Human rights due diligence in Belgium: Added value of a binding legal instrument at the national, supranational and international levels

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1. INTRODUCTION

1. Have you ever wondered at what costs you wear your fashionable shirt on your back, or have you ever thought that technological devices that make your life easier and more comfortable can make others' lives miserable? Would you be so calm if you knew that someone died or suffered over your fancy clothes or your smartphone?

2. On 24 April 2013, the Rana Plaza building in Dhaka, Bangladesh, which contained five garment factories, collapsed, and this resulted in the death of at least 1.332 people and the injury of more than 2.500 people.[1] It was shocking to learn that these five factories were suppliers of various well-known global brands in the garment sector, such as Benetton, Bonmarché, Kik, Mango, Primark, Texman, and Cato Fashions.[2] Another tragic incident occurred in China on 17 March 2010. Tian Yu, a 17-year-old worker, attempted to end her life by jumping out of a window at the Foxconn premises. Foxconn is an essential supplier of Apple and manufactures more than 50 percent of the world's electronic products. Even though she survived, she has to live paralyzed from the waist down. Many more workers have followed her path due to harsh working conditions. In 2010, 18 workers aged between 17 and 25 attempted suicide at the Foxconn premises. 14 of them died sadly, and four workers survived with injuries.[3]

3. These horrible incidents clearly illustrate the consequences of human rights violations caused by multinational corporations' operations abroad, and this is one of the most pressing issues that both governments and businesses must

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[1] International Labour Organization, "The Rana Plaza Accident and its aftermath", available at *https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm* (last accessed at 18 August 2020).
[2] Clean Clothes Campaign, "Rana Plaza", available at *https://cleanclothes.org/campaigns/past/rana-plaza*, (last accessed at 18 August 2020).
[3] PUN, N., SHEN, Y., GUO, Y., LU, H., CHAN J., SELDEN, M., "Apple, Foxconn, and Chinese workers' struggles from a global labor perspective", *Inter-Asia Cultural Studies* (2016), 166, 166.

address. In this context, the early business and human rights agenda embraced an approach focusing on voluntary actions taken by businesses, such as codes of conduct and enforcing self-regulation by social inspections. However, it appeared that these voluntary initiatives were insufficient to prevent the continued existence of serious violations. As a response, the business and human rights agenda started to change its approach from voluntary initiatives taken by businesses to governmental and intergovernmental initiatives.[4]

4. In this context, at the international level, new soft law instruments have been adopted to give guidance on the issue of business and human rights. The OECD Guidelines for Multinational Enterprises (2011), the United Nations Guiding Principles on Business and Human Rights (2011), and the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2017) constitute the main international frameworks.[5] Moreover, currently, there is an attempt to conclude a binding treaty regarding business and human rights at the UN level. Similarly, at the supranational level, namely the European Union, the European Commission is currently working on a legislative proposal on business and human rights, namely the Sustainable Corporate Governance Initiative.

5. Likewise, at the national level, legislative initiatives have been taken to ensure that businesses respect human rights in their operations abroad and their supply chain. In this context, the UK Modern Slavery Act (2015), the Australian Modern Slavery Act (2018), the Dutch Child Labor Due Diligence Act (2019), the French Act on the Duty of Vigilance of Parent and Outsourcing Companies (2017), the German Draft Bill on Mandatory Human Rights Due Diligence (2019) and the Swiss proposals are significant developments.

6. This paper aims to assess the Belgian business and human rights agenda in light of the above-mentioned developments. More specifically, its object is to answer the following questions: "*How can human rights due diligence (HRDD), stipulated by the United Nations Guiding Principles on Business and Human Rights, be enforced in Belgium? Do the existing national tort law and voluntary initiatives suffice to enforce HRDD by companies? Or is a specific binding national, supranational, or international norm required? If national law would prove to be insufficient, could human rights due diligence legislation at the EU level help to solve adverse human rights impacts caused by companies, or is an initiative at the UN level required? What are the pros and cons of different approaches varied from voluntary to mandatory, and from national to international?*"

7. Consequently, this paper aims to determine the added value of a binding legal instrument at the national, international, and supranational levels to ensure that businesses respect human rights in their operations and undertake the HRDD

[4] HUYSE, H., VERBRUGGE, B., *Belgium and The Sustainable Supply Chain Agenda: Leader or Laggard? Review of Human Right Due Diligence Initiatives in the Netherlands, Germany, France and EU, and Implications for Policy Work by Belgian Civil Society,* HIVA KU Leuven, 2018, 8.
[5] Ibid., at 11.

procedures. Moreover, it aims to determine whether the current soft law instruments and national tort law enable the Belgian courts to hold corporations responsible for human rights violations that occurred abroad in their supply chains. Furthermore, this paper analyzes the strong and weak points of adopting different approaches for Belgium, varied from voluntary to mandatory and from national to international.

8. The first part of this paper focuses on the responsibilities of businesses to respect human rights in their operations, namely the HRDD procedures. Firstly, it briefly introduces the definition and the reach of the HRDD requirements. Secondly, it describes the steps that businesses should take to conduct a successful HRDD in light of the OECD Due Diligence Guidance for Responsible Business Conduct (the OECD Guidance) and the UN Guiding Principles on Business and Human Rights (the UN Guiding Principles).

9. The second part of this paper focuses on the question of how the HRDD procedures can be implemented in domestic legal systems. In this context, three different options are introduced to answer this question by reviewing different approaches employed by certain countries. The first option is the so-called "new multi-stakeholder initiatives" employed by the Netherlands and Germany. The second option is to introduce a binding legislative act. In order to evaluate this option in detail, this paper introduces and analyzes several legislative initiatives from different states. In this context, the UK Modern Slavery Act 2015, the Australian Modern Slavery Act 2018, the Dutch Child Labor Due Diligence Act, the French Act on the Duty of Vigilance of Parent and Outsourcing Companies, the German Draft Bill on Mandatory Human Rights Due Diligence, and the Swiss Proposals are examined respectively. The third option is to apply the theory of supply chain responsibility via national tort law. More specifically, the third option aims to hold Belgian companies responsible for the harm caused by companies in their value chain via existing tort law, and by doing so, to enhance the implementation of HRDD by Belgian companies.

10. The third part this paper focuses on the added value of a binding legal instrument at the international and supranational levels to ensure that businesses respect human rights in their operations and undertake HRDD. In this context, the third part firstly introduces the latest developments in the field of business and human rights at the United Nations, the Council of Europe, and the European Union. Secondly, it discusses the strong and weak points of soft and hard law instruments to address business and human rights issues. Following this general discussion, thirdly, this paper turns particularly to the strong and weak points of having HRDD enshrined in an international treaty, namely the UN Draft Treaty on business and human rights. Lastly, this paper evaluates the Sustainable Corporate Governance Initiative of the European Commission by examining envisaged achievements and possible consequences of such EU regulation.

2. HUMAN RIGHTS DUE DILIGENCE

2.1. GENERAL

11. In its origin, due diligence started as a corporate risk assessment for financial and commercial transactions in the mid-1990s.[6] Similar to this corporate risk assessment, the UN Guiding Principles adopted a risk management system for identifying and assessing actual and potential adverse human rights impacts caused by business operations. However, it is argued that this approach can be problematic as it can create ambiguities regarding the essence of risk and the purposes of a corporate risk assessment. In this connection, human rights risks refer to adverse human rights impacts arising from businesses' operations. Human rights risk can be compared to a business' social risks in the corporate risk assessment process.[7] In this context, social risk refers to "*the actual and potential leverage that people or groups of people with a negative perception of corporate activity have on the business enterprise's value.*"[8] The goal of social risk assessment for companies is to promote business activities, whereas human rights risk assessment requires determining vulnerabilities for people who do not have any stake in the business.[9] This conceptual difference between social risk and human rights risk creates operational difficulties for managers of corporations in the operations of the assessment of risks as different strategies apply to the treatment of social and human rights risks.[10]

12. JOHN RUGGIE, United Nations Special Representative of the Secretary-General, defined human rights due diligence as "*the steps a company must take to become aware of, prevent and address adverse human rights impacts.*"[11] A broader definition can be that "*HRDD is a mechanism composed of various procedures that businesses should undertake to identify, prevent, mitigate and account for how they address actual and potential adverse human rights impacts in their own operations, their supply chain, and other business relationships.*"[12] Moreover, HRDD, under the UN Guiding Principles, is to be understood as a managerial process, that functions as a preventive measure rather than the enterprise liability model, which sets a liability standard that exercises a specific standard of care, against which actions of a business are judged to hold it responsible.[13]

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[6] MARTIN-ORTEGA, O., "Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?", *Netherlands Quarterly of Human Rights* (2013), 44,50.

[7] FASTERLING, B., "Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk", *Business and Human Rights Journal* (2017), 225, 225.

[8] Ibid.

[9] Ibid., at 231.

[10] Ibid.

[11] 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 Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5, at paragraph 56.

[12] UNITED NATIONS, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011, Principle 17.

[13] FASTERLING, B., supra n. 7, at 228.

13. Regarding the scope, the HRDD procedures include all internationally recognized rights. Accordingly, organizations should take into account the International Bill of Human Rights and the core conventions of the International Labor Organization.[14] In this context, the International Bill of Human Rights includes the five core human rights treaties of the United Nations. These five treaties are: 1) The Universal Declaration of Human Rights, 2) The International Covenant on Economic, Social and Cultural Rights, 3) The International Covenant on Civil and Political Rights, 4) The Optional Protocol to the International Covenant on Civil and Political Rights, and 5) The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.[15]

14. Moreover, Ruggie argued that narrowing internationally recognized rights for the purpose of HRDD is essentially problematic as businesses' activities reach almost all internationally recognized rights. In this context, regarding labor rights, he gave the examples of rights affected by business activities, such as freedom of association, the right to equal pay for equal work, the right to organize and participate in collective bargaining, the right to equality at work, the right to non-discrimination, the right to just and favorable remuneration, the abolition of slavery and forced labor, the right to a safe work environment, the abolition of child labor, the right to rest and leisure, the right to work, and the right to family life.[16]

15. Furthermore, Ruggie gave the examples of non-labor rights affected by business activities such as the right to life, liberty, and security of the person, the right to peaceful assembly, the right to an adequate standard of living, freedom from torture or cruel, inhuman or degrading treatment, the right to marry and form a family, the right to physical and mental health, access to medical services, equal recognition, and protection under the law, freedom of thought, conscience and religion, the right to education, the right to a fair trial, the right to hold opinions, freedom of information and expression, the right to participate in cultural life, the benefits of scientific progress, and the protection of authorial interests, the right to self-determination, the right to political life, the right to social security, freedom of movement, and the right to privacy.[17]

16. Regarding the scope of HRDD in terms of subject undertakings, it has a wide reach. It includes private small and medium-sized enterprises, and private multinational enterprises, public businesses, non-governmental organizations, and universities.[18]

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[14] UN HUMAN RIGHTS COUNCIL, supra n. 11, at paragraph 58.

[15] ECSR-Net, "International Bill of Human Rights", available at *https://www.escr-net.org/resources/international-bill-human-rights* (last accessed at 19 April 2020).

[16] UN HUMAN RIGHTS COUNCIL, supra n. 11, at paragraph 52.

[17] Ibid.

[18] Toolbox Human Rights for business & organisations, "HUMAN RIGHTS DUE DILIGENCE", available at *https://business-humanrights.be/tool/8/what* (last accessed at 16 March 2020).

2.2. HRDD PROCEDURES

17. The HRDD procedures consist of six steps in light of the OECD Guidance and the UN Guiding Principles. These steps are:

1. Embedding the responsibility to respect human rights into policies and embedding these policies into management systems and oversight bodies;
2. Identifying and assessing actual and potential human rights impacts;
3. Integrating and acting upon the findings: ceasing, preventing and mitigating adverse impacts;
4. Tracking implementation and results;
5. Communicating how impacts are addressed;
6. Providing for or cooperating in remedy.

2.2.1. Embedding the Responsibility to Respect Human Rights into Policies and Embedding These Policies into Management Systems and Oversight Bodies

18. The effectiveness of HRDD depends on the moral commitment of organizations to responsible business conduct, particularly human rights.[19] This moral commitment should be reflected in the policies of that organization. According to the UN Guiding Principles, such a policy statement "*is approved at the most senior level of the business enterprise; (b) is informed by relevant internal and/or external expertise; (c) stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services; (d) is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; (e) is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.*"[20]

19. Moreover, the OECD Guidance advises organizations to embed these policy commitments into oversight bodies and management systems. In this way, they will become a part of the regular management of the organization.[21] Furthermore, the concerned superior management and implementing departments should communicate regularly and share documents regarding human rights risks, decision-making processes, and the HRDD procedures.[22]

20. The UN Guiding Principles do not appoint a single method for how companies should fulfill the aforementioned task. In this context, the European Business Network for Corporate Social Responsibility has developed a blueprint for embedding human rights in key company functions.[23] This blueprint

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[19] FASTERLING, B., DEMUIJNCK, G., "Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights", *Journal of Business Ethics* (2013), 799, 801.
[20] UNITED NATIONS, supra n. 12, Principle 16.
[21] OECD, OECD Due Diligence Guidance for Responsible Business Conduct, 2018, 23.
[22] Ibid.
[23] CSR EUROPE, Blueprint for Embedding Human Rights in Key Company Functions, 2016.

introduced six common elements that can help organizations to accomplish their task. These six key elements are:

1. **Cross-functional leadership:** Organizations should have cross-functioning teams to effectively manage human rights issues. In this context, directors of various departments within an organization and various roles within a division should work together to set expectations and perform to embed respect for human rights.

2. **Share responsibility:** Human rights risks can arise from business activities and relationships that operational staff conducts. Therefore, the responsibility for adverse human rights impacts should remain with them.

3. **Incentivize:** To motivate staff to embed respect for human rights and make it attractive, company administrations can create incentives and performance measurements.

4. **Provide operational guidance and training:** It is vital to provide specially tailored guidance and training for different functions, divisions, and individuals. The guidance and training on human rights should be up to date over time because of the evolving nature of corporate management systems and human rights risks.

5. **Foster two-way communication:** Top-down and bottom-up communication between operational staff and company leadership should be provided to discuss how they are embedding the responsibility to respect human rights.

6. **Review, analyze, and integrate:** The organization's performance to embed human rights in its management should be reviewed periodically, and the lessons from that should be shared and integrated internally. For this purpose, special monitoring systems should be provided.

2.2.2. Identifying and Assessing Actual and Potential Human Rights Impacts

21. According to the OECD Guidance and the UN Guiding Principles, it is crucial to identify and assess actual and potential adverse human rights impacts in business operations. In this context, forced labor, child labor, wage discrimination for equal work, ecosystem degradation through land degradation, water pollution, failing to identify and appropriately engage with indigenous peoples are just a few examples of these adverse impacts.[24] This step can be examined on three levels.

22. Firstly, the OECD Guidance advises large organizations to carry out a broad scoping exercise in all fields of the organization, across its operations and relationships, including its supply chains where human rights are most likely to be at stake. For small organizations with less diverse operations, however, a

[24] OECD, supra n. 21, at 38-39.

scoping exercise may not be necessary. The purpose of this scoping exercise is to prioritize the most crucial risk areas for further assessment. In this sense, high-level risk areas can be related to the sector (e.g. products and its supply chain), geography (e.g. environmental adverse effects), or organization-specific risk factors (e.g. misconduct, known instances of corruption). In order to determine these high-level risk areas, organizations can make use of reports from governments, international organizations, civil society organizations, workers' representatives and trade unions, national human rights institutions, media, or other experts. If these sources appear to be insufficient, it is suggested to consult with relevant stakeholders and experts. After identifying the most crucial risk areas, organizations should prioritize them as the starting point for a deeper assessment of potential and actual impacts.[25] This approach has an added value, as one author noted: "*A risk approach allows for easier prioritization of the issues a company should focus on. As a result, it has a better chance to mitigate the most important issues.*"[26]

23. Secondly, organizations should continue with a more in-depth study in the prioritized risk areas, including suppliers and other business relationships.[27] This includes consulting potentially affected stakeholders to be able to gather information about the adverse human rights impacts. If these consultations are not possible, organizations should have options such as consulting credible and independent expert resources, including human rights defenders. In this process, it is crucial to pay special attention to risks that affect individuals from groups or populations that may be at intensified risk of vulnerability or marginalization. Moreover, this process should adopt a gender perspective as women and men can face different types of risks.[28]

24. Thirdly, organizations should continue with an assessment of the level of their involvement with the actual or potential adverse human rights impacts. In this context, it should be recalled that the involvement can be directly through the actions of the organization itself or indirectly through the actions of contractors, joint venture partners, or supply chain.[29] The OECD Guidance advises organizations to "*specifically assess whether or not they caused or would cause the adverse impact, or contributed or would contribute to the adverse impact; or whether the adverse impact is or would be directly linked to its operations, products or services by a business relationship*".[30] Accordingly, companies doing business abroad with diverse and complex supply chains require fieldwork to effectively assess the involvement in adverse human rights impacts. Therefore, they should employ human rights professionals with high-grade investigative skills.[31] After this assessment, organizations should prioritize

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[25] Ibid., at 25.
[26] TAYLOR, M.B., ZANDVLIET, L., FOROUHAR, M., "Due Diligence for Human Rights: A Risk-Based Approach", *Corporate Social Responsibility Initiative Working Paper 53* (2009) at 8.
[27] OECD, supra n. 21, at 26-27.
[28] UNITED NATIONS, supra n. 12, Commentary on Principle 18.
[29] OECD, supra n. 21, at 27.
[30] Ibid.
[31] TAYLOR, M.B., ZANDVLIET, L., FOROUHAR, M., supra n. 26, at 11.

the most significant human rights risks and impacts to be addressed, based on severity and possibility.[32]

2.2.3. Integrating and Acting Upon the Findings: Ceasing, Preventing, and Mitigating Adverse Impacts

25. After identifying and assessing adverse human rights impacts, organizations should take appropriate measures to cease, prevent, and mitigate these adverse impacts. The type of measure that needs to be taken depends on "*whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship."*[33]

26. In this connection, both the UN Guiding Principles and the OECD Guidance recommend organizations to stop their activities that are causing or contributing to adverse human rights impacts.[34] In a case where stopping these activities seems complicated because of operational or legal obstacles, organizations are advised to develop a roadmap to find a solution by engaging legal expertise and impacted or potentially impacted stakeholders and rightsholders.[35]

27. As explained, adverse human rights impacts can be directly linked to organizations' operations, products, or services by business relationships. According to the UN Guiding Principles, business relationships include "*relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.*"[36] Here, it should be determined how far in the supply chain organizations need to monitor their business relations. In other words, to what extent organizations reasonably address adverse human rights impacts in their supply chain. The UN Guiding Principles do not introduce a limitation regarding the supply chain responsibility. However, it introduces "the concept of leverage" to explain what organizations reasonably do to address adverse human rights impacts in their supply chain. In this context, "leverage" is deemed to exist where organizations have the power to affect the harmful practices of an entity in its business relationships. Moreover, the UN Guiding Principles recommend that organizations introduce mechanisms to increase their leverage over their supply chain to address human rights impacts.[37] Consequently, if a company has the leverage over an entity in its supply chain, this company has the responsibility to exercise it to address adverse human rights impacts.

28. The UN Guiding Principles recommend that organizations should "*seek to prevent or mitigate adverse human rights impacts that are directly linked to their*

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[32] Ibid., at 28.
[33] UNITED NATIONS, supra n. 12, Principle 19.
[34] OECD, supra n. 21, at 29; UNITED NATIONS, supra n. 12, Commentary on Principle 19.
[35] OECD, supra n. 21, at 29.
[36] UNITED NATIONS, supra n. 12, Commentary on Principle 13.
[37] Ibid., Commentary on Principle 19.

operations, products or services by their business relationships, even if they have not contributed to those impacts."[38] In this context, these measures include "*continuation of the relationship throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, disengagement from the relationship either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact.*"[39]

2.2.4. Tracking the Implementation and Results

29. Organizations need to monitor the implementation and effectiveness of the measures taken to identify, prevent, mitigate actual and potential adverse human rights impacts. This tracking activity includes periodic internal or third-party reviews and audits of the outcomes achieved. Likewise, organizations should benefit from periodic reviews of relevant multi-stakeholder and industry initiatives. Moreover, to determine whether risk mitigation measures are being pursued, and the adverse impacts have been prevented or mitigated, organizations should conduct a periodic assessment of their business relationships. Furthermore, organizations should consult and engage with impacted or potentially impacted rightsholders, their workers, and trade unions where they cause or contribute to adverse human rights impacts. In addition, organizations should determine adverse impacts or risks that may have been neglected in earlier due diligence processes and include these in future due diligence activities. The lessons learned from tracking should be used to improve the HRDD processes in the future.[40]

30. According to the UN Guiding Principles, "*tracking should: (a) be based on appropriate qualitative and quantitative indicators; (b) draw on feedback from both internal and external sources, including affected stakeholders.*"[41] In this context, organizations can use performance contracts, reviews, surveys and audits, and gender-disaggregated data. Moreover, operational-level grievance mechanisms can be helpful since it provides feedback from those directly affected.[42]

2.2.5. Communicating How Impacts are Addressed

31. Organizations should provide "*a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors.*"[43] In this context, organizations need to communicate externally concerning due diligence policies, how actual and potential adverse human rights impacts are identified and addressed. Moreover, they should share the findings and outcomes of their due diligence activities. To

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[38] Ibid., Principle 13.
[39] OECD, supra n. 21, at 30.
[40] Ibid., at 32.
[41] UNITED NATIONS, supra n. 12, Principle 20.
[42] Ibid., Commentary on Principle 20.
[43] Ibid., Commentary on Principle 21.

that end, they should publicly report all relevant information with regard to the HRDD procedures in an accessible manner. For example, this information can be published on organizations' websites, or in organizations' buildings, and in the local language. Moreover, communicating with impacted or potentially impacted rightsholders should be done in a timely, culturally sensitive, and approachable way.[44]

32. Communication can take different forms, such as in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports. According to the UN Guiding Principles, "*in all instances, communications should: (a) be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences; (b) provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved; (c) in turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.*"[45]

33. It is also important for organizations to manage their supply chains responsibly. Therefore, they should report publicly on risks and risk management along the supply chain. This allows the entire supply chain to share the responsibility of addressing adverse human rights impacts.[46]

2.2.6. Providing for or Cooperating in Remedy

34. Even though organizations meticulously carry out HRDD and have good practices, adverse impacts still can happen. In this case, both the OECD Guidance and the UN Guiding Principles expect organizations to provide for or cooperate in remedy.

35. According to the OECD Guidance, organizations should "*seek to restore the affected person or persons to the situation they would be in had the adverse impact not occurred (where possible) and enable remediation that is proportionate to the significance and scale of the adverse impact; comply with the law and seek out international guidelines on remediation, (which) may include apologies, restitution or rehabilitation, financial or non-financial compensation, punitive sanctions, taking measures to prevent future adverse impacts; consult and engage with impacted rightsholders and their representatives in the determination of the remedy; seek to assess the level of satisfaction of those who have raised complaints with the process provided and its outcome(s).*"[47] Moreover, the OECD Guidance suggests organizations to establish operational-level grievance mechanisms (OLGM), such as in-house worker complaint mechanisms or third-party complaint systems. By doing so,

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[44] OECD, supra n. 21, at 33.
[45] UNITED NATIONS, supra n. 15, Principle 21.
[46] Toolbox Human Rights for business & organisations, supra n. 18.
[47] OECD, supra n. 21, at 34.

they should set up a complaint procedure.[48] The UN Guiding Principles' guidance on remediation, on the other hand, is similar to the OECD Guidance.

36. With regard to supply chains, the UN Guiding Principles clarify organizations' responsibility concerning remediation: "*Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.*"[49]

37. After the examination of the structure of the HRDD procedures, it is clear that effective HRDD policies depend on three requirements: transparency, outside participation and verification, and independent monitoring and review.[50] More importantly, organizations should be aware of the evolving nature of adverse human rights impacts and should keep their HRDD activities in line with these impacts by updating them timely.

[48] Ibid., at 35.
[49] UNITED NATIONS, supra n. 12, Commentary on Principle 22.
[50] HARRISON, J., "Establishing A Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights İmpact Assessment", *Impact Assessment and Project Appraisal* (2013), 107,108.

3. IMPLEMENTATION OF THE HRDD PROCESSES IN DOMESTIC LEGAL SYSTEMS

3.1. GENERAL

38. In June 2014, the UN Human Rights Council called on all Member States to develop National Action Plans (NAPs) to facilitate the implementation of the UN Guiding Principles. Up to date, 24 states, including Belgium, have developed a national action plan, three states have included business and human rights chapters into their human rights national plan, and 26 states are committed to or in the process of developing a national action plan.[51]

39. This part of the paper specifically aims to guide Belgium for the implementation of the UN Guiding Principles via different tools. To that end, this paper proposes three different options based on various practices of other states.

40. The first option is the so-called "new multi-stakeholder initiatives", which are employed by the Netherlands and Germany. This paper examines the NAPs of the Netherlands, Germany, and Belgium to analyze this option. After introducing new multi-stakeholder initiatives, this paper discusses their weak and strong points.

41. The second option is to enact laws requiring businesses to undertake HRDD, which has been done by some countries such as the UK, the Netherlands, France, Australia, and Switzerland and has been proposed in others such as Germany. This paper briefly introduces the UK Modern Slavery Act 2015, the Australian Modern Slavery Act 2018, the Dutch Child Labor Due Diligence Act, the French Act on the Duty of Vigilance of Parent and Outsourcing Companies, the German Draft Bill on Mandatory Human Rights Due Diligence, and the Swiss proposals respectively to analyze the second option. After introducing these legislative initiatives, this paper discusses the successes and shortcomings of the second option for Belgium.

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[51] United Nations Human Rights Office of the High Commissioner, "State National Action Plans on Business and Human Rights", available at *https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx* (last accessed at 17 April 2021).
States that have developed a national action plan: The UK, the Netherlands, Denmark, Finland, Lithuania, Sweden, Norway, Colombia, Switzerland, Italy, USA, Germany, France, Poland, Spain, Belgium, Chile, Czech Republic, Ireland, Luxembourg, Republic of Slovenia, Kenya, Thailand, and Japan.
States that have included a business and human rights chapter in their human rights national action plans: Georgia, South Korea and Mexico.
States that are committed to or in the process of developing a national action plan: Argentina, Australia, Azerbaijan, Brazil, Ecuador, Guatemala, Greece, Honduras, India, Indonesia, Jordan, Latvia, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Myanmar, Nicaragua, Pakistan, Peru, Portugal, Uganda, Ukraine, and Zambia.

42. The third option is to apply the theory of supply chain responsibility via national tort law to enforce the UN Guiding Principles. More specifically, to hold Belgian companies responsible for the harm caused by companies in their value chain via existing tort law, and by doing so, to enhance the implementation of HRDD by Belgian companies.

3.2. NATIONAL ACTION PLANS AND NEW MULTI-STAKEHOLDER INITIATIVES

3.2.1. The Netherlands

43. The Netherlands launched its NAP in December 2013.[52] The Dutch NAP supports self-regulation and voluntary action rather than imposing the HRDD procedures as a legal obligation. Nevertheless, it states that an independent committee will evaluate whether regulatory measures are needed for the future.[53] In this connection, the current legislative developments in the Netherlands to impose HRDD on certain companies will be explained in detail under the next section, "Legislative Initiatives".

44. Regarding the HRDD implementation instruments, the Netherlands applies hybrid HRDD initiatives, which have a mainly voluntary set-up with certain binding features. Following the NAP, the Netherlands has funded high-profile multi-stakeholder initiatives. These initiatives are used as a forum to bring together businesses and civil society organizations and to advance collaboration and solidarity. In this process, the government acts as an independent umpire, funder, and organizer. The outcomes of these initiatives are sectoral partnership agreements that are between companies, their federations, and civil society actors.[54]

45. Although participation is voluntary, once companies participate in these partnership agreements, they must comply with the compulsory obligations introduced by the partnership agreements. Moreover, these agreements introduce non-compliance mechanisms, and in the case of non-compliance, there is a risk of being expelled.[55]

46. Even though the content of the agreements varies among sectors, there are minimum conditions that must be included in each sectoral agreement. In this context, each joining corporation is required to conduct the HRDD assessment of its supply chain, promote an action plan to address adverse human rights impacts, report on the progress made, and participate in collective activities on

[52] National Action Plan on Business and Human Rights, adopted 10 December 2013, The Netherlands, Ministry of Foreign Affairs, 2014, available at *https://www.ohchr.org/Documents/Issues/Business/NationalPlans/Netherlands_NAP.pdf* (last accessed at 17 April 2021).
[53] Ibid., at 28.
[54] HUYSE, H., VERBRUGGE, B., supra n. 4, at 9.
[55] Ibid.

key HRDD themes.[56] These collective activities focus on child labor, living wages, human rights violations, freedom of association, and the environment.[57] Moreover, joining companies in the textile and garment sector are required to reveal their suppliers. However, this information is confidential and only can be accessed by the Social and Economic Council of the Netherlands (the SER). Furthermore, these partnership agreements provide complaint mechanisms for victims to provide access to remedies.[58]

47. Up to now, nine partnership agreements have been concluded: The Dutch Agreement on Sustainable Garments and Textile, t*he Dutch Banking Sector Agreement, the Responsible Gold Agreement, the Agreement to Promote Sustainable Forestry, the Agreement for the Food Products Sector, the Agreement for International Responsible Investment in the Insurance Sector, the Agreement for the Pensions Funds,* the RBC Agreement in the Natural Stone Sector (TruStone Initiative), and the RBC Agreement for the Metals Sector.[59]

48. Concerning the business and human rights environment in the Netherlands, civil society organizations, non-governmental organizations(NGOs), and trade unions are strong and active in the field. At the government level, an important position was built inside the ministry of foreign affairs and the ministry of economic affairs. Over time, the government has invested considerably in international corporate social responsibility(CSR) initiatives, platforms, and provided resources for different stakeholders. Moreover, a secretariat hosted by the SER is operating a significant intermediary role as convener of multi-stakeholder dialogue, as an independent umpire to evaluate action plans and monitor reports. Regarding the business front, numerous sector federations have been actively involving in corporate social responsibility issues and the HRDD processes. As to public attention, there is an active debate in the media on business and human rights, often started by civil society organizations' research reports and campaigns.[60]

3.2.2. Germany

49. Germany launched its NAP in December 2016.[61] The German NAP prefers self-regulation and voluntary action, as the Dutch NAP does. Moreover, the German NAP includes explicit clauses regarding binding legislative measures for the future. In this context, it sets the goal that at least 50% of all enterprises based

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[56] Ibid.
[57] Ibid., at 31.
[58] Ibid.
[59] Government of the Netherlands, "Responsible Business Conduct (RBC) agreements", available at *https://www.government.nl/topics/responsible-business-conduct-rbc/responsible-business-conduct-rbc-agreements* (last accessed at 17 April 2021).
[60] HUYSE, H., VERBRUGGE, B., supra n. 4, at 26.
[61] National Action Plan. Implementation of the UN Guiding Principles on Business and Human Rights, adopted 16 December 2016, Germany, The Federal Foreign Office, 2017, available at *https://www.ohchr.org/Documents/Issues/Business/NationalPlans/NAP_Germany.pdf* (last accessed at 17 April 2021).

in Germany with more than 500 employees will have incorporated the elements of human rights due diligence by 2020. If this target is not reached, the Federal government will consider further action, which may include legislative measures.[62] Currently, Germany is in the process of legislating to impose HRDD on certain companies. The latest legislative developments regarding business and human rights in Germany will be explained in detail under the next section, "Legislative Initiatives".

50. The German NAP explains the government's "expectations" from companies to undertake HRDD. However, it does not legally impose the duty to exercise the HRDD procedures on companies.[63] Unlike the Dutch NAP, the German NAP includes mechanisms and procedures for monitoring, reporting, and reviewing its implementation. In this context, a permanent inter-ministerial committee is responsible for the implementation of the NAP.[64]

51. As mentioned above, Germany is applying hybrid HRDD initiatives, which have a mainly voluntary set-up with certain binding features. "*From a HRDD perspective, the Dutch and German initiatives are a step forward as they add binding features to a largely voluntary set-up. It can be seen as a first step towards a more balanced regulatory mix, with the aim of creating a multi-sided incentive-system for business to improve compliance with social and environmental standards*".[65]

52. Since 2014, Germany has been supporting multi-stakeholder initiatives in different areas.[66] For example, the Partnership for Sustainable Textiles covers approximately half of the German textile market with the 100 top-selling corporations. The Partnership has approximately 140 members assigned to five different stakeholder groups. These stakeholder groups include businesses, non-governmental organizations (NGOs), unions, standards organizations, and the Federal Government.[67] Despite some differences, the Partnership for Sustainable Textiles is comparable to the Dutch Sectoral Partnership Agreements.[68] Moreover, in 2018, the Dutch Agreement on Sustainable Garments and Textile and the German Partnership for Sustainable Textiles signed a cooperation agreement. The core purpose is to help companies to implement due diligence by way of harmonizing sustainability requirements. Additionally, participating companies can work collectively to promote better working conditions in risk areas and benefit from shared experience and assistance by both secretariats.[69]

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[62] Ibid., at 10.
[63] Ibid., at 7.
[64] Ibid., at 28.
[65] HUYSE, H., VERBRUGGE, B., supra n. 4, at 9.
[66] *Ibid.*, at 32.
[67] Partnership for Sustainable Textiles, "A Multi-Stakeholder Initiative", available at *https://www.textilbuendnis.com/en/uebersicht/#formanchor* (last accessed at 24 August 2020).
[68] HUYSE, H., VERBRUGGE, B., *supra* n. 4, at 32.
[69] CNV Internationaal, "GERMAN-DUTCH COOPERATION TAKES SUSTAINABILITY IN THE TEXTILE SECTOR TO THE NEXT LEVEL",

53. The German Initiative on Sustainable Cocoa[70], the Forum for Sustainable Palm Oil[71], the Action Alliance on Sustainable Bananas[72] are other significant examples of the German multi-stakeholder initiatives.

54. Concerning the business and human rights environment, like in the Netherlands, Germany has an active civil society. Mainly NGOs are working on the HRDD issues both in the context of multi-stakeholder initiatives and public debates. Trade unions, on the other hand, support HRDD by promoting sectoral dialogue between business and workers' unions.[73]

3.2.3. Belgium

55. Belgium launched its NAP in July 2017.[74] The Belgian NAP mainly focuses on the first and the third pillars of the UN Guiding Principles, namely the duty of states to protect against human rights violations by all actors in society, including businesses, and providing an effective remedy for victims when human rights are violated. However, it pays limited attention to corporate responsibility in terms of respect for human rights, namely the HRDD requirements.[75]

56. The Belgian NAP demonstrates what Belgium is already doing in the field of business and human rights. Moreover, it reveals broad policy areas and actions for the future. However, it is not an actional plan because of several reasons. Firstly, unlike the German NAP, it does not set long-term targets for the future in terms of the HRDD requirements. Secondly, explicit strategies to support different stakeholders in the process of HRDD are missing. Unlike the German and Dutch NAPs, it does not provide administrative and financial support for the organization of multi-stakeholder dialogues. It only encourages companies to initiate and pursue the implementation of the HRDD procedures with their own available resource. And lastly, it gives inadequate attention to a balanced regulatory mix, which is the main approach in the German and Dutch NAPs.[76]

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available at *https://www.cnvinternationaal.nl/en/our-work/news/2018/january/german-dutch-cooperation-takes-sustainability-in-the-textile-sector-to-the-next-level* (last accessed at 25 August 2020).

[70] See Forum Nachhaltiger Kakao, available at *https://www.kakaoforum.de/en/about-us/german-initiative-on-sustainable-cocoa/* (last accessed at 25 August 2020).

[71] See Forum Nachhaltiges Palmöl, available at *https://www.forumpalmoel.org/en/welcome* (last accessed at 25 August 2020).

[72] See Aktionsbündnis für Nachhaltige Bananen, available at *https://www.scp-centre.org/our-work/abnb/* (last accessed at 25 August 2020).

[73] HUYSE, H., VERBRUGGE, B., *supra* n. 4 at 27.

[74] Belgian National Action Plan on Business & Human Rights. Implementing the UN Guiding Principles on Business & Human Rights, adopted 23 June 2017, Belgium, The Belgian Federal Public Service Foreign Affairs, Foreign Trade and Development Cooperation, 2018, available at *https://www.duurzameontwikkeling.be/sites/default/files/content/be_nap_bhr_brochure_en.pdf (last accessed at 17 April 2021).*

[75] *Ibid.*, at 15.

[76] HUYSE, H., VERBRUGGE, B., *supra* n. 4, at 10.

57. Moreover, the Belgian stakeholders have limited capacity and expertise in terms of HRDD compared to the Netherlands and Germany. In this context, even though different sectors started to engage with Sustainable Development Goals (SDGs), this is limited to environmental and climate-related issues. Likewise, the HRDD issues are missing in the Belgian sector federations' policies.[77]

58. Nevertheless, regarding business and human rights environment, the public and political awareness have been increasing. The outcome of this awareness is the partnership agreements. In this context, the Beyond Chocolate partnership for sustainable Belgian chocolate,[78] TruStone Initiative[79] between the Dutch and Flemish natural stone sector, Belgian SDG Charter[80] to promote and to fulfill the Sustainable Development Goals(SDGs) are considerably important developments.

3.2.4. Strengths and Weaknesses of Having New Multi-Stakeholder Initiatives for the Enforcement of HRDD

59. The German and Dutch approaches to address the HRDD requirements are seen as "a step forward as they add binding features to a largely voluntary set-up."[81] However, it is important to identify the weak and strong points of this approach for the implementation of the UN Guiding Principles.

60. The strong points of this approach are clear. Firstly, these multi-stakeholder initiatives promote a tailored sector-specific approach, which is a useful tool to address adverse human rights impacts emerging from specific sectors. Secondly, they can promote a common ground to establish trust between different actors in the business, civil society, and government. [82] Thirdly, they enhance dialogue and collaborative spirit between civil society, businesses, and government. Thus, they increase widespread societal support for the outcomes.[83] And lastly, the dynamics of this approach can trigger public awareness, and this could result in better practices with regard to the HRDD obligations.

61. Nevertheless, this approach also has weak points. Firstly, the establishment of new multi-stakeholder initiatives can be costly. In this sense, it requires substantial investments from the government and time and effort from

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[77] *Ibid.*
[78] IDH sustainable trade initiative, "Beyond Chocolate", available at *https://www.idhsustainabletrade.com/initiative/beyondchocolate/* (last accessed at 6 May 2020).
[79] IRBC Agreements, "IRBC TruStone Initiative", available at *https://www.imvoconvenanten.nl/en/trustone*, (last accessed at 6 May 2020).
[80] sdgs.be, "The Belgian SDG Charter for International Development", available at *https://www.sdgs.be/en/belgian-sdg-charter-international-development* (last accessed at 6 May 2020).
[81] HUYSE, H., VERBRUGGE, B., *supra* n. 4, at 9.
[82] *Ibid.*, at 32.
[83] *Ibid.*

stakeholders.[84] Secondly, this approach might lead to a comparative disadvantage for the Belgian companies in the absence of European-wide arrangements.[85] In other words, if these initiatives are taken at the national level only, they cannot provide an equal level playing field. And lastly, it is still too early to assess whether this approach effectively incorporates the UN Guiding Principles into business operations.[86]

62. Overall, this paper argues that the benefits of this approach outweigh its weak points as it brings different parties together, creates dialogue and mutual understanding, and tries to find common ground. Moreover, this approach enables parties to define, share, and analyze the problems and dilemmas together and learn from each other.[87] Most importantly, the sector-specific method allows stakeholders to address specific human rights issues related to a specific sector. The overall process raises awareness regarding business and human rights issues, and this eventually leads to better practices. Weak points regarding comparative disadvantages, on the other hand, can be overcome if these initiatives are taken at higher levels such as the European Union and in collaboration with the other states, as in the aforementioned example of the cooperation agreement between the Dutch and German multi-stakeholder initiatives in the garment sector.

3.3. LEGISLATIVE INITIATIVES

3.3.1. The UK Modern Slavery Act 2015[88]

63. Section 54 on transparency in supply chains of the Modern Slavery Act imposes an obligation on commercial organizations to publish a slavery and human trafficking statement.[89] In this context, a commercial organization refers to a body corporate or a partnership carrying out business or part of a business in the UK.[90] Only certain commercial organizations with a particular turnover are subject to this act. The amount of turnover is determined by a regulation declared by the Secretary of State.[91]

64. A slavery and human trafficking statement should include the measures the organization has taken during the financial year to guarantee that slavery and human trafficking have not occurred in any of its supply chains and any part of its business. If the organization has not taken any measures to combat slavery

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[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] VAN HUIJSTEE, M., "Multi-stakeholder initiatives. A strategic guide for civil society organizations", SOMO, 2012, 17.
[88] Modern Slavery Act 2015 (2015 c.30), adopted 26 March 2015, available at *http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted (last accessed at 17 April 2021).*
[89] *Ibid.*, at 54(1).
[90] *Ibid.*, at 54(12).
[91] *Ibid.*, at 54(2b).

and human trafficking, this statement should include this information as well.[92] When a commercial organization neglects to issue the statement, the Secretary of State can seek a court injunction mandating compliance.[93]

65. The Act does not oblige businesses to conduct due diligence to identify, prevent, and address modern slavery in their business operations and supply chains. Moreover, it does not provide access to effective remedies in the UK for victims who have been subjected to forms of modern slavery abroad, for example, by a supplier of a UK company.[94] Even though the UK Modern Slavery Act has the potential to increase businesses' awareness regarding human rights, it only partially implements the UN Guiding Principles by simply introducing reporting obligations limited to modern slavery and human trafficking. Therefore it is criticized for being "an overall weak piece of legislation that leaves much to be done in the direction of an effective implementation of the UNGPs."[95]

3.3.2. The Australian Modern Slavery Act 2018[96]

66. The Australian Modern Slavery Act 2018 obliges companies to report annually on the risks of modern slavery in their operations and supply chains, and on how companies have addressed these risks. Regarding its scope, the reporting obligation only applies to companies that are based or operating in Australia and have annual consolidated revenue of more than $100 million. However, other organizations based or operating in Australia may report voluntarily.[97]

67. This Act enables civil society, investors, and consumers to scrutinize company statements on modern slavery by making them publicly available. Concerned parties have the opportunity to evaluate a company based on how it has addressed the risk of modern slavery in its operations and supply chain. Moreover, since this information is publicly available, it promotes sharing best practices and exposes those companies that fail to report or submit poor quality reports. To sum up, such legislation intends to push companies to take measures by the pressure of public scrutiny and the danger of reputational loss.[98]

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[92] *Ibid.*, at 54(4).
[93] *Ibid.*, at 54(11).
[94] MANTOUVALOU, V., "The UK Modern Slavery Act 2015 Three Years On", *Modern Law Review* (2018), 1017,1041.
[95] MACCHI, C., BRIGHT, C., "Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation", (4 March 2020), at 8, available at *https://ssrn.com/abstract=3524488* (last accessed at 17 April 2021).
[96] Modern Slavery Act 2018, (2018, no.153), adopted 29 November 2018, available at *https://www.legislation.gov.au/Series/C2018A00153* (last accessed at 17 April 2021).
[97] *Ibid.*, at Preliminary Part 1, Section 3.
[98] SINCLAIR, A., NOLAN, J., "Modern Slavery Laws in Australia: Steps in the Right Direction?", *Business and Human Rights Journal*, (2020), 164,164.

68. Although the Act is considered to be a significant development, there are concerns expressed regarding the enforcement of it. In this context, the Act does not provide fines for the companies which fail to report, and accordingly, the enforcement is left to civil society, consumers, and investors.[99] Another issue is that, unlike the UK Modern Slavery Act 2015, the Act does not establish an administrator who can help the implementation of the law.[100]

69. Even though the Modern Slavery Act 2018 is a significant step to ensure that companies respect human rights in their operations and supply chains, it only partially addresses the UN Guiding Principles. In this connection, it does not introduce a full-fledged HRDD requirement, and its scope is limited to modern slavery rather than all internationally recognized human rights. Moreover, it only introduces a reporting obligation on certain companies, which is only one step in the UN Guiding Principles.

3.3.3. The Dutch Child Labor Due Diligence Act[101]

70. On 14 May 2019, the Dutch Senate adopted the Child Labor Due Diligence Act. The Act states that it will enter into force on a date to be determined by Royal Decree, but not before January 1, 2020. In this context, it is expected to enter into force in 2022.[102]

71. The Act introduces an obligation on companies providing goods or services to the Dutch buyers to conduct an HRDD to identify and prevent child labor in their supply chains.[103] In this context, those companies that sell or supply goods or services to Dutch end-users fall under the scope of this Act, regardless of where the company is based or registered. For the purpose of the Act, an end-user refers to a natural or legal person buying the goods or the services. The Act states that a company that transports goods is not deemed a supplier of those goods.[104]

72. Unlike the UK and Australian Modern Slavery Acts, the Dutch Child Labor Due Diligence Act imposes a positive due diligence obligation. In this

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[99] *Ibid.*, at 167.
[100] *Ibid.*, at 168.
[101] The Dutch Child Labor Due Diligence Act, Wet zorgplicht kinderarbeid, adopted 14 May 2019, available at *https://zoek.officielebekendmakingen.nl/stb-2019-401.html (last accessed at 17 April 2021).*
[102] Ropes & Gray, "Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies", available at *https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies* (last accessed at 17 April 2020).
[103] HOFF, A., "Dutch child labour due diligence law: a step towards mandatory human rights due diligence", Oxford Human Rights Hub Blog, available at *http://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence* (last accessed at 17 April 2020).
[104] Ropes & Gray, *supra* n.102.

context, if a company has a reasonable doubt of child labor in the production of goods or services, it must adopt and implement an action plan.[105]

73. A company that is subject to the Act must issue a declaration stating that it exercises HRDD. This condition is not required if a company only purchases goods or services from other companies that have issued such a declaration. Moreover, the Act introduces a regulator who will watch and enforce compliance with the law. Third parties affected by a company's actions or omissions can submit a complaint to the designated regulator, after having submitted it first to the company. The Act introduces both administrative and criminal sanctions in case of non-compliance.[106]

74. The Dutch Act is an important step for the implementation of HRDD into domestic legal systems. However, it does not address all potential and actual adverse human rights impacts caused by business activities as its scope is limited to child labor. Therefore, it is not entirely in line with the UN Guiding Principles that ask companies to undertake due diligence covering all adverse human rights impacts.[107]

3.3.4. The French Act on the Duty of Vigilance of Parent and Outsourcing Companies[108]

75. Unlike the Dutch Child Labor Due Diligence Act and the UK and Australian Modern Slavery Acts, the French Act on the Duty of Vigilance of Parent and Outsourcing Companies applies horizontally across all human rights issues and sectors. It was adopted on 21 February 2017 and enacted on 27 March 2017.

76. The Act introduces a legal obligation for large companies to undertake HRDD in their operations and supply chains.[109] Regarding its scope, the law applies to companies incorporated or registered in France for two consecutive fiscal years having at least 5,000 workers in France; or at least 10,000 workers worldwide.[110]

77. Accordingly, the subjected companies must establish and implement a vigilance plan. In this context, the vigilance plan must have five elements: 1) a scoping exercise to identify, analyze, and prioritize risks for human rights; 2) procedures to periodically assess human rights risks connected with subsidiaries,

[105] *Ibid.*
[106] *Ibid.*
[107] MACCHI, C., BRIGHT, C., *supra* n. 95, at 12.
[108] The French Act on the Duty of Vigilance of Parent and Outsourcing Companies, LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, adopted 21 February 2017, available at *https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id (last accessed at 17 April 2021).*
[109] MACCHI, C., BRIGHT, C., *supra* n. 95, at 12.
[110] *Ibid.*, at 14.

subcontractors or suppliers; 3) actions to decrease human rights risks and prevent severe harm; 4) a mechanism collecting reports of potential and actual human rights risks and adverse impacts, 5) a mechanism to observe measures that have been implemented and assess their effectiveness.[111]

78. The Act introduces a non-compliance mechanism and a civil liability regime. As to the non-compliance mechanism, if the corporations falling under the scope of the Act fail to implement it, interested parties can ask the competent jurisdiction to order a company to establish, implement and publish a vigilance plan, followed by a periodic fine in case of continued non-compliance.[112] As to the civil liability regime, victims can ask compensation for negligence under the general principles of French tort law, if the corporations fail to comply with their vigilance plan or if they have an inadequate vigilance plan. In this case, the burden of proof rests on the damaged party, who must prove that the failure to comply resulted in the harms.[113]

79. Even though the French Act constitutes an advanced instrument to address HRDD, it still fails to ensure that victims have access to effective remedies, as they must cope with a high burden of proof to hold multinational enterprises responsible for their actions or omissions.[114] Moreover, the Act only addresses large companies, whereas small and medium-sized companies operating in high-risk sectors can cause adverse human rights impacts as well.

3.3.5. The German Draft Bill on Mandatory Human Rights Due Diligence

80. As mentioned above, the German NAP introduces the government's expectations from corporations with regard to human rights. In particular, the German NAP asks all corporations to introduce the HRDD mechanisms that are equivalent to their size, the sector in which they operate, and their position in supply chains. Moreover, the German NAP sets the goal that, by 2020, at least 50% of all corporations based in Germany with more than 500 employees should have incorporated HRDD into their corporate processes. Otherwise, the government would consider further action, such as introducing a legislative act.[115] In this context, it is revealed by two surveys that this target was clearly missed. Consequently, on 3 March 2021, the German government adopted a Draft Bill on corporate due diligence in supply chains. If the Parliament passes the Draft

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[111] *Ibid.*, at 12-13.
[112] COSSART, S., CHAPLIER, J., DE LOMÉNIE, T.B., "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All", *Business and Human Rights Journal* (2017), 317,320.
[113] *Ibid.*, at 14.
[114] PALOMBO, D., "The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals" *Business and Human Rights Journal* (2019), 265.266.
[115] National Action Plan. Implementation of the UN Guiding Principles on Business and Human Rights, *supra* no. 61, at 10.

Bill, it will come into force and establish mandatory due diligence obligations for certain companies.[116]

81. In this context, the Draft Bill obliges companies to ensure that human rights are observed throughout their entire supply chain. Thus, the Draft Bill requires companies having more than 3,000 employees to fulfill the HRDD obligations as of January 1, 2023. Companies having more than 1,000 employees, however, must meet their HRDD obligations as of 2024. Accordingly, a company's obligations reach the entire supply chain, including its own business activities and direct suppliers. The scope extends to indirect suppliers only if the company has a substantiated knowledge of human rights violations by suppliers.[117]

82. Moreover, the Draft Bill asks companies to establish a complaint mechanism and report on due diligence activities. Likewise, the Draft Bill introduces sanctions in the form of fines to ensure compliance with its obligations. In this connection, fines can be up to 2% of the average annual turnover for large companies with an annual turnover of more than 400 million euros. Furthermore, in case of a serious violation of the obligations, companies can be excluded from public procurement for up to three years.[118]

83. The Draft Bill is an important step to implement the UN Guiding Principles as it introduces a full-fledged due diligence obligation on companies. Nevertheless, it only affects large companies, whereas small and medium-sized companies operating in high-risk sectors can create adverse human rights impacts as well.

3.3.6. The Swiss Proposals

84. In Switzerland, a popular initiative[119], the Responsible Business Initiative (the RBI), was launched by a coalition of Swiss NGOs, namely the Swiss Coalition for Corporate Justice. The RBI proposes amending the Swiss Constitution by adding a particular provision to ensure that companies respect internationally recognized human rights and international environmental standards and undertake due diligence activities.[120] Regarding its scope, the RIB proposes that

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[116] MAYER BROWN, "Business and Human Rights – Germany Adopts Draft Mandatory Human Rights Due Diligence Law", available at *https://www.mayerbrown.com/en/perspectives-events/blogs/2021/03/business-and-human-rights--germany-adopts-draft-mandatory-human-rights-due-diligence-law* (last accessed at 10 April 2021).

[117] *Ibid.*

[118] *Ibid.*

[119] According to Swiss law, a popular initiative enables Swiss citizens to ask an amendment to the Federal Constitution. Swiss Coalition for Corporate Justice SCCJ, "About the Initiative", available at *https://corporatejustice.ch/about-the-initiative/* (last accessed at 6 May 2020).

[120] BUENO, N., "The Swiss Responsible Business Initiative and its Counter-Proposal: Texts and Current Developments", Cambridge: Business and Human Rights Blog, available at *https://www.cambridge.org/core/blog/2018/12/07/the-swiss-responsible-*

the law should cover all companies that have their registered office, central administration, or principal place of business in Switzerland. Moreover, its scope includes the damage caused by other companies that are under the control of Swiss companies. In this context, controlled companies are usually subsidiaries of parent companies. However, a multinational company can de facto exercise control over another company even though the latter is not part of its legal structure. For example, de facto control exists when a Swiss corporation is the only purchaser of a supplier. According to the proposed constitutional amendment, a company is not liable for the damages if it takes all the precautionary measures and properly undertakes due diligence activities to avoid the harm, or it is proven that damage would have happened even though all the precautionary measures had been taken. Finally, the proposed constitutional amendment guarantees Swiss law will apply to the supply chain responsibility cases regardless of the law applicable under private international law.[121]

85. In response to the popular initiative, on 14 June 2018, the National Council adopted the text of the counter-proposal of the RBI. Accordingly, this counter-proposal aims to change the Swiss Code of Obligations by introducing particular provisions. Similar to the RBI, the counter-proposal provides an obligation to undertake HRDD, a specific liability clause, and a private international law rule to ensure that Swiss law will apply to the supply chain liability cases. However, its scope is limited. Only those companies heaving two out of the three following thresholds are subject to due diligence obligation: 1) a balance sheet of CHF40 million, 2) a turnover of CHF80 million, 3) employment of 500 employees. However, smaller companies presenting a high risk for human rights are also subject to HRDD. Regarding supply chain responsibility, the proposed law does not accept economic dependence as a relationship of control. In contrast to the RBI, the counter-proposal introduces a liability regime limited solely to the harm caused to life and limb or property.[122]

86. Regarding private international law rules, both the RBI and the counter-proposal clarifies that Swiss law applies to the supply chain responsibility cases. Moreover, both of them hold parent companies liable for human rights violations committed by their foreign subsidiaries, unless they prove that they properly undertake the HRDD obligations. Consequently, the HRDD obligation becomes a tool to shift the burden of proof, which is a serious obstacle for victims to access to effective remedies. Even though both proposals make it possible to hold a parent company liable for the wrongdoings of its subsidiaries, the counter-proposal requires the exercise of effective control over subsidiaries by parent companies as a condition for such liability. Accordingly, the control that a parent company performs over its subsidiary should not be on paper but should be effective in practice. In this connection, effective control exists if a

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business-initiative-and-its-counter-proposal-texts-and-current-developments/ (last accessed at 7 May 2020).

[121] Swiss Coalition for Corporate Justice SCCJ, “The initiative text with explanations”, available at *https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf* (last accessed at 6 May 2020).

[122] BUENO, N., *supra* no. 120.

parent company effectively supervises and intervenes in the activities of its subsidiaries. The burden to prove the existence of such effective control is on victims.[123]

87. On 18 December 2019, the Council of States voted against the counter-proposal and adopted another proposal supported by the Government, limited to reporting obligations and issue-specific due diligence on child labor and conflict minerals. This proposal is strongly criticized by civil society.[124]

88. On 4 June 2020, a conciliation committee trying to reconcile both proposals put forward by two parliamentary chambers, namely the National Council and the Council of States, rejected the counter-proposal of the National Council and opted for the proposal of the Council of States, which is limited to reporting obligations and issue-specific due diligence on child labor and conflict minerals. Subsequently, on 8-9 June, this proposal was approved by both the National Council and the Council of States.[125]

89. In reaction to these parliamentary developments, on 29 November 2020, the RBI set for a public referendum. According to Swiss law, in order for an initiative to be successful, it should obtain both the popular and cantonal majority in the referendum. In this context, the proposal could not pass the referendum, despite the majority of the votes in favor, as it could not obtain the required cantonal majority. Consequently, the proposal limited to reporting obligations and issue-specific due diligence adopted by the Parliament automatically entered into force in 2021.[126]

90. Both the RBI and the counter-proposal of the National Council can be considered as missed opportunities for Switzerland. In this context, reporting obligations and due diligence obligations limited to specific issues are not sufficient to fully implement the UN Guiding Principles and ensure that Swiss companies respect human rights in their operations.

3.3.7. The Successes and Shortcomings of the Legislative Initiatives Incorporating HRDD

91. As described above, there is an emerging uneven and fragmented trend towards legislative acts to impose HRDD on companies. In this context, the UK

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[123] PALOMBO, D., *supra* n. 114, at 277-278.

[124] Business & Human Rights Resource Centre, "Switzerland: Debate intensifies around Initiative for responsible business conduct launched by NGO coalition", available at *https://www.business-humanrights.org/en/switzerland-ngo-coalition-launches-responsible-business-initiative* (last accessed at 6 May 2020).

[125] Business & Human Rights Resource Centre, "Switzerland: Responsible Business Initiative rejected at ballot box despite gaining 50.7% of popular vote", available at *https://www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal/* (last accessed at 10 April 2021).

[126] *Ibid.*

and Australian Modern Slavery Acts only partially focus on the HRDD process, namely mandatory reporting obligations and human trafficking issues. The Dutch Child Labor Due Diligence Act goes further than just a mandatory reporting by asking companies to undertake HRDD limited to child labor. Moreover, the French Act on the Duty of Vigilance of Parent and Outsourcing Companies goes even further via an overarching mandatory due diligence framework, including penalties and a civil liability regime, even though their scope is limited to large companies.[127] Similarly, the German Draft Bill on mandatory due diligence in the supply chain is an important step as it introduces full-fledged HRDD obligations on certain companies. The Swiss proposals, namely the RBI and the counter-proposal of the National Council, however, can be seen as the most advanced instruments as they shift the burden of proof from victims to companies and introduce a private international law rule to protect victims from the application of less protective foreign law to their supply chain liability cases. It would have been a perfect example of implementing the UN Guiding Principles via legislative initiatives if one of these proposals were adopted by Switzerland. Unfortunately, this opportunity was missed as the proposal introducing reporting and limited due diligence obligations was adopted by the Swiss Parliament.

92. In this context, it is significant to identify the successes and shortcomings of legislative initiatives for the implementation of the UN Guiding Principles to analyze their added value.

93. The most important success of these legislative initiatives is that they have the ability to impose companies to undertake HRDD. Voluntary initiatives are deemed as ineffective since they lack enforcement mechanisms. In this sense, despite all the effort to raise awareness and numerous initiatives taken by a wide range of stakeholders at different levels, many companies are still not willing to undertake HRDD to manage their supply chains responsibly.[128] Nevertheless, it should be pointed out that binding legislative initiatives are most effective when they are blended with softer measures.[129] Moreover, legislative initiatives can promote a special civil liability regime (e.g. the Swiss proposals) where victims can ask for compensation for the harm caused by business operations by circumventing the burden of proof requirement. Therefore, legislative initiatives can be employed as a useful tool to remove all the barriers for foreign victims to have access to effective remedies. Furthermore, legislative initiatives at the level of the home country can overcome the problem that multinational companies prefer suppliers from certain countries that offer the lowest legal requirements in terms of human rights protection and labor rights (law shopping).[130]

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[127] MACCHI, C., BRIGHT, C., *supra* n. 95, at 1.
[128] HUYSE, H., VERBRUGGE, B., *supra* n. 4, at 39.
[129] *Ibid.*, at 34.
[130] BRIGHT, C., "Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: Is the French Law on the Duty of Vigilance the Way Forward?" *EUI Working Paper MWP* (2020), at 1.

94. Despite their successes, legislative initiatives also have certain shortcomings. Firstly, creating one general regulation that applies to all sectors and all human rights issues can be challenging. There are concerns regarding the outcome as it could lead to nothing more than box-ticking and empty reports.[131] Secondly, as described above, the current legislative initiatives are diverse regarding the obligations they introduce and their scope. Therefore, they cannot level the playing field. As a result, legislative initiatives can create comparative disadvantages for subject companies. Thirdly, the current legislative initiatives mainly focus on large companies. However, undertaking HRDD can be particularly crucial for small and medium-sized companies operating in high-risk sectors and areas. And lastly, the diversity of the current legislative initiatives can undermine the business operations of internationally active companies as they can be subject to different national standards.

95. These analyses have revealed that binding legislative initiatives would provide numerous benefits in the effective enforcement of HRDD and access to effective remedies for the victims of adverse human rights impacts caused by business operations. Nevertheless, the above-mentioned shortcomings of this approach should not be underestimated. Therefore, this paper recommends taking legislative initiatives at the European Union level instead of at the national level to minimize these shortcomings. A binding legislative initiative at the European Union level would level the playing field, clarify the obligations of internationally active companies that face diverse national standards. Moreover, it would enforce HRDD effectively and provide access to effective remedies for victims of companies' wrongdoings.

3.4. USING EXISTING MECHANISMS: BELGIAN TORT LAW AND CORPORATE SUPPLY CHAIN LIABILITY

96. The third option that this paper analyzes is to impose companies to undertake the HRDD procedures by holding them responsible for the harm caused by their business operations via national tort law. More specifically, this section of the paper discusses the possible challenges in the Belgian legal system to hold a parent company liable for the harm caused by its supply chains via national tort law.

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[131] See THE ECONOMIST INTELLIGENCE UNIT, No More Excuses: Responsible supply chains in a globalised world, August 2017.

97. In this context, supply chain liability is a new legal theory that accepts that "a company may be held liable for damage-causing events in its supply chain if it failed to prevent the damage in violation of a relevant duty to refrain from causing harm or a duty to prevent harm."[132] There are numerous difficulties that victims have to face in the application of this theory in the Belgian legal system. This paper introduces these difficulties by classifying them based on their source. In this context, the issues emerging from the applications of national tort law and private international law are identified respectively.

3.4.1. Difficulties Emerging from the Application of National Tort Law

98. The first issue in the application of the theory of supply chain liability is to find a legal basis. In this context, Articles 1382 to 1386 of the Belgian Civil Code set the rules of Belgian tort law.[133] Article 1382 states: "Any act of man, which causes damage to another, shall oblige the person by whose fault it occurred to repair it."[134] Article 1383 includes that a person is responsible for the damage s/he causes "not only by reason of one's acts but also by reason of one's imprudence or negligence."[135] For the liability, the following conditions should be satisfied cumulatively: (1) fault, (2) damage, and (3) a causal link between the fault and the resulting damage.[136]

99. Concerning the determination of the existence of a fault, under Belgian law, the acts of the wrongdoer are compared to the acts of a "reasonably careful and forward-looking person under the same circumstances."[137] This person refers to the so-called *bonus pater familias*. If a *bonus pater familias* predicts that his/her action could lead to damage, s/he takes measures to prevent it. In the application of this principle for corporate supply chain liability claims, two questions need to be addressed. Firstly, when can a reasonably careful and forward-looking company predict the damage resulting from its action or omission? Secondly, which precautionary measures should this company take in order to prevent this damage? This principle is open to the interpretation of courts and applied case by case. Therefore, its scope can be expanded by courts to capture corporate supply chain liability claims given the fact that growing awareness of ethical norms and human rights in this field. Numerous elements can be considered to assess whether a partner company would have foreseen the damage beforehand and whether it has taken precautionary measures to prevent this damage. In this context, repeated damage, earlier knowledge of risks, expertise in risk prevention can increase the foreseeably.[138]

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[132] BERGKAMP, P.A., "Models of Corporate Supply Chain Liability", *Jura Falconis* (2018-2019), 161,162.
[133] *Ibid.*, at 181.
[134] *Ibid.*, at 181-182.
[135] *Ibid.*, at 182.
[136] *Ibid.*
[137] *Ibid.*
[138] *Ibid.*, at 183.

100. Moreover, published-self commitments and internal self-regulation required by UN Guiding Principles can be used by national courts as a benchmark to evaluate the foreseeability and the preventability of the damage. These documents illustrate companies' awareness of what is necessary to avoid possible damage. Therefore, a company behaving against its self-norms can be held responsible for the damage since it has already predicted it. Moreover, if a company's internal self-regulation requires a higher degree of precautionary measures than what official law imposes on companies, this can be considered as the expertise of this company. Therefore, in this case, the foreseeability and preventability test applied by courts should be more rigorous.[139] Furthermore, internal self-regulation and self-policy commitments can generate a minimum sector-wide standard for the foreseeability of the damage as they illustrate a common practice of what is considered as necessary to prevent damage within the profession. This means that in a specific sector if a considerable number of companies are adherent to the same self-rules, these rules can be used as a benchmark by courts to evaluate the behaviors of all companies in the same profession even if they do not internalize these rules.[140]

101. The second issue is the determination of people who have standing before the Belgian courts. In this context, the Belgian Judicial Code (Part IV - Book II) promotes how to perform civil judicial actions. According to Belgian law, as a rule, only victims can file a case. In this connection, victims should have a natural or legal personality and have a legal interest to bring a case. This legal interest should be an existing and concrete one. Additionally, if stakeholders can demonstrate such an interest, they can also bring a claim before courts.[141] Moreover, Belgian law allows a class action if a human rights abuse also violates consumer rights. To bring a collective claim, consumers should act through an authorized consumer representative who does not need any charge and should not have any financial gain. In this context, this representative can be a consumer rights association, a member of the Consumers' Council, or a representative approved by the Minister for Consumer Affairs.[142]

102. The third issue is the doctrine of separate legal personality. This doctrine is accepted by common law and civil law jurisdictions. Accordingly, the separation of legal personality among a parent company and its suppliers or subsidiaries must be preserved. This principle may be bypassed only in

[139] GLINSKI, C., "The Ruggie Framework, Business Human Rights Self-Regulation and Tort Law: Increasing Standards through Mutual Impact and Learning", *Nordic Journal of Human Rights* (2017), 15,27.
[140] *Ibid.*, at 28.
[141] UNIVERSITY OF ANTWERP FACULTY OF LAW, Access to Remedy in Belgium. The United Nations Guiding Principles on Business and Human Rights (UNGP) in Belgium: State-Based Judicial and Non-Judicial Mechanisms that Provide Access to a Remedy, 2017, 33, available at *https://www.sdgs.be/sites/default/files/publication/attachments/brochure_acces_to_remedy_in_belgium_2017.pdf (last accessed at 17 April 2021).*
[142] *Ibid.*, at 35.

exceptional circumstances, namely piercing the corporate veil.[143] Thus, it is difficult to hold a company responsible for its supplier's wrongdoing that has a distinct legal personality, unless courts pierce the corporate veil and accept the supply chain and parent company as one legal personality.

103. The last issue is that, under Belgian law, the burden of proof lies on victims. Therefore, victims should prove the existence of damage, fault, and a causal link between the fault and the resulting damage. Given the complex business relationships of corporations, it could be challenging to prove that a parent company's acts or omissions were decisive in causing the damage. Moreover, to prove the existence of the corporate group and to determine the role of the different entities in the corporate group can be excessively difficult for victims.[144]

104. These are the main difficulties that foreign victims have to face to file a case before a Belgian court against a Belgian parent company to hold it responsible for the harm caused by its business operations. Accordingly, these issues should be addressed by the government to provide effective remedies to victims and to force companies to undertake HRDD. More specifically, the burden of proof should be shifted from foreign victims to parent companies, and there should be a legal exception to the principle of separate legal personality for supply chain liability cases.

3.4.2. Difficulties Emerging from the Application of Private International Law: Jurisdiction and Applicable Law

105. As mentioned above, victims face difficulties emerging from the application of private international law when they file a case before a foreign court. In this context, this paper examines the determination of jurisdiction and applicable law by analyzing two civil liability cases from Germany and the UK, respectively, namely, *Jabir v KiK* and Okpabi v Royal Dutch Shell plc.

a. Jabir v KiK

106. Regarding the facts of the case, in 2012, a fire occurred in a tailoring factory of Ali Enterprises in Karachi, Pakistan. This fire caused the death of 260 employees and wounded another 32 employees. Ali Enterprises was one of the suppliers of a German retail company, namely KiK. KiK transposed its code of conduct into its supply chain agreement with Ali Enterprises. The code of conduct of *KiK* included comprehensive fire and safety regulations. Therefore, a group of surviving employees and relatives of victims started proceedings against KiK before the Regional Court of Dortmund, Germany. The plaintiffs sought compensation on the grounds that KiK infringed its duty to watch and

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[143] CURRAN, V.G., "Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations", *Chicago Journal of International Law* (2017), 403,408.
[144] UNIVERSITY OF ANTWERP FACULTY OF LAW, *supra* n. 141, at 34.

enforce the fire and safety regulations set out in the supply agreement with Ali Enterprises.[145]

107. Concerning jurisdiction, the Regional Court of Dortmund found the jurisdiction to review the case based on Article 4(1) and Article 63(1) of the Brussels I*bis* Regulation.[146,147] Article 4(1) states: "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." This means that jurisdiction is determined based on the domicile of the defendant. Article 63(1) of the Regulation determines the domicile of a legal person: "For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business." Therefore, it was not difficult for the Regional Court of Dortmund to establish its jurisdiction for this case.

108. As to the applicable law, the Rome II-Regulation[148] determines applicable law for non-contractual obligations in civil and commercial matters. Article 4(1) of the Rome II-Regulation states that "Unless otherwise provided for in this Regulation, the law applicable to a noncontractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur." Thus, the Court found that Pakistani law applies to the case.[149] Accordingly, on 10 January 2019, the Regional Court of Dortmund dismissed the case on the grounds that claims are time-barred under Pakistani law.[150] Therefore, this case could not be examined as to the merits.

b. Okpabi v Royal Dutch Shell plc

109. Regarding the facts of the case, the Ogale and Bille Nigerian communities started proceedings against the UK company Royal Dutch Shell plc (RDS) and its Nigerian subsidiary Shell Petroleum Development Company (SPDC) before the England and Wales High Court for holding them responsible for the

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[145] REINKE B., ZUMBANSEN, P.C., "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'", *King's College London Law School Research Paper No. 2019-18,* (2019).
[146] *Ibid.*, at 13.
[147] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 351, 20.12.2012, p. 1–32.
[148] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199, 31.7.2007, p. 40–49.
[149] REINKE B., ZUMBANSEN, P.C., *supra* n. 145, at 14.
[150] Hogan Lovells Focus on Regulation "Jabir and others v. KiK Textilien und Non-Food GmbH – Dortmund court dismisses lawsuit", available at *https://www.hlregulation.com/2019/01/11/jabir-and-others-v-kik-textilien-und-non-food-gmbh-dortmund-court-dismisses-lawsuit/* (last accessed at 17 April 2020).

environmental damage caused by leaks of oil from the pipelines around the Niger Delta.[151]

110. On 26 January 2017, the England and Wales High Court held that the communities could not ask for compensation from Shell in English courts. The reasoning behind this conclusion was the lack of evidence showing that RDS exercised a sufficient degree of oversight, control, or direction over SPDC. Thus, RDS had no legal responsibility for the damage caused by its Nigerian subsidiary. On 14 February 2018, the England and Wales Court of Appeal upheld the High Court's ruling.[152] However, the reason for examining this case is not discussing the outcome of the judgment. Instead, the purpose is to show how the High Court dealt with the problems emerging from the application of private international law.

111. Regarding jurisdiction, like Jabir v. Kik, the England and Wales High Court found jurisdiction based on Article 4(1) of the Brussels I*bis* Regulation.[153] Moreover, the High Court decided that the doctrine of *forum non-conveniens* cannot be applied to cases filed against parent companies incorporated in the UK by referring a well-known judgment of the Court of Justice of the European Union (the CJEU), namely the *Owusu v Jackson* case.[154]

112. In this context, the doctrine of *forum non-conveniens* gives courts a discretionary power to decline jurisdiction when a different jurisdiction is considered more convenient for the parties.[155] The CJEU rejected the application of this doctrine in the *Owusu v Jackson* case by stating: "*Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular, that of article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.*"[156]

113. Regarding the determination of the applicable law, there was a dispute about which law applies to the claims against RDS based on Article 7 of the Rome II Regulation. According to this Article, the law applicable to a non-contractual obligation stemming from environmental damage shall be the law of

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[151] Okpabi & Ors v Royal Dutch Shell plc & Anor [2017] EWHC TCC 89, available at *http://www.bailii.org/ew/cases/EWHC/TCC/2017/89.html#para2 (last accessed at 17 April 2021).*

[152] Okpabi & Ors v Royal Dutch Shell plc & Anor (Rev 1) [2018] EWCA Civ 191, available at *https://www.business-humanrights.org/sites/default/files/documents/Shell%20Approved%20Judgment.pdf (last accessed at 17 April 2021).*

[153] Okpabi & Ors v Royal Dutch Shell plc & Anor, supra n. 151, at paragraph 63.

[154] Ibid., at paragraphs 64-68.

[155] UNIVERSITY OF ANTWERP FACULTY OF LAW, supra n. 141, at 31.

[156] ECJ, 1 March 2005, Andrew Owusu v N. B. Jackson and Others, no. C-281/02, ECLI:EU:C:2005:120, at paragraph 41.

the country where the damaged occurred *"unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the the damage occurred."* While the claimants argued that the event that has caused the damage occurred in England, and accordingly, English law should be applied, the defendants argued that Nigerian law applies to the claims against RDS. The High Court solved this problem with an innovative interpretation. It decided to apply English law to the claims against RDS based on the fact that the law of Nigeria is a part of a common-law jurisdiction, and the Nigerian courts bear in mind English common law when they give a judgment.[157] Thus, the High Court considered Nigerian law as a part of English common law and accordingly concluded that English law applies to the case. The High Court's approach allowed it to by-pass the application of a law that is less protective for victims.

114. In conclusion, a civil liability case can be brought before a Belgian court by a foreign victim without any problem regarding jurisdiction as the Brussels Ibis Regulation is part of Belgian private international law, and the CJEU does not accept the doctrine of *forum non-conveniens*. However, the real difficulty is to apply foreign law to the case since it could lead to a less protective law of different countries. Therefore, this issue constitutes a serious obstacle for victims to have access to effective remedies, as in the example of *the Jabir v KiK* case. Even though the High Court of England and Wales overcame this problem in *Okpabi v Royal Dutch Shell plc* with an innovative interpretation, this solution cannot work for all cases. Moreover, this problem cannot be solved by introducing a particular private international law provision at the national level, as the EU Regulations on private international law has priority over national rules. Therefore, the solution should come from EU law.

4. ADDED VALUE OF A BINDING LEGAL INSTRUMENT AT THE INTERNATIONAL AND SUPRANATIONAL LEVELS FOR THE IMPLEMENTATION OF THE UN GUIDING PRINCIPLES

4.1. GENERAL

115. This part focuses on the added value of a binding legal instrument at the international or the supranational levels to ensure that businesses respect human rights in their operations and undertake HRDD. In this context, at the international and supranational levels, there is an emerging trend towards binding instruments regarding business and human rights. The outcomes of this

[157] Okpabi & Ors v Royal Dutch Shell plc & Anor, supra n. 151, at paragraphs 50-61.

trend can be observed both at the European Union and the United Nations. Moreover, at the Council of Europe, there has been a call for Member States to address adverse human rights impacts caused by business operations by introducing legislative initiatives.

116. In this context, this part firstly introduces the latest developments in the field of business and human rights at the United Nations, the Council of Europe, and the European Union respectively. Secondly, this part discusses the strong and weak points of adopting soft and hard law instruments to address business and human rights issues. Following this general discussion, thirdly, this part turns to particularly the strong and weak points of having HRDD enshrined in an international treaty, namely the UN Draft Treaty on business and human rights. Lastly, this paper evaluates the Sustainable Corporate Governance Initiative of the European Commission by examining envisaged achievements and possible consequences of such EU regulation.

4.2. LATEST DEVELOPMENTS WORLDWIDE

4.2.1. The United Nations

117. At the United Nations level, there has been an effort to conclude a treaty on business and human rights. In this context, the UN Human Rights Council in Geneva adopted a resolution laid out by Ecuador and South Africa in June 2014. In a next step, the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (the Working Group) was established to develop an international legally binding instrument. Between 6 and 10 July 2015, the Working Group had its first gathering. The second gathering took place in October 2016. In September 2017, "Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights" was issued by the Chair and the third gathering took place in October 2017. A "Zero Draft" was introduced in July 2018. The fourth gathering of the Working Group on the Zero Draft took place in Geneva in October 2018. A *"Revised Draft" was published on 16 July 2019 by the Working Group.* The fifth gathering took place in October 2019. On 6 August 2020, the "Second Revised Draft" is published, and the sixth session of the Working Group was held between 26 and 30 October 2020.[158] This ambitious work is continuing to adopt a treaty on business and human rights.

118. In this context, the Second Draft introduces an obligation on State Parties to require business enterprises to undertake HRDD activities proportionate to their size, risk of severely impacting human rights, and the nature of their

[158] Business & Human Rights Source Centre, "Intergovernmental Working Group" available at *https://www.business-humanrights.org/en/big-issues/binding-treaty/intergovernmental-working-group/#:~:text=The%20open%2Dended%20intergovernmental%20working,and%20developments%20from%20the%20IGWG*, (last accessed at 10 April 2021).

operations.[159] Regarding the scope, the Second Draft applies to all business enterprises and covers all internationally recognized human rights and fundamental freedoms originating from the Universal Declaration of Human Rights, core international human rights conventions, customary international law, and fundamental ILO convention.[160] Moreover, the Second Draft requires State Parties to have an effective legal liability regime where business enterprises can be held responsible for their human rights violations.[161] Likewise, it introduces a private international law rule to determine the law applicable to the proceedings regarding human rights claims against business enterprises.[162]

4.2.2. The Council of Europe

119. At the level of the Council of Europe, there are significant developments in the domain of business and human rights. In this context, on 6 October 2010, the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1757 (2010)[163]. The Resolution invites the Member States to enhance accountability for corporate human rights conduct, legislate to protect individuals from corporate abuses of human rights, and increase awareness of the Council of Europe's standards among businesses. Moreover, on 16 April 2014, the Committee of Ministers adopted the Declaration on the UN Guiding Principles on business and human rights[164] to support the implementation of the UN Guiding Principles by the Member States. Following, on 2 March 2016, the Committee of Ministers of the Council of Europe adopted the Recommendation CM/Rec (2016)3 on human rights and business.[165] This document provides more specific guidance to help the Member States in preventing and remedying human rights violations caused by business

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[159] Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises, Second Revised Draft, 6 August 2020, at Article 6, paragraph 2. Available at *https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf* (last accessed at 17 April 2021).
[160] Ibid., at Article 3, paragraphs 1 and 3.
[161] Ibid., at Article 8.
[162] Ibid., at Article 11.
[163] COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY, *Resolution 1757 (2010),* adopted on 6 October 2010, available at *http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17903&lang=en (last accessed at 17 April 2021).*
[164] COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, *Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights,* adopted on 16 April 2014, available at *https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c6ee3 (last accessed at 17 April 2021).*
[165] COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, *Recommendation CM/Rec (2016)3 of the Committee of Ministers to member States on human rights and business,* adopted on 2 March 2016, available at *https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html (last accessed at 17 April 2021).*

operations. More recently, on 29 November 2019, the Assembly adopted Resolution 2311 (2019)[166] and Recommendation 2166 (2019)[167] requesting the Council of Europe Member States to take all the necessary measures to implement the UN Guiding Principles and Recommendation CM/Rec (2016)3. These soft-law instruments are notable as they ask the Member States to legislate to ensure the implementation of the UN Guiding Principles.

4.2.3. The European Union

120. At the supranational level, namely the European Union, there has been a growing expectation for the EU to initiate regulatory action with respect to business and human rights.[168] In this connection, on 20 February 2020, the European Commission published a study on due diligence requirements in the supply chain.[169] Following this study, on 24 February 2020, in its joint civil society response, the European Coalition for Corporate Justice called on EU Commission to "*act swiftly on the study's findings and urgently initiate the process toward a legislative proposal on corporate human rights and environmental due diligence, which includes enhanced access to judicial remedy for victims.*"[170]

121. Moreover, despite the lack of power to initiate legislation, the European Parliament (EP) emphasized in its resolutions and reports the necessity of mandatory due diligence legislation at the EU level. In this context, the EP Resolution on EU Coordinated Action to Combat the COVID-19 Pandemic and Its Consequences (2020/2616(RSP)) stated that "*corporate human rights and environmental due diligence are necessary conditions in order to prevent and mitigate future crises and ensure sustainable value chain.*"[171] Likewise, the EP Report on Competition Policy – Annual Report 2019 (2019/2131(INI))

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[166] COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY, *Resolution 2311 (2019),* adopted on 29 November 2019, available at *http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28296&lang=en(last accessed at 17 April 2021).*

[167] COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY, *Recommendation 2166 (2019),* adopted on 29 November 2019, available at *http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=28298&lang=EN* (last accessed at 17 April 2021).

[168] HUYSE, H., VERBRUGGE, B., supra n.4, at 38.

[169] SMIT, L., BRIGHT, C., MCCORQUODALE, R., BAUER, M., DERINGER, H., BAEZA- BREINBAUER, D., TORRES-CORTÉS, F., ALLEWELDT, F., KARA, S., SALINIER, C., TOBED, H.T., Study on due diligence requirements through the supply chain. Final Report, Publications Office of the European Union, 2020.

[170] European Coalition for Corporate Justice, "Joint civil society response to the European Commission study into supply chain due diligence", available at *https://corporatejustice.org/eccj-publications/16802-joint-civil-society-response-to-the-european-commission-study-into-supply-chain-due-diligence* (last accessed at 17 April 2020).

[171] EUROPEAN UNION, EUROPEAN PARLIAMENT, *European Parliament Resolution on EU coordinated action to combat the COVID-19 pandemic and its consequences (*2020/2616(RSP)), 17 April 2020, P9_TA(2020)0054, at 68.

emphasized the significance of transparency, sustainability, and corporate accountability in global value chains, and called on the EU to establish a legal framework for mandatory due diligence in global value chains.[172] Furthermore, the EP Resolution on Human Rights and Democracy in the World and the European Union's Policy on the Matter – Annual Report 2018 (2019/2125(INI)) called for a legislative proposal on mandatory human rights due diligence to prevent human rights violations in the global operations of corporations and to provide access to remedies for victims of corporate wrongdoing.[173] Also, in 2020, the European Parliament published two studies on potential human rights due diligence legislation: Substantive Elements of Potential Legislation on Human Rights Due Diligence (2020)[174] and Human Rights Due Diligence Legislation – Options for the EU (2020).[175]

122. In response to these expectations, on 29 April 2020, in a webinar organized by European Parliament's Responsible Business Conduct (RBC) Working Group on due diligence, Didier Reynders, EU Commissioner for Justice, declared that the EU is currently considering introducing mandatory due diligence and started consultations with stakeholders.[176]

123. In July 2020, the Commission published another study. The study investigated the causes of EU companies for giving priority to short-term benefits of shareholders rather than to the long-term interests of the company and sustainable value chains. The study assessed possible EU-level responses to this issue of short-termism in corporate governance, such as non-legislative soft and hard law instruments, and called for an EU action.[177]

124. In light of the above-mentioned developments, the European Commission launched an initiative to propose a directive for improving the EU regulatory

[172] EUROPEAN UNION, EUROPEAN PARLIAMENT, *Report on competition policy – annual report 2019 (2019/2131(INI)), 25 February 2020, A9-0022/2020, at 11.*
[173] EUROPEAN UNION, EUROPEAN PARLIAMENT, *European Parliament Resolution on human rights and democracy in the world and the European Union's policy on the matter – annual report 2018 (2019/2125(INI)),* 15 January 2020, P9_TA(2020)0007, at 51.
[174] KRAJEWSKI, M., FARACIK, B., Substantive Elements of Potential Legislation on Human Rights Due Diligence, European Parliament's online database: Think Tank, 2020.
[175] KRAJEWSKI, M., FARACIK, B., METHVEN O'BRIEN, C., MARTIN-ORTEGA, O., Human Rights Due Diligence Legislation – Options for the EU, European Parliament's online database: Think Tank, 2020.
[176] RBC European Parliament Working Group on Responsible Business Conduct, "SPEECH BY COMMISSIONER REYNDERS IN RBC WEBINAR ON DUE DILIGENCE", available at *https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/* (last accessed at 28 August 2020).
[177] EY, Study on directors' duties and sustainable corporate governance. Final Report, Publications Office of the European Union, 2020, available at *https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en* (last accessed at 18 April 2021).

framework on company law and corporate governance, namely the Sustainable Corporate Governance Initiative. Under the initiative, the Commission conducted an Inception Impact Assessment and launched a public consultation between 26 October 2020 and 8 February 2021. The Commission plans to submit a proposal for a directive for the second quarter of 2021.[178]

125. As a recommendation to the European Commission's initiative, on 27 January 2021, the European Parliament Committee on Legal Affairs adopted a draft report that included a proposal for a directive on corporate due diligence and corporate accountability (the Draft Directive). The draft report then proceeded to a plenary vote on 9-10 March at the European Parliament, and the final report was adopted with 504 votes in favor, 79 against, and 112 abstentions.[179,180]

126. In this context, the Draft Directive introduces due diligence obligations on undertakings regarding actual and potential adverse impacts on human rights, the environment, and good governance in their business relationships and operations.[181] Regarding the scope, due diligence obligations apply to large undertakings governed by the law of a Member State or established in the territory of the Union. Moreover, it includes publicly listed medium and small-sized undertakings and high-risk small and medium-sized undertakings. Also, the Draft Directive applies to large undertakings, publicly listed small and medium-sized undertakings, and small and medium-sized undertakings operating in high-risk areas, which are not governed by the law of a Member State and not established in the territory of the Union when they operate in the internal market by selling goods or providing services.[182] The Draft Directive requires the Member States to introduce effective, dissuasive, and proportionate administrative sanctions to ensure compliance with its provisions. These sanctions may include fines, exclusion of undertakings from public procurement, state aid, and public support schemes.[183] Moreover, the draft directive introduces a civil liability regime to hold undertakings accountable for any harm caused by their operations or business relationships[184] and a private

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[178] European Commission, "Sustainable corporate governance", available at *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance* (last accessed at 6 March 2021).

[179] Business & Human Rights Resource Centre, "European Parliament adopts key report with recommendations to EU Commission on mandatory due diligence & corporate accountability" available at *https://www.business-humanrights.org/en/latest-news/european-parliament-committee-on-legal-affairs-publishes-report-with-recommendations-to-eu-commission-on-mandatory-due-diligence/* (last accessed at 7 April 2021).

[180] EUROPEAN UNION, EUROPEAN PARLIAMENT, *European Parliament Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)),* 10 March 2021, P9_TA-PROV(2021)0073.

[181] In the annex to the Resolution, at Article 4 paragraph 1.

[182] Ibid., at Article 2.

[183] Ibid., at Article 18.

[184] Ibid., at Article 19.

international law rule to ensure that its relevant provisions are considered overriding mandatory provisions in accordance with Article 16 of Regulation (EC) No 864/2007 of the European Parliament and of the Council.[185]

127. As to the current legislative framework at the EU level, in 2014, the European Parliament issued the Directive 2014/95/EU on non-financial reporting.[186] This Directive requires large companies to publish certain information concerning "*environmental protection, social responsibility, and treatment of employees, respect for human rights, anti-corruption and bribery.*" Concerning its scope, only large public-interest companies with more than 500 workers have the obligation to disclose.[187] Another legislative act is the EU Regulation on conflict minerals (2017/821).[188] This Regulation requires, from 2021 onwards, importers of tin, tungsten, tantalum, and gold must undertake HRDD in their supply chains to ensure that the minerals they are sourcing do not finance conflict or other unlawful practices.[189]

4.3. ADVANTAGES AND DISADVANTAGES OF HAVING SOFT AND HARD LAW INSTRUMENTS

4.3.1. General

128. As explained above, the field of business and human rights is mostly governed by soft law instruments. However, the effectiveness of soft law instruments is contested as they are not mandatory but merely voluntary. Accordingly, the world is witnessing an emerging trend towards binding legal instruments both at the international and supranational levels. In this context, it is significant to analyze the weak and strong points of soft and hard law instruments to address business and human rights.

129. The effectiveness of hard law instruments can be seen as the most significant advantage over soft law instruments. In this connection, hard law instruments can heighten compliance as they provide enforcement mechanisms and can be directly enforced by courts.[190] This is especially relevant for the situations in which corporations symbolically undertake due diligence without

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[185] Ibid., at Article 20.

[186] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance, OJ L 330, 15.11.2014, p. 1-9.

[187] Ibid., at Article 19a (1).

[188] 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, OJ L 130, 19.5.2017, p. 1-20.

[189] Ibid., at Articles 1 and 20(3).

[190] CHOUDHURY, B, "Balancing Soft and Hard Law for Business and Human Rights", (1 August 2018), at 2, available at *https://ssrn.com/abstract=3213215* (last accessed at 18 April 2021).

changing their initial approach.[191] Conversely, the direct application of soft law instruments by national courts can be problematic in the sense that judges are strictly bound by the law that is in force. Therefore, soft law instruments may only be used for interpretative purposes by judges, and this dilutes their effectiveness.

130. Nevertheless, soft law instruments have many advantages over hard law instruments. Firstly, the use of soft law instruments better corresponds with the fields that are growing and evolving swiftly as soft law instruments can be adopted and modified easily. Secondly, soft law instruments are especially helpful for addressing such areas in which governments are unwilling to perform binding commitments and or it is difficult to reach a consensus.[192] Thirdly, the flexibility of soft law instruments provides governments the space to maneuver and enables them to respond easier to changing conditions and issues.[193] Lastly, soft law instruments reduce contracting expenses such as negotiation, drafting, approval, and ratification costs.[194]

131. Consequently, both soft and hard law instruments have advantages and disadvantages. However, the combination of both hard and soft law instruments can minimize the above-mentioned disadvantages. In this context, the effectiveness of soft law can be increased by combining elements of hard law, for example, by introducing a variety of enforcement mechanisms such as independent monitoring.[195] In this way, while the compliance with and accordingly enforcement of soft law can be strengthened, at the same time, the flexibility of soft law mechanisms enables businesses and governments to respond swiftly and easily to the developments in the field of business and human rights.

4.3.2. Strong and Weak Points of Having HRDD Enshrined in an International Treaty

132. As explained above, there is an ongoing attempt at the UN to conclude a treaty to implement the UN Guiding Principles. In this context, this paper aims to identify the strong and weak points of having an international treaty on business and human rights.

133. There would be several strong points of having an international treaty. Firstly, it can illustrate the trustworthiness of states' commitments, and this is especially relevant when there is a necessity for collaboration among states.[196]

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[191] NOLAN, J., “The Corporate Responsibility to Respect Rights: Soft Law or Not Law?” in DEVA S., and BILCHITZ D. (eds), Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, Cambridge University Press, 2013, (138) 155.
[192] ABBOTT K.W., SNIDAL, D., “Hard and Soft Law in International Governance”, *International Organization* (2000), 421,423.
[193] Ibid.
[194] Ibid., at 434.
[195] CHOUDHURY, B, supra n. 190, at 16.
[196] ABBOTT K.W., SNIDAL, D., supra n.192, at 426.

Secondly, it would enable the enforcement of states' commitments, especially if it creates a third party for its interpretation.[197] Thirdly, it can foster compliance as it provides enforcement mechanisms. Fourthly, a binding treaty can create an equal level playing field by providing a uniform and coherent set of standards. In this context, as explained before, legislative initiatives that are taken at the national levels differ from one state to another and introduce different types of obligations on companies. More specifically, companies that operate in multiple countries have to face different national standards. This situation puts them in a comparative disadvantaged position. However, it should be noted that the creation of an equal level playing field depends on how widely this treaty will be ratified worldwide. And lastly, it can facilitate cooperation among states. In this context, it is argued that a binding instrument should be preferred "*as assurance devices when the benefits of cooperation are great, but the potential for opportunism and its costs are high.*"[198] In the domain of business and human rights, the cooperation of states is crucial to ensure that all businesses respect human rights, and they cannot escape from their obligations only by moving their operations to another country where less human rights protection is offered. Moreover, the cost of the opportunistic behaviors of companies and governments is high, as it could lead to massive human rights violations.

134. Despite its strong points, there would be several weak points of having an international treaty on business and human rights. Firstly, the fact that governments are unwilling to make binding promises in the domain of business and human rights can result in very high contracting costs such as negotiation, drafting, approval, and ratification costs.[199] Secondly, the sovereignty costs can be higher in time if an international authority could decide the issues of business and human rights as it is an evolving domain.[200] In this context, sovereignty costs refer to the constraints of state behaviors regarding business and human rights issues. Thirdly, a binding treaty demands comprehensive exactness in drafting obligations. This can result in extreme rigidity or prevent reaching consensus between states.[201] Fourthly, a lack of global support for a binding treaty is problematic.[202] In this context, the EU currently is not participating in the negotiations of the UN Treaty.[203] This means that numerous states that accommodate many large multinational corporations will not fall under the scope of this Treaty. Thus, the effectiveness of the Treaty in protecting human rights is questionable.[204] And lastly, The Second Revised Draft provides a uniform set of rules that applies all businesses regardless of which sector in which

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[197] Ibid., at 427.
[198] ABBOTT K.W., SNIDAL, D., supra n. 192, at 429.
[199] CHOUDHURY, B, supra n. 190, at 11.
[200] Ibid.
[201] ABBOTT K.W., SNIDAL, D., supra n. 192, at 433.
[202] CHOUDHURY, B, supra n. 190, at 18.
[203] Business & Human Rights Resource Centre, "UN Treaty on Business & Human Rights negotiations Day 1 - The round of discussions kicks off with an improved draft", available at *https://www.business-humanrights.org/en/un-treaty-on-business-human-rights-negotiations-day-1-the-round-of-discussions-kicks-off-with-an-improved-draft* (last accessed at 18 April 2020).
[204] CHOUDHURY, B, supra n. 190, at 29.

they operate or the severity of potential adverse human rights impacts that they can cause. This approach may not be effective and successful for the prevention of adverse human rights impact caused by business operations. A tailored sector-specific approach corresponds better to ensure businesses respect human rights in their operations.

135. Nevertheless, the UN Draft Treaty successfully incorporates the elements of the UN Guiding Principles. The biggest challenge, however, is the lack of global support. As long as this issue cannot be overcome, the weak points of having HRDD enshrined in an international treaty outweighs its strong points.

4.3.3. The Sustainable Corporate Governance Initiative at the EU: Reasons for and Concerns of such an Action

136. As explained above, the EU is also in the process of developing a binding instrument to ensure that European companies respect human rights in their operations, namely the Sustainable Corporate Governance Initiative. In this process,, as mentioned above, on 20 February 2020, the European Commission published a study on due diligence requirements in supply chains. This study is the outcome of the wide consultations with stakeholders -large businesses, small and medium enterprises, industry organizations, NGOs- across Europe and perfectly reveals why an EU action is necessary and what are the strong points of such an action. According to this study, the majority of these stakeholders think that:

- The current laws concerning due diligence obligations are neither effective and efficient nor coherent.[205] Thus, they do not bring clarity to the obligations of the companies and create uncertainty in this respect;[206]

- an EU level regulation on a general HRDD may be beneficial for businesses as it constitutes a single and harmonized EU-level standard rather than fragmented and uneven national measures.[207] Moreover, it may benefit companies as it brings all EU competitors to the same standard. Thus, corporations engaging with HRDD will not be in a competitively disadvantaged position;[208]

- an EU level regulation on a general HRDD can indirectly advance the respect for human rights among global supply chains;[209]

- EU leadership in this area is particularly important for different reasons. In this context, the credibility of EU law among the Member States, the fact that the global impact of the EU can lead to better conditions in

[205] SMIT, L. et al., supra n. 169, at 93-95.
[206] Ibid., at 95-96.
[207] Ibid., at 142-144.
[208] Ibid., at 146-147.
[209] Ibid., at 149.

global as well, and the commitment of the European Union to human rights justify for the EU to act;[210]

- A general EU level regulation on the HRDD requirements can provide notable financial gains for companies concerning their brand image, prestige, and businesses if companies undertake HRDD, and this is known by their consumers.[211]

137. Apart from the Commission's study, the current COVID-19 crisis revealed the weaknesses of the European economy and unregulated global supply chains.[212] In this context, first, the unexpected closure of factories in China resulted in a lack of raw materials. Following, the sharp drop in market demand in the EU caused the closure of factories in producing countries, and accordingly, lots of people lost their jobs. Moreover, the COVID 19 crisis has worsened the health and safety risks for workers in value chains as the result of unsanitary working conditions and the lack of personal protective equipment. Furthermore, by ignoring health risks in their global value chains, or by hoarding goods and price-gouging, some businesses have put the EU citizens' access to basic food and medical supplies at risk. This situation illustrated that the EU should regulate its companies to prevent and respond better to future crises.[213] As the transformation process of the entire industrial sector and all value chains will take considerable time, the EU should act immediately.[214]

138. Moreover, as explained in the second part of this paper, cases that are filed by foreign victims are subject to private international law rules. In this context, the most challenging issue is the determination of applicable law since that could lead to the application of less protective foreign laws. Nevertheless, an EU regulation can overcome this problem by introducing a particular private international law rule.

139. Despite these reasons justifying an EU action, there are some concerns regarding the consequences of the intervention of the EU. In this context, firstly, there are some concerns expressed regarding costs. More specifically, the company-level costs and administrative burden can be a problem.[215] It is expressed that if the costs to undertake HRDD are significant, this can have a negative impact on employment levels within and outside Europe.[216] However, it

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[210] Ibid., at 151.
[211] Ibid., at 557.
[212] RBC European Parliament Working Group on Responsible Business Conduct, supra n. 176.
[213] European Coalition for Corporate Justice, "From impossible to inevitable: corporate justice in times of COVID-19", available at *https://corporatejustice.org/eccj-publications/16805-from-impossible-to-inevitable-corporate-justice-in-times-of-covid-19* (last accessed at 4 September 2020).
[214] RBC European Parliament Working Group on Responsible Business Conduct, supra n. 176.
[215] SMIT, L. et al., supra n. 169, at 290-300.
[216] Ibid., at 548.

should be noted that these financial concerns are related to the general HRDD obligations of companies and not specific to the EU action. In addition, it is expressed that EU-level costs can be an issue. In this context, the monitoring of enforcement and implementation of an EU-level regulation can be costly as it requires a considerable number of personnel for the inspections.[217] If this EU regulation foresees new judicial or non-judicial compliance mechanisms for access to justice, this could lead even to further costs.[218]

140. Secondly, an EU regulation imposing a general due diligence obligation on the European companies may lead to a breach of WTO law by the EU. In this context, the HRDD obligations may constitute constraints on international trade. This happens where producers in exporting countries are forced, as a precondition to secure contracts or preserve existing business relations, to adjust their business activities to ensure that they respect human rights.[219] In this connection, for example, it is argued that due diligence requirements imposed by the EU Regulation on conflict minerals can cause breaches of GATT provisions for which the EU could be held responsible.[220] As mentioned above, the EU Regulation on conflict minerals requires importers of tin, tungsten, tantalum, and gold to undertake HRDD on their supply chains to ensure that the minerals they are sourcing do not finance conflict or other unlawful practices. Naturally, for the EU import regime, its application results in factual different treatment between minerals sourced from conflict-affected and high-risk areas and minerals sourced from areas without conflict.[221] It is argued that the presence of such a different treatment can violate both Article I:1 GATT[222] and Article III:4 GATT[223] since they ban discriminatory measures that have adverse impacts

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[217] Ibid., at 557.
[218] Ibid., at 545.
[219] VIDAL-LEON, C., "Corporate Social Responsibility, Human Rights, and the World Trade Organization", *Journal of International Economic Law* (2013), 893,893.
[220] PARTITI, E., VAN DER VELDE, S., "Curbing Supply-Chain Human Rights Violations Through Trade and Due Diligence. Possible WTO Concerns Raised by the EU Conflict Minerals Regulation", *ASSER research paper* 02 (2017), at 7.
[221] Ibid., at 10.
[222] GATT 1947: General Agreement on Tariffs and Trade, 30 October 1947, available at *https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleIII* (last accessed at 18 April 2021).
Article I: 1 GATT: With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.
[223] Ibid. Article III:4 GATT: The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the

on competitive opportunities between WTO members.[224] By analogy, the same reasoning is also relevant for a general EU regulation imposing human rights due diligence on European companies.

141. Lastly, another critique is raised in the context of the European Parliament's report on corporate due diligence, containing the Draft Directive. In this context, it is argued that the HRDD obligations can put small and medium-sized enterprises out of business since they lack the capacity to comply with all requirements. Moreover, it is argued that such legislation would harm the competitiveness of European companies around the globe. Thus, it would be beneficial only for international competitors of the EU, such as China.[225]

142. Overall, despite these critiques, this paper strongly argues that an EU-level regulation is necessary to ensure that European companies respect human rights in their operations. Moreover, the above-explained benefits of such an EU-level regulation justify the intervention of the EU.

5. CONCLUSION AND RECOMMENDATIONS

143. To sum up, this paper aimed to develop a potential business and human rights agenda for Belgium regarding the implementation of HRDD and to ensure that Belgian corporations respect human rights in their operations. For this purpose, the first part briefly introduced the concept of HRDD and its procedures in light of the UN Guiding Principles and the OECD Guidance.

144. The second part focused on the implementation of HRDD into the Belgian domestic legal system. In this context, three options were introduced based on the practices of other states. The first option is the so-called "new multi-stakeholder initiatives" employed by the Netherlands and Germany. These HRDD initiatives have a hybrid character as they incorporate certain binding features in a mainly voluntary set-up. To facilitate these multi-stakeholder initiatives, the government acts as an independent organizer, funder, and umpire to bring together business and civil society organizations. The outcomes of these

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application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

[224] PARTITI, E., VAN DER VELDE, S., supra n. 220, at 7.

[225] eu*observer*, "'Corporate due diligence'? - a reality check before EP votes", available at *https://euobserver.com/stakeholders/151111* (last accessed at 8 April 2021).

initiatives are sectoral partnership agreements that are between companies, their federations, and civil society actors.[226] This paper has clarified that the benefits of this approach outweigh its weak points. Therefore, this paper recommends that Belgium employs this approach. In this context, it provides a useful tailored sector-specific tool to address adverse human rights impacts emerging from specific sectors. Moreover, it enhances the dialogue, collaboration, and mutual understanding between businesses, civil society, and the government. The overall process raises awareness regarding business and human rights issues, and this eventually leads to better practices.[227]

145. The second option to implement HRDD in the Belgian legal system is to introduce a binding legislative act. This paper introduced and analyzed several legislative initiatives from different states to evaluate this option in detail, In this context, the UK Modern Slavery Act 2015, the Australian Modern Slavery Act 2018, the Dutch Child Labor Due Diligence Act, the French Act on the Duty of Vigilance of Parent and Outsourcing Companies, the German Draft Bill on mandatory human rights due diligence, and the Swiss Proposals were examined respectively. This examination of legislative acts has revealed that they do not provide a coherent system, and none of them imposes a full-fledged due diligence obligation on companies as required by the UN Guiding Principles and the OECD Guidance. In this context, while some of them are issue-specific such as child labor and human trafficking, some of them address general adverse human rights impacts. Moreover, while some of them only apply large companies, some of them have a broader reach. After the examination of these legislative initiatives, this paper analyzed the successes and shortcomings of this approach. Accordingly, this paper argues that even though a binding legislative act would provide numerous benefits in the enforcement of HRDD and access to effective remedies for victims, the shortcomings of this approach should not be underestimated. This paper recommends taking legislative initiatives at the European Union level instead of at the national level to minimize its shortcomings. A binding legislative initiative at the European Union level would level the playing field and clarify the obligations of internationally active companies that face diverse national standards. Moreover, it can enforce HRDD effectively and provide access to effective remedies for victims of companies' wrongdoings.

146. The third option is to hold Belgian companies responsible for the harm caused by companies in their value chain via existing tort law, and by doing so, to enhance the implementation of HRDD by Belgian companies. In this connection, this paper has identified several challenges that foreign victims face to file a case against a Belgian company before a Belgian court. These challenges emerge from the application of the national tort law and private international law. Regarding tort law-related challenges, the doctrine of separate legal personality and the burden of proof appears problematic. To address these difficulties and to provide access to effective remedies for victims, this paper

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[226] HUYSE, H., VERBRUGGE, B., supra n. 4, at 9.
[227] VAN HUIJSTEE, M., supra n. 87, at 17.

recommends that Belgium introduces legislative changes. More specifically, the burden of proof should be shifted from foreign victims to parent companies, and there should be a legal exception to the principle of separate legal personality for supply chain liability cases. Regarding private international law-related challenges, the possible application of less protective foreign laws to the supply chain liability cases is the main problem, and this problem can be overcome only at the EU level.

147. The third part focused on the added value of binding legal instruments at the international and supranational levels to ensure that businesses respect human rights in their operations and undertake HRDD. In this context, this paper firstly introduced the latest developments in the field of business and human rights at the United Nations, the Council of Europe, and the European Union. Secondly, this paper discussed the strong and weak points of soft and hard law instruments to address business and human rights issues. Accordingly, this paper has concluded that hard and soft law instruments should be combined to deal with business and human rights issues. Then, this paper turned to the strong and weak points of having HRDD enshrined in an international treaty, namely the UN Draft Treaty on business and human rights. In this connection, the examination of the UN Draft Treaty has revealed that it successfully fulfills the requirements of the UN Guiding Principles. Nevertheless, the success of the UN Treaty depends on worldwide ratification, especially by developed countries. Therefore, as this paper pointed out, the lack of global support appears to be the biggest challenge. Lastly, this paper evaluated the Sustainable Corporate Governance Initiative of the European Commission by examining envisaged achievements and possible consequences of such EU regulation. In this context, as the current national laws concerning business and human rights are fragmented, uneven, and incoherent, they cannot bring clarity to the obligations of companies that operate internationally.[228] Therefore, an EU-level regulation on a general HRDD can overcome these issues by providing a single and harmonized system.[229] Thus, it can level the playing field for all the companies within the EU.[230] Moreover, an EU-level regulation can indirectly lead to better practices worldwide and enhance respect for human rights among global supply chains.[231] Furthermore, as explained before, supply chain liability cases that are filed by foreign victims are subject to private international law rules. In this context, the possible application of less protective foreign laws to the supply chain reliability cases is the main problem, and an EU-level regulation can overcome this problem by introducing a particular private international law rule. Likewise, the abovementioned harmful effects of the COVID 19 crisis on the European economy and the working conditions of workers in global supply chains have revealed the necessity of an EU action. Nevertheless, this paper explained concerns regarding a possible EU action, namely high costs, the breach of WTO law, putting small and medium-sized enterprises out of business, and harming the competitiveness of European companies at the global

[228] SMIT, L. et al., supra n. 169, at 95-96.
[229] Ibid., at 142-144.
[230] Ibid., at 146-147.
[231] Ibid., at 151.

level. Nevertheless, overall, this paper argues that the EU should act to ensure that businesses respect human rights in their operations worldwide.

148. Overall, this paper has clarified that all different approaches have certain advantages and disadvantages. Therefore, in the determination of the position towards the implementation of the HRDD procedures, this paper recommends that Belgium considers a mix of different types of measures as the UN Guiding Principles suggests: "*States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights.*"[232]

[232] UNITED NATIONS, supra n.12, Commentary on Principle 3.