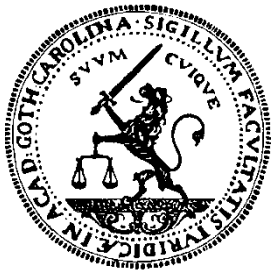

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From the Factory Floor to the Board-room

Ensuring Workers' Rights in Global EU Value Chains Through Human Rights Due Diligence

JURM02 Graduate thesis

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Summary

Many modern-day businesses operate in global and highly complex value chains; the journey from raw material to finished product can span multiple continents, sometimes numerous times. These global value chains are increasingly being recognized as home to extensive human rights abuses, including against workers. To address this, several initiatives have been introduced in recent years, both in Europe and internationally, which aim to increase companies' responsibility for human rights in value chains. A prominent such example is laws on mandatory human rights due diligence.

This thesis aims to assess how extensively upcoming laws should require EU companies to conduct due diligence regarding workers' rights across their value chains. The normative nature of the question requires the investigation to adopt a *de lege ferenda* approach, with practical experiences from the implementation of existing regulations serving as guidance.

The thesis examines the regulatory frameworks that govern corporate responsibility for human rights in value chains at the international, EU, and national levels. It finds that there traditionally has been a lack of binding legislation in the area, leading to voluntary guidelines playing a central role. This is changing with recent legislative initiatives, such as those on mandatory human rights due diligence.

The study further finds that the value chain extension varies significantly between different existing laws and guidelines on human rights due diligence. Voluntary instruments generally establish an extensive responsibility covering the entire value chain, both upstream and downstream, while hard laws are more cautious and limit the responsibility to certain value chain levels or types of activities.

The thesis concludes that the concept of human rights due diligence inherently contains several elements that make the responsibility manageable for companies; its extent is determined by the company's size, resources and de facto leverage over the entity connecting it to the harm, and efforts can be focused where the risks are most significant. In view of this, the investigation finds that it is uncalled for to exclude entire sections of the value chain from the responsibility in emerging regulations. If due diligence covering the full value chain is not reasonable or possible in a specific case, there are already mechanisms that take this into account. With a significant portion of workers' rights violations occurring deep in the value chains, an extensive responsibility is simply necessary for the laws to have the desired effect.

Sammanfattning

Många företag verkar idag i globala och ofta mycket komplexa värdekedjor; vägen från råmaterial till färdig produkt kan korsa flera kontinenter, ibland många gånger. Dessa värdekedjor uppmärksammas allt oftare som hem åt omfattande människorättskränkningar, däribland mot arbetare. Med anledning av detta har flera initiativ tagits de senaste åren, både i Europa och internationellt, som syftar till att öka företags ansvar för mänskliga rättigheter i värdekedjan. Ett framträdande sådant exempel är krav på *human rights due diligence* (tillbörlig aktsamhet i fråga om mänskliga rättigheter).

Den här uppsatsen ämnar bedöma hur stor del av EU-företagens värdekedja som i kommande lagar bör täckas av ansvaret att iaktta *human rights due diligence* gällande arbetares rättigheter. Frågeställningens normativa karaktär förutsätter ett *de lege ferenda*-perspektiv på rätten, där praktiska lärdomar från befintliga regleringar används som ett centralt rättesnöre.

I uppsatsen kartläggs de regelverk som styr företags ansvar för mänskliga rättigheter i värdekedjan på internationell, EU- och nationell nivå. Studien visar att det traditionellt har funnits få bindande lagregleringar på området och att olika former av frivilliga riktlinjer därmed har varit av stor betydelse. Detta håller på att förändras genom ny lagstiftning, såsom om obligatorisk *human rights due diligence.*

Studien finner vidare att värdekedjeansvarets omfattning varierar påtagligt mellan olika befintliga lagar och riktlinjer om *human rights due diligence*. De frivilliga instrumenten föreskriver generellt ett omfattande ansvar som täcker hela värdekedjan, både uppströms och nedströms, medan bindande lagar är mer återhållsamma och begränsar ansvaret till vissa typer av aktiviteter eller nivåer av värdekedjan.

I uppsatsen dras slutsatsen att konceptet *human rights due diligence* innehåller flera komponenter som gör ansvaret hanterbart för företag. Bland annat bestäms ansvarets omfattning av företagets storlek, resurser och faktiska möjligheter att påverka de aktörer i värdekedjan som utgör kopplingen till en rättighetskränkning. Dessutom kan företagen fokusera sina insatser där riskerna är störst. Mot bakgrund av detta kommer uppsatsen fram till att det inte är motiverat att begränsa ansvaret i kommande lagar till att endast täcka delar av värdekedjan. Det finns redan mekanismer som tar hänsyn till om ansvar för hela värdekedjan skulle vara orimligt eller omöjligt i det enskilda fallet. Då en betydande del av övergreppen mot arbetares rättigheter inträffar djupt inne i värdekedjan är ett omfattande ansvar helt enkelt en förutsättning för att lagarna ska få önskad effekt.

Preface

Writing a master's thesis is of course always heavy work, with unavoidable ups and downs – I had, however, not anticipated my ups and downs to be so closely tied to an unpredictable and lengthy decision-making process in Brussels. The "will they, won't they" of the CSDDD put a spanner in the works of my early topic choices, but perhaps it worked out for the better in the end. Many thanks to my supervisor Matt for valuable insights along the way, especially concerning that part.

As I now put my (many) years of study behind me, I would also like to thank those that have made it all both so much easier, and so much more fun: mamma, pappa & Hanna, because no day is complete without the family group chat; all the friends I've made along the way, in Lund and elsewhere; and Iván, for literally moving across a continent, and for always cheering and supporting.

Amanda Idborg
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Abbreviations

BHR	Business and Human Rights
CSDDD	Corporate Sustainability Due Diligence Directive
CSRD	Corporate Sustainability Reporting Directive
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
HRDD	Human Rights Due Diligence
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
ICC	International Criminal Court
MNE	Multinational Enterprise
NGO	Non-Governmental Organization
NCP	National Contact Point (of the OECD)
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the United Nations' High Commissioner for Human Rights
SME	Small / Medium-Sized Enterprise
SRSG	Special Representative of the Secretary-General (of the UN)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGP	United Nations Guiding Principles on Business and Human Rights

1 Introduction

1.1 At Issue: Corporate Responsibility Across the Value Chain

During the winter and spring of 2024, an unexpected legislative drama unfolded in Brussels as the landmark Corporate Sustainability Due Diligence Directive, which had been politically agreed upon in December 2023 after years of preparation and negotiation,[1] was thrown back out in the cold when several Member States withdrew support like dominoes.[2] New negotiations followed, leading at last to a new, somewhat watered-down directive.[3] During the months leading up to the final compromise agreement, debates among both legislators and external parties highlighted the proposed directive's many controversies.

The CSDDD is part of a broader global effort to increase corporate accountability for human and environmental rights violations. Traditionally, companies have only been subject to the laws of the countries where a certain business activity takes place and, *importantly*, not held accountable for the actions of their suppliers. In an increasingly globalized economy, this has led to widespread abuse of both people and planet within many companies' global value chains.

Addressing these regulatory challenges is complex. The CSDDD follows the model established through the UN's Guiding Principles on Business and Human Rights (UNGPs), which centers around requiring companies to perform human rights due diligence (HRDD). Unlike other forms of due diligence, which focus on risks to the company itself, HRDD aims to identify and mitigate risks that the company might pose to others. The UNGPs extend this responsibility to the entire value chain, meaning that companies must assess risks related to their activities and those of their suppliers, distributors, and other business relations, including more distant and indirect ones.

[1] Council of the EU, "Corporate Sustainability Due Diligence: Council and Parliament Strike Deal to Protect Environment and Human Rights" (Consilium, December 14, 2023) <https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/> accessed May 9, 2024.

[2] Mark Segal, "EU Council Fails to Approve New Environmental, Human Rights Sustainability Due Diligence Law" (ESG Today, February 28, 2024) <https://www.esgtoday.com/eu-council-fails-to-approve-new-environmental-human-rights-sustainability-due-diligence-law/> accessed May 21, 2024.

[3] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (prev. doc. 5893/24) (CSDDD) [NOTE: compromise as of March 2024, preliminary version].

The extent of this value chain responsibility was a key point of contention during the spring re-negotiations of the CSDDD in Brussels. Should the HRDD responsibility follow the UNGPs' model and cover the entire value chain, or should it be limited to parts where the company has more direct control, such as with its direct contract partners?

The question remains relevant for the CSDDD despite it already being adopted, as the directive includes a provision saying that the value chain definition should be evaluated and possibly adjusted in a few years. The question is also relevant far beyond this specific EU legislative process, as several EU Member States already have domestic laws taking different stances on the matter, while similar legislation is emerging also in other regions of the world. The severe impacts of business on human rights globally have been well known for some time, and the need for legislative action is gaining traction. Only time will tell whether mandatory HRDD turns out to be a comprehensive solution to this lack of corporate accountability, but it is likely at least one step on the way to making business the force for good it has the potential to be – in the EU and beyond.

1.2 Research Questions and Outline

The thesis aims to investigate the concept of mandatory HRDD and contribute to the discussion about the appropriate extension of such regulations. Due to the limited scope of the text, it will focus primarily on HRDD as a means of protecting workers' rights across global value chains.

The overarching question the thesis strives to answer is:

- How extensively should the responsibility to conduct human rights due diligence (HRDD) regarding workers' rights span along the value chains of EU companies?

The investigation beings with a chapter (2) on the concept of workers' rights, aimed at identifying what they are, how they relate to other human rights, and how they are affected by global supply chain practices. This is followed by a chapter (3) on the business and human rights regime, which examines the interplay between instruments of soft and hard law in regulating corporate compliance with human rights, including workers' rights. This leads to a chapter (4) that looks more specifically into the concept of HRDD, both in terms of its emergence and development and in terms of how regulations are structured from a legal-technical perspective. The following chapter (5) then examines existing HRDD legislation, both at the EU level and in EU Member States. Together, these initial chapters provide an extensive background for the rest of the investigation and ultimately the discussion. These chapters are rather theoretical in nature and provide insights into what HRDD is, how regulations on it can be designed, and how they are intended to protect workers' rights in global value chains.

The next chapter (6) provides a more empirical take on the topic by examining practical experiences and outcomes of existing HRDD regimes, both voluntary and mandatory. The purpose of this part is to investigate how different regulations, with varying value chain responsibilities, have functioned in practice. The thesis then embarks on an analytic discussion (chapter 7) about the appropriate extension of due diligence requirements into the value chain.

1.3 Methodological Approach and Material

The nature of this thesis' research question presupposes a *de lege ferenda* analysis of how requirements of mandatory HRDD should be constructed concerning their extension along the value chain. This involves a normative discussion about the appropriate extent of value chain responsibility – essentially, how the law ought to be. However, forming an adequate background for such a discussion requires a *de lege lata* approach, where existing initiatives of both soft and hard law are analyzed and interpreted.

The investigation primarily employs legal doctrinal research methods, in studying, systematizing, and interpreting various sources of positive law to establish an understanding of the current state of the law. Jan Smits conceptualizes the aims of legal doctrinal research as threefold: first, to *describe* the law as it stands as neutrally and consistently as possible; second, to *prescribe* practical solutions to problems, within the framework of the existing system; and lastly, to *justify* the law, by showing its coherence with the broader system to which it pertains.[4]

The outline of this thesis, explained in the previous subchapter, aligns well with Smits's conceptualization. The initial chapters aim to provide a description of the topic by examining different aspects of the current HRDD framework, both in regard to its content and its context within the broader system. This includes an exploration of the business and human rights (BHR) framework in general terms. The latter parts of the thesis aim to fulfill the prescriptive and justifying goals of doctrinal research by addressing how regulations should be designed, considering their relationship to the broader international legal system, particularly the human rights framework.

Legal doctrinal research studies the law from an internal perspective. As Smits notes, "[t]he legal system is not only the subject of the inquiry, it also provides the normative framework for analysis."[5] In other words, normative conclusions should be based on considerations grounded in existing law. In this thesis, the State obligation to protect individuals from corporate human rights violations serves as such an internal framework.

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[4] Jan Smits, "What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research" in Rob van Gestel, Hans-W Micklitz and Edward L. Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017).

[5] ibid 5.

Sanne Taekema notes that "[i]n order to answer normative questions, a framework is needed that provides a yardstick, a set of standards or values which can serve to support a judgment."[6] Besides the internal frameworks described by Smits, which are based on existing legal principles, Taekema also suggests that normative questions can be answered using external frameworks, such as political aims. In this investigation, the political aim of achieving corporate accountability and responsibility for human rights[7] - an external framework - will be used alongside the previously described internal one. Taekema underscores that there is not always a clear distinction between internal frameworks and those based on political aims, since legislative processes are often the result of political ones.[8]

Given the topic's nature, great attention must be paid to the complex structure of international law when determining which sources are relevant to the legal doctrinal method in this case. Researching international law involves studying both sources of international law produced by international actors and sources of domestic law where international provisions have been incorporated.[9] This investigation consults international human rights law instruments, international voluntary regimes on corporate accountability, and several sources of domestic and EU law. This results in a relatively complex source base, as is often the case for studies of international law.

For source material not in English, Swedish or Norwegian, translations are made using online translation tool deepl.com. Translations of legal instruments are checked against descriptions of the laws in English-language doctrine. Certain parts of the thesis are linguistically improved using AI tool ChatGPT, but no content is generated at any stage of the process.

1.4 Current State of Research

The extent of value chain responsibility has been researched from multiple angles, in various contexts, and by actors with different interests. The thesis aims to contribute to the existing body of research by addressing the normative research question, in conversation with existing literature and research and focusing on practical outcomes of already adopted laws and regimes.

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[6] Sanne Taekema, "Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice" (2018) Law and Method 6.

[7] The EU markets itself as a "global leader on responsible business conduct" and highlights it as an explicit goal for the Union's external action, see EAAS, "Business and Human Rights" (*EEAS*, September 28, 2021) <https://www.eeas.europa.eu/eeas/business-and-human-rights_en> accessed May 22, 2024.

[8] Taekema [n 6], 7 f.

[9] Rossana Deplano, "Is International Legal Research International?" in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar Publishing 2021) 39.

In academia, BHR has emerged as a distinct research field in recent years. It addresses topics related to both soft and hard law, particularly the relationship between the two. The field is developing rapidly, with much academic output focusing on its development and the increasing judicialization of principles and practices previously enshrined only in soft law. [10]

A key resource for this investigation is the comprehensive textbook "Business and Human Rights: From Principles to Practice", edited by Justine Nolan and Dorothée Baumann-Pauly, featuring chapters by numerous scholars central to the field, including former Special Representative of the Secretary-General (SRSG) John Ruggie[11]. The book demonstrates how BHR has established itself as a field of research and highlights its interdisciplinary nature, with contributions from various legal (and related) disciplines.

Nolan is a prominent figure in the BHR field beyond the referenced book and has been vocally sceptic of HRDD as a route to corporate accountability. Her contributions are part of a broader academic debate on HRDD, where common criticisms include its focus on compliance over actual action or results.[12] This criticism will be examined in chapter 4.

Criticism such as the one described above essentially concerns the effectiveness of HRDD, ie its practical outcomes. This is highly relevant to this investigation, as the practical outcomes of regulations will be relevant to answer the normative research question. Several empirical studies have investigated how soft law HRDD provisions are implemented by companies in practice, including one by Robert McCorquodale and others in 2017.[13] McCorquodale followed up with a similar investigation with another team in 2020, as part of the preparatory processes for the CSDDD.[14] These investigations show a general willingness among companies to comply with the frameworks, but they also underline practical difficulties related to the implementation of the HRDD. This will be further discussed in chapter 6.

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[10] See eg David Birchall and Surya Deva (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020); Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016).

[11] John G. Ruggie (1944-2021), professor of International Law at Harvard Law School, was a key figure within the BHR field, known as the main creator of the "Protect, Respect and Remedy" Framework and the UNGPs.

[12] Justine Nolan, "Chasing the Next Shiny Thing: Can Human Rights Due Diligence Effectively Address Labour Exploitation in Global Fashion Supply Chains?" (2022) 11 International Journal for Crime, Justice and Social Democracy 1, 7.

[13] Robert McCorquodale and others, "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" (2017) 2 Business and Human Rights Journal 195.

[14] European Commission and others, "Study on Due Diligence Requirements through the Supply Chain: Final Report" (Publications Office 2020).

Hard law initiatives on HRDD examined in this investigation are largely still too new to have generated significant research on their implementation, effectiveness, and results. However, there is a body of more theoretical research into their contents. These are generally contributions by scholars from the country in question, and the output itself is usually centered around outlining the contents of the laws, sometimes in comparison with similar laws in other countries.

To the author's knowledge, there is a scarcity of academic research specifically examining the extension of value chain responsibility in emerging hard law regulations on HRDD. Remarks on this extension are usually made in broader analyses of different pieces of legislation, but they are not the main focus. Nevertheless, there is research on closely related topics, such as the possibilities of establishing jurisdiction over events in companies' distant value chains. Research suggests that while it is complex, this is possible under international law. The investigation consults the works of Krajewski, Bernaz, and others on these and related areas.

The extension of value chain responsibility has also been researched outside of formal academia, namely in reports and research by international organizations, non-governmental organizations (NGOs), and human rights institutes. These studies generally argue for extensive value chain responsibility, in line with voluntary regimes, and focus on justifying that such responsibility *can* be extensive in hard law regulations, rather than examining whether it *should* be, as in the present thesis. Nevertheless, they provide important insights into the topic and confirm its relevance and significance.

1.5 Delimitations

To fit this vast and interesting topic into the scope of a master's thesis, several important delimitations are made. First, it should be stressed that the thesis does not attempt to comment on the appropriate scope of HRDD requirements in ways other than regarding the extent of the responsibility's reach into the value chain. As clearly shown during the many twists and turns of the CSDDD debate, there are many possible points of debate concerning legislation on mandatory value chain due diligence. While discussions on, for instance, the appropriate limits in employees or revenue for companies to be covered by the legislation, or discussions on applicable sanctions, are undeniably interesting and important, they will not be addressed in this thesis. This is, therefore, not a general investigation into mandatory value chain due diligence as such, but rather a delimited and focused investigation concerning solely the appropriate responsibility for the value chain.

While the general discussion on value chain responsibility is relevant to all jurisdictions, the thesis is delimited to examine legislation and initiatives only from the EU and its Member States. One reason for this is the scope of the text; a comprehensive account of worldwide relevant legislation and

jurisprudence is simply too extensive. Another reason is to allow for a more just comparative discussion based on the findings, given that the jurisdictions covered share many fundamental traits. Lastly, the author's background in Swedish and EU law makes significantly different legal systems less approachable.

Lastly, the topic is delimited to focus specifically on workers' rights, rather than targeting human and environmental rights more broadly. A significant part of the results of this investigation should, however, be translatable to other rights. That assessment, in any case, lies beyond the scope of this thesis.

1.6 Definitions of Key Terminology

Company: Throughout the thesis, the term *company* is used to refer to all forms of business entities targeted by the due diligence requirements discussed. It is understood as an umbrella term encompassing a wide range of businesses. Choosing the appropriate terminology posed a challenge in this case, as terms vary between the legal instruments investigated. The UNGPs change between *company, business* and *corporation* (specifying that the legal form of the entity does not affect applicability of the principles), while the OECD Guidelines target *multinational enterprises.* These terms cannot be understood as synonymous, but since the differences in entities targeted by each instrument will not be investigated in the thesis, distinguishing between them has not been deemed necessary.

Supply chain: The term refers to "physical assets as well as labour within all tiers of suppliers who contribute to a product or service."[15] This can include the extraction of raw materials, suppliers making necessary components, energy used in these different steps, etcetera.

Value chain: The term is generally used for a broader concept than "supply chain" and covers the full lifecycle of a product or service, from start until end. Unlike "supply chain", "value chain" is generally seen as also including non-material parts of the chain, such as responsible design and marketing practices, or the safe operation of vehicles.[16]

Choosing whether to use *value* or *supply chain* in the thesis was challenging. They are not strictly synonymous, yet there are some inconsistencies in how different instruments define and use them.[17] *Value chain* is primarily used

[15] The Danish Institute for Human Rights and others, "Due Diligence in the Downstream Value Chain: Case Studies of Current Company Practice" (The Danish Institute for Human Rights 2023) 7.

[16] ibid.

[17] See eg how *supply chain* also includes things such as technology used in Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130/1 (EU Conflict Minerals Regulation), art 2(c).

throughout this investigation, and it is noted where an instrument instead uses *supply chain* and the significance of this choice in the specific case.

Home State: The term refers to the State where a company is headquartered or otherwise has an established base for its operations.

Host State: The term refers to a State, other than the home State, where a company's operations are taking place.

Stakeholder: The term refers to persons or groups who are or could be directly or indirectly affected by a company's project or activity.[18] This can range from eg workers and local communities to civil society organizations and host governments, depending on the specific situation. Assessing an operation's potential impacts on stakeholders is a key part of human rights due diligence.

[18] OECD, "Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector" (OECD Publishing 2017) <https://doi.org/10.1787/9789264252462-en> 19.

2 Workers' Rights as Human Rights

In this chapter, the status of workers' rights within the broader field of human rights will be explored, along with a more specific look at how workers' rights are affected by the complex structures of modern-day global value chains.

2.1 The Emergence of International Workers' Rights

Among the early international efforts to address labor issues was the establishment of the International Labour Organization (ILO) under the League of Nations in 1919, following the immense horrors of the First World War and a growing consensus that lasting peace required increased social justice.[19] The ILO's mandate included promoting social justice and setting international labor standards in the form of conventions and recommendations, with the former being treaties to which signatory States are legally bound, while the latter are sets of non-binding principles and guidelines.[20] Today, the total number of ILO instruments exceeds 400.[21]

Workers' rights continued to evolve and expand over the following decades, encompassing a wide array of work-related matters. The Universal Declaration of Human Rights (UDHR), adopted in 1948, further solidified the fundamental right to fair work, particularly through articles 23 and 24:

> **Article 23:**
>
> 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
> 2. Everyone, without any discrimination, has the right to equal pay for equal work.
> 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

[19] Barbara Shailor, "Workers' Rights in the Business and Human Rights Movement" in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 194 ff.

[20] ILO, "Conventions, Protocols and Recommendations" (*International Labour Organization*, January 28, 2024) <https://www.ilo.org/international-labour-standards/conventions-protocols-and-recommendations> accessed May 9, 2024.

[21] 191 Conventions, 208 Recommendations and 6 Protocols, see ILO, "ILO Adopted Instruments" <https://webapps.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10005:0::NO:::> accessed May 9, 2024.

4. Everyone has the right to form and to join trade unions for the protection of his interests.[22]

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.[23]

While the UDHR itself is not legally binding, it is said to represents shared values of the international community, at least in part enshrined in international customary law;[24] to what extent this applies to the UDHR's provisions on workers' rights could be the topic of a master's thesis of its own, so for the purpose of this text, it suffices to note that workers' rights are included in the instrument that is at the very heart of the human rights field.

The central position of workers' rights within broader international human rights is further demonstrated by the inclusion of several workers' rights related provisions in the 1966 International Covenants, which together with the UDHR comprise the International Bill of Rights: The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). These instruments are indeed binding for States that have ratified them; 172 in the case of the ICCPR,[25] and 174 for the ICESCR.[26]

Of the two Covenants, especially the ICESCR is relevant to workers' rights, as it holds provisions on things such as the right to freely choose one's work,[27] equal and livable wages,[28] safe and healthy working conditions,[29] reasonable working hours and paid periodic holidays,[30] and the right to form and join trade unions, including a right to strike.[31]

Article 6 of ICESCR is particularly interesting, as it asserts not only the rights *at* work, but also the right *to* work. The UN's Economic and Social Council has developed upon this right by underlining that "[t]he right to work is

[22] Universal Declaration of Human Rights (adopted 10 December 1948) 217 A(III) (UNGA) art 23.
[23] ibid art 24.
[24] Hurst Hannum, "The UDHR in National and International Law" (1998) 3 Health and Human Rights 144, 147-148.
[25] United Nations, "ICCPR Signatories" (United Nations Treaty Collection) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed May 9, 2024.
[26] United Nations, "ICESCR Signatories" (United Nations Treaty Collection) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en> accessed May 9, 2024.
[27] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 6.
[28] ICESCR art 7 a.
[29] ICESCR art 7 b.
[30] ICESCR art 7 d.
[31] ICESCR art 8.

essential for realizing other human rights and forms an inseparable and inherent part of human dignity".[32]

Provisions in ICCPR relevant to workers' rights include, *inter alia*, a prohibition of forced labor,[33] a reassertion of the right to form and join trade unions,[34] and a provision on freedom from discrimination.[35]

The ICCPR and ICESCR along with seven other instruments comprise what is commonly referred to as the "core" human rights instruments, jointly setting out foundational human rights across a variety of areas. Of these instruments, several establish rights of relevance to workers, by asserting the rights of children, migrant workers, and persons with disabilities, or by demanding the elimination of gender and racial discrimination, and more.[36]

Of great relevance in a European context, the European Convention on Human Rights (ECHR) establishes only two labor related rights: the right to form and join trade unions,[37] and the prohibition of forced labor.[38] Other labor related rights are instead included in the European Social Charter (ESC), underlining a desire to make distinction between civil and political rights on one hand, and economic and social ones on the other. The same division has been made in the ICCPR and ICESCR.

Negotiations on EU accession to the ECHR began in 2010, and there are reports of important progress having been made in the last few months, bringing the EU closer to being a party to the convention.[39] Already at present, though, all 27 Member States are parties to the Convention,[40] as well as to the ESC.[41]

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[32] UN Economic and Social Council, 'general comment No. 18: Article 6 of the International Covenant on Economic, Social and Cultural Rights' (24 November 2005) E/C.12/GC/18 para I.

[33] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 8.

[34] ICCPR art 22.

[35] ICCPR art 26.

[36] OHCHR, "The Core International Human Rights Instruments and Their Monitoring Bodies" (*OHCHR*) <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies> accessed May 9, 2024.

[37] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 11.

[38] ECHR art 4.

[39] Delegation of the EU to the Council of Europe, "Major Progress on the Path to EU Accession to the ECHR: Negotiations Concluded at Technical Level in Strasbourg" (*EEAS*, March 31, 2023) <https://www.eeas.europa.eu/delegations/council-europe/major-progress-path-eu-accession-echr-negotiations-concluded-technical-level-strasbourg_en?s=51> accessed May 9, 2024.

[40] Council of Europe, "States Parties to the Convention" (*CPT*) <https://www.coe.int/en/web/cpt/states> accessed May 9, 2024.

[41] Original or revised versions.

Being classified primarily as social rights, labor rights have according to some scholars traditionally been somewhat neglected in broader human rights law, which is principally centered around political and civil rights. This has been reflected, *inter alia*, in a traditional reluctance of the European Court of Human Rights (ECtHR) to take up labor related cases.[42] One suggested reason for this is the often-negative character of political and civil rights, meaning a State fulfills them by abstaining from interfering with, for example, religious practices or expressions of free speech. Social and economic rights, on the other hand, are often positive in character and have hence been deemed better left to elected representatives to manage, rather than the judiciary. These conceptions have however been challenged in recent years, with labor law more clearly being integrated and accepted in the human rights sphere.[43]

To summarize this brief and very concise overview of the emergence of international workers' rights, their place within the broader human rights field, and their content, a few general things ought to be said.

First of all, human rights affecting workers' conditions, safety and dignity are plentiful. As the main objective of this investigation is to examine the structure and scope of requirements on HRDD, and not to conduct an in-depth investigation into workers' rights per se, the more precise contents of international workers' rights will not be examined.

Second, it should be underlined that for the purpose of this thesis, the human rights in question need to be examined with a look to what obligations they de jure impose on States and other parties; who is obligated to fulfill them, and through what means? This line of questions quickly leads us into the issue of interpreting the rights. What *is* a fair wage or a healthy working environment? Some of these themes will be discussed in the next subchapter, which examines the relationship between national labor law and international human rights protecting workers, while the questions regarding State and corporate responsibility to ensure workers' rights will be addressed more in-depth in chapter 3.

2.2 International Rights and National Labor Law

Human rights are international legal obligations of States towards individuals, arising either from binding treaties or applicable customary international law. These obligations, at least in theory, are enforceable by individuals against the State. The exact nature of these obligations has been extensively

[42] Virginia Mantouvalou, "Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation" (2013) 13 Human Rights Law Review 529, 532 f.
[43] ibid 533 ff.

researched and debated; generally, different rights are considered to give rise to different forms of State obligations, which vary in extent.[44]

A State voluntarily becomes a party to treaties and is then legally bound to comply with their provisions, in accordance with the principle of *pacta sunt servanda*.[45] While the specific treaties that each State is bound by naturally differ, many human rights instruments have near-universal status. Besides such treaty-based obligations, some human rights are also considered to be enshrined in international customary law. Unlike treaty obligations, States do not need to actively choose to be bound by customary law; these are universal and derive their legitimacy from *opinio juris* and from them being established State practice.[46]

As done briefly in the previous subchapter, State obligations regarding human rights are often categorized as positive or negative in character. Positive obligations require States to act in certain ways, while negative obligations require States to refrain from certain acts. Most modern-day scholars agree that all human rights generate both positive and negative obligations for States.[47]

This conceptualization of obligations as positive and/or negative has in human rights law doctrine been developed into a three-dimensional framework of duties to **respect**, to **protect**, and to **fulfil** human rights. The duty to respect corresponds largely to States' negative obligations, while positive obligations are divided into duties to protect and fulfill. Using this framework, States have a negative obligation to respect the rights of individuals and groups by not infringing on them, an obligation to protect rights for example by regulating non-State actors like companies, and an obligation to fulfill rights by taking positive action to ensure their enjoyment.[48]

Having established *that* States have obligations to respect, protect and fulfill the human rights that they are bound by, the question remains as to what this means in practice; how does a State live up to its obligations?

Answering this question involves examining the relationship between national labor law and international obligations on workers' rights, as

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[44] Dalia Palombo, *Business and Human Rights: The Obligations of the European Home States* (Bloomsbury Publishing 2020); Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010) 242 ff.
[45] Mihaela Maria Barnes, State-Owned Entities and Human Rights: The Role of International Law (Cambridge University Press 2021), 43.
[46] William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021), 3 ff.
[47] Palombo [n 44], 104-107.
[48] ibid, 103 ff.

legislative measures are a common way for States to meet their human rights obligations. For instance, the ICCPR stipulates:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[49]

This provision contrasts interestingly with the ICESCR, which states:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[50]

These two provisions illustrate the differences between obligations in the political/civil sphere and the economic/social sphere. For political and civil rights, the obligation is concrete and direct, requiring States to adopt laws to realize the rights. In practice, this would mean, *inter alia*, illegalizing forced labor, and prosecuting anyone who violates that prohibition.[51] For economic and social rights, the obligations generally require more active effort, as well as interpretation, as with, for example, requirements of "[s]afe and healthy working conditions"[52] or "social security, including social insurance"[53].

A key concept in understanding States' obligations is the margin of appreciation doctrine, according to which States are to be permitted some level of diversity in how they interpret their international obligations. The fact that most States have ratified central human rights instruments establishing the right to, for example, a safe working environment,[54] does not mean that all States are required to adopt and enforce the same laws on occupational safety.[55]

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[49] ICCPR art 2.2.
[50] ICESCR art 2.1.
[51] ICCPR art 8.
[52] ICESCR art 7(b).
[53] ICESCR art 9.
[54] See eg ICESCR art 7(b).
[55] Andrew Legg, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality (Oxford University Press 2012).

Central to this thesis is the understanding that States' human rights obligations include ensuring the human rights compliance of private entities within their jurisdiction, such as companies. State responsibility for corporate behavior will be further examined in chapter 3. In the context of the current discussion, it can be concluded that legislation is a key means for States to meet their human rights obligations, and that legislation governing the activities of companies hence is a way to live up to obligations relating to corporate behavior.

2.3 Workers' Rights and Global Value Chains

One significant challenge in efficiently regulating and ensuring human rights for workers is the complex structure of global value chains, through which many modern businesses operate.[56] The legal aspects of these challenges will be examined in chapter 3, while this subchapter provides an overview of the link between value chain structures and the occurrence of various workers' rights violations.

According to UN estimates, some 450 million people worldwide work in connection with global supply chains,[57] which constitute the foundation of around 80% of world trade.[58] While this system has generated significant benefits in terms of employment and economic growth for many countries, groups, and individuals, it has also led to serious issues.

Reports from the ILO, various NGOs, and other sources all paint a similar picture: a vast number of workers engaged in value chain-related work suffer poor working conditions, such as unlivable wages, forced overtime, or exposure to toxic substances. Many are denied their right to unionize.[59] Human Rights Watch assesses that "[t]he people most affected by human rights abuses in a company's value chain often belong to groups who have no realistic opportunities to call attention to these problems themselves, or secure a remedy, such as women workers, migrant workers, child laborers, or residents of rural or poor urban areas."[60]

Although difficult to quantify precisely, studies suggest a significant linkage between global value chains and forced labor, child labor and human trafficking.[61] A total of 168 million children are believed to be engaged in

[56] See eg Human Rights Watch, *Human Rights in Value Chains: A Call for a Binding Global Standard on Due Diligence* (Human Rights Watch 2016); ILO and others, *Ending Child Labour, Forced Labour and Human Trafficking in Global Value Chains* (2019); Nolan [n 12].

[57] The report uses the term *supply chain*, and, although not specified in the text, seems to target specifically the production-part of the chain, and not end-usage, disposal or other things associated with the downstream.

[58] UN Industrial Development Organization, UNIDO and sustainable value chains (2003).

[59] Human Rights Watch [n 56].

[60] ibid 2.

[61] ILO and others [n 56].

child labor around the world, with 85 million in hazardous work. People kept in forced labor are estimated at around 21 million, adults and children combined.[62] Even without precise data on the proportion of these practices occuring within global supply chains, the assertion of a significant connection underscores the necessity of addressing the matter seriously.

Saying anything general about the structures of global EU value chains is challenging, as they vary greatly between sectors. However, in many sectors, European companies are situated near the "bottom" of the chain, with extensive networks of suppliers, subcontractors, and outsourced producers before them.[63]

As will be demonstrated in the following chapters of this thesis, one central problem in ensuring human rights compliance in global value chains is the combination of lacking regulations and/or enforcement in third countries and the vast extension of the chains. This often keeps the human rights impact at arm's length from the EU company and, consequently, from the regulatory powers of their home States.

[62] ibid 5.

[63] See eg Elena Pessot and others, "A Journey into the European Value Chains: Key Industries and Best Practices" in Rosanna Fornasiero and others (eds), *Next Generation Value Chains: Lecture Notes in Management and Industrial Engineering* (Springer 2021).

3 The Business and Human Rights Regime

The field of BHR is rather complex. On the one hand, BHR regulations come in the form of national laws that govern corporate behavior in relation to human rights. Most States have extensive sets of such regulations, covering things like labor rights, environmental protection, and anti-discrimination. Alongside these national laws, there are numerous international instruments that, although built on voluntarism on the part of companies, are highly influential. This mixture of hard law regulations and voluntary regimes creates a complex regulatory landscape, whose main features will be explored in this chapter.

3.1 Accountability Through Hard Law

Companies are typically subject to a wide range of hard law regulations, many of which cover areas directly or indirectly related to human rights. These regulations, many of which fall into the sphere of labor law, are rarely explicitly advertised as BHR rules but are by definition indeed precisely that.

States obliging companies to comply with international workers' rights through legislation is common and generally uncontroversial; regulating companies' relationships with their workers is a natural part of most legal systems. Such labor laws commonly regulate things such as minimum wages, working hours, safety standards, and more. These regulations target companies directly as legal entities and oblige them, often under civil liability, to follow applicable rules and regulations. The concept that a legal person may be subject to obligations under national law is far from a controversial one, but a cornerstone of most jurisdictions. A State essentially exercises the same control over a company operating in its territory as it does over an individual residing there.[64]

This thesis does not analyze or account for the content of labor law regulations at the national level in the EU. Instead, it examines their role in the broader discussion on international workers' rights in value chains. This subchapter will explore the extension of States' obligations and possibilities to regulate corporate behavior in the context of global value chains and briefly examine the potential emergence of international hard law on BHR.

3.1.1 State Responsibility for Corporate Behavior

To begin, it is crucial to examine the responsibility for workers' rights as such. As seen in chapter 2, States have an obligation under international law to

[64] For a comprehensive take on the matter of liability for human rights violations in different national jurisdictions, see eg Ewa Bagińska, *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* (Springer 2015).

respect, protect and fulfill workers' rights. But what of the company itself? While some international law obligations apply not only to States but also to individuals, such as responsibility for international crimes, companies are generally not considered to have such obligations; the International Criminal Court (ICC) has no jurisdiction over companies, nor did any of the special tribunals.[65]

Since companies are generally not recognized as duty-bearers under international law, they are not legally bound by any provision until a State translates it into national legislation.[66] This leads to a core issue in regulating businesses' responsibility for human rights worldwide: legal corporate responsibility is fundamentally tied to the will and actions of States. When a State lacks the will or capacity to implement or enforce sufficient legislation, companies are essentially placed in a position where human rights compliance is voluntary, at least legally speaking. If a company perceives human rights compliance to conflict with profit maximization, shareholders' interests can take precedence over the protection of stakeholders', including workers', human rights.[67]

When discussing companies' impacts on human rights, we refer to the *horizontal* application of those rights. Instead of targeting the acts and omissions of States in relation to individuals (a *vertical* relationship), it concerns the acts and omissions of a private party, a company, in relation to another private party, an individual or a group of individuals. The prevailing perception among scholars is that such horizontal relationships are governed through the indirect application of human rights law, meaning States have a positive obligation to ensure private parties do not infringe upon the rights of others. As shown in chapter 2, this is generally achieved through the implementation and enforcement of legislation.[68]

A State's obligation to regulate horizontal human rights impacts has limitations, however, with a key one being that it traditionally has been considered to apply only within the State's own territory. In other words, a State would be obligated to legislate in a way that ensures that companies comply with human rights only when they operate within its national borders. If a company is involved in business operations abroad, the State would not have a positive obligation under international law to regulate its human rights compliance there; that responsibility falls instead on the State where the operation is taking place. This traditional notion has however been contested in later years,

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[65] Palombo [n 44], 101 f.

[66] See eg Markus Krajewski, "Mandatory Human Rights Due Diligence Laws: Blurring the Lines between State Duty to Protect and Corporate Responsibility to Respect?" (2023) [41] Nordic Journal of Human Rights 265.

[67] See eg Justine Nolan, "Business and human rights in context" in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016).

[68] Palombo [n 44], 118.

among others by Krajewski. He argues that a State obligation to regulate certain business activities abroad when the host State fails to do so can be derived from general principles of international law.[69]

3.1.2 National Legislation, Global Reach?

States' jurisdiction is generally based on territoriality, meaning that activities occurring outside a State's territory are typically deemed outside its jurisdiction. This is a fundamental principle of international law.[70] There are, however, exceptions to this rule.

Jurisdictional matters become an issue for corporate compliance with workers' rights when the State with territorial jurisdiction, ie the State that "hosts" a certain business activity, is unwilling or unable to implement and/or enforce sufficient legislation to ensure these rights. As already established, the company's "home" State has traditionally been considered to not have any obligation to assume responsibility in the host State's place, and while there are differing opinions on that, there may be compelling non-legal reasons for the State to want to do so even without begin obligated to.

Legislation on workers' rights varies widely across the world. Many States lack sufficient regulations to effectively secure these rights, either due to an inability to implement and enforce legislation, or an unwillingness to do so. This notion should however be somewhat nuanced; lax regulations can attract companies to invest and establish operations in a State, turning a lack of labor rights into a competitive advantage. From a developing State's perspective, this could mean choosing between laxer regulations to attract investment and employment, or losing potential development to a neighboring State that was willing to accommodate the company better.[71]

To address these issues, many governments have taken steps to regulate the behavior of companies abroad. This is, as explained, contrary to the principle of jurisdiction primarily being territorial, so States have had to explore the possibilities of applying their jurisdiction extraterritorially in different ways.

States' jurisdictional powers consist of several parts: prescriptive jurisdiction, meaning the authority to adopt legislation establishing norms of conduct; adjudicative jurisdiction, the power to determine the rights of parties under the law in a certain case; and, enforcement jurisdiction, the ensuring of compliance with the law.[72] A home State adopting laws to govern "its" companies'

[69] Markus Krajewski, "The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities" (2018) 23 (Special Issue) Deakin Law Review 13.
[70] International Law Commission, "Report of the International Law Commission Fifty-eight session" (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10, 519.
[71] James Brudney, "Hiding in Plain Sight: An ILO Convention on Labor Standards in Global Value Chains" (2023) 23 Chicago Journal of International 272, 181 f.
[72] International Law Commission [n 70], 517 f.

actions abroad exercises extraterritorial prescriptive jurisdiction. If noncompliance with such laws occurs abroad and is tried in the home State's courts, it exercises extraterritorial adjudicative jurisdiction. As for the last of the three, enforcement jurisdiction, exercising it extraterritorially is generally considered an infringement on the non-intervention principle in the UN Charter, meaning a State cannot use its police or other forms of law enforcement in the territory of another State without permission.[73]

As for prescriptive as well as adjudicative jurisdiction, many States have rules allowing for extraterritoriality in some cases, most commonly in criminal law. Jurisdiction is then claimed based on connections other than territoriality, such as the nationality of perpetrator or victim, or the nature of the crime as an international one.[74] In cases where a company's violations of human rights can categorize as an international crime, these criminal law provisions on extraterritoriality could be relevant to corporate human rights compliance. Similarly, criminal charges could be brought against specific corporate representatives in the home State based on the nationality of the perpetrator. Some States also allow for criminal liability for the legal persons themselves.[75]

There are also examples of civil laws with extraterritorial reach, such as the Alien Torts Statute in the United States. This law grants US federal courts jurisdiction in civil cases concerning violations of international law committed anywhere in the world. Starting around the 1980s, the statute was used by survivors of various human rights abuses connected to US individuals or companies. However, during the 2010s, the US Supreme Court issued rulings limiting the law's scope, reducing the possibilities to use it for civil redress in cases of corporate abuses committed abroad.[76]

Extending jurisdiction extraterritorially raises important questions. By extending prescriptive powers to govern companies' behavior abroad, a State essentially highjacks the prescriptive power of another State. This is significant to keep in mind in discussions of this kind.[77]

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[73] Charter of the United Nations (signed 24 October 1945), art 2(7).

[74] International Law Commission [n 70], 517 ff; for a concrete example, see eg the Swedish Criminal Code (Brottsbalk 1962:700), ch 2 §2.

[75] Magdalena Catargiu, "The Origins of Criminal Liability of Legal Persons – a Comparative Perspective" (2013) 7 Agora International Journal of Juridical Sciences.

[76] Beth Stephens, "The rise and fall of the Alien Tort Statute" in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edwards Elgar Publishing 2020).

[77] Rachel Chambers, "An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct Jurisdictional Dilemma Raised/Created by the Use of the Extraterritorial Techniques" (2018) 14 Utrecht Law Review 22, 23.

Former SRSG Ruggie proposed distinguishing between direct extraterritorial jurisdiction and "domestic measures with extraterritorial implications".[78] There are many possible such measures, including introducing requirements for human rights compliance in operations abroad for participating in public procurement processes or for listing on a national stock exchange.[79] These measures are interesting jurisdictionally as they do not entail actual regulations of corporate behavior abroad, but rather strong *incentives* for companies to act a certain way abroad.

In recent years, many States have introduced legislation demanding reporting and transparency regarding the human rights compliance of "their" companies. This is another example of rules directing companies to act in a certain way in their foreign operations, without directly regulating their behavior abroad. States arguably do not exercise neither extraterritorial prescriptive nor adjudicative jurisdiction with this kind of legislation, as they establish an obligation to report on behavior, rather than regulate it.[80]

One prominent example of such legislation is the EU's recent Corporate Sustainability Reporting Directive (CSRD), a sister directive to the CSDDD. The CSRD and similar initiatives require companies to report on social and environmental matters, including matters relating to workers' rights, enabling investors and stakeholders to make informed decisions and thereby influence company behavior.[81]

This discussion on the extraterritorial reach of domestic legislation has thus far primarily focused on home States' ability to regulate or influence "their" companies' activities abroad. However, the main focus of this thesis is not the extraterritorial activities of EU companies themselves, but rather activities that are linked to them through their value chain.

When extending this discussion to the value chain, it is no longer a question of controlling or influencing the conduct of EU companies themselves, but instead of using national legislation to control how the company in question affects the conduct of *others.* This presents additional questions, as there at least is a clear link between the State and the regulated company when States

[78] UN Human Rights Council, "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational companies and other business enterprises, John Ruggie. Guiding Principles on Business and Human Right: Implementing the United Nations 'Protect, Respect and Remedy' Framework." (21 March 2011) A/HRC/17/31, 7.

[79] For a discussion on these measures and multiple others, see Nadia Bernaz, "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?" (2012) 117 Journal of Business Ethics 493.

[80] Chambers [n 77] eg 25 f.

[81] EU Directorate-General for Financial Stability, Financial Services and Capital Markets Union, "Corporate Sustainability Reporting" <https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en> accessed May 10, 2024.

regulate "their" companies' conduct abroad. If a regulation targets the value chain, there is generally no such link between the regulating State and the regulated company.

In later years, several States, and the EU, have implemented mandatory HRDD legislation covering the value chain. As explained in later parts of this thesis, HRDD obligations require companies to establish processes to identify, prevent, mitigate, and report on potential human rights impacts in their operations, or in operations to which they are linked. This link can be a business relationship, such as between a company and actors in its value chain.

Through these regulations, States do not directly regulate the behavior of the foreign value chain connections directly, but rather confers that responsibility onto the company in scope, essentially making them responsible for governing other private entities' conduct. While not entirely uncontroversial, this is not in clear contradiction with any principles of international law.[82] Chapter 4 examines arguments for and against the legality of this type of legislation.

3.1.3 International Level: A BHR Treaty on the Horizon?

As discussed, the legal responsibility to ensure human rights lies with States, not companies. No international instruments currently impose human rights related obligations directly on companies.[83] However, efforts are underway to increase corporate responsibility for human rights through international hard law. In 2014, the UN Human Rights Council adopted a resolution to pursue a BHR treaty, aiming to introduce new State obligations to ensure greater human rights responsibilities are imposed on companies.[84]

Given the State-centric nature of the international system, a potential future BHR treaty would only bind signatory States. Thus, the text is structed to impose obligations on State Parties to implement a vast array of national legislation applicable to companies. The latest draft, from 2023, outlined its purposes to include "clarify[ing] and facilitate[ing] effective implementation of the obligation of States to respect, protect, fulfil and promote human rights in the context of business activities"[85] and "clarify[ing] and ensure[ing] respect and fulfilment of the human rights responsibilities of business enterprises"[86].

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[82] Thomas Ackermann, "Extraterritorial Protection of Human Rights in Value Chains" (2022) 59 Common Market Law Review 143; Chambers [n 77], 124 ff.

[83] Justine Nolan, "Mapping the movement: the business and human rights regulatory framework" in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016), 32.

[84] Arvind Ganesan, "Towards a business and human rights treaty?" in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016).

[85] UN OHCHR, *Updated draft legally binding instrument (clean version) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises* (July 2023) art 2(a).

[86] ibid art 2(b).

While States' obligations to respect, protect and fulfil are, as seen, already a well-established concept, the text extends businesses' responsibilities from respecting, a negative responsibility, to also include fulfilling rights.

The 2023 treaty draft obliges State Parties to "regulate effectively the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control"[87], explicitly including activities of a transnational character. Regarding jurisdiction, the draft mandates that State Parties take measures to establish jurisdiction when abuse or harm occurs within their territory or jurisdiction, or when it is perpetrated by a legal person domiciled there or by a natural person who is a national or habitual resident.[88] These provisions highlight that an international treaty cannot fully resolve jurisdictional issues, as States' abilities to exercise extraterritorial jurisdiction are inherently limited under international law.

With the treaty process now having lasted a decade, it has revealed significant differences in the positions of various stakeholders. Many businesses have strongly resisted binding international regulations, as have many States. Despite this, the UN working group tasked with developing the treaty has made progress, presenting several draft texts after extensive consultations with stakeholders, including governments, civil society, affected communities, and businesses. Even so, many observers believe it will be years before a final treaty is presented, and that there is a high risk that many States will ultimately refrain from signing.[89]

In conclusion, while many companies worldwide are bound by legislation governing their compliance with workers' rights, these laws are a fragmented and incomplete patchwork. Transnational operations can exploit governance gaps, enabling companies to prioritize profits over the rights of workers, and despite steps taken at national and international levels to address this, achieving proper corporate accountability and responsibility for workers' and other human rights still remains a distant goal.

3.2 The Soft Law Side of the Regime

In addition to hard law, the field of BHR also contains a significant amount of influential soft law instruments which have been developed over the past decades. With progress on the hard law side having been slow, fragmented, and somewhat insufficient, soft law has played an important role in addressing BHR issues and in establishing frameworks for how companies should act.

[87] ibid art 6.1.
[88] ibid art 9.1.
[89] Ganesan [n 84].

The notion that companies should be accountable for impacts their operations have on people and planet gained considerable traction around the 1970s.[90] While discussions on corporate accountability for human rights in a judicial sense had been ongoing since the Nuremberg trials,[91] the challenges associated with a hard law approach led to a growing recognition of the need for alternative means to address BHR issues as the influence and economic power of companies grew throughout the 20th century.

Early soft law instruments emerged from this general debate about corporate responsibility and accountability. In 1976 and 1977 respectively, the Organization for Economic Co-operation and Development (OECD) and the ILO introduced guidelines and principles to establish standards for corporate behavior. Both instruments, although updated since, remain relevant and influential to this day. Worth noting is that they are both entirely based on voluntarism, meaning companies are legally bound by their provisions only if they are translated into applicable national legislation.

During the same time period, other parts of the UN, aside from ILO, also engaged in discussions on corporate accountability. In 1973, the UN Commission on Transnational Companies was created to draft a code of conduct for companies. However, reaching sufficient consensus proved more challenging that for the OECD and the ILO, and the code was never completed. Among other differences, proponents of the instrument were reportedly divided between making it a legally binding convention or a voluntary set of guidelines and principles.[92]

In 2000, the UN launched its Global Compact, an initiative urging companies to "embrace and enact" 10 principles related to human rights, labor rights, anti-corruption, and the environment. Participation is voluntary, and companies agree to publish an annual public report on their progress. The Global Compact has been successful in raising awareness of BHR issues, attracting over 25 000 participants, but has also faced criticism for a perceived laxness of its principles.[93]

It would not be until 2011 that the UN adopted a more comprehensive BHR instrument. Unanimously endorsed by the Human Rights Council, the UNGPs are based on the 'Protect, Respect and Remedy' Framework: a State duty to **protect** human rights; a corporate responsibility to **respect** human

[90] For a concise and clear overview of the early development of the BHR movement, see Nolan [n 83].
[91] See eg *The United States of America vs Carl Krauch et al* (US Military Tribunal Nuremberg) (IG Farben); For a discussion on the role of the Nuremberg trials in the development of the field of BHR, see Steven S Nam, "Decentralization and public-private diplomacy in the business and human rights field" in Jean Quataert and Lora Wildenthal (eds), *The Routledge history of human rights* (Routledge 2019).
[92] Nolan [n 83], 39.
[93] ibid 40.

rights; and effective access to **remedy**. These three pillars are intended to create "differentiated but complimentary responsibilities", essentially meaning that while different responsibilities are imposed on States and companies, the two need to both fulfill theirs for results to be achieved.[94] The UNGPs have received strong support from governments, NGOs and many businesses.[95]

The UNGPs have profoundly influenced the development of hard law, as well as other soft law instruments. In essence, many soft law instruments on BHR are perhaps best understood in symbiosis, as they generally draw on the same overall principles and ideas and often reference each other.

Despite not imposing legally binding obligations on companies, soft law instruments on BHR have been argued by many to have been key in promoting universal standards for corporate behavior. Ruggie, the architect of the UNGPs, phrased it the following way:

> The UNGPs reaffirm that business enterprises must comply with all applicable laws. Beyond legal compliance, they also stipulate that enterprises have the responsibility to respect human rights, irrespective of a state's willingness or ability to enforce the law. This responsibility is based in a social norm. […] We know that the corporate responsibility to respect human rights is a transnational social norm because the relevant actors acknowledge it as such, including businesses themselves in their corporate responsibility commitments.[96]

Ruggie further argued that the *social norms* of the UNGPs position themselves in between legal and moral norms, establishing not only *that* companies have a responsibility for human rights, but also how they should meet them.[97]

The following three subchapters will examine in more detail the three soft law instruments that are most central to the matter of international workers' rights in business.

3.2.1 UNGPs

[94] UN Human Rights Council, "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 Companies and Other Business Enterprises, John Ruggie" (7 April 2008) A/HRC/8/5 para 9.
[95] UN Human Rights Council, "Interrim report of the Special Representative of the Secretary- General on the issue of human rights and transnational companies and other business enterprises" (2006) A/HRC/4/035, especially para 12.
[96] John Gerard Ruggie, "The Social Construction of the UN Guiding Principles on Business & Human Rights" (2017) SSRN Electronic Journal 11-17, 13.
[97] ibid 14.

The UNGPs address all States and all business enterprises, regardless of size, sector, or structure. The extent of a company's responsibilities however depends on its size and the scope and nature of the potential human rights impacts.[98] The human rights that are within businesses' responsibility to respect include, *inter alia*, those expressed in the International Bill of Human Rights as well as the fundamental rights established in the ILO Declaration on Fundamental Principles and Rights at Work.[99] The UNGPs thereby do not establish any new rights, but rely on existing instruments.

Companies' responsibility to respect human rights is structured both as a negative obligation ("avoid causing or contributing to adverse human rights impacts") and a positive obligation ("seek to prevent or mitigate adverse human rights impacts"). The latter of the two applies to impacts that are "directly linked to their operations, products or services by their business relationships, even if [the company itself has] not contributed to those impacts."[100] This means companies are responsible for impacts they **cause** or **contribute to**, as well as impacts **directly linked** to their activities. Expectations on the company largely depend on its relation and proximity to the impact, in other words which of these three categories of connection is at hand. The responsibility further "exists independently of States' abilities and/or willingness to fulfill their own human rights obligations"[101], meaning a company's responsibilities can go beyond complying with applicable legislation.

In order for companies to meet their obligations under the UNGPs, they are to have policies and processes "appropriate to their size and circumstances" in place. Such policies and processes include a policy commitment, ongoing HRDD processes and, if needed, processes enabling remediation.[102] The focus of this thesis lies with the HRDD part of the regime, which will be examined in closer detail in chapter 4.

3.2.2 OECD Guidelines

The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines), introduced in 1976, were the first instrument of international soft law aimed at defining responsible business conduct. Initially, they did not cover many areas now associated with the term, such as human rights, the environment or anti-corruption; they focused instead primarily on matters like disclosure of information, competition, and taxation.

[98] UNGP 14 with commentary.
[99] UNGP 12 with commentary.
[100] UNGP 13 with commentary.
[101] UNGP 11 with commentary.
[102] UNGP 15 with commentary.

The few human rights related responsibilities that were included in the original Guidelines concerned labor rights.[103]

The OECD Guidelines have undergone several updates, the most significant being in 2011, which introduced extensive human rights provisions based on the then-new UNGPs, including provisions on HRDD. Just like in the UNGPs, companies were recommended to *prevent and mitigate* adverse impacts "directly linked to their operations, products and services by their business relationships"[104]. Earlier versions of the OECD Guidelines had instead held that companies merely were to "encourage, where practicable, business partners, including suppliers and subcontractors"[105]. In other words, pre-2011 versions of the Guidelines did not as explicitly extend the responsibility to cover the value chain.

The latest update, from June 2023, introduced new recommendations for aligning with international climate goals[106], principles on data protection[107] and downstream due diligence.[108] Unless otherwise stated, it will in the following be this 2023 version that is referred to as the OECD Guidelines.

Unlike the UNGPs, which address all companies regardless of size or structure,[109] the OECD Guidelines target multinational enterprises (MNEs) specifically. Despite that, the Guidelines abstain from defining the term MNE[110] and encourage out of scope companies, such as small and medium-sized enterprises (SMEs) and non-multinationals, to comply to the greatest extent possible.[111]

The standards and principles established in the OECD Guidelines are non-binding and non-enforceable. As an instrument of soft law, they are however unique in establishing a grievance system, where individuals and organizations can lodge complaints about alleged MNE non-compliance with the Guidelines.

The grievance system is set up in the form of National Contact Points (NCPs) within all adhering States. It is worth noting that, despite the non-binding character of the Guidelines regime, the obligation to establish an NCP is legally binding for OECD Member States; the requirement was included in a

[103] Sander van 't Foort, "The History of National Contact Points and the OECD Guidelines for Multinational Enterprises" (2017) 2017 Rechtsgeschichte - Legal History 195.
[104] OECD Guidelines (2011 edition), ch II A.12.
[105] OECD Guidelines (2000 edition), ch II 10.
[106] OECD Guidelines ch VI, see eg commentaries 76-79.
[107] OECD Guidelines ch IX, see eg commentaries 110 and 114.
[108] OECD Guidelines ch II, see eg commentary 17.
[109] UNGP 14 with commentary.
[110] OECD Guidelines ch I commentary 4.
[111] OECD Guidelines ch I commentary 6.

1984 OECD Council Decision, which makes it binding for all parties of the OECD Convention.[112] This duality - voluntarism for companies, while States are legally obligated to set up a non-judicial mechanism in their territory - has been referred to as a "hybrid feature" of the system. This dual approach has been argued to be a pragmatic middle way, allowing flexibility and voluntarism in some parts, while imposing legal obligations in others, and has been suggested as a possible model for the potential future BHR treaty.[113]

NCPs handle complaints through "specific instances". The system was not part of the original 1976 Guidelines regime but added through an amendment in the year 2000.[114] Since then, more than 650 cases relating to MNE activities in over 105 countries and territories have been handled by NCPs across the world.[115] A more extensive look into the NCP grievance process and some "jurisprudence" will follow in chapter 5.

3.2.3 ILO MNE Declaration

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO MNE Declaration), adopted in 1977, provides guidance for companies based on principles from other ILO instruments, such as conventions and recommendations.[116] In order to promote and facilitate the application of its principles, the ILO has issued a number of concretized guidance documents and operational tools since.[117]

The ILO is unique as a UN agency, in that it is structured as a tripartite organization, bringing together governments, employers and workers. These three groups are to have equal voice, ensuring that "the views of partners are closely reflected in labour standards and in shaping policies and programmes"[118]. The principles in the MNE Declaration are commented to all three groups, but with an acknowledgement that the different actors have different roles to play.[119]

For States, the Declaration emphasizes the obligation to respect, promote and realize the principles on fundamental rights from various ILO Conventions,

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[112] Convention on the OECD (signed 14 December 1960, entered into force 30 September 1961) 888 UNTS 179, 5.

[113] Patrick Simon Perillo, "The Role of the OECD Guidelines for Multinational Enterprises and the National Contact Points in Shaping the Future of Corporate Accountability" (2022) 24 International Community Law Review 36.

[114] NCPs existed before then, but their function was merely to promote the Guidelines within the given territory, not to manage grievances. See Foort [n 103].

[115] OECD, "National Contact Points - Organisation for Economic Co-Operation and Development" <https://mneguidelines.oecd.org/ncps/> accessed May 10, 2024.

[116] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (International Labour Organization 2022) (ILO MNE Declaration), 5.

[117] ILO MNE Declaration annex II.

[118] "About the ILO" (*International Labour Organization*, January 28, 2024) <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> accessed May 10, 2024.

[119] ILO MNE Declaration General Policies, point 10.

regardless of whether they have ratified the Conventions themselves. These rights include the freedoms of association and collective bargaining, elimination of forced or compulsory labor, abolition of child labor, elimination of employment discrimination and the right to a safe and healthy working environment.[120] With 187 Member States, this obligation is nearly universal.[121] For companies, the ILO MNE Declaration's principles are recommendations and do not create binding rules.

The Declaration includes chapters on general policies, employment, training, work conditions, and industrial relations, with clear distinctions between State and corporate responsibilities. States' responsibilities are generally more extensive and concrete. For example, in order to eliminate forced or compulsory labor, States are to "take effective measures to prevent and eliminate [the practice], to provide to victims protection and access to appropriate and effective remedies, such as compensation and rehabilitation, and to sanction the perpetrators"[122], while companies are to "take immediate and effective measures within their own competence to secure the prohibition and elimination of forced or compulsory labour in their operations."[123] The State responsibility is further concretized to include the development of a national plan of action and providing guidance to other parties, while the corporate responsibility consists in the quoted, short paragraph, referring only to ending the practice within their own operations.

[120] ILO MNE Declaration General Policies, point 9.
[121] As of May 2024.
[122] ILO MNE Declaration Employment, point 23.
[123] ILO MNE Declaration Employment, point 25.

4 Human Rights Due Diligence

The concept of HRDD was first introduced in the UNGPs and has since become a key feature of many BHR regimes, both in soft and hard law. This chapter outlines the main features of the concept as such, emphasizing its potential to extend corporate responsibility to the value chain.

4.1 Main Features

While the precise structure of HRDD requirements differ between instruments, they share several core features. This subchapter gives a brief introduction to these features, using the UNGPs as a primary point of reference. The reason for this is the immense impact the UNGPs have had on other instruments.

According to the UNGPs, HRDD is how companies practically meet their responsibilities of identifying, preventing, mitigating, and accounting for how they address impacts.[124] It is a process that "include[s] assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[125]

HRDD requirements can be analyzed using three key parameters: **breadth**, meaning the types of human rights impacts targeted; **depth**, meaning to what extent the value chain is covered by the due diligence; and **content**, meaning the steps a company is expected to take to meet the requirements.[126]

The UNGPs' HRDD process is broad, deep, and rich in content. It addresses "all internationally recognized human rights"[127] and considers impacts related both to the company's own operations and to operations to which the company is connected through business relationships.[128] Content-wise, the processes should "identify, prevent, mitigate and account for how [the company] address[es] [its] adverse human rights impacts"[129]. As can be seen, these responsibilities are both positive and negative in character.

HRDD, as outlined in the UNGPs and other instruments like the OECD Guidelines and national legislation, is risk-based. This means that companies can focus their efforts on areas where the risk of human rights impacts is most

[124] UNGP 17 with commentary; UN Human Rights Council [n 94], point 56.
[125] UNGP 17.
[126] The Danish Institute for Human Rights, Holly G and Methven O'Brien C, *Human Rights Due Diligence Laws: Key Considerations* (The Danish Institute for Human Rights 2021).
[127] UNGP 12 with commentary.
[128] UNGP 17 with commentary.
[129] UNGP 17 with commentary.

significant, particularly when an extensive value chain makes comprehensive due diligence unreasonable or impossible.[130]

The risk-based approach means that the investigative moments of identifying potential human rights impact is of central importance. The concept of *risk* itself is hence at the center of the responsibility (or obligation, in the case of hard law). Companies are also allowed some flexibility in their HRDD processes based on their size and resources, as long as attention is paid to the severity of potential impacts; if an SME has severe human rights impacts, the corresponding HRDD measures will still be necessary. [131] Most other HRDD instruments than the UNGPs include a size limit for companies to be in scope, meaning they might not apply to SMEs at all, but the overall principle of weighing the severity of the impact against the size and capacities of the company is still shared between instruments.

The risk-based approach is an important feature to keep in mind, not least when discussing the burden imposed on companies through requirements of HRDD covering the value chain. Extending companies' responsibility to cover the full value chain might sound dauntingly extensive, but through allowing a risk-based approach, the actual efforts required of the companies are limited significantly.

HRDD is expected to be an ongoing process, "recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve"[132]. It is hence not sufficient to perform the steps of the HRDD process once; they must be an integral part of the company's management. The UNGPs emphasize that identifying and assessing potential risks should be a systematic process, considering various elements to create a comprehensive overview of actual and potential human rights impacts. This includes meaningful consultation with stakeholders. Aside from that, it can be achieved through reports from news outlets or NGOs, or the performance of self-standing assessments (such as audits), etcetera.[133] The process described is very similar to that of the OECD Guidelines, which also underline that "[m]eaningful stakeholder engagement is a key component of the due diligence process"[134].

If (potential) human rights impacts are identified in the activities of a linked entity, the UNGPs state that the company is to integrate its findings "across relevant internal functions and processes, and take appropriate action"[135]. The former means eg assuring that there is a functioning internal human rights

[130] UNGP commentary to principle 17.
[131] UNGP commentary to principle 14.
[132] UNGP 17(c).
[133] UN OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide. (2012) HR/PUB/12/02, 39 ff.
[134] OECD Guidelines ch II 28.
[135] UNGP principle 19.

policy integrated in all levels of management, and that sufficient internal budget means are allocated to address the issue. Appropriate action will depend on several factors, such as whether the company has *leverage* over the entity in question, ie to what degree it is in a position to pressure the entity into changing its behavior. Strong leverage can, for example, be when a company represents a large proportion of business for the entity. If there is leverage, it should always be used, and if possible it should be increased. If that is not successful, the company should consider ending the relationship.[136]

4.2 Extending Responsibility to the Value Chain

The exact structure of HRDD requirements can differ quite significantly, as will be clearly shown when different existing pieces of legislation are examined in chapter 5. One common feature in all versions of HRDD, however, is the idea that it is not only a given company's *own* operations that are assessed for potential human rights impacts but also *other companies'* operations, when they are somehow linked. This is where we enter the discussion about a value (or supply) chain responsibility. Defining this linkage is at the very core of this thesis.

First off, it should be said that it, in principle, is possible to imagine a HRDD responsibility that applies only to a **company's own activities**.[137] At that level, the issues regarding causality and practical feasibility (discussed in the coming subchapters) are largely avoided, since the HRDD responsibility only entails assessing and mitigating risks due to acts and omissions within the company's own direct control. This would however not address the value chain-based complexities of the modern economy, meaning many impacts would go untouched.

The next, somewhat more far-reaching level of responsibility would be to extend the HRDD to cover activities of direct suppliers and subcontractors. This level can be referred to as the **Tier 1**. Here, the company is made responsible for assessing risks associated with the activities of their direct business relations, ie relations that they have decided to conduct business with.

Further away in the upstream value chain, beyond Tier 1, the connection between the company and the possible impacts becomes weaker. It is no longer a direct business relation, but rather a relation one or several steps removed. Legally, this raises questions: how do you impose liability on someone for something that occurs so far from their apparent control? These higher levels of the upstream value chain are often referred to as the **Tier 2, 3, 4**, etcetera.

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[136] UN OHCHR [n 133], 48 ff.

[137] According to the UNGPs, companies are to avoid causing or contributing to adverse human rights impacts through their *own* activities and address them when they occur. This includes providing remedy. The requirements are eased when impacts occur outside of the own operation.

For the sake of this thesis, they are grouped together and referred to as one, to keep the discussion more concise.

Lastly, value chain responsibility can include **downstream** activities, meaning the future life of a material or commodity *after* it leaves the company in question. The nature of downstream activities differs greatly between sectors, but can commonly include the receiving, buying, using, and disposing of the product or service.

These different possible levels of responsibility can be illustrated as follows:

The conceptualization of these value chain levels will be central to the rest of the thesis.

The HRDD responsibility of the UNGPs covers "adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be linked to its operations, products or services by its business relationships"[138]. *Business relationships* are specified by GP 13 as including "relationships with business partners, entities in [the] value chain, and any other non-State or State entity directly linked to [the company's] business operations, products or services"[139]. It is important to note that the HRDD responsibility does not cover the related party's operations *in general*, but only in the parts where they are connected to the company's own operations, products, or services.[140] The UNGPs' HRDD responsibility hence covers all Tiers of the value chain, including downstream, as long as there is a link between the company and the impact in question.[141]

The OECD Guidelines uses the same phrasing of direct linkage by business relationships, but concretizes further what precisely that can be:

> The term 'business relationship' includes relationships with business partners, sub-contractors, franchisees, investee companies, clients, and joint venture partners, entities in the supply chain which supply products or services that contribute to the enterprise's own operations, products or services or which receive, license, buy or use products or services from the enterprise, and any other non-State or State entities directly linked to its

[138] UNGP 17(a).
[139] UNGP commentary to principle 13.
[140] UN OHCHR [n 133], 32.
[141] UN OHCHR, *Mandating Downstream Human Rights Due Diliegece* (13 September 2022).

> operations, products or services. […] Business relationships include relationships beyond contractual, 'first tier' or immediate relationships.[142]

The OECD Guidelines thereby also extends responsibility to all levels of the value chain, explicitly clarifying that no contractual relationship between the parties is needed.

4.3 Legal Liability: The Matter of Causality

According to the UNGPs, companies must take appropriate action upon detecting actual or potential human rights impacts linked to their operations. The nature of these actions depends on the impacts and whether the company caused, contributed to, or was otherwise directly linked to them. What is less clear is whether the UNGPs envision that incompliance with this responsibility should give rise to civil liability.[143] If so, this raises interesting questions of causality.

Consider this scenario: a European company which owns a number of fashion brands buys garments from a factory in Bangladesh. The company does not operate the factory and is only one of many buyers. The building housing the factory collapses, and many workers die. The company is then accused of having failed to adequately assess or improve the factory's safety standards. Using civil law terms of causation, one might question whether purchasing garments is sufficient to link the company to the unsafe conditions in the factory, especially since they were only one of many buyers. Moreover, records at the factory showed that no garments had been produced specifically for the company in question for over a month before the collapse. This scenario is in fact not a fictional one but based on a case brought before the Danish NCP.[144] The NCP concluded that the circumstances established a supplier relationship that constituted a "direct linkage"[145] between the actors, in line with the OECD Guidelines.[146] The case will be discussed in more detail in chapter 6.

In the referenced case, the issue of causality was addressed rather lightly. The business relationship between the parties was deemed sufficient to impose responsibility on the company, even if the connection between this relationship and the human rights impact itself were somewhat weak.

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[142] OECD Guidelines ch II 17.

[143] Nicolas Bueno and Claire Bright, "Implementing Human Rights Due Diligence through Corporate Civil Liability" (2020) 69 International and Comparative Law Quarterly 789.

[144] Specific instance notified by Clean Clothes Campaign Denmark and Active Consumers regarding the activities of PWT Group, DK NCP (notified 12 December 2014) (Rana Plaza NCP Case).

[145] See OECD Guidelines sect 2 art 13.

[146] Rana Plaza NCP Case final statement 5.

In general, hard law regulations place more emphasis on causality. Hard law initiatives on HRDD often include tort liability for companies, and for such liability, causation is a key component. The harm in question must somehow be attributable to the defendant's actions or omissions, and there must be some level of foreseeability that the damage could occur. Exactly how this is determined naturally varies across legal systems.[147]

As soft law instruments, the UNGPs and OECD Guidelines offer more flexibility in how they construct the responsibility of companies. After all, they are responsibilities, not obligations, and they are not sanctioned with any liability but perhaps social and reputational. Some distinction is, however, made between impacts caused or contributed to by a company, and those the company is merely linked to through a business relationship. In the first case, the company should "provide for or cooperate in their remediation through legitimate processes". In other word, the corporate responsibility to respect human rights is explicitly connected to the right to remediation. When the company is only linked to the impact, there is no such requirement.[148]

4.4 Critique

The introduction of legislation on mandatory HRDD has received relatively broad support from NGOs,[149] trade unions,[150] business associations,[151] and individual companies[152]. That being said, the concept has also been subject to debate. Within academia, various criticisms and concerns have been raised about the new laws and of the concept of mandatory HRDD itself. This subchapter will explore some of the main points of contention.

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[147] The Danish Institute for Human Rights [n 126].

[148] UNGP 22 with commentary.

[149] See eg European Coalition for Corporate Justice, "Over 100 NGOs Demand Human Rights and Environmental Due Diligence Legislation" (*ECCJ*, December 2, 2019) <https://corporatejustice.org/news/over-100-ngos-demand-human-rights-and-environmental-due-diligence-legislation/> accessed May 10, 2024.

[150] See eg IndustriALL Global Union, "Trade Unions Strategize Pathways for Human Rights Due Diligence in Africa" (*IndustriALL*, November 2, 2023) <https://www.industriall-union.org/trade-unions-strategize-pathways-for-human-rights-due-diligence-in-africa> accessed May 10, 2024.

[151] See eg OI Pomodoro Da Industria Nord Italia, "Istituzioni e OI a Confronto Sulle Istanze Proposte Dalla Filiera per Contrastare l'import in UE Di Conserve Di Pomodoro Che Non Rispettano Gli Standard Di Sostenibilità Richiesti Alle Analoghe Produzioni Europee" *OIPomodoro* (February16,2024) <https://oipomodoronorditalia.it/2024/02/16/istituzioni-e-oi-a-confronto-sulle-istanze-proposte-dalla-filiera-per-contrastare-limport-in-ue-di-conserve-di-pomodoro-che-non-rispettano-gli-standard-di-sostenibilita/> accessed May 10, 2024.

[152] See eg Business & Human Rights Resource Centre, "Nordic Businesses Call on Their Governments to Support The Corporate Sustainability Due Diligence Directive" <https://media.business-humanrights.org/media/documents/Nordic_Businesses_Statement_CSDDD_2024.pdf> accessed May 10, 2024.

One common line of criticism is that mandatory HRDD does not make enough difference to the way businesses operate, as requirements focus on establishing processes and plans rather than achieving concrete human right outcomes. One scholar expressing this concern is US labor law professor James Brudney, who has noted that HRDD following the UNGPs' model merely centers around a process of voluntary self-regulation for companies, and that no actual human rights outcomes are required of them. He notes that the regime also lacks clear consequences for companies that fail to comply with their responsibilities.[153]

Brudney suggests that an international hard law instrument developed by the ILO would be a more efficient alternative, arguing that such a solution would bring benefits both in terms of including workers in the design and implementation stages, and in terms of its potential for establishing substantial responsibilities rather than procedural ones.

Justine Nolan, director of the Australian Human Rights Institute, also voices concerns that HRDD emphasizes "form over substance" and "processes over outcomes". She argues that emerging hard law regulations need to be substantive and concrete to have a real effect on corporate human rights practices. Nolan underlines that the processes would need to enable rights holders, such as workers, to in a true and meaningful way be allowed to question corporate practices where needed, adding that "box-ticking processes will not catalyse operational changes to business models that are needed to address substantive human rights risks in supply chains."[154]

Nolan underscores that strong and meaningful stakeholder engagement is central to making HRDD a framework that is "proactive, not reactive, and can be an effective part of corporate decision-making"[155].

Jonathan Bonnitcha and Robert McCorquodale, in a well-cited article, question the intended aim of the HRDD requirements of the UNGPs, and by extension all instruments following their model;

> [T]he Guiding Principles invoke two different concepts of due diligence: the first is a process to manage business risks and the second is the standard of conduct required to discharge an obligation. […] This confusion creates uncertainty about the extent of businesses' responsibility to respect human rights and uncertainty about how that responsibility relates to businesses'

[153] Brudney [n 71], 195.
[154] Nolan [n 12], 7.
[155] ibid, 9.

> correlative responsibility to provide a remedy when they infringe human rights.[156]

This confusion, they argue, comes from the fact that due diligence generally refers to different concepts within commercial and human rights law. For practitioners of the former, a due diligence process aims to identify and mitigate risks to the company itself, such as prior to a purchase or merger, whereas HRDD aims to identify and mitigate risks that the company might inflict *on others*. Bonnitcha and McCorquodale acknowledge that the use of a term that was already familiar to businesses was likely a deliberate tactic by the creators of the UNGPs, but argue that the confusion it causes contributes to a lack of clarity about the purpose of HRDD: is it primarily a safeguard against human rights violations, or a way for companies to defend themselves against liability when a violation has occurred?

Ruggie, along with working group member John Sherman, responded to this criticism by emphasizing that there is no contradiction between the two interpretations. They argue that HRDD is essential for companies to *know* as well as *show* that they live up to their responsibilities.[157]

Another criticism concerns the horizontal nature of HRDD, meaning it imposes obligations (in the case of hard law regulations) on companies to supervise other companies across their value chain, instead of such supervision being conducted by a State authority. This structure raises legal questions. Thomas Ackermann has addressed this matter by concluding that companies are generally permitted to trust that the conduct of their peers is lawful, hence not being obligated to be their "brother's keeper" and act as a supervisor of fellow private entities. He asks himself: "[w]hy should this be any different in the relationship between a European retail company and a textile manufacturer in Pakistan who regularly deal with each other at arm's length?"[158]

Ackermann concludes that HRDD covering the value chain is legitimized due to pragmatic reasons, noting that companies are often in a better position to conduct such supervision since they are not constrained by territorial borders in the way a State would be.[159]

A final common criticism in the scholarly debate on HRDD concerns the feasibility for companies to identify and address human rights impacts not only in their own operations or those of their direct business partners, but also

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[156] Jonathan Bonnitcha and Robert McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights" (2017) 28 European Journal of International Law 899, abstract.

[157] John Gerard Ruggie and John F Sherman III, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale" (2017) 28 European Journal of International Law 921.

[158] Ackermann [n 82], 149.

[159] ibid 149 ff.

further away in the value chain. As will be demonstrated in chapter 6, studies have found that companies face challenges when they are not in a contractual relationship with the concerned entity. This critique is hence directed more at HRDD deep into the value chain, than at HRDD per se.

5 HRDD Legislation in the EU and its Member States

The EU and its Member States have adopted several laws on mandatory HRDD in recent years. This chapter will examine these laws, in order to gain an understanding for how extensively the responsibility covers the value chain. It should be noted that other similar initiatives have been introduced in third countries; these will however not be analyzed further in this work.

5.1 EU Directives and Regulations

The final compromise version[160] of the CSDDD included a narrower value chain responsibility than the initial Commission proposal. The compromise covers companies' "own operations, those of their subsidiaries, as well as their direct and indirect business partners throughout their chains of activities"[161]. The familiar term *value chain* has hence turned into *chain of activity,* and *business relation* into *business partner*.

With this new terminology, the value chain responsibility of the CSDDD seems to differ from that in the UNGPs and OECD Guidelines, which both explicitly extend to all actors with whom there is a value chain connection. The "chain of activities" is explicitly "without prejudice to the terms 'value chain' or 'supply chain' as defined in or within the meaning of other EU legislation"[162].

The scope of the "chain of activities" in the upstream is defined as:

> […] activities of a company's upstream business partners related to the production of goods or the provision of services by the company including the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of the products and development of the product or the service.[163]

Downstream, the "chain of activities" is considerably more limited and includes:

> […] activities of a company's downstream business partners related to the distribution, transport and storage of the product,

[160] As previously pointed out, this thesis is submitted just before the final text of the CSDDD is set to be published in the Official Journal of the EU.
[161] CSDDD preface (15).
[162] ibid preface (18).
[163] ibid art 3 1(g)(i).

> where the business partners carry out those activities for the company or on behalf of the company […].[164]

The central term "business partner" includes direct and indirect business partners, meaning both those with which there is a commercial agreement, and those which merely perform "operations related to the operations, products or services of the company."[165]

The downstream responsibility is limited to include only certain activities, and, importantly, only the first level of the downstream chain, considering only activities carried out *for* or *on behalf of* the company are covered. The downstream responsibility also explicitly excludes the receiving of services and products from regulated financial undertakings.[166] Upstream, the responsibility is more extensive, covering many different activities and activities beyond Tier 1.

Downstream responsibility was a contested topic during the CSDDD negotiations. The Commission had initially included an extensive downstream responsibility in their proposal, but this was limited during negotiations. The Office of the United Nations' High Commissioner for Human Rights (OHCHR) issued a statement in September 2022, urging CSDDD legislators to extend the responsibility to the downstream value chain. They argued downstream activities can be diverse and often severe, including, *inter alia,* franchisees keeping people in forced labor or external delivery services failing to provide basic labor protections.[167] This input was not heeded.

The CSDDD forms part of an extensive set of EU initiatives aimed at achieving a fair, green transition of the EU economy within the framework of the Green Deal. Several of these new regulations include elements of HRDD.

In January 2017, the EU adopted the Conflict Minerals Regulation, with the purpose of breaking the nexus between conflict and the illegal exploitation of minerals.[168] The HRDD of the EU Conflict Minerals Regulation covers the "mineral supply chain", defined as "the system of activities, organizations, actors, technology, information, resources and services involved in moving and processing the minerals from the extraction site to their incorporation in the final product."[169] Simply put, the responsibility covers every part of the upstream supply chain, from extraction to final product. The downstream is excluded, as is indicated by the choice of the term *supply* chain.

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[164] ibid art 3 1(g)(ii).
[165] ibid art 3 1(e).
[166] ibid preface (19).
[167] UN OHCHR [n 141].
[168] EU Conflict Minerals Regulation preface (1).
[169] ibid art 2 (c).

Further due diligence requirements regarding minerals and metals were introduced in 2023 through the EU's Battery Regulation.[170] While the Critical Minerals Regulation targets sourcing of minerals and metals only in areas recognized as particularly high-risk, the Battery Regulation is broader and recognizes risks when business is conducted under "safer" circumstances.[171] The types of risks referenced in the Battery Regulation are also more diverse and include a number of labor related rights, such as trade union freedoms and occupational health and safety,[172] and the ILO's fundamental conventions and principles are referenced explicitly.[173] The Conflict Minerals regulation focuses instead only on gross violations, such as child labor.[174]

The Battery Regulation demands HRDD processes to be consistent with the standards of a number of "internationally recognized due diligence instruments", including the UNGPs, OECD Guidelines and ILO MNE Declaration.[175] The responsibility is extensive, covering both the full upstream and downstream; the Regulation aims at "[a]ddressing the entire life cycle of all batteries placed on the Union market."[176]

Another piece of Green Deal legislation that includes value chain due diligence requirements is the 2023 Regulation on Deforestation-Free Products.[177] While the regulation establishes obligations similar to those of other HRDD instruments examined, it is not of direct relevance of this investigation, since it does not target workers' rights along that chain. It is relevant to note, though, that the responsibility is special in the sense that it targets the whole supply chain, for the purpose of reaching and examining the last Tier of the chain specifically – the recovery of the material.[178]

The so-called Forced Labor Ban[179] was adopted by the EU around the same time as the CSDDD and is another example of legislation containing elements of HRDD. The regulation prohibits the sale, import, and export of products

[170] Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC (2023) OJ L191/1 (EU Battery Regulation).
[171] ibid preface (78).
[172] ibid art 2 (b).
[173] ibid art 2 (e) and (g).
[174] EU Conflict Minerals Regulation preface (3).
[175] EU Battery Regulation art 49 (1)(a).
[176] ibid preface (10).
[177] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (2023) OJ L150/206 (EU Regulation on Deforestation-Free Products).
[178] ibid arts 8-11.
[179] Proposal for a regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market (COM(2022)0453 – C9-0307/2022 – 2022/0269(COD)).

made with forced labor.[180] The Commission and competent national authorities will act as governing bodies.[181] If they find reason to initiate an investigation, the company importing, exporting, or selling will have to prove that they have conducted HRDD. The Regulation does, however, not establish new HRDD requirements; instead, companies should follow requirements already established in national or EU law, or in voluntary regimes from the UN, OECD, ILO, or others.[182] This provides great flexibility for companies, and effectively means that the responsibility's extension into the supply chain can differ depending on which framework is followed.

As seen, EU Green Deal initiatives containing HRDD requirements differ in terms of the extension of value chain responsibility. When the CSDDD enters into force, it will in principle apply across industries; however, the sector-specific instruments will continue to apply within their areas of application, meaning value chain requirements for EU companies will depend on context and sector.

5.2 National Initiatives

Aside from these EU initiatives, several laws on HRDD have also been adopted on the national level in later years. This subchapter provides an overview over these laws.

France adopted a law on a "Duty of Vigilance" in 2017,[183] making it the first country in the world to have comprehensive legislation mandating HRDD across sectors and for a wide variety of human rights impacts. Only very large companies are in scope.[184]

The HRDD responsibility of the French law covers impacts resulting from the company's own activities, and from those of other companies it directly or indirectly controls, such as different kinds of subsidiaries. Furthermore, it covers activities of both subcontractors and suppliers, if there is an "established commercial relationship" and the activities in question are connected to this relationship.[185] In French law, an established commercial relationship is generally one that is stable, of a certain intensity, and likely to last. There is no requirement of a contractual relationship.[186] It is, however,

[180] ibid art 3.
[181] ibid preface (24).
[182] ibid art 17.
[183] LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (FR) (French Duty of Vigilance Law).
[184] ibid art 1.
[185] ibid art 1.
[186] French Commercial Code, L. 442-1-II.

still unclear whether these same criteria apply for the Vigilance law; that will be clarified through future jurisprudence.[187]

Since no contractual relationship is needed, the law does enable responsibility beyond Tier 1, but if the French courts interpret the "established commercial relationship" as being long-lasting and substantial, that will likely even so limit the value chain responsibility considerably, in comparison to the soft law instruments. One could imagine fickle and volatile buying patterns, with rapid changes between suppliers, being used by companies to avoid the establishment of such a relationship, hence avoiding responsibility.

In January 2023, a German law on HRDD entered into force.[188] The size limits for companies to be in scope is lower than in the French law, but still, only companies of a considerable size are in scope.[189] The law focuses the HRDD responsibility on Tier 1, "direct suppliers".[190] There are however situations when this responsibility is extended. The activities of indirect suppliers - "any enterprise which is not a direct supplier and whose supplies are necessary for the production of the enterprise's product or for the provision and use of the relevant services"[191] – are covered by the HRDD requirements when there are actual indications of violations of human or environmental rights. The law refers to this as a need for *substantiated knowledge.*[192]

In order for companies to be made aware of potential violations in the value chain and gain *substantiated knowledge,* they are obligated to set up a complaint mechanism. If a company has substantiated knowledge about violations in the value chain, it must perform a risk analysis and undertake preventative, cessative and minimizing efforts.[193]

The French and German laws are unique in establishing HRDD obligations that apply across sectors and for a wide variety of rights. Norway is the only other State in Europe with such legislation. Despite the country not being an EU Member, it has been deemed in-scope for this investigation due to its exceptionally strong ties to the EU.

The Norwegian Transparency Act, adopted in 2021 and in force in 2022, makes strong reference to the due diligence requirements of the OECD Guidelines and extends the responsibility to impacts to which the company is

[187] 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, 144 f; Sherpa, "Vigilance Plans Reference Guidance" (2019), 32 f.
[188] Lieferkettensorgfaltspflichtengesetz vom 16. Juli 2021 (BGBl. I S. 2959) (FRG) (German Supply Chain Act).
[189] ibid division 1 section 1(1).
[190] ibid section 5 (1).
[191] ibid section 2 (8) (own translation).
[192] ibid section 9 (3).
[193] ibid section 9 (1).

directly linked through the value chain or business partners.[194] There is ongoing debate between Norwegian scholars about whether the responsibility extends to the downstream, or is limited only to the upstream; it is, it seems, not quite clear, so future jurisprudence will have to provide further definition.[195]

Besides all-encompassing laws such as the ones discussed, several States around the world have sector or right specific HRDD legislation. In an EU context, such an example is the Dutch Child Labor Due Diligence Law.[196]

While the Dutch law is narrow in terms of rights covered, it is wider in scope than most other similar laws, by encompassing all businesses that provide goods or services to end users in the Netherlands.[197] Merely transporting the goods does not invoke responsibility.[198] The obligation consists in investigating whether there is a risk that the company's goods or services have been produced using child labor, as well as developing a plan to prevent such practices if there is reasonable suspicion.[199] The responsibility in principle covers the entire upstream of the value chain,[200] with the important yet somewhat unclear limitation that sources which are not reasonably known and consultable are exempted.[201]

As is clear to see from the overview presented here, national legislation on mandatory HRDD is on the rise. All of the laws mentioned have been adopted in the last seven years. It is worth noting that legislation at the national level will be affected by the new EU legislation, in particular the CSDDD, as EU rules take precedence over national rules, except, depending on the legislative act in question, where the national legislation is stricter.

[194] Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven) (Norwegian Transparency Act), section 4; see furthermore Liv Monica Stubholt, Tone Sørfonn Moe and Nina Stærnes, "The Norwegian Legislation on Social Sustainability: An Overview of the Transparency Act" (2024) 10 Oslo Law Review 1.

[195] Frode Elgesem, "Åpenhetsloven – Må Man Gjøre Aktsomhetsvurderinger Knyttet Til Risikoer i Nedstrøms Aktiviteter?" (2023) 62 Lov og Rett 205; Mads Karlsrud Haugse and Ole André Oftebro, "Innebærer Åpenhetsloven En Plikt Til Aktsomhetsvurderinger Knyttet Til Nedstrøms Aktiviteter?" (2023) 62 Lov og Rett 607.

[196] Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid) (NL) (Dutch Child Labor Law)

[197] ibid art 4.1.

[198] ibid art 4.4.

[199] ibid art 5.1.

[200] ibid; Liesbeth Enneking, "Putting the Dutch Child Labour Due Diligence Act into Perspective" (2019) 12 Erasmus Law Review 20, 32.

[201] Dutch Child Labor Law art 5.2; Enneking [n 200], 35.

6 Value Chain Responsibility in Practice

This chapter examines real-life experiences from implementing HRDD of different depths. The aim is to understand the feasibility of such requirements for companies, and their effect on workers' rights in the value chain.

6.1 Studies on Voluntary HRDD

Until the legislative developments of the last few years, HRDD was a soft law concept that companies adhered to voluntarily. Since there are no governing bodies monitoring the implementation of such voluntary practices - with the notable exception of the OECD's NCPs, which will be discussed in the next subchapter - its evaluation has been done through studies, usually based on surveys, interviews, and assessments of publicly available corporate reports of different sorts.

The studies presented in this subchapter represent only a sample of the total body of research into this topic. The selection is due to these studies being commonly cited in other works, indicating they have had a major impact on the HRDD debate. They are also more extensive and ambitious in scope than many other evaluations undertaken.

In 2017, Robert McCorquodale and others conducted a study of the HRDD practices of around 150 companies worldwide.[202] At that time, the UNGPs had only existed for six years. Of participating companies, just over 50% responded that they had at some point undertaken HRDD and/or human rights impact assessments. Among the rest, a considerable part had undertaken similar processes as part of other processes, without referring to them explicitly as human rights related.[203] Many of these 'other' processes involved matters of labor law.

The study found considerable differences between these groups – those that had consciously conduced HRDD, calling it such, and those that had merely included human rights themes in other processes –, with the former being considerably more likely to identify adverse human rights impacts, to track the effectiveness of actions taken, to consult human rights experts, and to consider a wider range of human rights, than the latter group. Companies with non-specific human rights processes were particularly struggling to identify impacts beyond Tier 1 of the value chain.[204] The study hence indicated an intricate value already in companies attempting to conduct HRDD.

The study further found that companies face challenges when conducting HRDD beyond Tier 1, often because of suppliers withholding information

[202] Robert McCorquodale and others [n 13].
[203] ibid 205.
[204] ibid 221.

about further steps in the value chain.[205] The study concluded that companies in general asked for clearer regulation, since the voluntary approach brought uncertainty in regard to, *inter alia,* the appropriate extension of HRDD into the value chain.[206] The study also concluded that discrepancies between companies conducting explicit and non-explicit HRDD was less prominent in regard to human rights that were regulated through other, already well-established legal areas, such as labor law.

McCorquodale was one of the authors of another similar study in 2019, which was part of the preparatory work for the CSDDD and published by the Commission in 2020.[207] Surveying 334 EU companies, the study found that some 37% of companies claimed to undertake due diligence regarding all human rights impacts. A majority of companies who claimed to conduct HRDD did, however, not include levels beyond Tier 1. Some 16% indicated their HRDD covered the whole upstream supply chain, and a further 16% that they saw to the full upstream and downstream value chain.[208] Many companies reported practical challenges when conducting HRDD in the supply chain, mainly due to the complex and opaque nature of global supply and value chains.[209]

75% of the businesses surveyed in the 2019 study responded that mandatory EU regulations on HRDD would be beneficial to them, by providing clarity and harmonization of rules. Less than 10% disagreed with this. Looking only at large companies, the support for legislation was even stronger.[210]

The 2019 study showed contractual clauses and codes of conduct were the most common ways for companies to practically implement HRDD, both upstream and downstream. The second most frequent way was auditing.[211] Many respondents expressed skepticism about the efficiency of auditing. This skepticism has resonated within academia. Nolan has been one such skeptic voice, arguing that audits take an insufficient "superficial snapshot approach" and that it lacks a focus on the root causes of problems, including the auditing company's own business model and purchasing practices. [212]

Since 2017, the World Benchmarking Alliance has conducted five studies of the human rights performance of large companies. Over the course of these studies, 70% of companies in the apparel and extractive industries were in 2023 found to have improved their human rights policy commitments, HRDD

[205] ibid 221.
[206] ibid 223.
[207] European Commission and others [n 14], 48 ff.
[208] ibid 65.
[209] ibid 70.
[210] ibid 140.
[211] ibid 66 f.
[212] Nolan [n 12], 6 ff.

and grievance mechanisms. This change had, however, overall been modest.[213]

Of the companies surveyed in the 2023 Benchmark study, 61% claimed to take some HRDD steps, but less than half of these involved rightsholders in their processes. This was listed as one of the key findings of the report.[214] Another key finding, of great relevance to this thesis, was that a full 91% of companies surveyed provided grievance mechanisms for all workers, which was a significant increase compared to previous years.[215]

Among apparel companies surveyed, 85% claimed to consider suppliers' human rights performance when contracting. The study however found that only 27% of companies could disclose proof that they enabled their suppliers to meet these expectations, noting that purchasing practices such as short lead-times put pressure on suppliers that can contribute to human rights impacts. The study underscores that "[t]he disparity between high expectations and the lack of a conducive environment to meet them creates a scenario where suppliers struggle to meet both human rights and gender equality standards and commercial demands"[216].

In late 2023, the Danish Institute for Human Rights conducted a study into how a number of large European companies view their downstream responsibilities. The study clearly demonstrates that downstream risks vary greatly between sectors, and it highlights the sectors of finance and technology as extra prone to human rights risks downstream.[217] General risks to labor rights are said to include "restrictions on freedom of association and collective bargaining at a franchise or hazardous work conditions in distribution or disposal of goods."[218]

6.2 NCP Specific Instances

Processes within the OECD Guidelines' grievance system offer a unique insight into HRDD implementation in specific cases. This subchapter examines several NCP statements on HRDD in regard to workers' rights, in order to understand how the Guidelines are to be interpreted and applied in a real-life setting.

6.2.1 About the NCP Process

The grievance, or *specific instance*, process at NCPs consists of three steps. First, the NCP conducts an initial assessment of the claim, determining

[213] World Benchmarking Alliance, *Corporate Human Rights Benchmark 2023 Insights Report* (2023), 9.
[214] ibid 12.
[215] ibid 14 f.
[216] ibid 16.
[217] The Danish Institute for Human Rights [n 15], 8.
[218] ibid.

whether to accept the case for further examination. Second, if the case is accepted, it is moved over to a support stage, where the NCP facilitates voluntary dialogues and/or mediation between the parties. Third, the NCP concludes the case, which entails a public statement by the NCP about the case and its outcomes.[219] In the specific instances where the parties reach an agreement, a signed joint final statement is generally issued.

Specific instance processes are non-binding, as are any conclusions or recommendations made by the NCP in its statements. The companies involved have no legal obligation to act in any way at any point of the process, neither by participating nor by abiding by the outcome. A company's refusal to participate will, however, not prevent the NCP from accepting a case for further examination, nor from issuing a statement with its assessment.

Since the NCP system is non-judicial, its flexibility in claiming "jurisdiction" is significantly greater than that of judicial courts. The OECD Guidelines are addressed to MNEs that operate in or from the territories of adhering States, giving the NCPs a far reach that goes beyond traditional notions of territorial jurisdiction.[220] This flexibility is undeniably a strength to the NCP system in comparison to judicial processes.

6.2.2 Statements on Value Chain HRDD Responsibility

The search "due diligence" gives 153 results in the OECD's NCP Specific Instance Database[221]. Is the search changed to "value chain due diligence", results decrease to only 1, and "supply chain due diligence" gives 10. Only "supply chain" and "value chain" give 20 and 1, respectively. While additional cases concerning value chain due diligence could be missed by these searches, eg by other terminology being used in summaries, the topic seems underrepresented in the more than 650 NCP cases listed. This is interesting, since the OECD Guidelines clearly extend companies' responsibility to the value chain.

Chapter 4 introduced an NCP case concerning the tragic Rana Plaza catastrophe in Bangladesh in 2013, and that is a good start for this examination of NCP interpretations of the HRDD responsibility in regard to the value chain. The collapse of the building, housing numerous factories, killed more than 1100[222] people, injuring well over a further 2000, and is often cited as a vital

[219] OECD, "National Contact Points - Organisation for Economic Co-Operation and Development" <https://mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm> accessed May 10, 2024.
[220] OECD Guidelines ch I point 3.
[221] OECD, "Database of Specific Instances - Organisation for Economic Co-Operation and Development" <https://mneguidelines.oecd.org/database/> accessed May 22, 2024.
[222] Exact numbers differ between sources.

turning point in the worldwide recognition of the need for value chain responsibility in the garment industry.[223]

The case was submitted to the Danish NCP by two NGOs, alleging that a Danish company had failed in its responsibility to conduct due diligence in regard to its supplier, operating in the Rana Plaza building. The Bangladeshi supplier produced garments for several buyers and records showed that no clothes had been produced specifically for the Danish company for over a month prior to the accident. The Danish company did, however, appear in the supplier's own list of "main buyers". In its Final Statement, the NCP concluded that these circumstances were enough to establish that there was a supplier relationship between the two companies, and that this constituted a 'direct linkage' in the meaning required by the OECD Guidelines.[224] The NCP clarified that the objection that garments were not produced for the company in question at the time of the accident was irrelevant, since no information had been provided as to why that was. It could, argued the NCP, have been a matter of chance.[225]

The NCP found that while the company had visited the factory, the efforts had not been enough; the company had not provided details on inspections made during the visits, nor shown that it had demanded improvements from the supplier afterwards. The NCP further noted that due diligence regarding business relations in Bangladesh was "particularly required", considering poor working conditions were well known and reported on.[226] This is a reference to the risk-based approach; a well-known higher risk gives rise to higher due diligence expectations.

A few months prior to the collapse of the Rana Plaza building, another large-scale workplace disaster occurred in a Bangladeshi factory, when a great fire broke out in the Tazreen Fashion factory, killing at least 112 workers.[227] The German NCP received a complaint in May 2013, concerning two[228] German companies' alleged responsibility regarding the incident.[229]

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[223] Justine Nolan, "Rana Plaza: the collapse of a factory in Bangladesh and its ramifications for the global garment industry" in Baumann-Pauly D and Nolan J (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016).
[224] OECD Guidelines section 2 A13.
[225] Rana Plaza NCP Case final statement 5.
[226] ibid 6.
[227] Clean Clothes Campaign, "Tazreen Fire: Fight for Compensation" (*Clean Clothes Campaign*, August 13, 2019) <https://cleanclothes.org/campaigns/past/tazreen> accessed May 10, 2024.
[228] The initial complaint concerned three companies, but one was referred to the Brazilian NCP.
[229] Complaint by Uwe Kekeritz, Member of the German Bundestag, against KiK Textilien und Non-Food GmbH, C&A Mode GmbH & Co., and Karl Reiker GmbH & Co. KG, GE NCP (notified 13 May 2013) (Tazreen NCP Case).

The claimant argued that safety measures at the factory, which according to an earlier independent assessment were inadequate, in part resulted from the purchasing behavior of the German companies, and others buying from the factory, leading to time and pricing pressures for the manufacturers. The fact that the companies continued to produce at the factory despite being aware of the inadequacies equaled contributing to the human rights violations, they argued.[230]

One of the companies responded that it had never commissioned the factory in question for production, but had been unexpectedly notified by its contract partner that production would be subcontracted there. After subsequently conducting audits at the factory and finding conditions to be inadequate, the German company ended the business relationship. The other company presented a similar story; they were several contractual steps away from the factory, and production had been subcontracted there without their knowledge or permission. They claimed they ended the business relationship upon discovering the subcontracting to the factory, months before the fire.[231]

The NCP found neither of the companies had acted contrary to the OECD Guidelines. It concluded that the companies had provided sufficient evidence that they had not produced goods in the factory for more than half a year before the fire, and that "[t]he only persons who can be held responsible for the fire are those who had been able to significantly influence the safety measures at the time that it occurred."[232]

Seen together with the Rana Plaza case at the Danish NCP, the German NCP's reasoning is interesting. In both cases, the companies could show that their goods had not been produced at the factories for some time before the incidents in question. In the Danish/Rana Plaza case, though, the business relationship was still intact, and so there was found to be a direct linkage to the human rights impact. In the German/Tazreen case, however, the business relationships were ended, meaning there was found to no longer be a linkage, and, importantly, no leverage.

In December 2014, the South Korean NCP received a complaint regarding the continued puchasing by Korean companies of cotton produced through State-sponsored forced labor in Uzbekistan. Despite being outside the European scope of this thesis, the case has been deemed relevant to mention in view of the NCP's reasoning regarding the importance of leverage. The NCP concluded that there was an undeniable linkage between the South Korean company and the Uzbek one, based on them being part of the same value chain. The Uzbek company was also found to indeed use both forced and child labor. Despite this, the NCP found that the South Korean company

[230] ibid 1 f.
[231] ibid 2 f.
[232] ibid 4.

had not breached the Guidelines, since it had conducted its due diligence and was not in a position were it could affect the actions of the Uzbek government; it had no *leverage*. Based on this assessment, the NCP chose not to accept the case for further examination.[233] This clearly demonstrates how leverage in the specific case affects expectations on companies. It also shows that companies can live up to their due diligence responsibilities, even when the violations persist; compliance over substance.

In a 2015 case, a Dutch multinational company was accused by a trade union of using a construction subcontractor that did not comply with applicable employement standards. Due to the parties reaching a mutual agreement, the Dutch NCP never made any statement about the facts of the case,[234] but it is even so interesting for this investigation. The parties agreed that the accused company would require its main contractors to impose the same obligations on subcontractors and suppliers as they themselves imposed on theirs. This way, the obligation effectively "ripples" through the supply chain, through contractual means.

The four cases discussed here have been chosen from the wider body of search results because of their focus on workers' rights in Tier 1 or beyond. Excluded cases dealt instead with matters such as corruption, oil spills and displacements. A significant part of search results, roughly 1/3, were further filtered since they predated the 2011 changes of the OECD Guidelines, which incorporated HRDD requirements in inspiration of the UNGPs. Lastly, several cases were excluded from the investigation due to the final statements not being available online. This was the case for specific instances from the Brazilian NCP.

6.3 Implementation and Jurisprudence: France's Law

The national legislation discussed in this thesis is all relatively new, meaning most if it has yet to lead to any case-law. The exception is the French Vigilance law, which was adopted already in 2017 and has started to appear in cases at French courts. This subchapter looks at early indications from this emerging jurisprudence, along with studies on how companies have practically implemented the HRDD requirements of the Vigilance law.

A group of French NGOs, including Amnesty International and Sherpa, issued a report in 2019, assessing the early implementation by companies of

[233] Korean Trans National Companies Watch, Cotton Campaign and Anti-Slavery International vs Daewoo International, POSCO, National Pension Service, Norges Bank Investment Management and Korea Minting, Security Printing & ID Card Operating Company, KOR NCP (notified 3 December 2014).
[234] FNV Eemshaven v. NUON Energy N.V, NL NCP (notified 27 July 2012), pg. 3.

vigilance plans in accordance with the law.[235] The report found plans to be "broadly insufficient".[236] Among other things, methods for risk identification were often "insufficient or non-existent"[237], the plans had bad readability, and were very short, a majority of them only a few pages.[238] Furthermore, many vigilance plans presented policies only in regard to suppliers, and failed to show that the assessments were ongoing and not merely occasional.[239]

A somewhat more recent 2021 study by Elsa Savourey and Stéphane Brabant provides a similar picture of poor implementation. Among the issues raised are uncertainties about the responsibility's extension into the value chain; the legislator did not define the *established commercial relationship*, and companies generally do not declare which entities they identify as such within their operations. Savourey and Brabant noted that several NGOs had requested that companies provide lists of companies with whom they have such a relation.[240]

This NGO request for insight into the value chain mapping by companies was denied by a French court in December 2023, in the first Vigilance law related ruling judged on the merits. The case was brought against La Poste, the French postal services, by a trade union, which argued that the company's vigilance plan was insufficient, in regard to, *inter alia,* the alleged use of undocumented workers by subcontractors.[241]

The union behind the suit had asked the court to mandate La Poste to publish a comprehensive list of all subcontractors and suppliers, including La Poste's dependence on each of them, arguing that it was necessary to live up to the law's requirement of mapping the value chain.[242] The court denied this part, referring to confidentiality. The court instead discussed other possible measures, such as making only part of the information public without mentioning names. Another alternative was communicating the list to staff representative bodies instead of publicly.[243]

The court did, however, concede to the union's demands that improvements be made to the risk mapping in broader terms; it was very general and did not

[235] Amnesty International and others, "The Law on Duty of Vigilance of Parent and Outsourcing Companies Year 1: Companies Must Do Better" (2019).
[236] ibid 11 ff.
[237] ibid 15.
[238] ibid 11.
[239] ibid 16.
[240] Savourey and Brabant [n 187], 144 f.
[241] Tribunal Judiciaire de Paris, Déc. 5, 2023, 21/15827 (La Poste), 5 f.
[242] ibid 9.
[243] ibid 20 f.

enable external parties to determine which specific risk factors could be linked to which activities.[244]

The French Vigilance Law has just recently started to generate case law, and there are currently a number of cases awaiting decision. This means a lot is likely to happen in terms of further interpretation of the law through case-law in the near future.

[244] ibid 19.

7 Analysis: How Extensive Should the Responsibility Be?

After exploring the concept of value chain HRDD and examining how regulations have been implemented in practice, the thesis now moves onto an independent analysis of how such responsibility should be structured, particularly regarding its extension within the value chain.

To address the normative aspect of the research question, it is essential to first conclude that States have an undisputed obligation under international law to legislate in a way that ensures corporate compliance with human rights. There are scholars who argue that this applies also to corporate activities abroad, if the host State does not meet its obligations.[245] Regardless of the status of that matter, established political aims of corporate accountability in the EU justify answering the question with a focus on achieving *actual* improvements to workers' rights globally, within the bounds of feasibility for companies targeted.

7.1 Tier 1 connections: Low Hanging Fruits

Starting with the least controversial level of the value chains - Tier 1 connections, such as direct suppliers and distributors – it is clear that HRDD must cover this level if there is to be any point to it at all. Due diligence for human rights inherently implies a responsibility for with whom you choose to work. Indeed, Tier 1 connections are explicitly covered by all HRDD instruments analyzed in this investigation.

As seen in chapter 6, companies commonly address risks in their value chain through contractual clauses, often referencing codes of conduct.[246] In light of this, extending responsibility requirements to cover Tier 1 is straightforward and feasible, since an established contractual relationship already exists, requiring only certain adjustments and clear expectations about compliance with workers' rights.

The contractual relationship also facilitates legal liability. While there might not always be direct causality between a company and human rights impacts caused by its supplier, sufficient causality ought at least to be easier to show than for more distant business relations.

Being that the HRDD obligations impose a *procedural* responsibility for companies, and not a responsibility for human rights impacts per se, it is essential that emerging regulations are constructed in a way that does not enable HRDD processes to be mere tick-box exercises of including the right

[245] Krajewski [n 69].
[246] See eg European Commission and others [n 14], 66 f.

clauses into the right contracts, without actually enabling necessary changes. Studies in chapter 6 and academic critiques in chapter 4 indicate that contractual routes alone are insufficient for companies to make a real difference in the value chain.[247] New HRDD laws should therefore be concrete about accepted methodologies and focus on more than just contractual clauses and auditing, to avoid repeating the French early experiences of unclear requirements and poor implementation.[248]

The World Benchmarking Alliance's 2023 report points out that companies' HRDD could increase pressures on suppliers without addressing structural issues contributing to workers' rights impacts, such as short lead-times and unpredictable purchasing patterns.[249] Emerging regulations should therefore consider actual value chain patterns and understand the root causes of violations.

In some industries and situations, one can imagine suppliers effectively setting the terms, leaving companies with little ability to influence contractual terms or supplier behavior. An example could be when suppliers provide essential goods or services, impossible to attain elsewhere. In these situations, the UNGPs and similar frameworks allow for some flexibility; companies are to use whatever leverage they have, but if they have none, the regulations recognize that limitation. The South Korean NCP's case on forced labor in Uzbekistan illustrates this lack of leverage, where the company had no power to influence the actions of the Uzbek government.

It is important to stress that Tier 1 value chain responsibility does not mean strict liability for the acts and omissions of suppliers and distributors. HRDD requirements do not demand companies work with "perfect" partners, but rather that they identify and address risks according to their ability and circumstances. The challenge for legislators is to find a balance in emerging regulations that makes responsibility feasible and reasonable for companies while avoiding formalistic rules that prioritize compliance over substantive change.

7.2 Tier 2, 3, 4 and beyond: Great Benefits if Done Right

Recognizing that the modern economy operates through intricate and complex value chains means recognizing that companies, despite perhaps being fully compliant with human rights standards *themselves*, can be directly or indirectly dependent on actors which are *not* human rights compliant. As

[247] See eg World Benchmarking Alliance [n 213]; European Commission and others [n 14], 66 ff.
[248] Amnesty International and others [n 235]; Savourey and Brabant [n 187]; Sherpa [n 187].
[249] World Benchmarking Alliance [n 213].

demonstrated in chapter 2, value chains often harbor widespread violations of workers' rights at multiple levels. Therefore, extending the HRDD responsibilities of EU companies to include more indirect and distant business connections is essential for new initiatives to truly promote corporate accountability and responsibility.

However, several studies cited in chapter 6 indicate that it can be practically challenging for companies to examine the value chain beyond Tier 1.[250] This concern must be addressed seriously, as HRDD responsibilities are meaningless if they cannot be practically implemented.

As discussed in the previous subchapter on Tier 1, emerging regulations should specify the methodologies companies should use when implementing the HRDD responsibilities, especially when parts of the value chain are inaccessible to them. For instance, the already central concept of *leverage* could be applied to Tier 1 suppliers to demand transparency about the broader value chain. Contractual clauses requiring continuous insight into higher levels of the value chain is also a viable option.

As discussed in the previous subchapter on Tier 1, companies often use contractual means to influence the behavior of actors deeper in the value chain. By introducing clauses that require direct suppliers to include human rights compliance in *their* contracts, and so on, companies can extend their influence far into the value chain using familiar civil law tools. A practical example of this approach is discussed in the Dutch NCP's construction subcontractor case in chapter 6.[251] Various of the hard laws examined have also incorporated such provisions.

Moving beyond the practical feasibility, it is relevant to question the justification for imposing on companies a responsibility that extends deep into the value chain. As Ackermann puts it, why should companies, private entities, have to be their "brother's keeper" and ensure that other private entities comply with human rights?[252] This is indeed contrary to established ideas about the legal relationships between separate private entities. The issue becomes even more complex when considering indirect relationships in the higher Tiers.

Ackermann concludes that the legitimacy of extensive HRDD responsibilities rests on pragmatic reasons. States have limited possibilities to address corporate accountability in the value chain directly due to jurisdictional issues, making it a necessary approach. This argument is compelling, as an

[250] See eg European Commission and others [n 14], 70.
[251] FNV Eemshaven v. NUON Energy N.V.
[252] Ackermann [n 82], 149.

unregulated global market can result in governance gaps with potentially severe consequences for workers and other affected groups.

A concrete reason for including the higher Tiers of the value chain in HRDD requirements is that many pressing issues in global value chains involve raw material extraction. This has been underlined by multiple NGOs, and several sector specific EU directives target the sourcing of metals, minerals and timber explicitly due to the increased risk of human rights and environmental impacts there. With many abuses occurring during material extraction, extending value chain responsibility beyond Tier 1 is crucial; if the goal is to reduce the negative impacts of our EU businesses, there is no choice but to let the responsibility run deep. A responsibility limited to Tier 1 is simply insufficient.

There are different possible approaches as to *how* to include actors beyond Tier 1 in the HRDD responsibility. The German Supply Chain Act is a notable example. While the UNGPs and OECD Guidelines extend responsibility to the entire value chain from the start, the German law focuses only on Tier 1, unless there is *substantiated knowledge* of deeper impacts.[253] This is examined closer in chapter 5.

While the German approach does lead to extensive value chain responsibility in some instances, it shifts the responsibility to identify potential impacts beyond Tier 1 from companies to external stakeholders, such as affected workers, trade unions, or NGOs. For this to be effective, companies need to establish honest and functional complaint systems, and external actors must investigate what the companies will not. Since studies consulted in chapter 2 indicate that the groups most vulnerable to value chain related abuses are already marginalized groups with little possibility to make their voices heard, such as migrant workers, this poses a significant problem.[254]

Extending responsibility deeper into the value chain, in accordance with the UNGPs, OECD Guidelines and some national legislation, does not mean assigning unlimited responsibilities to companies. It is, however, necessary for the rules to have the desired effect, as impacts and violations often occur deeper in the value chain.

7.3 Downstream: Overlooked but Important

Reaching the final level of value chain responsibility, the matter becomes more controversial and existing regimes diverge more significantly. While hard law regulations have been cautious about extending HRDD responsibility to the downstream value chain, as shown in chapter 5, both the UNGPs and the OECD Guidelines clearly target the *entire* value chain,

[253] German Supply Chain Act section 9 (3).
[254] Human Rights Watch [n 56], 2.

including downstream activities. The European Commission initially included full downstream responsibility in its CSDDD proposition, but during negotiations, this was limited to specific activities, highlighting the controversial nature of the concept.

Several NGOs as well as the OHCHR advocate for including the downstream value chain in emerging HRDD regulations, arguing that it can be the part of the value chain most likely to see impacts in some sectors.[255] However, studies consulted for this investigation indicate that few companies have processes in place for downstream value chain due diligence,[256] and it is common that entries in the debate focus entirely on the upstream parts of the chain. In all, the downstream seems to be somewhat overlooked.

Downstream HRDD addresses different issues depending on the sector and context, ranging from end-use and end-of-life waste management for products, to transports and storage, to the provision of products or services to other companies for continued processing in different ways. Many of these activities can affect workers' rights, making it a relevant value chain level to examine within this thesis. As long as a product or service continues to exist after leaving a company, it will interact with workers in some way, which means workers' right can and will always be affected.

Following the same reasoning as in the previous subchapters on the upstream, downstream HRDD should be included for pragmatic reasons. Significant workers' rights violations can and do occur downstream, meaning it must be covered if emerging regulations are to be truly meaningful.

[255] UN OHCHR [n 141]; The Danish Institute for Human Rights and others [n 15].
[256] European Commission and others [n 14], 65.

8 Concluding Remarks

Mandatory HRDD is not about obliging companies to be perfect; they do not need to know everything, do everything, or take responsibility for everything. In line with the system established by the UNGPs, companies should prioritize based on severity and likelihood, and the efforts required are determined by the company's leverage over the parties involved in the workers' rights abuses at hand. Companies are also allowed to consider their dependency on particular business relationships when assessing appropriate actions. Essentially, HRDD following the UNGP model considers the needs of companies and what is feasible for companies to achieve.

In view of this, the investigation finds no need to exclude entire sections of the value chain from responsibility in emerging HRDD regulations. If certain sections are unreasonable to include in specific cases, existing mechanisms already provide ways for companies to manage their responsibilities feasibly. The goal of addressing as many potential workers' rights violations as possible should take precedence over additional considerations for companies. However, it is important that emerging regulations are clear and precise about their expectations of companies. Different parts of the value chain will need to be addressed differently, and for this, companies need realistic and sufficient tools.

Although the thesis has identified strong arguments for extensive mandatory HRDD, it should be noted that this is likely not a comprehensive final solution to EU companies' contribution to workers' rights violations around the world. It is also important to acknowledge that individual companies can have limited possibilities to make substantial difference – oftentimes, the system itself is flawed, meaning companies have little choice but to press production costs, lead-times, and other demands on suppliers if they want to stay in the game, often inevitably impacting workers' rights. It is therefore important that emerging regulations consider underlying structural causes of violations, and that EU businesses take a united stand for change.

These findings mean that the CSDDD provision that states that the value chain definition is to be evaluated in a few years is most welcome; the directive as it stands is a significant step forward, but proper results will require a deepening of the responsibility. This also applies to other HRDD laws that may be adopted elsewhere in the world in the years to come.

The increasing number of legislators at both national and supranational levels introducing or considering laws on mandatory HRDD is, again, a positive step. However, more steps will likely be needed to adequately address the great impact that business has on people and planet, including on workers' rights. A binding treaty on BHR has been discussed for years, and some academics advocate for a specific ILO Convention addressing workers' rights

in value chains. These initiatives are, however, likely still distant, whereas HRDD is here and now – several countries have already legislated in this area in recent years, and with the EU finally agreeing on the CSDDD around the time this thesis is submitted, the future looks promising.

Multiple studies show that companies ask for regulations to clarify their responsibilities and level the playing field, and finally, EU legislators have responded to this call. With the CSDDD and other directives mandating HRDD, the EU is moving towards corporate accountability and justice. If the Brussels effect takes hold and we see ripples from this progress in other countries and regions, the optimist can well hope that the world is entering a new era where respecting workers' rights – and broader human rights – is not merely a pretty slogan but an inevitable and central aspect of doing business. Justly.

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