bill-for-responsible-sustainable-international-business-conduct-netherlands/> accessed 19 March 2021

Yurchenko R, 'Trust, but check: what are the fiduciary duties of directors' (*Mind.ua*) <https://mind.ua/openmind/20214664-doviryaj-ale-pereviryaj-shcho-take-fiduciarni-obovyazki-direktoriv> accessed 18 May 2021

## Reports

Association4U, 'Guidelines for the Ukrainian Public Administration on the Approximation of Ukrainian Legislation to EU Law' (2018) <https://eu-ua.kmu.gov.ua/sites/default/files/inline/files/a4u_legal_approximation_guidelines_en_2018.10.pdf> accessed 20 May 2021

Business & Human Rights Resource Centre, 'Modern Slavery Act: Five Years of Reporting. Conclusions from Monitoring Corporate Disclosure' (2021) <https://media.business-humanrights.org/media/documents/Modern_Slavery_Act_2021.pdf> accessed 19 April 2021

Corporate Governance Professional Association and Centre for CSR Development Ukraine, 'Company Transparency Index 2019 – Ukraine' (2019) <https://cgpa.com.ua/wp-content/uploads/2020/10/Transp_index_2019_en_web.pdf> accessed 13 May 2021

De Groen WP and others, 'Study on the Non-Financial Reporting Directive: Final Report' (Publications Office 2021) Study for the European Commission Directorate General for Financial Stability, Financial Services and Capital Markets Union

De Schutter PO and others, 'Human Rights Due Diligence: The Role of States' (2012) <https://www.cidse.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf> accessed 3 May 2021

DIHR, 'Human Rights and the 2030 Agenda for Sustainable Development: Lessons Learned and Next Steps' (2018) <https://www.humanrights.dk/sites/humanrights.dk/files/media/document/HR%202030%20agenda.pdf> accessed 15 April 2021

——, 'Human Rights Impact Assessment: Guidance and Toolbox' (2020) <https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hria_toolbox_2020/eng/dihr_hria_guidance_and_toolbox_2020_eng.pdf> accessed 7 April 2021

——, 'Business And Human Rights National Action Plans – A Snapshot in 2020' (2020) <https://globalnaps.org/wp-content/uploads/2020/11/summary-of-bhr-naps-november-2020-dihr_final.pdf> accessed 14 February 2021

——, '"Smart Mix" in the Nordics. A Stocktake on Measures to Foster Business Respect for Human Rights' (2021) <https://www.humanrights.dk/sites/humanrights.dk/files/media/document/Smart%20Mix%20in%20the%20Nordics_2021.pdf> accessed 3 May 2021

——, 'Sustainable Corporate Governance Consultation Response' (2021) <https://www.humanrights.dk/publications/sustainable-corporate-governance-consultation-response> accessed 15 May 2021

DIHR and ICAR, 'National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks' (2014) <https://media.business-humanrights.org/media/documents/files/documents/DIHR_-_ICAR_National_Action_Plans_NAPs_Report.pdf> accessed 23 March 2021

——, 'National Action Plans on Business and Human Rights Toolkit' (2017) <https://www.humanrights.dk/publications/national-action-plans-business-human-rights-toolkit-2017-edition> accessed 13 April 2021

ECCJ, 'Key Features of Mandatory Human Rights Due Diligence Legislation' (2018) <https://corporatejustice.org/eccj-position-paper-mhrdd-final_june2018_3.pdf> accessed 15 February 2021

——, 'EU Model Legislation on Corporate Responsibility to Respect Human Rights and the Environment. Legal Brief' (2020) <http://corporatejustice.org/wp-content/uploads/2021/04/2020-legal-brief.pdf> accessed 4 May 2021

——, 'Evidence for Mandatory Human Rights and Environmental Due Diligence Legislation' (2021) <https://corporatejustice.org/eccj-publications/16867-evidence-for-mandatory-human-rights-and-environmental-due-diligence-legislation-january-2021> accessed 14 February 2021

——, 'Corporate Due Diligence Laws and Legislative Proposals in Europe. Comparative Table' (2021) <https://corporatejustice.org/wp-content/uploads/2021/05/Corporate-due-diligence-laws-and-legislative-proposals-in-Europe-May-2021.pdf> accessed 10 May 2021

ECCJ and CORE, 'Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check' (2020) <http://corporatejustice.org/wp-content/uploads/2021/03/debating-mhrdd-legislation-a-reality-check.pdf> accessed 3 May 2021

European Commission, 'Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights. Overview of Progress' (2019) <https://ec.europa.eu/docsroom/documents/34963> accessed 1 May 2021

European Commission. Directorate General for Justice and Consumers, 'Inception Impact Assessment of the Sustainable Corporate Governance Inititative' (2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance> accessed 26 April 2021

European Parliament, Directorate-General for External Policies, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries' (2019) <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf> accessed 5 May 2021

European Parliamentary Research Service, 'Non-Financial Reporting Directive. Implementation Appraisal Briefing' (2021) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf> accessed 24 April 2021

EY, 'Study on Directors' Duties and Sustainable Corporate Governance: Final Report' (Publications Office 2020) Study for the European Commission Directorate General for Justice and Consumers

Faracik B, 'Study on Implementation of the UN Guiding Principles on Business and Human Rights' (2017) Study for the European Parliament's Sub-Committee on Human Rights <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf> accessed 2 May 2021

Ilko Kucheriv Democratic Initiatives Foundation, 'Human Rights Observance in Ukraine: What Ukrainians Know and Think of Human Rights. Progress Study 2020' (2020) <https://www.ua.undp.org/content/ukraine/en/home/library/democratic_governance/what-ukrainians-know-and-think-about-human-rights--assessment-of.html> accessed 24 May 2021

ILO, 'Achieving Decent Work in Global Supply Chains, Report for Discussion at the Technical Meeting on Achieving Decent Work in Global Supply Chains (Geneva, 25–28 February 2020)' (2020)

International Learning Lab on Public Procurement and Human Rights, 'Public Procurement and Human Rights: A Survey of Twenty Jurisdictions' (2016) <https://www.hrprocurementlab.org/wp-content/uploads/2016/06/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf> accessed 11 May 2021

'ISO 26000 and OECD Guidelines - Practical Overview of the Linkages' (2019) <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100418.pdf> accessed 15 April 2021

Marx A, Bright C and Wouters J, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries: Study' (2019) Study for the European Parliament's Sub-Committee on Human Rights

Ministry of Environmental Protection and Natural Resources of Ukraine, 'Report on Incentive Tools for Green Modernization of Industrial Enterprises in the EU Countries and in Ukraine' (2021) <https://mepr.gov.ua/files/%D0%B7%D0%B2%D1%96%D1%82.pdf> accessed 30 April 2021

National Environmental Centre of Ukraine, 'Implementation of Environmental Impact Assessment in Ukraine: Risk Analysis and Prospects (Public Vision)' (2019) <https://bit.ly/3gRCpjZ> accessed 30 April 2021

OECD, 'OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine' (2021) <https://www.oecd.org/corporate/soe-review-ukraine.htm> accessed 19 May 2021

OECD Directorate for Financial and Enterprise Affairs Investment Committee, 'Ukraine: Follow-Up Report on the Adherence to the Declaration on International Investment and Multinational Enterprises' (2017) DAF/INV/RD(2017)6

OHCHR and UNGC, 'Embedding Human Rights in Business Practice I' (2004) <https://www.unglobalcompact.org/library/12> accessed 9 March 2021

——, 'Embedding Human Rights in Business Practice II' (2007) <https://www.unglobalcompact.org/library/12> accessed 9 March 2021

Oxfam, 'EU Tax Haven Blacklist Review' (2020) <https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2020-02/2020-02-17%20Oxfam%20background%20briefing%20-%20EU%20tax%20haven%20list.pdf> accessed 24 May 2021

Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 'The Nexus between Corruption and Human Rights' <https://referenceworks.brillonline.com/entries/international-year-book-and-statesmens-who-s-who/*-SIM_org_39387> accessed 13 May 2021

Smit L and others, 'Study on Due Diligence Requirements through the Supply Chain: Final Report' (Publications Office 2020) Study for the European Commission Directorate General for Justice and Consumers

UN Ukraine, 'UN Position Paper on Labor Code' (2020) <https://ukraine.un.org/sites/default/files/2020-10/UN%20Position%20Paper%20on%20Labour%20Code_final%20version.pdf> accessed 10 May 2021

Uvarova O, 'The National Baseline Assessment on Business and Human Rights in Ukraine' (2019) Report developed by the Yaroslav Mudryi National Law University in cooperation with the Ministry of Justice of Ukraine <https://minjust.gov.ua/files/general/2019/07/10/20190710170838-51.pdf> accessed 13 April 2021

——, ‘The National Baseline Assessment on Business and Human Rights in Ukraine. Executive Summary’ Report developed by the Yaroslav Mudryi National Law University in cooperation with the Ministry of Justice of Ukraine <https://legalforum.nlu.edu.ua/wp-content/uploads/2019/06/executive-summary.pdf> accessed 14 February 2021

Vyshlinsky H, Yablonovskyy D and Prokhorov B, ‘How Can Ukrainian SME Grow into National and Global Champions?’ (2019) Policy Paper <https://ces.org.ua/en/how-can-ukrainian-sme-grow-into-national-and-global-champions/> accessed 6 May 2021

Zerk DrJ, ‘Corporate Liability for Gross Human Rights Abuses – Towards a Fairer and More Effective System of Domestic Law Remedies’ (2012) <https://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomesticelawremedies.pdf> accessed 6 May 2021

## Electronic resources

‘1st Regional Forum on Business and Human Rights in Eastern Europe and Central Asia Making Human Rights a Priority for Business’ (*Regional BHR Forum*, November 2020) <https://www.businesshumanrights-ecis.com> accessed 3 April 2021

‘2019 SBA Fact Sheet UKRAINE’ <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/sba-fs-2019_ukraine.pdf> accessed 6 May 2021

2020 UN Forum on Business and Human Rights, ‘Business and Human Rights in Central and Eastern Europe: Rebuilding Trust for New Social Contract (A Transcript of the Session in Russian)’ (*Sched*) <https://static.sched.com/hosted_files/2020unforumbhr/c7/CEE%20session_2020_FINAL%20Rus%20revised.pdf> accessed 31 March 2021

‘2020 UN Forum on Business and Human Rights Schedule’ (*Sched*, November 2020) <https://2020unforumbhr.sched.com/> accessed 3 April 2021

‘Activities of Enterprises: Number of Large, Medium, Small and Micro Enterprises by Types of Economic Activity (2010-2019)’ (*State Statistics Service of Ukraine*) <http://www.ukrstat.gov.ua/operativ/menu/menu_u/sze_20.htm> accessed 6 May 2021

‘Barrier-Free Environment in Business: A New Section on the Diia.Business Portal’ (*UNDP*) <https://www.ua.undp.org/content/ukraine/en/home/presscenter/pressreleases/2021/barrier-free-business--a-new-section-on-the-diia-business-portal.html> accessed 16 May 2021

‘Business and Human Rights: Key Challenges for New Democracies (Panel Discussion: Programme and Draft Resolution, Yaroslav Mudryi National Law University, Kharkiv, 25 September 2019)’ (September 2019) <https://legalforum.nlu.edu.ua/wp-content/uploads/2019/06/forum_business_2019_prohrama_ukr_press.pdf> accessed 3 April 2021

‘Cases and News | Business Process Systematisation’ (*business.diia.gov.ua*) <https://business.diia.gov.ua/cases/sistematizacia-biznes-procesiv> accessed 16 May 2021

‘Chronology of Major Events in Georgia EU Cooperation’ (*georgiaembassyusa.org*) <https://georgiaembassyusa.org/wp-content/uploads/2018/01/Chronology-of-Major-Events-in-Georgia-EU-Cooperation.pdf> accessed 21 May 2021

‘Complaints Database’ (*OECD Watch*) <https://www.oecdwatch.org/complaints-database/> accessed 14 May 2021

‘Corporate Human Rights Due Diligence in Practice: The Union Hidalgo Case in France’ (*Oxford Law Faculty*, 19 November 2020) <https://www.law.ox.ac.uk/events/corporate-human-rights-due-diligence-practice-union-hidalgo-case-france> accessed 25 May 2021

‘Decent Work Country Programme Ukraine 2020-2024’ (*ILO*, 3 February 2021) <http://www.ilo.org/budapest/what-we-do/decent-work-country-programmes/WCMS_774454/lang--en/index.htm> accessed 27 May 2021

‘Doing Business 2020, Fact Sheet: Europe and Central Asia’ (*Doing Business*) <https://www.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/DB20-FS-ECA.pdf> accessed 16 April 2021

‘Due Diligence’ (*KPMG*, 11 February 2021) <https://home.kpmg/ua/en/home/services/deal-advisory/transaction-services/due-diligence.html> accessed 13 May 2021

‘EU Taxonomy for Sustainable Activities’ (*European Commission*) <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en> accessed 15 May 2021

‘Europe Inc. Wins as EU Delays New Business Rules’ (*POLITICO*, 21 May 2021) <https://www.politico.eu/article/europe-inc-puts-brussels-new-business-rules-on-ice/> accessed 25 May 2021

‘Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation’ (*OHCHR*, December 2006) <https://unsdg.un.org/resources/frequently-asked-questions-human-rights-based-approach-development-cooperation> accessed 20 May 2021

‘Georgia | National Action Plans on Business and Human Rights’ (16 November 2017) <https://globalnaps.org/country/georgia/> accessed 16 April 2021

‘Guidelines for MNEs - OECD, Proactive Agenda’ <https://mneguidelines.oecd.org/proactiveagenda.htm> accessed 5 May 2021

‘Guidelines for MNEs - OECD, Responsible Business Conduct by Sector’ <https://www.oecd.org/industry/inv/mne/> accessed 15 April 2021

Hloba D, 'Tax aspects of due diligence in the relationship with the counterparty' (*PRAVO.UA*, 24 February 2021) <https://pravo.ua/podatkovi-aspekti-nalezhnoi-obachnosti-u-vidnosinah-z-kontragentom/> accessed 13 May 2021

'Homepage | UN Global Compact' <https://www.unglobalcompact.org/> accessed 14 March 2021

'Human Rights Due Diligence | National Action Plans on Business and Human Rights' <https://globalnaps.org/issue/human-rights-due-diligence/> accessed 24 March 2021

'Human Rights in the Business Environment Programme' (*UCU Law School*) <http://law.ucu.edu.ua/programa-prava-lyudyny-v-biznes-seredovyshhi/> accessed 3 April 2021

'Human Rights-Based Approach' (*UNSDG*) <https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach, https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach> accessed 24 May 2021

'I Kharkiv International Legal Forum' (2017) <https://legalforum.nlu.edu.ua/2017/> accessed 2 April 2021

'II Kharkiv International Legal Forum' (2018) <https://legalforum.nlu.edu.ua/2018/> accessed 2 April 2021

'III Kharkiv International Legal Forum' (2019) <https://legalforum.simcord.com/en/> accessed 3 April 2021

'ISO 26000 — Social Responsibility' (*ISO*) <https://www.iso.org/iso-26000-social-responsibility.html> accessed 15 April 2021

'IV Kharkiv International Legal Forum' (2020) <https://legalforum.nlu.edu.ua/en/program/> accessed 3 April 2021

'Key Provisions of EU Global Human Rights Sanctions Regime' (*European Commission*, December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2419> accessed 27 May 2021

'Lack of Trust in the Judiciary Is the Major Obstacle to Foreign Investment in Ukraine' (*European Business Association*, 9 November 2020) <https://eba.com.ua/en/nedovira-do-sudovoyi-systemy-posila-1-mistse-sered-pereshkod-dlya-inozemnyh-investytsij/> accessed 20 May 2021

'Map: Corporate Accountability Legislative Progress in Europe' (*ECCJ*, May 2021) <https://corporatejustice.org/publications/mapping-corporate-accountability-legislative-progress-in-europe/> accessed 5 May 2021

‘Ministry of Justice has begun the implementation of the UN Guiding Principles on Business and Human Rights’ (*Ministry of Justice*) <https://minjust.gov.ua/news/ministry/minyust-rozpochav-robotu-nad-implementatsieyu-kerivnih-printsipiv-oon-u-sferi-biznesu-ta-prav-lyudini-v-ukraini> accessed 2 April 2021

‘Non-Discrimination: Groups in Vulnerable Situations’ (*OHCHR*) <https://www.ohchr.org/EN/Issues/Health/Pages/GroupsInVulnerableSituations.aspx> accessed 24 May 2021

‘Notice of electronic public consultations on the draft Order of the Cabinet of Ministers of Ukraine “On approval of the Action plan to the National Human Rights Strategy 2021-2023” (Повідомлення про проведення електронних консультацій з громадськістю щодо проєкту розпорядження Кабінету Міністрів України ’Про затвердження Плану дій з реалізації Національної стратегії у сфері прав людини на 2021-2023 роки’)’ (*Ministry of Justice*, 1 April 2021) <https://minjust.gov.ua/uk/m/04012021-povidomlennya-pro-provedennya-elektronnih-konsultatsiy-z-gromadskistyu-schodo-proektu-rozporyadjennya-kabinetu-ministriv-ukraini-pro-zatverdjennya-planu-diy-z-realizatsii-natsionalnoi-strategii-u-sferi-prav-lyudini-na-2021-2023-roki> accessed 23 May 2021

‘Office of the Ombudsperson to Become a Platform for Communication of the National Action Plan on Business and Human Rights’ (*Ukrainian Parliament Commissioner for Human Rights*, 29 January 2019) <https://ombudsman.gov.ua/ua/all-news/pr/29119-oz-ofis-ombudsmana-stane-osnovnoyu-platformoyu-dlya-komunikatsiii-z-pitan/> accessed 6 April 2021

‘Ratifications of ILO Conventions: Ratifications for Ukraine’ <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102867> accessed 19 May 2021

‘Reports of the SRSG on Human Rights and Transnational Corporations and Other Business Enterprises’ (*OHCHR*) <https://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx> accessed 9 March 2021

‘Russian Aggression’ (*Permanent Mission of Ukraine to the United Nations*) <http://ukraineun.org/en/ukraine-and-un/russian-aggression/> accessed 19 May 2021

‘Status of Ratification of 18 International Human Rights Treaties’ (*OHCHR*) <https://indicators.ohchr.org/> accessed 19 May 2021

‘Strategic Action Plan’ (*Ukrainian Parliament Commissioner for Human Rights*) <https://ombudsman.gov.ua/ua/page/secretariat/docs/strategichnij-plan-diyalnosti.html> accessed 14 April 2021

‘Sustainable Corporate Governance’ (*European Commission*) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance> accessed 26 April 2021

‘Sustainable Finance Package’ (*European Commission*, April 2021) <https://ec.europa.eu/info/publications/210421-sustainable-finance-communication_en> accessed 24 April 2021

‘Switzerland: Responsible Business Initiative Rejected at Ballot Box despite Gaining 50.7% of Popular Vote’ (*Business & Human Rights Resource Centre*) <https://www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal/> accessed 19 April 2021

‘The Bill Initiated by the President Is Designed to Eliminate the Influence of Oligarchs in Ukraine’ (*Official website of the President of Ukraine*) <https://www.president.gov.ua/en/news/inicijovanij-prezidentom-zakonoproekt-poklikanij-usunuti-vpl-68597> accessed 20 May 2021

‘The Equator Principles’ (*Equator Principles*) <https://equator-principles.com/about/> accessed 15 April 2021

‘The Human Rights Guide to the Sustainable Development Goals | Linking Human Rights with All Sustainable Development Goals and Targets’ (*DIHR*) <https://sdg.humanrights.dk/> accessed 15 April 2021

‘The Implementation Action Plan for the Association Agreement between Ukraine and the EU’ (*Ministry of Justice*) <https://minjust.gov.ua/eurointergration/plan_zahodiv> accessed 20 May 2021

‘The Inaugural Meeting of the Intersectoral Platform on Business and Human Rights Took Place’ (*Ukrainian Parliament Commissioner for Human Rights*, 15 December 2020) <https://www.ombudsman.gov.ua/ua/all-news/pr/v%D1%96dbulosya-ustanovche-zas%D1%96dannya-m%D1%96zhsektoralno%D1%97-platformi-z-pitan-b%D1%96znesu-%D1%96-prav-lyudini/> accessed 6 April 2021

‘The Ukrainian edition of the UN Guiding Principles on Business and Human Rights was presented in the MFA’ (December 2014) <https://mfa.gov.ua/news/30627-v-mzs-prezentovano-ukrajinsyke-vidannya-kerivnih-principiv-oon-z-pitany-pidprijemnicykoji-dijalynosti-v-aspekti-prav-lyudini> accessed 1 April 2021

‘The Voluntary Principles on Security and Human Rights’ (*Voluntary Principles on Security and Human Rights*) <https://www.voluntaryprinciples.org/> accessed 15 April 2021

‘Ukraine | National Action Plans on Business and Human Rights’ (29 March 2019) <https://globalnaps.org/country/ukraine/> accessed 14 February 2021

‘Ukraine | Overview’ (*World Bank*) <https://www.worldbank.org/en/country/ukraine/overview> accessed 20 May 2021

‘Ukraine | UN Global Compact’ <https://www.unglobalcompact.org/engage-locally/europe/ukraine> accessed 14 May 2021

‘Ukraine - Trade’ (*European Commission*) <https://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/> accessed 20 May 2021

‘Ukraine: Freedom in the World 2021 Country Report’ (*Freedom House*) <https://freedomhouse.org/country/ukraine/freedom-world/2021> accessed 19 May 2021

‘Ukraine Imposes a New Set of Anti-Russian Sanctions’ (*Sanctions & Export Controls Update*, 29 March 2021) <https://sanctionsnews.bakermckenzie.com/ukraine-imposes-a-new-set-of-anti-russian-sanctions/> accessed 27 May 2021

‘Ukraine on Its Way to Reform 50-Year-Old Labour Law’ (*ILO*, 5 November 2020) <http://www.ilo.org/budapest/whats-new/WCMS_760075/lang--en/index.htm> accessed 10 May 2021

‘UkraineInvest Guide | March-May 2021’ (*UkraineInvest*, May 2021) <https://ukraineinvest.gov.ua/guide/> accessed 20 May 2021

‘Working Group on Human Rights and Transnational Corporations and Other Business Enterprises’ (*OHCHR*) <https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> accessed 24 March 2021

## Other sources

‘Decree of The President Of Ukraine No 119/2021 “On the National Strategy for Human Rights” (Unofficial Translation)’ <https://globalnaps.org/wp-content/uploads/2021/05/ukrainian-bhr-chapter-2021-unofficial-english-translation.pdf> accessed 14 May 2021

*2020 UN Forum on Business and Human Rights: High Level Plenary (Valeria Kolomiets, Deputy Minister on European Integration, Ministry of Justice of Ukraine)* (2020) <http://webtv.un.org/search/high-level-plenary-forum-on-business-and-human-rights-2020/6210118752001/?term=&lan=english&cat=Meetings%2FEvents&page=3> accessed 14 April 2021

Anti-Slavery International and others to Mr. Frans Timmermans, Executive Vice President for the European Green Deal, Mr. Didier Reynders, Commissioner for Justice and European Commission, ‘Regarding: NGO Support for the EU Commission Plans on Sustainable Corporate Governance and Response to Criticism’ (24 May 2021)

<https://corporatejustice.org/wp-content/uploads/2021/05/letter_ngo_support_for_eu_commission_plans_on_sustainable_corporate_governance.pdf> accessed 26 May 2021

Deva S, 'Achieving SDGs by Respecting Human Rights: A Pathway for Companies' (31 May 2019) <sec.or.th/Documents/Seminar/Attach/6/Keynote%20Speech%20Dr.%20Surya%20Deva.pdf > accessed 1 May 2021

ECCJ, *Annual General Meeting 'Corporate Accountability: From Gaps to Opportunities' (Day 1)* (2021)

Khystova H, 'The Doctrine of Positive Human Rights Obligations of the State: Doctoral Thesis' (Yaroslav Mudryi National Law University 2019) <http://nauka.nlu.edu.ua/download/diss/Xristova/d_Xristova.pdf> accessed 12 May 2021

New University, *Academic Forum of the New University: Business and Human Rights in Central and Eastern Europe (Speech by Olena Uvarova)* (2021) <https://www.nova-uni.si/en/academic-forum-of-the-new-university-business-and-human-rights-in-central-and-eastern-europe/> accessed 27 May 2021

Oxford Law Faculty, *Book Launch: Multinational Enterprises and the Law* (2021) <https://www.youtube.com/watch?v=MUBIB7Fb0GM> accessed 18 May 2021

Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *On the Precedents of Mandatory Human Rights Due Diligence in Europe - 2021 Webinar Series (Part II)* (2021) <https://www.youtube.com/watch?v=cu1I-JNItDE&t=893s> accessed 25 May 2021

Ruggie JG, 'European Commission Initiative on Mandatory Human Rights Due Diligence and Directors' Duties' <https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf> accessed 26 April 2021

Ruggie JG, 'Letter from John Ruggie to German Ministers Regarding Alignment of Draft Supply Chain Law with the UNGPs' (9 March 2021) <https://shiftproject.org/ruggie-letter-german-law-supply-chain-law/> accessed 23 April 2021

Shift, 'Fulfilling the State Duty to Protect: A Statement on the Role of Mandatory Measures in a "Smart Mix"' <https://shiftproject.org/fulfilling-the-state-duty-to-protect-a-statement-on-the-role-of-mandatory-measures-in-a-smart-mix/> accessed 19 May 2021

Vronska H and Burlakov S, 'Facilitating Judicial Proceedings Related to the Public Interests in Environmental Protection' (Kyiv, 15 February 2021) <https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/ENG_Environment_Presentation.pdf> accessed 7 May 2021