

# The Road to Corporate Sustainability

*Transparency, Prevention and Accountability for  
Global Human Rights Harms*



**UNIVERSITY OF GOTHENBURG**  
**SCHOOL OF BUSINESS, ECONOMICS AND LAW**

Clara Andersson

Department of Law

HRO800 Examensarbete, fall semester of 2022

Master's Thesis in International Law

Supervised by Abhinayan Basu Bal

Examined by Trisha Rajput

# Table of content

- Abstract..... 1**
- Preface..... 2**
- Abbreviations..... 3**
- 1 Corporate Sustainable Development in a Globalized World..... 5**
  - 1.1 Human Rights and Multinational Enterprises..... 5
    - 1.1.1 Globalization and Sustainable Development..... 5
    - 1.1.2 Corporate Expansion to Markets Abroad ..... 6
    - 1.1.3 Modern Day Slavery..... 7
    - 1.1.4 Various Ways to Combat Corporate Human Rights Violations..... 8
      - 1.1.4.1 International Soft Law Mechanisms ..... 8
      - 1.1.4.2 Criminal and Civil Corporate Liability ..... 9
  - 1.2 Scope and Purpose ..... 9
    - 1.2.1 Delimitations ..... 10
  - 1.3 Methodology and Material ..... 11
  - 1.4 Synoptic Overview ..... 12
- 2 Establishing Corporate Accountability for Human Rights Violations ..... 12**
  - 2.1 Corporate Accountability for Human Rights Violations in International Law ..... 12
    - 2.1.1 The 2030 Agenda for Sustainable Development..... 13
    - 2.1.2 Sustainability Reporting and Human Rights Due Diligence ..... 13
    - 2.1.3 Corporate Criminal Liability ..... 16
    - 2.1.4 Corporate Civil Liability ..... 17
  - 2.2 Corporate Accountability for Human Rights Violations in European Law..... 18
    - 2.2.1 Legal Basis to Impose Directives on Corporate Safeguards ..... 18
    - 2.2.2 Sustainability Reporting and Human Rights Due Diligence ..... 18
    - 2.2.3 Corporate Criminal and Civil Liability ..... 21
  - 2.3 Corporate Accountability for Human Rights Violations in Germany ..... 21
    - 2.3.1 Sustainability Reporting ..... 21
    - 2.3.2 Human Rights Due Diligence..... 22
    - 2.3.3 Corporate Criminal Liability ..... 24

2.3.4	Corporate Regulatory Offenses .....	24
2.3.5	The Draft of the Corporate Sanctions Act .....	25
2.3.6	Corporate Civil Liability .....	26
2.4	Corporate Accountability for Human Rights Violations in the US .....	27
2.4.1	Sustainability Reporting .....	28
2.4.2	Human Rights Due Diligence.....	29
2.4.3	Corporate Criminal Liability .....	29
2.4.4	Corporate Civil Liability .....	30
2.5	Corporate Accountability for Human Rights Violations in Brazil .....	32
2.5.1	Sustainability Reporting .....	32
2.5.2	Human Rights Due Diligence.....	33
2.5.3	Corporate Criminal Liability .....	34
2.5.4	Administrative Regulation – the “Dirty List” .....	35
2.5.5	Corporate Civil Liability .....	35
2.6	Summarization.....	36
2.6.1	International Law.....	36
2.6.2	European Law.....	36
2.6.3	German Law .....	37
2.6.4	US Law .....	37
2.6.5	Brazilian Law .....	37
<b>3</b>	<b>Practical Differences between the Jurisdictions.....</b>	<b>38</b>
3.1	Sustainability Reporting .....	38
3.1.1	International Law.....	38
3.1.2	European and German Law .....	39
3.1.3	US Law .....	40
3.1.4	Brazilian Law .....	41
3.2	Human Rights Due Diligence.....	42
3.2.1	International Law.....	42
3.2.2	European and German Law .....	43
3.2.3	US Law .....	44
3.2.4	Brazilian Law .....	45
3.3	Corporate Criminal and Civil Liability for Human Rights Abuses.....	46

3.3.1	International Law.....	46
3.3.2	European and German Law .....	46
3.3.3	US Law .....	47
3.3.4	Brazilian Law .....	49
3.4	Summarization.....	50
<b>4</b>	<b>How can Accountability for Transnational Corporate Human Rights Violations Most Efficiently be Established? .....</b>	<b>51</b>
4.1	Transparency and Preventive Measures .....	51
4.2	Top-down Regulation and Market Pressure to Promote Sustainability.....	54
4.3	Risk Analysis and Preventive Measures.....	58
4.4	Corporate Criminal, Civil and Administrative Liability.....	59
4.4.1	Human Rights Due Diligence and Civil or Corporate Criminal Liability.	60
4.5	Possible Legal Transplantation.....	61
4.5.1	Why Has the US Not Imposed Mandatory Laws on Sustainability? .....	61
4.5.2	A Need to Increase Accountability throughout the Whole Supply Chain.	61
<b>5</b>	<b>Concluding Remarks .....</b>	<b>63</b>
	<b>Bibliography .....</b>	<b>68</b>
	Literature .....	68
	Case Law .....	68
	Norms, Legislative Material, Principles and Guidelines .....	69
	Internet Sources.....	72

## **Abstract**

Multinational enterprises usually establish business in other countries by setting up foreign subsidiaries or subcontracting producers. This creates a global system of complex supply chains. Domestic companies that contribute to violations of human rights abroad need to be held accountable. The international society and domestic jurisdictions have resorted differently when regulating this issue. International soft laws provide a global common frame of reference when it comes to sustainability reporting and human rights due diligence, which both are important instruments to prevent and find infringements of human rights in multinational supply chains. Pressure from stakeholders make soft laws effective, although no sanctions can be imposed on non-compliant corporations. In Germany and Brazil, mandatory transparency measures concerning non-financial information has been implemented and mandatory human rights due diligence is in the process of getting implemented domestically. This will enhance preventive measures, the possibility to impose accountability on domestic companies that impact human rights abroad and civil liability and victims' possibility to claim damages. However, the scope of the measures should be wider to not enable any corporation to profit from infringements of human rights. US legislators have resorted differently. The US strongly relies on corporate criminal liability to stop corporate violations, which imposes sanctions first after violations occur with no possibility for victims of abuse to claim compensation. It would be preferable if the US also imposed preventive measures with a civil liability component and enhanced transparency in supply chains to prevent violations as well as to provide victims with an ability to be granted restitution. Further, technological advancements need to be developed to ease the implementation of preventive measures and make it cost-efficient for multinational enterprises to act sustainably.

## **Preface**

If respect for human rights is to become a practical reality, human rights have to impact legislation. If the law is regressive, human rights become a theoretical illusion, unable to be implemented practically. I hold a strong faith that the law can be used as a progressive tool to implement human rights practically. The subject of this thesis shows the importance of a progressive legislation and a global legal society that values each person's inherent value – to ensure the practical implementation of human rights globally.

Throughout my endeavor, from an initial grain of interest to an idea and finally to the final presentation of my work, Abhinayan Basu Bal has provided me with inspiring ideas and helpful directions within an economic and corporate legal landscape that I am unfamiliar to. His interesting thoughts and helpful way has made my journey to reach this final work eventful and I will forever be grateful that he made me challenge myself to investigate a legal field that I initially did not feel the most confident in. I would also like to thank my dear family and friends for listening to my never-ending ramble about obstacles, small wins, and confusion along the way to this final text. Lastly, I would like to proclaim my gratitude towards Rodrigo Chefer Maranhão, not only for his immense support, but also for his invaluable help with translating Brazilian legal documents when English translations were inadequate, and his help and insight into the Brazilian legal system that is so foreign to me.

With a wish for a pleasant reading and a sustainable future,

*Clara Andersson*

Gothenburg, 19 December 2022

## Abbreviations

ATS	Alien Tort Statute
BIAC	Organization for Economic Co-operation and Development Business and Industry Advisory Committee
BMJV	German Federal Ministry of Justice and Consumer Protection
CBP	United States Customs and Border Protection
CSDD	Proposal for a Corporate Sustainability Due Diligence Directive
CSR	Corporate social responsibility
CSRD	Proposal for a Corporate Sustainability Reporting Directive
CVM	Securities and Exchange Commission of Brazil
ESG	Environmental, Social and Governance
EU	European Union
FIDES	Fundação Instituto de Desenvolvimento Empresarial e Social
GAS 20	German Accounting Standards 20
GRI	Global Reporting Initiative
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organization
IMT	International Military Tribunal in Nuremberg
ISO 26000	International Organization for Standardization 26000 Social Responsibility
MNE Declaration	Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

NAP	United States National Action Plan on Responsible Business Conduct
NCPs	National Contact Points
NFRD	Non-Financial Reporting Directive
NGO	Non-governmental organization
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
SDGs	Sustainable Development Goals
SEC	Securities and Exchange Commission of the United States
TFEU	Treaty of the Functioning of the European Union
TUAC	Organization for Economic Co-operation and Development Trade Union Advisory Committee
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGPs	United Nations Guiding Principles on Business and Human Rights
US	United States of America

# 1 Corporate Sustainable Development in a Globalized World

## 1.1 Human Rights and Multinational Enterprises

Following the Second World War, the United Nations (UN) adopted the Universal Declaration of Human Rights (UDHR) in 1948, setting forth a list of fundamental and inalienable rights of all humans.<sup>1</sup> These include, amongst others; the right to life, liberty and security of person; freedom from slavery; freedom from torture; recognition as a person before the law; equality before the law and freedom from discrimination and effective remedies by competent national tribunals for acts violating the fundamental rights every person is granted.<sup>2</sup>

### 1.1.1 Globalization and Sustainable Development

Globalization, or in other terms the growth of trade between nations and the complex movement of opening economic borders, allowing the expansion of multinational enterprises<sup>3</sup> around the world,<sup>4</sup> has led to increasingly complex, dynamic and non-transparent global supply and value chains.<sup>5</sup> In turn, this has led to an international division of labor and production, as these have moved from developed and industrialized states to developing and less industrialized states, which has aggravated human rights harms globally.<sup>6</sup>

The international corporate environment has experienced significant changes over the past three decades. As governments opened markets, businesses embraced new opportunities, leading to a period of economic growth and business interrelation. The development and economic growth have especially been contributed to by multinational corporations, in their home states as well as their host states.<sup>7</sup> Multinational enterprises' international investments drive the economy through job creation, human capital development, efficient capital distribution, and technology, knowledge, and skills transfers.<sup>8</sup> Many multinational corporations respect high standards of business conduct; however, some oversee appropriate principles and standards of business conduct in the pursuit of gaining improper competitive advantage. This is notably true in

---

<sup>1</sup> Universal Declaration of Human Rights 1948.

<sup>2</sup> *ibid*, art 1-9.

<sup>3</sup> In this text, I use the terms “enterprise”, “corporation”, “company”, “legal person” and “business” interchangeably in a non-technical manner, denoting collective entities that are recognized as legal persons by law.

<sup>4</sup> Yvon Pesqueux, ‘What Is Globalization? The Paradoxes of the Economic and Political Substance of Markets.’ (2013) 2 (1) South Asian Journal of Business and Management Cases 1, 2 < [https://www.researchgate.net/publication/258126896\\_What\\_is\\_Globalization\\_The\\_Paradoxes\\_of\\_the\\_Economic\\_and\\_Political\\_Substance\\_of\\_Markets](https://www.researchgate.net/publication/258126896_What_is_Globalization_The_Paradoxes_of_the_Economic_and_Political_Substance_of_Markets) > accessed 3 October 2022.

<sup>5</sup> Horatia Muir-Watt, ‘Private International Law Beyond the Schism’ (2011) 2 Transnational Legal Theory, 347 < [https://www.researchgate.net/publication/263147955\\_Private\\_International\\_Law\\_Beyond\\_the\\_Schism](https://www.researchgate.net/publication/263147955_Private_International_Law_Beyond_the_Schism) > accessed 5 October 2022.

<sup>6</sup> *ibid*.

<sup>7</sup> The state where the parent company is located is called the *home state* and the state where the infringements take place is called the *host state*, see Almut Schilling-Vacaflor, ‘Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?’ (2021) Human Rights Review 109, 110 < [https://www.researchgate.net/publication/344881058\\_Putting\\_the\\_French\\_Duty\\_of\\_Vigilance\\_Law\\_in\\_Context\\_Towards\\_Corporate\\_Accountability\\_for\\_Human\\_Rights\\_Violations\\_in\\_the\\_Global\\_South](https://www.researchgate.net/publication/344881058_Putting_the_French_Duty_of_Vigilance_Law_in_Context_Towards_Corporate_Accountability_for_Human_Rights_Violations_in_the_Global_South) > accessed 21 September 2022.

<sup>8</sup> OECD Guidelines for Multinational Enterprises - Responsible Business Conduct Matters, 1 < <https://www.oecd.org/corporate/mne/responsible-business-conduct-matters.htm> > accessed 22 September 2022.

environments where regulatory, legal, and institutional frameworks are underdeveloped.<sup>9</sup> A growing number of multinational corporations transfer whole or parts of their production to alien countries to save production costs,<sup>10</sup> which has extended the complexity of subcontracting, outsourcing and supply chains. The geographical and legal detachment of multinational corporations in a globalized economy camouflages the involvement of these companies in human rights violations, such as slavery, and creates challenges regarding the attribution of corporate responsibility of such violations.<sup>11</sup>

Within the state duty to protect human rights,<sup>12</sup> states in which companies generally have complex supply chains in other countries have an obligation to secure that no human rights are violated in these supply chains. With the expanding globalization there has also been a growing interest in sustainable investments from stakeholders, and “the demand for information about corporate social responsibility (CSR) as well as firms’ environmental, social, and governance (ESG) activities and policies has steadily risen”.<sup>13</sup>

### 1.1.2 Corporate Expansion to Markets Abroad

Corporations generally expand to new markets to increase profitability by setting up subsidiaries and contracting with other corporations.<sup>14</sup> A parent company<sup>15</sup> that holds a majority of shares has by definition the practical capacity to control its subsidiaries.<sup>16</sup> Corporations that operate across jurisdictions usually set up subsidiaries to gain tax advantages, to reduce coordination costs or to comply with legal requirements of the host country, some also do it to limit their losses if the operation in the host country fails.<sup>17</sup>

According to the doctrine of “separate corporate personality” within company law, that is recognized in most jurisdictions, each company is a separate legal entity and a company that owns shares in another company will not generally be responsible for acts committed by the company of which it holds shares in.<sup>18</sup> This doctrine is formulated in the law of the United States of America (US), that states “Unless otherwise provided in the articles of organization,

---

<sup>9</sup> *ibid.*

<sup>10</sup> Nicolas Bueno, ‘Corporate liability for violations of the human right to just conditions of work in extraterritorial operations’, (2017) 21 (5) *The International Journal of Human Rights* 565 < <https://www.tandfonline.com/doi/full/10.1080/13642987.2017.1298092> > accessed 1 October 2022.

<sup>11</sup> Florian Jessberger, ‘Corporate Involvement in Slavery and Criminal Responsibility under International Law,’ (2016) 14 (2) *Journal of International Criminal Justice* 327, 335 < <https://academic.oup.com/jicj/article-abstract/14/2/327/2412040> > accessed 16 September 2022.

<sup>12</sup> See 2.1 *Corporate Accountability for Human Rights Violations in International Law* where the state duty to protect human rights is outlined.

<sup>13</sup> Hans B. Christensen, Luzi Hail and Christian Leuz, ‘Mandatory CSR and sustainability reporting: economic analysis and literature review’ (2021) 26 *Review of Accounting Studies* 1176, 1177 < <https://link.springer.com/article/10.1007/s11142-021-09609-5> > accessed October 30 2022.

<sup>14</sup> Radu Mares, ‘Liability within Corporate Groups: Parent Company’s Accountability for Subsidiary Human Rights Abuses’ (2019) *Research Handbook on Human Rights and Business* 3 < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3481052](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481052) > accessed 5 October 2022.

<sup>15</sup> A company that owns shares in another company is called a *parent company* and a company of which the parent company own shares is called a *subsidiary*.

<sup>16</sup> Mares, ‘Liability within Corporate Groups’ (n 14) 5.

<sup>17</sup> *ibid* 6.

<sup>18</sup> OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse* (A/HRC/32/19) 2016 III A para 21.

a shareholder of a corporation shall not be personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct”.<sup>19</sup> The same principle can be found in Brazil<sup>20</sup> and Germany.<sup>21</sup> A shareholder’s loss is thus limited to the amount that the shareholder has invested in the company.

Another doctrine, called the “piercing of the corporate veil”, allows a parent company to be liable for subsidiaries’ liabilities in order to not let parent companies abuse the legal separation within corporate groups.<sup>22</sup> For a parent company to be liable, the company must have had *control* over the subsidiary and the establishment of liability must be *necessary to avoid injustice*.<sup>23</sup> These criteria constitute high thresholds, as the doctrine of separate legal capacity is said to encourage investment of capital in new businesses and create wealth, and it should therefore not easily be subject to exceptions.<sup>24</sup>

Other means that can create liability for parent companies is through tort law. There is no general duty to prevent third parties from causing damage, however, a parent company is directly liable for its own conduct which contributed to the harm committed by a subsidiary. In this case, elements of tort law need to be fulfilled and proven.<sup>25</sup> In the US, there must also exist a “duty of care” for the parent company to be directly liable, based on the parent company’s action or inaction in the harm.<sup>26</sup> Such a duty exists if a parent company has operational control over a subsidiary.<sup>27</sup>

### 1.1.3 Modern Day Slavery

While the harms that corporations commit towards human rights vary, companies’ involvement in specifically modern slavery is prominent. Many of the modern forms of slavery are based on more subtle forms of exploitation than legal ownership, such as forced labor.<sup>28</sup> Many corporations domiciled in developed countries in Europe or North America rely on persons working in slavery-like conditions in developing countries to produce the goods they sell to withhold a competitive advantage.<sup>29</sup> In the worldwide market economy, with strong demand for cheap labor, exploitation of work force and slavery is profitable business and the global

---

<sup>19</sup> Model Business Corporation Act, section 6.22 (b).

<sup>20</sup> Lei No 6.404 (Law No 6.404) (15 December 1976), art 1.

<sup>21</sup> Gesetz betreffend die Gesellschaften mit beschränkter Haftung (Act on Limited Liability Companies), section 13 (2).

<sup>22</sup> See for example *Anderson v. Abbott*, 321 U.S. 349 (1944).

<sup>23</sup> Henry Hansmann, Richard Squire, ‘External and Internal Asset Partitioning: Corporations and Their Subsidiaries’ (2016) *The Oxford Handbook of Corporate Law and Governance* 251, 269 < <https://academic.oup.com/edited-volume/43491/chapter-abstract/363882834?redirectedFrom=fulltext> > accessed 24 October 2022.

<sup>24</sup> See for example *Basf Corporation v. Posm II Properties Part.*, C.A. No. 3608-VCS (Del. Ch. 2009).

<sup>25</sup> These elements constitute harmful conduct, fault, causality, and damage. Mares, ‘Liability within Corporate Groups’ (n 14) 11.

<sup>26</sup> See for example *Caparo Industries Plc v. Dickman* [1990] 2 AC 605.

<sup>27</sup> Mares, ‘Liability within Corporate Groups’ (n 14) 13.

<sup>28</sup> See for example *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* [2001] ICTY IT-96-23-T & IT-96-23/1-T para 519.

<sup>29</sup> Wolfgang Kaleck, Miriam Saage-Maag, ‘Corporate Accountability for Human Rights Violations Amounting to International Crimes’, (2010) 8 JICJ 699, 703 et seq < [https://heinonline-org.ezproxy.ub.gu.se/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jicj8&men\\_hide=false&men\\_tab=toc&kind=&page=699](https://heinonline-org.ezproxy.ub.gu.se/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jicj8&men_hide=false&men_tab=toc&kind=&page=699) > accessed 20 September 2022.

society exposes millions of individuals to poverty and deprives them of their human rights.<sup>30</sup> The International Labour Organization (ILO) estimates that forced labor alone leads to \$150 billion in profits every year<sup>31</sup> and an estimated amount of 27.6 million people were subject to forced labor 2021, out of these, 17.3 million were exploited in the private sector.<sup>32</sup>

#### **1.1.4 Various Ways to Combat Corporate Human Rights Violations**

The economic expansion across borders and the massive move of capital between countries and millions of people involved in multinational corporate operations has motivated both the international community as well as domestic legislators to combat corporate human rights violations.

##### **1.1.4.1 International Soft Law Mechanisms**

Several soft law<sup>33</sup> instruments apply universal human rights principles to businesses. The 2030 Agenda for Sustainable Development, adopted in 2015 by all UN member states, is a plan of action for the people of our planet, with the goal of full implementation by 2030.<sup>34</sup> The action plan contains seventeen global goals called Sustainable Development Goals (SDGs). Three of these SDGs are relevant in the context of sustainable finance. These constitute SDG 8 on sustainable economic growth and decent work, SDG 12 on responsible production and consumption and SDG 16 on peace, justice and strong institutions.

In 2011, the UN launched voluntary guidelines for corporate responsibility to respect human rights called the United Nations Guiding Principles on Business and Human Rights (UNGPs).<sup>35</sup> The guidelines provide for measures that corporations should take in order to ensure that human rights are respected throughout their supply chains. Principles 11 to 24 outline the responsibilities of businesses as to human rights, and also form the basis for regional and domestic regulations on business conduct. The UNGPs focus on preemptive measures and encourages businesses to act preventively before actions develop into violations of human rights and there is no limit as to how a company should be constituted in terms of size, sector, operational context, ownership, and structure for the UNGPs to apply.<sup>36</sup>

One part of the preemptive work that the UN encourages companies to carry out is *human rights due diligence*, a risk management tool that companies undertake to identify, respond, mitigate and prevent negative human rights impacts in its own operations and supply chains. This includes assessing actual and potential human rights issues, acting upon what they find, and do

---

<sup>30</sup> Jessberger, 'Corporate Involvement in Slavery' (n 11) 328.

<sup>31</sup> See ILO, 'Profits and Poverty, the Economics of Forced Labour' (2014), 45 < [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_243391.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf) > accessed 16 September 2022. Please note that the numbers are from 2014 and this number has probably changed to some extent.

<sup>32</sup> ILO, 'Global Estimates of Modern Slavery: Forced Labour and Forced Marriage' (12 September 2022) 25 < [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ipec/documents/publication/wcms\\_854733.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf) > accessed 16 November 2022.

<sup>33</sup> *Soft laws* are principles and declarations that are not legally binding.

<sup>34</sup> UN, 'Transforming our world: the 2030 Agenda for Sustainable Development' A/RES/70/1 (2015) (The 2030 Agenda for Sustainable Development).

<sup>35</sup> UN, 'Guiding Principles on Business and Human Rights' (2011) (UNGPs), principles 11-24.

<sup>36</sup> UNGPs, principle 14.

this continuously as human rights risks may change over time.<sup>37</sup> The UN has found that undertaking human rights due diligence contributes to sustainable development as not having negative impacts on human rights is a minimum expectation from corporations.<sup>38</sup>

#### ***1.1.4.2 Criminal and Civil Corporate Liability***

The ancient rule of *societas delinquere non potest* has been prevalent within criminal law, both nationally and internationally.<sup>39</sup> According to this rule, corporations cannot be held criminally responsible, and criminal responsibility can only be attributed to individual persons.<sup>40</sup> This principle was applied in the Nuremberg trials after the Second World War, it was held that “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.<sup>41</sup> At the current stage of its development, international law limits criminal responsibility to individuals<sup>42</sup> and international corporate criminal responsibility has yet not been established.

Due to the globalization of the economy, there has been a change in the general understanding of individual to collective responsibility of crimes. Businesses commit atrocities because it is profitable, sometimes on the expense of human rights and through committing crimes. It is eminent that this development has given rise to a new debate about possibly extending criminal liability to also include corporations. Nowadays most domestic legal systems obtain liability of legal persons under criminal law and implements criminal sanctions against corporations.<sup>43</sup>

### ***1.2 Scope and Purpose***

The rise of corporate human rights harms in global supply chains motivates that the gap between the implementation of human rights law and corporate law should disappear. Corporate law cannot only focus on profit and economical aspects, it must also consider how businesses can conduct global activities in a sustainable manner, with respect for human rights no matter where they operate. This thesis acts as a bridge between these parts of law and investigates the way that public corporations in two developed economies and one emerging economy are held accountable for violations of human rights within their supply chains and subcontracting networks. Most studies concerning this have investigated developed countries,<sup>44</sup> it is therefore interesting to investigate the legal regime of Brazil, as it is an emerging country.

---

<sup>37</sup> UNGPs, principle 17.

<sup>38</sup> UN, ‘The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises’ (2018) A/73/163, para 59.

<sup>39</sup> Thomas Weigend, ‘Societas Delinquere Non Potest? A German Perspective,’ (2008) 6 (5) *Journal of International Criminal Justice* 927, 930 <  
<https://heinonline.org/HOL/LandingPage?handle=hein.journals/jicj6&div=69&id=&page=> > accessed 22 September 2022.

<sup>40</sup> *ibid* 929.

<sup>41</sup> Judgment of the International Military Tribunal for the Trial of German Major War Criminals against Goring and others (1946) 42.

<sup>42</sup> Rome Statute of the International Criminal Court 1998, art 25.

<sup>43</sup> Jessberger, ‘Corporate Involvement in Slavery’ (n 11) 336.

<sup>44</sup> Laura Maria Ferri, ‘The influence of the institutional context on sustainability reporting. A cross-national analysis’ (2017) 13 (1) *Social Responsibility Journal* 24, 25 <

The purpose of this thesis is to assess and compare the possibility to prevent companies in Germany, the US and Brazil from violating human rights abroad and to hold corporations accountable for human rights violations that occur within the corporation, the corporate group and in the supply chains of companies that are domiciled in Germany, the US and Brazil, but where the human rights harms are committed abroad.

For this purpose, the following research questions are analyzed:

- i.* Are voluntary standards a workable basis for businesses to implement transparency and preventive measures to prevent corporate human rights harms and what are the challenges of hard laws<sup>45</sup> in this matter?
- ii.* Is the prescribed accountability for corporate violations of human rights within foreign operations, subsidiaries' operations, and within supply chains enough, or are there problems with accountability that persist?

### **1.2.1 Delimitations**

Within this thesis, the non-financial reporting requirements, human rights due diligence, and civil and criminal liability of corporations for violations of human rights outside of the state's territory in Germany, the US and Brazil are examined.<sup>46</sup> The focus is on how home states of multinational enterprises prevent corporate human rights harms and establish accountability for such harms within their jurisdictions. How accountability in host states of multinational enterprises is established is not considered within the scope of this thesis.<sup>47</sup> The liability of persons representing or constituting the corporation, such as directors or officers, is not examined. Only obligations upon the *legal entity as such* are examined.

In regard to the US and Brazil, that are federal law systems, only federal laws are studied. Without limiting the thesis to examine how corporate accountability is established regarding a specific human rights violation, the thesis aims to investigate how corporate accountability is established with regards to all various violations of internationally recognized human rights binding on the states, since businesses can potentially impact any of these rights. Environmental concerns are also a part of sustainable development, but an investigation within this matter falls outside the scope of this thesis.

Export and import control are important measures taken by states to refrain multinational corporations from committing human rights violations, however, these are not dealt with due to the limit in time and space that this thesis has. Instead, regulations that are used to establish

---

<https://www.proquest.com/docview/1872753471?parentSessionId=TMe%2Br0sx5mfr7gG7XSSZA7novsat1R7ahPXv6HgoKR4%3D&pq-origsite=primo&accountid=11162> > accessed 10 October 2022.

<sup>45</sup> *Hard laws* are legal obligations that are binding on the parties involved and which can be legally enforced before a court.

<sup>46</sup> I do need to be transparent with my possible Eurocentric worldview and perspective. Please keep this in mind while reading the text.

<sup>47</sup> Conflict of laws between nations will also not be examined.

jurisdiction for courts of home states and sanctions established within home states of corporations are studied.<sup>48</sup>

### *1.3 Methodology and Material*

Through adapting a comparative functional method, preventive legislation and accountability for multinational corporate human rights violations is investigated within the different jurisdictions of study. The comparative functional method looks to rules' social function,<sup>49</sup> explains similarities and differences between legal systems<sup>50</sup> and approaches rules and institutions as a response to certain problems, in this case, that problem is transnational corporate violations of human rights. Hence, this thesis offers a cross-cultural comparison, interpreting the legal as well as the non-legal context of the problem. The different jurisdictions' laws and institutions are considered from a prevention and accountability point of reference of how different jurisdictions hold solutions to the same social problem.

One assumption underlying this thesis is that corporate violations is a global problem and a practice that happens within all jurisdictions, while recognizing that the violations take different form and happen to a different extent within different jurisdictions. Within some states more violations occur, committed by subsidiaries or within supply chains of foreign companies, while some states most often are home states of corporations and human rights violations generally occur abroad, within these corporations' supply chains.

The thesis does further, through the functional comparative method, analyze if there is a possibility to make legal transplants between the different jurisdictions of study. This is done based on what the conducted research shows to be the better way to prevent human rights violations and to assure accountability for these violations. The comparison will serve as an evaluation criterion<sup>51</sup> for which jurisdictions that fulfill the obligation to make corporations refrain from committing human rights violations abroad better.

The materials used in this thesis are the soft and hard laws governing sustainability reporting, human rights due diligence and criminal, civil and administrative liability in the German, US and Brazilian jurisdictions, as well as in international law. Important cases on the area as well as literature written on the field are brought up and used to interpret the regulations. Primarily English translations and publications of regulations and secondary sources are used, due to lack of knowledge in German or Portuguese. German legislation and secondary sources are easier to find in English than relevant information about Brazilian law. A Portuguese native speaker

---

<sup>48</sup> This is a limitation to this thesis and further research must be conducted to achieve a comprehensive overview of the problem with transnational corporate human rights violations.

<sup>49</sup> Julie De Coninck, 'The Functional Method of Comparative Law: "Quo Vadis"?' (2010) 74 (2) *The Rabel Journal of Comparative and International Private Law* 318, 321 < <https://www.jstor.org/stable/27878873> > accessed 31 October 2022.

<sup>50</sup> *ibid.*

<sup>51</sup> Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006; online edn, Oxford Academic, 2012) 339, 343 < <https://doi.org/10.1093/oxfordhb/9780199296064.013.0011> > accessed 31 October 2022.

has helped with the translation of relevant laws when English sources within Brazilian legal material were limited.<sup>52</sup>

#### *1.4 Synoptic Overview*

Firstly, an account of how sustainability reporting, human rights due diligence and civil and criminal liability is regulated in international law as well as within the different jurisdictions of study; Germany, the US and Brazil are given. Then, a comparison of the transparency and preventive legislation as well as the possibility to hold companies accountable for corporate human rights violations abroad within the different jurisdictions is conducted, and the thesis aims to see if the different jurisdictions provide different possibilities and practical differences when it comes to holding companies accountable for human rights violations. Lastly, the legal regimes are analyzed through a critical lens, and interpretations of future possible ways to establish corporate accountability and redress for victims is examined, as well as legislators' and market actors' impact on corporate sustainability practices. The thesis lastly examines if it is appropriate to perform legal transplants from one legal regime to another, considering the social implications of such a change.

## **2 Establishing Corporate Accountability for Human Rights Violations**

In order to later be able to analyze the preventive measures within the jurisdictions and the possibility to find corporations liable for transnational human rights violations, the applicable regulations firstly need to be outlined. Hence, the different soft and hard laws regulating sustainability reporting, human rights due diligence and civil and criminal liability in international law and within the German, US and Brazilian jurisdictions, are presented in the following chapter.

### *2.1 Corporate Accountability for Human Rights Violations in International Law*

Through decades after the adaptation of the UDHR, the UN expanded the definition of human rights through more specific conventions. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), which lays out the right to education, to work in just and favorable conditions, the right to social protection and to an adequate standard of living<sup>53</sup> and the International Covenant on Civil and Political Rights (ICCPR), which addresses rights such as freedom of movement, equality before the law, and prohibitions on arbitrary deprivation of life, torture, slavery, and arbitrary arrest or detention.<sup>54</sup>

Together, the UDHR, ICESCR, ICCPR and the optional protocols to these covenants form the International Bill of Human Rights. The human rights obligations covered by the declaration

---

<sup>52</sup> I would like to wholeheartedly thank Rodrigo Chefer Maranhão for his invaluable help and patience with translating relevant legal material. All possible mistakes made in this process are attributed to me only.

<sup>53</sup> International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).

<sup>54</sup> International Covenant on Civil and Political Rights 1966 (ICCPR).

and covenants apply to states. States must respect, protect, and fulfill these human rights.<sup>55</sup> Within the responsibility to protect these rights, states must take measures and impose effective regulation to make sure that corporations, domiciled in their territory or under their jurisdiction, do not violate these human rights.<sup>56</sup> There exists several international treaties and regulations that implement principles, guidelines or requirements upon states and businesses.

### **2.1.1 The 2030 Agenda for Sustainable Development**

The 2030 Agenda for Sustainable Development, which was adopted by the UN's member states in 2015, is a plan of action for people, planet and prosperity that calls for a joint action by all countries.<sup>57</sup> The agenda provides for 17 SDGs and the aim is to implement all of these by 2030. By 2030, states should end modern slavery, trafficking, and child labor,<sup>58</sup> and ensure equal access to justice<sup>59</sup> and companies need to publish sustainability reports.<sup>60</sup> The SDGs are general goals, and it does not exist any punishment or enforcement mechanisms in the case of any state not reaching the goals by the year of 2030.

### **2.1.2 Sustainability Reporting and Human Rights Due Diligence**

The international community, including several non-profit organizations and private actors, has taken steps towards implementing international standards as to transparency concerning non-financial matters and preemptive measures and risk analysis concerning possible human rights violations. The Global Reporting Initiative (GRI) is an independent, international non-profit organization that supports social sustainability on a global scale. It has established Sustainability Reporting Standards,<sup>61</sup> to improve the openness and accountability of economic, environmental, and social results and help businesses take responsibility for their impacts. The reporting standards include references to the UN's SDGs and it provides all organizations with a sustainability reporting system that is used around the world on a large scale.<sup>62</sup>

The concept of human rights due diligence was first introduced by the UNGPs. Due diligence describes the processes through which businesses can identify, prevent, mitigate and account for the business' actual and potential human rights impacts within their value chains through assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and effectiveness of actions taken, and communicating how impacts are addressed.<sup>63</sup> The potential human rights impacts should be addressed through prevention or mitigation and actual impacts should be subject for remediation.<sup>64</sup> The concept of human rights due diligence has gained a wide acceptance at the international level and is now used to clarify

---

<sup>55</sup> UNHCR, 'International Bill of Human Rights A brief history, and the two International Covenants' < <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights> > accessed 26 September 2022.

<sup>56</sup> UN, Human Rights Council Res. 17/31 (2011), at I (A) (2).

<sup>57</sup> The 2030 Agenda for Sustainable Development, preamble.

<sup>58</sup> *ibid*, SDG 8.

<sup>59</sup> *ibid*, SDG 16.

<sup>60</sup> *ibid*, SDG 12.

<sup>61</sup> GRI Standards (2021).

<sup>62</sup> Sanjay Pareek and Srinivas Subbarao Pasumarti, 'ESG reporting practices in India, UK and USA: An international comparison' (2021) 12 (6) Turkish Journal of Computer and Mathematics Education 2984, 2986 < <https://www.proquest.com/docview/2623926864> > accessed 24 October 2022.

<sup>63</sup> UNGPs, principle 17.

<sup>64</sup> UNGPs, commentary to principle 17.

standards of care within corporate structures and value chains in both common and civil law jurisdictions.<sup>65</sup> In this sense human rights due diligence refers to a process and a standard of care expected of businesses to meet their responsibility to respect human rights.<sup>66</sup> The due diligence requirements are not breached if a desired result is not achieved, instead the requirements are breached when a corporation *does not take the necessary steps* towards achieving that result. Human rights due diligence thus constitutes a framework to both prevent and address adverse human rights impacts.

States “should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights” in practice.<sup>67</sup> The UNGPs require business enterprises to avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur, but also to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.<sup>68</sup> The requirements set up in the UNGPs refer to the *value chain* which is a wider concept than the supply chain. Within the concept of value chains, human rights due diligence requirements also cover the corporations’ other business partners than suppliers.<sup>69</sup> This includes entities with which the business has a direct or indirect business relationship with and which either supplies products or services that contribute to the corporation’s own products or services or receives products or services from the corporation. The human rights due diligence should be ongoing,<sup>70</sup> fit to correspond the size and type of company and the context in which it operates<sup>71</sup> and cover all human rights.<sup>72</sup>

The concept of human rights due diligence is extended to other areas of responsible business conduct such as labor rights through the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines),<sup>73</sup> which constitutes recommendations for multinational enterprises on responsible business conduct. The recommendations express shared values of countries. Through the 2011 update of the OECD Guidelines, they now integrate the corporate responsibility to respect human rights as set out in the UNGPs, including the duty to conduct human rights due diligence and responsible supply chain management.<sup>74</sup>

The member countries of OECD and others have agreed to promote the non-binding code of conduct that the OECD Guidelines constitute. Germany and the US are both members of the

---

<sup>65</sup> The European Commission, *Study on due diligence requirements through the supply chain: final report*, (Publications Office, 2020), 157.

<sup>66</sup> Jonathan Bonnitcha and Robert McCorquodale, ‘The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights’ (2017) 28 (3) *European Journal of International Law* 899, 900 < <https://academic.oup.com/ejil/article/28/3/899/4616670> > accessed 24 October 2022.

<sup>67</sup> UNGPs, principle 3 and its commentary.

<sup>68</sup> *ibid*, principle 13, 15 and 17.

<sup>69</sup> *ibid*, principle 13 and its commentary.

<sup>70</sup> *ibid*, commentary to principle 19.

<sup>71</sup> *ibid*, commentary to principle 17.

<sup>72</sup> *ibid*, principle 17 and its commentary.

<sup>73</sup> OECD Guidelines for Multinational Enterprises, OECD Publishing 2011 (OECD Guidelines).

<sup>74</sup> *ibid*, part II and IV.

OECD.<sup>75</sup> Brazil is one of the countries that adhere to the OECD Guidelines without being a member.<sup>76</sup> Although the OECD guidelines are not legally binding, governments are committed to promote their implementation. The OECD Guidelines are supported by representatives of businesses, worker organizations and non-governmental organizations through the OECD Business and Industry Advisory Committee (BIAC), the OECD Trade Union Advisory Committee (TUAC), and OECD Watch.<sup>77</sup> Adhering countries shall set up National Contact Points (NCPs) to further the effectiveness of the OECD Guidelines by undertaking promotional activities, handling enquiries and provide a mediation and conciliation platform for resolving issues that arise from alleged non-observance of the OECD Guidelines.<sup>78</sup>

The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) was aligned with the UNGPs in 2017 and provides social policy guidelines on due diligence to identify adverse impacts on human rights.<sup>79</sup> Through International Organization for Standardization 26 000 Social Responsibility (ISO 26000) organizations are also expected to exercise due diligence to avoid contributing to negative impacts on, among other fields, human rights. ISO 26000 does also provide guidance, rather than requirements, aligned with an international standard concerning corporate social responsibility.

The UN Global Compact is the world's largest corporate sustainability initiative with a global reach and more than 16 000 corporate participants.<sup>80</sup> It acts as a forum for discussion and communication including several different actors, both companies, organizations, and governments. Participants to the pact are encouraged to implement socially responsible policies and the UN Global Compact states ten principles in the areas of human rights, labor, environment and anti-corruption. It has two objectives: to mainstream the ten principles and catalyze corporate actions in support of UN goals, like the SDGs.<sup>81</sup> Principle one and two relate to human rights, they very broadly state that “Businesses should support and respect the protection of internationally proclaimed human rights” and “make sure that they are not complicit in human rights abuses”.<sup>82</sup> Further, principle four and five state that businesses should eliminate forced labor.<sup>83</sup>

The UN Human Rights Council has revised the draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Revised Zero Draft), for a third time and it was published in August

---

<sup>75</sup> List of OECD Member countries – ratification of the Convention on the OECD. < <https://www.oecd.org/about/document/ratification-oecd-convention.htm> > accessed 10 October 2022.

<sup>76</sup> OECD < <https://www.oecd.org/els/emp/guidelinesformultinationalenterprises.htm> > accessed 10 October 2022.

<sup>77</sup> OECD Guidelines, 68.

<sup>78</sup> *ibid.*

<sup>79</sup> ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977 (Tripartite Declaration).

<sup>80</sup> UN Global Compact, ‘What’s the commitment?’ < <https://www.unglobalcompact.org/participation/join/commitment> > accessed 25 October 2022.

<sup>81</sup> UN Global Compact, ‘Our mission’ < <https://unglobalcompact.org/what-is-gc/mission> > accessed 24 October 2022.

<sup>82</sup> UN Global Compact, ‘The Ten Principles of the UN Global Compact’ < <https://unglobalcompact.org/what-is-gc/mission/principles> > accessed 24 October 2022.

<sup>83</sup> *ibid.*

2021.<sup>84</sup> The Revised Zero Draft is currently only a *draft* of a legally binding instrument. The concept of due diligence is implemented in article 6.3 of the Revised Zero Draft. It seeks to introduce mandatory due diligence through the adoption of legislation at the domestic level, establishing a legal duty for businesses to carry out due diligence and effective national procedures to ensure compliance with the human rights due diligence obligations.<sup>85</sup> The implementation of the Revised Zero Draft would therefore introduce an obligation for states to implement mandatory human rights due diligence obligations for corporations.

The Revised Zero Draft also prescribes that state parties should create a comprehensive system of legal liability for human rights abuses committed by or with the participation of corporations or arising from corporations' business relationships<sup>86</sup> and proportionate, effective and dissuasive criminal, civil and/or administrative sanctions and reparations for victims of corporate human rights violations.<sup>87</sup> Jurisdiction over claims brought by victims should vest in the state where the human rights abuse occurred, produced effects, where an act or omission contributing to the human rights abuse occurred, where the alleged legal person is domiciled or where the victim is a national or is domiciled.<sup>88</sup> This allows for a large scope concerning jurisdiction in matters of corporate human rights violations. The law of the state where the case is brought up should be applicable, if the victim does not request to apply the law of another applicable jurisdiction.<sup>89</sup>

### **2.1.3 Corporate Criminal Liability**

Some violations of human rights can constitute international, transnational, or domestic crimes.<sup>90</sup> The International Military Tribunal (IMT) in Nuremberg stated that "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".<sup>91</sup> This established criminal responsibility of individuals directly under international law. There are no cases before international tribunals that have dealt with criminal liability of a corporation, and only a handful have dealt with the involvement of private officers in slavery.<sup>92</sup> This displays a global reluctance of prosecuting corporations through international criminal law.

The draft statute at the start of the Rome Conference granted the International Criminal Court (ICC) jurisdiction not only over natural persons, but also over legal persons.<sup>93</sup> The proposed penalties for corporate crimes were fines, dissolution, prohibition, closure, forfeiture, or other

---

<sup>84</sup> OEIGWG, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' 2021 (Revised Zero Draft).

<sup>85</sup> *ibid*, art 6.6.

<sup>86</sup> *ibid*, art 8.1.

<sup>87</sup> *ibid*, art 8.3.

<sup>88</sup> *ibid*, art 9.1.

<sup>89</sup> *ibid*, art 11.

<sup>90</sup> No further development about the different kinds of crimes and what they constitute will be examined within the content of this thesis.

<sup>91</sup> The International Military Tribunal for the Trial of German Major War Criminals against Goring and others (1946) 447 et seq.

<sup>92</sup> Jessberger, 'Corporate Involvement in Slavery' (n 11) 329.

<sup>93</sup> Draft Statute of the International Criminal Court, UN Doc. A/CONF.183/2/Add.1 (1998), art 23 paras 5 and 6.

appropriate forms of reparation.<sup>94</sup> Corporate criminal responsibility was although never included in the final version of the statute and today, the Rome Statute of the ICC provides for jurisdiction over natural persons only.<sup>95</sup>

#### 2.1.4 Corporate Civil Liability

In any legal system the failure to respect a treaty creates liability for the one that failed to reach the legal expectations, and with this also a duty to provide compensation for any resulting damage. The International Court of Justice's (ICJ) predecessor very early on confirmed that the consequence of an unlawful harmful act is a duty to provide compensation.<sup>96</sup> This principle is also codified in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts,<sup>97</sup> adopted by the UN. The international society is foremost made up of states and states are the main actors who possess the capacities given to them within international law.<sup>98</sup> Corporations have been given an increasing attention within the international field of law due to many corporations' transnational activities and corporations do nowadays hold both rights and obligations under international law.<sup>99</sup> However, virtually no international instruments provides for enforcement mechanisms of corporate civil liability or lays down any obligation for corporations to pay reparations. States, as parties to treaties, must choose how to apply the rules.<sup>100</sup>

Since there does not exist any international enforcement mechanisms, states need to legislate measures to enforce corporate civil liability for human rights violations. States have the primary responsibility to protect the human rights recognized in international law.<sup>101</sup> The possibility to enforce corporate liability for violations of international human rights law are hence found in domestic law. States are obliged to provide victims with "effective access to justice", regardless of who is responsible for the violation<sup>102</sup> and to enforce "judgment reparation against individuals or entities liable for the harm suffered",<sup>103</sup> in which companies can constitute such entities. Corporations' human rights due diligence measures need to be complemented by active engagement from the company's side in remediation of adverse human rights impacts that the company caused or contributed to.<sup>104</sup> The Office of the High Commissioner for Human Rights

---

<sup>94</sup> *ibid*, art 76.

<sup>95</sup> See the Rome Statute of the International Criminal Court 1998, art 25.

<sup>96</sup> *Germany v Poland* [1927] PCIJ Series A No 9, 21: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form".

<sup>97</sup> International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts in *Yearbook of the International Law Commission* (2001 vol. II part 2), art 1.

<sup>98</sup> Anders Henriksen, *International Law* (2<sup>nd</sup> edn, Oxford University Press 2019) 80.

<sup>99</sup> *ibid* 79.

<sup>100</sup> Eric Mongelard, 'Corporate civil liability for violations of international humanitarian law' (2006) 88 (863) *International Review of the Red Cross* 665, 671 < [https://international-review.icrc.org/sites/default/files/irrc\\_863\\_9.pdf](https://international-review.icrc.org/sites/default/files/irrc_863_9.pdf) > accessed 10 October 2022.

<sup>101</sup> Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights (2003) UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, art 1.

<sup>102</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) UN Doc. A/RES/60/147, principles 1-3.

<sup>103</sup> *ibid*, principle 17.

<sup>104</sup> UN, 'The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (2018) A/73/163, para 10.

(OHCHR) has released guidance on improving corporate accountability and access to remedy for victims of corporate human rights abuse.<sup>105</sup> One of the policy objectives states that domestic civil liability regimes should take appropriate account of effective measures taken by companies to identify, prevent and mitigate adverse human rights impacts of their activities.<sup>106</sup>

## 2.2 *Corporate Accountability for Human Rights Violations in European Law*

Germany is a member state of the European Union (EU) since 1 January 1958.<sup>107</sup> The EU has had a leading role in imposing directives that mandate member states, including Germany, to impose legislation on sustainable finance.

### 2.2.1 **Legal Basis to Impose Directives on Corporate Safeguards**

The EU has competence to act in order to attain freedom of establishment as regards a particular activity, in particular “by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by member states of companies”,<sup>108</sup> as outlined in the Treaty of the Functioning of the European Union (TFEU). In order to attain freedom of establishment in the internal market, the European Parliament and the Council can impose directives.<sup>109</sup> For the internal market to work efficiently, companies need to be able to compete on the same premises. For this to happen, all companies that are established within the EU must be subject to the same requirements. Diverging requirements create a fragmentation of the internal market through an “uneven playing field for companies”.<sup>110</sup> The goal of directives is to streamline and eradicate existing disparities between national rules and diverging requirements that hinder the freedom of establishment within the EU.

### 2.2.2 **Sustainability Reporting and Human Rights Due Diligence**

The Non-Financial Reporting Directive (NFRD) lays down rules on disclosure of non-financial and diversity information by certain large companies.<sup>111</sup> Through the directive, the EU introduced the first cross-national regulation on mandatory sustainability reporting.<sup>112</sup> It sought to enhance the reporting quality and the transparency of corporations’ sustainability reporting performance. It also intended to motivate companies to lay more emphasis on non-financial

---

<sup>105</sup> OHCHR, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse* (2016) UN Doc. A/HRC/32/19, Annex: Guidance to Improve Corporate Accountability and Access to Judicial Remedy for Business-Related Human Rights Abuse.

<sup>106</sup> *ibid*, policy objective 12.4.

<sup>107</sup> Country profiles: Germany < [https://european-union.europa.eu/principles-countries-history/country-profiles/germany\\_en](https://european-union.europa.eu/principles-countries-history/country-profiles/germany_en) > accessed 10 October 2022.

<sup>108</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2012] C 326/49 (TFEU), art 50 (2) (g).

<sup>109</sup> *ibid*, art 50 and 114.

<sup>110</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (CSDD) COM [2022] 71 final, 11.

<sup>111</sup> 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 (NFRD) L 330/1.

<sup>112</sup> Tobias Gerwing, Peter Kajüter and Maximilian Wirth, ‘The role of sustainable corporate governance in mandatory sustainability reporting quality’ (2022) 92 *Journal of Business Economics* 517, 518 < <https://doi-org.ezproxy.ub.gu.se/10.1007/s11573-022-01092-x> > accessed 20 September 2022.

aspects in internal decision-making.<sup>113</sup> Large public-interest entities<sup>114</sup> with more than 500 employees have to publish information related to social matters, treatment of employees and respect for human rights as well as other issues under the reporting areas of the business model, policies, the outcome of policies, risk and risk management and key performance indicators.<sup>115</sup> Corporations should, when appropriate, report on human rights due diligence practices implemented by its suppliers and subcontractors.<sup>116</sup> Public-interest parent corporations of large corporate groups must disclose the same information regarding the whole corporate group.<sup>117</sup> The NFRD exempts subsidiaries from their reporting obligations if their parent company does the reporting for the whole corporate group.<sup>118</sup> In order to help companies to disclose this information, the European Commission published non-mandatory guidelines in June 2017.<sup>119</sup> The NFRD defines a common standard for non-financial reporting for certain corporations and like any other directive from the EU, it had to be transposed into the domestic law of the member states. Member states must also provide for penalties applicable to infringements of the national provisions adapted under the NFRD.<sup>120</sup>

On 21 April 2021, the Commission adopted a proposal for a Corporate Sustainability Reporting Directive (CSRD), which will amend the requirements of the NFRD and other pieces of legislation that cover audit and transparency of sustainable reporting.<sup>121</sup> The timetable of the implementation of a final legislative text based on the Commission's proposal will depend on how the Parliament and the Council progress in their negotiations. In view of the growth of users' needs for sustainability information, the CSRD is implemented with the notion that additional categories of undertakings should be required to report information.<sup>122</sup> The CSRD would hence introduce more detailed reporting requirements and extend the scope of concerned companies to all large companies and all companies listed on regulated markets as well as small and medium-sized interest entities,<sup>123</sup> except listed micro-enterprises, removing the existent 500-employee threshold. Concerned corporations will have to, where appropriate, include information about the group's value chain, including its own operations, its products and services, its business relationships, and its supply chain.<sup>124</sup>

---

<sup>113</sup> Ibid.

<sup>114</sup> See the definition of "public-interest undertakings" in art 2 (1) and "large undertakings" in art 3 (4) of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance (Accounting Directive).

<sup>115</sup> NFRD, art 1.

<sup>116</sup> *ibid.*, section 6.

<sup>117</sup> *ibid.*, inserted art 29a of the Accounting Directive.

<sup>118</sup> *ibid.*, inserted art 19a 3 and 29a 3 of the Accounting Directive.

<sup>119</sup> The European Commission, *Guidelines on non-financial reporting (methodology for reporting non-financial information)* (2017) C 215/01.

<sup>120</sup> The Accounting Directive, art 51.

<sup>121</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting (CSRD) COM/2021/189 final.

<sup>122</sup> *ibid.*, 25 para 15.

<sup>123</sup> *ibid.*, art 1 (3). A definition of such undertakings can be found in the Accounting Directive, art 3.

<sup>124</sup> CSRD, art 1 (3) and (7).

An independent auditor will need to certify that the corporations are complying with the reporting requirements.<sup>125</sup> If corporations breach the national provisions, the new legislation provides that member states must impose sanctions in the form of a public statement indicating the responsible corporation, order the concerned corporation to stop the infringement and impose fines.<sup>126</sup> The European Financial Reporting Advisory Group (EFRAG) will be responsible for developing sustainability reporting standards that the concerned companies will have to comply with under the CSRD.<sup>127</sup>

The Commission has also, on the 23 February 2022, published a proposal for a Corporate Sustainability Due Diligence Directive (CSDD) that provides due diligence guidelines for both environmental and human rights issues throughout global value chains.<sup>128</sup> The proposed directive reminds of the proposed CSRD. The CSDD does however go beyond the reporting duties of CSRD and imposes a duty to implement due diligence measures<sup>129</sup> that assigns accountability beyond a company's own operations, into the value chain.<sup>130</sup> EU-companies with 500 employees and a net worldwide turnover of more than 150 million euro or 250 employees with a net worldwide turnover of more than 40 million euro<sup>131</sup> are covered by the CSDD proposal as well as non-EU companies if they generate a net turnover of 150 million or 40 million<sup>132</sup> euro in the EU.<sup>133</sup>

Member states should implement sanctioning rules applicable to infringements of national provisions adapted for the CSDD.<sup>134</sup> A European network of supervisory authorities should also be set up, composed of representatives of the supervisory authorities, to facilitate the cooperation of supervisory authorities and aligning sanctioning and supervisory practices throughout the member states.<sup>135</sup> The due diligence obligations provided in the CSDD proposal will not only be enforced through administrative supervision but also civil liability. If a company fails to comply with its human rights due diligence obligations and such a failure results in an adverse human rights impact that led to damage, states should ensure that companies are liable for damages.<sup>136</sup> This liability should be without prejudice to the civil liability of enterprises in the value chain.<sup>137</sup>

---

<sup>125</sup> *ibid*, art 3 (1) et seq.

<sup>126</sup> *ibid*, art 1 (12).

<sup>127</sup> *ibid*, 9.

<sup>128</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (CSDD) COM [2022] 71 final.

<sup>129</sup> See what these measures are in CSDD, art 5-11.

<sup>130</sup> CSDD, art 1 (1).

<sup>131</sup> If at least 50% of the net turnover was generated in specifically mentioned sectors, see Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (CSDD) COM [2022] 71 final, art 2 (2) (b).

<sup>132</sup> If at least 50% of the net turnover was generated in specific sectors, see CSDD art 2 (1) (b) (i-iii).

<sup>133</sup> CSDD, art 2 (1) and (2).

<sup>134</sup> *ibid*, art 20.

<sup>135</sup> *ibid*, art 21.

<sup>136</sup> *ibid*, art 22 (1).

<sup>137</sup> *ibid*, art 22 (3).

### 2.2.3 Corporate Criminal and Civil Liability

The EU has abstained from prescribing exactly how corporate responsibility for violations should be established and member states have the possibility to impose civil sanctions instead of criminal sanctions for corporate wrongdoings.<sup>138</sup> Within the EU, a civil claim might succeed against a parent company where the company's supplier caused harm to the claimant, provided it can be established that the company "intervened in the management of the supplier's activities" in such a way as one can assume a duty of care of the parent company.<sup>139</sup>

## 2.3 Corporate Accountability for Human Rights Violations in Germany

### 2.3.1 Sustainability Reporting

The NFRD was integrated into domestic German law in 2017 through the new legislation called the CSR Directive Implementation Act and was codified in §§ 289b-e and 315b-c of the Handelsgesetzbuch (German Commercial Code) and it was further specified by the German Accounting Standards (GAS) 20. GAS 20 contains recommendations for the application of accounting principles. The main risks must be disclosed for each non-financial aspect of a company, including the aspect of respect for human rights.<sup>140</sup> As a result of this, listed firms that are classified as large<sup>141</sup> with more than 500 employees now have to include non-financial statements in their management report<sup>142</sup> and the supervisory board must independently examine the correctness of the non-financial statement.<sup>143</sup> Public parent corporations should submit a non-financial report including information about subsidiaries if the subsidiaries are not exempted from the obligation.<sup>144</sup>

Before this legislation was implemented, sustainability reporting was voluntary and corporations that voluntarily reported sustainability reports signaled a superior sustainability performance. With the sustainability reporting being mandatory now, these firms can keep up their superiority within sustainability performance by publishing high-quality sustainability reports.<sup>145</sup> However, the sustainability reporting lacks effective enforcement mechanisms, compared to financial reporting.<sup>146</sup> The reporting company is on its own responsible for the correctness and quality of their reports. Whoever, acting in the capacity of a member of the representative body or of the supervisory board of a share capital company, acts in contravention, in drawing up the management report or in preparing a separate non-financial report will be deemed to have committed a regulatory offense, punishable by a fine.<sup>147</sup> They are

---

<sup>138</sup> Weigend, 'Societas Delinquere Non Potest?' (n 39) 929. Although see Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC COM (2021) 851 final.

<sup>139</sup> The European Commission, *Study on due diligence requirements through the supply chain* (n 65) 209.

<sup>140</sup> Handelsgesetzbuch (German Commercial Code) § 289c.

<sup>141</sup> Within the meaning of § 267 para 3 sentence 1 of the German Commercial Code.

<sup>142</sup> The German Commercial Code § 289b para 1.

<sup>143</sup> Aktiengesetz (German Stock Corporation Act) § 171.

<sup>144</sup> The German Commercial Code § 315 b.

<sup>145</sup> Gerwing, Kajüter and Wirth, 'The role of sustainable corporate governance in mandatory sustainability reporting quality' (n 112) 519.

<sup>146</sup> *ibid.*

<sup>147</sup> The German Commercial Code § 334 para 3, the fine can result in an amount pursuant to § 334 (3a).

liable for imprisonment for up to three years or a fine if they incorrectly render information in the report.<sup>148</sup>

### 2.3.2 Human Rights Due Diligence

The German domestic law contains examples of different types of due diligence obligations, including precautionary duties, supervision duties, protective duties, and safety duties. All these due diligence obligations are subject to the proportionality principle as to standards of reasonableness, appropriateness, adequacy, and cost-benefit analysis.<sup>149</sup> The measure that the corporations should deploy should not be out of proportion with the goal pursued. The more severe a measure interferes with human rights, the greater is the public interest in regulation, and further measures are appropriate.

Lieferkettensorgfaltspflichtengesetz (Act on Corporate Due Diligence Obligations in Supply Chains) was published in the German Federal Law Gazette on 22 July 2021 after completion of the parliamentary procedure and it will go into force 1 January 2023.<sup>150</sup> The Act applies to human rights risks.<sup>151</sup> It was transcribed with the intention to strengthen human rights throughout the whole supply chain by making corporations liable for any breaches of human rights-related compliance throughout their supply chains.<sup>152</sup> The *supply chain*, in the context of the Act, constitutes all the steps, both within Germany and abroad, that are necessary to produce the products or provide the services of the company worldwide, including actions of an enterprise, direct suppliers, and indirect suppliers.<sup>153</sup> Due to this, the companies must perform human rights due diligence from the very extraction of raw materials to the delivery to the consumer. The act applies to companies based in Germany<sup>154</sup> with more than 3 000 employees and companies based in other countries with more than 3 000 employees that have registered German branches, from 2024 this threshold will be lowered to 1 000 employees.<sup>155</sup>

Concerned companies should establish an appropriate and effective risk management system to comply with the human rights due diligence obligations<sup>156</sup> and determine someone to be responsible for monitoring risk management.<sup>157</sup> Companies should conduct an appropriate and ongoing risk analysis to identify human rights related risks, at least once a year and on an ad hoc basis,<sup>158</sup> and if the corporation identifies a risk, it should take immediate and appropriate preventive measures.<sup>159</sup> Companies that fall within the scope of the Act must also issue a policy

---

<sup>148</sup> *ibid* § 331.

<sup>149</sup> The European Commission, *Study on due diligence requirements through the supply chain* (n 65) 201.

<sup>150</sup> Lieferkettensorgfaltspflichtengesetz (Act on Corporate Due Diligence Obligations in Supply Chains), annex art 5 (1).

<sup>151</sup> *ibid*, section 2 (1).

<sup>152</sup> Federal Ministry of Labour and Social Affairs, ‘Act on Corporate Due Diligence in Supply Chains’ (18 August 2021) < <https://www.bmas.de/EN/Services/Press/recent-publications/2021/act-on-corporate-due-diligence-in-supply-chains.html> > accessed 18 September 2022.

<sup>153</sup> The Act on Corporate Due Diligence Obligations in Supply Chains, section 2 (5).

<sup>154</sup> *Based* as in the location where the principal place of business, administrative headquarter, statutory seat, or branch office is located must be within German jurisdiction.

<sup>155</sup> The Act on Corporate Due Diligence Obligations in Supply Chains, section 1 (1).

<sup>156</sup> *ibid*, section 4 (1).

<sup>157</sup> *ibid*, section 4 (3).

<sup>158</sup> *ibid*, section 5.

<sup>159</sup> *ibid*, section 6 (1).

statement that includes elements of its human rights strategy, describe the procedures by which it fulfils its obligations according to the Act, its priorities in relation to human rights and its expectations on employees and suppliers.<sup>160</sup> It should also establish preventive measures within its own business area and for direct suppliers.<sup>161</sup> If the company determines that a violation of a protected legal position<sup>162</sup> has occurred or is imminent, it must immediately take appropriate remedial action to prevent, stop or minimize the violation.<sup>163</sup>

A company must report on the fulfilment of its due diligence obligations annually and make the report publicly available free of charge on the company's website no later than four months after the end of the financial year for a period of seven years.<sup>164</sup> Targeted companies must also establish a complaints procedure to enable people to report violations of human rights obligations in the company's business area or the area of a direct supplier and the effectiveness of this procedure should be reviewed annually and on an ad hoc basis.<sup>165</sup> The complaints procedure should also enable people to report violations of human rights-related obligations due to indirect suppliers.<sup>166</sup>

The implementation of the due diligence obligations laid down in the Act is monitored by the German Federal Office for Economic Affairs and Export Control.<sup>167</sup> If a company fails to comply with its obligations pursuant to the Act, it provides for sanctions. The corporation can be subject to fines that can amount to up to 800 thousand euros and if a company's average annual turnover is more than 400 million euros, the fine can amount to up to two percent of the company's annual turnover.<sup>168</sup> Companies can also be excluded from winning public contracts in Germany for up to three years.<sup>169</sup> The Act does not introduce any additional civil liability compared to the existing Bürgerliches Gesetzbuch (German Civil Code).<sup>170</sup> Any person claiming to have been violated in a legal position pursuant to the Act that is of paramount importance may although authorize a domestic trade union or non-governmental organization (NGO) to bring proceedings to enforce the victim's rights in its own capacity.<sup>171</sup> The new act thus enlarged the procedural possibilities for people to claim damages.

---

<sup>160</sup> *ibid*, section 6 (2).

<sup>161</sup> *ibid*, section 6 (3) and (4).

<sup>162</sup> See the Act on Corporate Due Diligence Obligations in Supply Chains, section 2 (1) for the definition of a protected legal position according to the Act.

<sup>163</sup> The Act on Corporate Due Diligence Obligations in Supply Chains, section 7.

<sup>164</sup> *ibid*, section 10.

<sup>165</sup> *ibid*, section 8.

<sup>166</sup> *ibid*, section 9.

<sup>167</sup> *ibid*, section 19.

<sup>168</sup> *ibid*, section 24.

<sup>169</sup> *ibid*, section 22.

<sup>170</sup> See section 2.3.6 *Corporate Civil Liability*.

<sup>171</sup> The Act on Corporate Due Diligence Obligations in Supply Chains, section 11. See how civil liability on the grounds of a breach of a duty of care and claims under foreign law is enforced under section 2.3.6 *Corporate Civil Liability*.

### 2.3.3 Corporate Criminal Liability

Germany is one of a few European countries that still limits criminal liability to natural persons,<sup>172</sup> however, administrative liability for corporate criminal offenses is recognized.<sup>173</sup> Many German theorists oppose the introduction of corporate criminal liability, because according to them, corporations lack the element of moral blame that is the key to find someone criminally liable.<sup>174</sup> The current legal situation only allows the sanctioning of corporations due to criminal acts under Gesetz über Ordnungswidrigkeiten (Act on Regulatory Offenses).<sup>175</sup>

### 2.3.4 Corporate Regulatory Offenses

In German law, an administrative offense is an offense that does not reach the punishable unlawful content of a criminal offense, but nonetheless is worthy of punishment. Such punishment is not imposed with a criminal sanction, but as a legal consequence, it results in a fine.<sup>176</sup> Administrative fines can be imposed on a legal person if an organ, a representative, or a person with a managerial function within the corporation has committed a criminal offense or an administrative offense which violated an obligation of the legal person, or if the corporation was enriched or intended to be enriched by the offense.<sup>177</sup> A company cannot be held directly liable for administrative offenses committed by its subsidiaries,<sup>178</sup> unless it itself was directly involved in the infringement so that the parent company can be blamed for its own wrongdoing.<sup>179</sup> A parent company can also be administratively liable if it infringes its duty to supervise the subsidiary, if this infringement results in a violation.<sup>180</sup>

The main rule is that only regulatory offenses committed within the territorial scope of the Act of Regulatory Offenses can be sanctioned.<sup>181</sup> No sanctions can be imposed if German criminal law does not apply to the act that constituted a violation.<sup>182</sup> The company can although be held liable if the criminal or administrative offense is committed abroad by a representative of the company, if the offense is punishable under German law.<sup>183</sup> The applicability of German law depends on the specific committed offense. Generally, crimes committed by German nationals

---

<sup>172</sup> Strafgesetzbuch (German Criminal Code) only applies to natural persons.

<sup>173</sup> According to the German Criminal Code, section 73 (3). The proceeds of a crime can be confiscated from a legal person if a natural person commits a criminal offense on the legal person's behalf.

<sup>174</sup> Weigend, 'Societas Delinquere Non Potest?' (n 39) 936.

<sup>175</sup> Sijad Allahverdiyev and Marvin Othman, 'Verbandssanktionengesetz' — Corporate Liability for Germany?' (2022) 23 (4) German Law Journal 637, 638 < <https://www.cambridge.org/core/journals/german-law-journal/article/verbandssanktionengesetz-corporate-liability-for-germany/DC98C79DA36CB354E8782A9B2CDA024C> > accessed 18 September 2022.

<sup>176</sup> Gesetz über Ordnungswidrigkeiten (Act on Regulatory Offenses), section 1.

<sup>177</sup> *ibid*, section 30 (1).

<sup>178</sup> Andreas Lohner and Nicolai Behr, 'Corporate Liability in Germany' (Global Compliance News, 2022) < <https://www.globalcompliancenes.com/white-collar-crime/corporate-liability-in-germany/> > accessed 17 September 2022.

<sup>179</sup> The Act on Regulatory Offenses, section 30 (1).

<sup>180</sup> *ibid*, section 130 (1).

<sup>181</sup> *ibid*, section 5.

<sup>182</sup> Thomas Grützner, Carsten Momsen and Jonas Menne, 'Draft Bill on German Corporate Sanctions Act' (2019) CEJ 26, 36 < [https://www.jura.fu-berlin.de/fachbereich/einrichtungen/strafrecht/lehrende/momsenc/mitarbeiter/momsen\\_carsten/CEJ-Fall-2019-Gru\\_tzner-Momsen-Menne.pdf](https://www.jura.fu-berlin.de/fachbereich/einrichtungen/strafrecht/lehrende/momsenc/mitarbeiter/momsen_carsten/CEJ-Fall-2019-Gru_tzner-Momsen-Menne.pdf) > accessed 17 September 2022.

<sup>183</sup> Lohner and Behr, 'Corporate Liability in Germany' (n 178).

are punishable under German law.<sup>184</sup> The administrative fine can be set up to ten million euros if the offense is intentionally committed by a managerial organ and if it is committed negligently, to not more than five million euros.<sup>185</sup> If a company breaches its supervisory obligation, resulting in a criminal offense, the fine cannot exceed one million euros and a regulatory offense can result in a fine not exceeding the amount imposable for the breach of duty.<sup>186</sup> The fine imposed shall exceed the financial benefit which the company obtained by committing the offense.<sup>187</sup> The Act also allows for an interim measure of confiscating the profit achieved from the offense.<sup>188</sup>

### 2.3.5 The Draft of the Corporate Sanctions Act

German legislators have for a period of time discussed how companies in Germany should be sanctioned more severely when they commit criminal offenses<sup>189</sup> and the potential introduction of corporate criminal liability in Germany.<sup>190</sup> On 22 April 2020 the Federal Ministry of Justice and Consumer Protection (BMJV) published the first *Verbandssanktionengesetz* (Draft of the Corporate Sanctions Act)<sup>191</sup> in order to better ensure that white-collar crime is effectively prosecuted and appropriately sanctioned.<sup>192</sup> A second draft of the Act was introduced to the Lower House of the German Parliament on 21 October 2020.<sup>193</sup> The legislative work although collapsed in the summer of 2021 and the Act has yet not been enforced.<sup>194</sup> The Act would practically introduce corporate criminal liability in Germany, however, it would not be referred to as this, as only natural persons are able to be found culpable within German criminal law. According to the Draft of the Corporate Sanctions Act, a corporate act is a criminal offense if a duty of the corporation was violated or if the corporation was enriched or attempted to enrich itself by committing the act.<sup>195</sup> Only managers can commit acts that makes the corporation liable and the company is only liable when non-management employees commit offenses if the offense could have been prevented by managers.<sup>196</sup> A corporate fine or a warning with a caveat of a fine can be imposed by the court.<sup>197</sup>

The Draft Act provides for a higher upper limit regarding the administrative fines than the Act on Regulatory Offenses. If the company's average turnover over the last three years exceeds one hundred million euros and the act was committed intentionally, the fines can range from

---

<sup>184</sup> The German Criminal Code, section 7.

<sup>185</sup> The Act on Regulatory Offenses, section 30 (2).

<sup>186</sup> *ibid*, section 130 (3).

<sup>187</sup> *ibid*, section 30 (3) in conjunction with section 17 (4).

<sup>188</sup> *ibid*, section 22.

<sup>189</sup> Allahverdiyev and Othman, 'Verbandssanktionengesetz' (n 175) 639-640.

<sup>190</sup> Grützner, Momsen and Menne, 'Draft Bill on German Corporate Sanctions Act' (n 182) 26.

<sup>191</sup> Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft (Draft Bill to Strengthen the Integrity of the Economy), section 1.

<sup>192</sup> Coalition Agreement, *Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land* (March 12, 2018).

<sup>193</sup> Gesetzentwurf der Bundesregierung - Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft, Deutscher Bundestag: Drucksachen [BT] 19/23568, (Draft of the Corporate Sanctions Act).

<sup>194</sup> Allahverdiyev and Othman, 'Verbandssanktionengesetz' (n 175) 637.

<sup>195</sup> The Draft of the Corporate Sanctions Act, section 2 (1) no. 3.

<sup>196</sup> *ibid*, section 3.

<sup>197</sup> *ibid*, section 8.

ten thousand euros to ten percent of the company's average annual turnover.<sup>198</sup> If the corporation's average turnover is below one hundred million euros and the act is committed with negligence, the fine ranges from 500 euros to five million euros.<sup>199</sup> The court also has the ability to mitigate the sanction and reduce the fines if the corporation provides an internal investigation which contributes to an effective resolution of the case,<sup>200</sup> in order to create an incentive to set up such systems.<sup>201</sup> Opposed to the current legal order, the court will also be able to publicly disclose sanctions imposed on a company. If a large number of people suffered damage as a consequence of the corporation's unlawful act, the court has an opportunity to order the corporation's conviction to be publicly announced.<sup>202</sup> This can help individuals to prepare further legal action.<sup>203</sup> The principle of mandatory prosecution will be introduced for corporate crimes,<sup>204</sup> opposed to the current legal order under the Act of Regulatory Offenses, which stipulates that the prosecuting authority can terminate proceedings.<sup>205</sup>

The Corporate Sanctions Act would be applicable to all violations which are punishable in Germany, even if they were committed abroad. If German law is not applicable, the new Draft of the Corporate Sanctions Act is still applicable, if the offense would be punishable if it was committed in Germany, it is punishable at the crime scene and the corporation has its registered office in Germany, no matter where the offense occurred or the nationalities of the offender or victim.<sup>206</sup>

### 2.3.6 Corporate Civil Liability

Human rights violations may constitute a tort. In Germany the substantive law of torts is governed by the German Civil Code.<sup>207</sup> The ones that can be held liable for torts are the ones who directly causes injury, or should have taken more precautions to prevent the harm.<sup>208</sup> Civil liability can arise from intentional or negligent injury of life, body, health, freedom, property or other right<sup>209</sup> or from a breach of a statute that is intended to protect another person.<sup>210</sup> The provision offers protection of rights that are also protected by human rights treaties.<sup>211</sup> Responsibility can be attributed to companies if representatives commit violations.<sup>212</sup> Liability

---

<sup>198</sup> *ibid*, section 9 (2).

<sup>199</sup> *ibid*, section 9 (1).

<sup>200</sup> *ibid*, section 17.

<sup>201</sup> Explanatory memorandum for the Draft of the Corporate Sanctions Act, 99.

<sup>202</sup> The Draft of the Corporate Sanctions Act, section 14.

<sup>203</sup> *ibid*, 75-76.

<sup>204</sup> See the Draft of the Corporate Sanctions Act, section 24 that states that the German Criminal Code and the Courts Constitutional Act are applicable to the prosecution of corporations. According to section 152 II of the German Criminal Code, the public prosecution service must take action in relation to all offenses.

<sup>205</sup> The Act of Regulatory Offenses, section 47.

<sup>206</sup> The Draft of the Corporate Sanctions Act, section 2 (2).

<sup>207</sup> Bürgerliches Gesetzbuch (German Civil Code), sections 823 et seq.

<sup>208</sup> Federal Ministry of Justice and Consumer Protection, *The responsibility of business enterprises for human rights violations: Access to justice and the courts* (November 2019) 26-27.

<sup>209</sup> The German Civil Code, section 823 (1).

<sup>210</sup> *ibid*, section 823 (2).

<sup>211</sup> Federal Ministry of Justice and Consumer Protection, *The responsibility of business enterprises for human rights violations: Access to justice and the courts* (November 2019) 26.

<sup>212</sup> The German Civil Code, section 31.

is limited to the corporations own wrongdoing and parent companies cannot be liable for subsidiaries' misconduct.<sup>213</sup>

The German Civil Code enables private litigants to claim damages for violations of due diligence obligations contained in other laws, provided these laws aim to protect individual interests, such as human rights due diligence laws.<sup>214</sup> Hence, the monitoring of the corporate due diligence obligations is done through a combination of public and private enforcement.<sup>215</sup> Under the German Civil Code there is a reverse burden of proof in relation to health and safety, which creates a form of negligence liability, in that a company incurs liability for damages unless it can prove that it exercised due diligence in selecting, equipping or supervising the agents that committed the violation, or that the damage would have occurred in spite of exercising the required due diligence.<sup>216</sup>

Anyone who considers that their rights have been infringed abroad by the actions of a German corporation can claim damages in Germany.<sup>217</sup> A foreign subsidiary or supplier can be sued in Germany if, for instance, the parent company in Germany has aided or instigated the damaging act committed by the subsidiary or supplier.<sup>218</sup> Damages for pain and suffering are provided in specific cases such as in the event of an injury to body, health, freedom or sexual self-determination.<sup>219</sup> German law does not provide for punitive damages and is limited to compensation for the damage that the victim suffered.<sup>220</sup>

#### 2.4 Corporate Accountability for Human Rights Violations in the US

The US is a federal law system. Federal laws are laws applicable in the whole nation that apply to people living within US territory. State laws only apply to the state where it was enacted. The federal government has specific powers and all the power that is not delegated to the federal government remains with the states.<sup>221</sup> The federal government's powers are limited by the 10<sup>th</sup> Amendment, that grants states the power to legislate on specific matters, and in some matters

---

<sup>213</sup> Sebastian Felix Janka, 'Parent Company Liability in German and EU Competition Law' (2016) 7:9 Journal of European Competition Law and Practice, 614, 617 < <https://academic.oup.com/jeclap/article-abstract/7/9/614/2647008> > accessed 22 November 2022.

<sup>214</sup> The German Civil Code, section 823 (2).

<sup>215</sup> See section 2.3.2 *Human Rights Due Diligence* above where public enforcement of Human Rights Due Diligence obligations are explained.

<sup>216</sup> The German Civil Code, section 831.

<sup>217</sup> Council Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ibis Regulation) [2012], article 4 (1) and Federal Ministry of Justice and Consumer Protection, *The responsibility of business enterprises for human rights violations: Access to justice and the courts* (November 2019) 8.

<sup>218</sup> Zivilprozessordnung (German Code of Civil Procedure), section 32 and Federal Ministry of Justice and Consumer Protection, *The responsibility of business enterprises for human rights violations: Access to justice and the courts* (November 2019) 16-17.

<sup>219</sup> The German Civil Code, section 253 (2).

<sup>220</sup> Federal Ministry of Justice and Consumer Protection, *The responsibility of business enterprises for human rights violations: Access to justice and the courts* (November 2019) 32.

<sup>221</sup> The US Embassy Federal Judicial Center, 'The U.S. Legal System: A Short Description', 1 < [https://ar.usembassy.gov/wp-content/uploads/sites/26/2016/03/U\\_S\\_Legal\\_System\\_English07.pdf](https://ar.usembassy.gov/wp-content/uploads/sites/26/2016/03/U_S_Legal_System_English07.pdf) > accessed 31 October 2022.

both the federal and state governments have powers.<sup>222</sup> Multiple federal and state laws regulate human rights issues.

It does not fit into the scope of this thesis to investigate how corporate human rights violations are regulated within different states, therefore, regulations on the federal level are examined. One exception is although made on this point, as will be evident under section 2.4.1 *Sustainability Reporting*, the US does not have regulations on sustainability reporting on a federal level<sup>223</sup> and the State of California's law on transparency in supply chains requires sustainability reporting on a state level in the US, therefore this law will be examined as an example of how states in the US can regulate sustainability reporting.

### **2.4.1 Sustainability Reporting**

The California Transparency in Supply Chains Act of 2010 (California Act),<sup>224</sup> requires companies to report on specific actions to combat slavery and human trafficking in their supply chains. Retailers and manufacturers that are doing business in California, with annual worldwide gross receipts of 100 million US dollars or more, must explicitly disclose their efforts to eradicate slavery and human trafficking, and protect basic human rights, along their entire supply chain.<sup>225</sup> The intent was to ensure that large retailers and manufacturers provide consumers with information regarding their efforts to eradicate slavery and human trafficking from their supply chains, educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains and thereby improve the lives of victims of slavery and human trafficking.<sup>226</sup> The disclosure thus provides consumers with the information they need to make informed choices about the products and services they buy through a clearly labeled link on the business' homepage.<sup>227</sup>

The Security and Exchange Commission (SEC) Investor Advisory Committee, the financial oversight agency, has called for requiring SEC registrants<sup>228</sup> to provide information related to environmental, social and governance matters that is of importance for investors in their investment and voting decisions.<sup>229</sup> However, this has not become the reality yet. SEC requires public companies to file annual and quarterly reports with an overview of their financial condition.<sup>230</sup> These disclosure requirements do not mention sustainability and as many other disclosure requirements, they are primarily focused on financial information.

---

<sup>222</sup> National Geographic Society, 'The Roles of State and Federal Governments' (June 2 2022) < <https://education.nationalgeographic.org/resource/roles-state-and-federal-governments> > accessed 31 October 2022.

<sup>223</sup> The Corporate Transparency Act (CTA) does although exist, which requires disclosure of beneficial ownership, which will not be examined further in this thesis as it is not directly related to sustainability reporting.

<sup>224</sup> California Civil Code § 1714.43, California Transparency in Supply Chains Act of 2010 (California Act).

<sup>225</sup> *ibid*, section 3 (a)(1).

<sup>226</sup> *ibid*, section 2 (j).

<sup>227</sup> *ibid*, section 3 (b).

<sup>228</sup> SEC registrant means an issuer with a class of equity securities registered under the Exchange Act.

<sup>229</sup> B. Christensen, Hail and Leuz, 'Mandatory CSR and sustainability reporting' (n 13) 1177.

<sup>230</sup> See to the annual report "Form 10-K", required by SEC.

The growing focus on corporate sustainability has led to voluntary responses rather than new legislation in the US. However, this trend seems to be changing.<sup>231</sup> The US Trade Facilitation and Trade Enforcement Act allows US Customs and Border Protection (CBP) to seize imported goods if an importer is unable to provide a certificate proving which measures were taken to ensure that the goods were not produced using forced labor.<sup>232</sup> There does not currently exist mandatory sustainability reporting regulations on a federal level, although the SEC has released guidance that states that public companies should disclose information that might be important for investors to evaluate the business, including matters related to social risks.<sup>233</sup> A proposition to amend the Securities Exchange Act of 1934 was proposed in 2019.<sup>234</sup> The amendment would have mandated public companies in the US to include a human rights risk and impact report in an annual human rights analysis report,<sup>235</sup> however, it was never enacted. It is evident that it is not the government that pushes a new agenda with enhanced sustainability reporting in the US, it is private market actors that does this.

### **2.4.2 Human Rights Due Diligence**

In December 2016, the first US National Action Plan on Responsible Business Conduct (NAP) was published to build on existing laws and policies, such as the UNGPs, to hold companies more accountable for irresponsible business conduct.<sup>236</sup> The NAP encourages corporations to conduct human rights due diligence to assess human rights risks but did not propose new legislation.<sup>237</sup> The NAP does not provide any structured framework to monitor implementation of the NAP, it does not provide for enforcement mechanisms and does not impose legal liability on businesses. On 16 June 2021, it was announced that the NAP will be updated and revitalized to focus, improve, and expand the national efforts to promote responsible business conduct in the US.<sup>238</sup> The US does not provide for regulations that implement mandatory human rights due diligence in the current situation.

### **2.4.3 Corporate Criminal Liability**

The US has pursued many more corporate criminal enforcement actions than any other nation and collected more sanctions due to its broad scope of corporate criminal liability.<sup>239</sup> US courts

---

<sup>231</sup> David Silk and Carmen Lu, 'Environmental, Social and Governance Law USA 2022' (ICLG) < <https://iclg.com/practice-areas/environmental-social-and-governance-law/usa> > accessed 26 September 2022.

<sup>232</sup> Public Law No: 114-125 (February 24 2016), Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA).

<sup>233</sup> Silk and Lu, 'Environmental, social and Governance Law USA 2022' (ICLG) (n 231) and SEC, *Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations* (February 25, 2020).

<sup>234</sup> Discussion Draft, H.R.6375, to amend the Securities Exchange Act of 1934 to require issuers to make disclosures related to supply chain disruption risk, and for other purposes.

<sup>235</sup> *ibid*, section 3.

<sup>236</sup> United States' Responsible Business Conduct, First National Action Plan for the United States of America (December 16, 2016).

<sup>237</sup> *ibid*, 7.

<sup>238</sup> Anthony J. Blinken, '10th Anniversary of the UN Guiding Principles on Business and Human Rights' (US Department of State, June 16, 2021) < <https://www.state.gov/10th-anniversary-of-the-un-guiding-principles-on-business-and-human-rights/> > accessed 15 November 2022.

<sup>239</sup> Jennifer Arlen and Samuel W. Buell, 'The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement' (2020) 93 (4) *Southern California Law Review* 697, 699-700 < [https://southerncalifornialawreview.com/wp-content/uploads/2020/09/Arlen\\_website.pdf](https://southerncalifornialawreview.com/wp-content/uploads/2020/09/Arlen_website.pdf) > accessed 15 November 2022.

hold extraterritorial jurisdiction when US based companies commit crimes outside of the US.<sup>240</sup> The company itself can also be held liable for almost any crime committed by an employee within the scope of their employment if the employee had the intent to benefit the company.<sup>241</sup> The legal regime offer lower sanctions as an incentive for companies to self-report about actions that constitute crimes.<sup>242</sup> This is motivated with the claim that the corporations themselves are able to obtain evidence about misconduct within the corporation easier than government authorities.<sup>243</sup>

It is enough to aid or abet other corporations to commit criminal acts for a corporation to be held liable, thus both parent companies and contracting parties can be held liable if they aid or abet another company into violating human rights, also abroad.<sup>244</sup> In 2007 the Chiquita Brands International plead guilty to making payments to a designated terrorist organization in Colombia and agreed to five years' probation, to pay 25 million dollars in fines to implement and maintain an effective compliance and ethics program and to cooperate in the ongoing investigation.<sup>245</sup>

#### 2.4.4 Corporate Civil Liability

The Alien Tort Statute (ATS) grants federal district courts jurisdiction over any civil action where an alien sues for a tort committed in violation of the law of nations or a treaty of the US.<sup>246</sup> In other words, it gives US courts universal jurisdiction over violations of international law, such as human rights conventions. In the *Sosa case*, the US Supreme Court held that ATS claims can be brought against both natural and legal persons.<sup>247</sup> However, in this same case the court stated that only claims that rest on a norm that is “specific, universal and obligatory” are actionable.<sup>248</sup> If this criterion is fulfilled, it must also be an “appropriate” exercise of judicial discretion for the court to allow the case.<sup>249</sup>

Civil litigation for business-related human rights abuses expanded from the 1990s onwards in the US and the focus turned to the standard for aiding and abetting as a determinant factor to establish a company's contribution to human rights violations.<sup>250</sup> In the *Sosa case*, the Court stated that, given that international law is evolving, new causes of action can be recognized under the ATS, such as new claims like modern slavery or indirect forms of liability like aiding

---

<sup>240</sup> See for example *Blackmer v. United States*, 284 U.S. 421, 438-41 (1932).

<sup>241</sup> Arlen and W. Buell, 'The Law of Corporate Investigations' (n 239) 707.

<sup>242</sup> *ibid*, 708.

<sup>243</sup> *ibid*, 702.

<sup>244</sup> See for example *John Doe I, et al. v. Chiquita Brands International, Inc., et al*, 2:07-cv-03406, New Jersey Court (2007).

<sup>245</sup> *John Doe I, et al. v. Chiquita Brands International, Inc., et al*, 2:07-cv-03406, New Jersey Court (2007).

<sup>246</sup> Aliens action for tort, 28 U.S.C. § 1350.

<sup>247</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739 (2004).

<sup>248</sup> *ibid*, 38.

<sup>249</sup> Congressional Research Service, 'The Alien Tort Statute: A Primer' (2022) 12 < <https://crsreports.congress.gov/product/pdf/R/R44947> > accessed 30 October 2022.

<sup>250</sup> Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' (2020) 69 (4) *The International and Comparative Law Quarterly* 789, 807 < <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/implementing-human-rights-due-diligence-through-corporate-civil-liability/89B854AAA7F3ED5AC841DF266E567498> > accessed 30 October 2022.

and abetting.<sup>251</sup> However, the expansion of case law based on the ATS was restrained in the *Kiobel* case in 2013<sup>252</sup> when the US Supreme Court applied the presumption against extraterritoriality, restricting jurisdiction and the possibility of using the ATS to cases in which violations of international law occurred within the US. If a violation occurs outside of the US, the claims must “touch and concern” the territory of the US “with sufficient force to displace the presumption against extraterritorial application” for the possibility to apply ATS.<sup>253</sup> The jurisdiction was further restricted in 2018 when the US Supreme Court affirmed in the *Jesner* case<sup>254</sup> that “foreign corporations may not be defendants in suits brought under the ATS”,<sup>255</sup> restricting the possible use of the ATS to cases filed against companies based in the US.

In the *Jesner* case, the US Supreme Court was deeply critical to create remedies for breaches of international norms, they argued that such a power “invaded terrain that belongs to the people’s representatives and should be promptly returned to them”.<sup>256</sup> The Supreme Court further restricted the ability to use the ATS for international corporate human rights violations in the *Nestle* case in 2020. The Supreme Court held that US courts lack jurisdiction over corporations based in the US who, through operational decisions within the US, are alleged to aid or abet foreign subsidiaries to commit human rights violations, even when the parent company profits from the human rights abuses that happen abroad, because such operational decisions constitute “general corporate activity”.<sup>257</sup> The Court found that there was not a sufficient connection between the alleged aiding and abetting in the US and the forced labor committed abroad and that the actions of the parent company, in the form of operational decisions, only were considered “general corporate activities”, insufficient to trigger jurisdiction under the ATS.<sup>258</sup> The judgement in the *Nestle* case can be considered a setback for parent company liability.<sup>259</sup>

Foreign subsidiaries and their parent companies in the US can be almost immune from civil liability for actions outside of the US and it is questionable whether any conduct of a US parent company can trigger jurisdiction under the ATS.<sup>260</sup> The road to use the ATS has thus become very narrow and plaintiffs must therefore regress to using more general legal ways to establish US jurisdiction over cases of corporate human rights harms abroad.<sup>261</sup> This can however be

---

<sup>251</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739 (2004), 17.

<sup>252</sup> *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

<sup>253</sup> *ibid*, 14.

<sup>254</sup> *Jesner v Arab Bank, Plc*, No 16-499, 584 U.S. (2018).

<sup>255</sup> *ibid*, 3.

<sup>256</sup> *ibid* and Andrew Sanger ‘Corporate Liability for Breaches of International Law Abroad: Canadian Supreme Court Opens the Door But Questions Remain’ (2020) 79 (3) *The Cambridge Law Journal* 381, 383 < <https://www-cambridge-org.ezproxy.ub.gu.se/core/journals/cambridge-law-journal/article/corporate-liability-for-breaches-of-international-law-abroad-canadian-supreme-court-opens-the-door-but-questions-remain/27E8B8B054133DC9297ABEAAE09E5504> > accessed 29 October 2022.

<sup>257</sup> *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931 U.S. (2021), 4-5.

<sup>258</sup> *ibid*, 5.

<sup>259</sup> Ben Ye, ‘*Okpabi v. Shell* and *Nestle USA v. Doe*: Trend and Divergence on Parent Company Liability for Human Rights Abuse in the United Kingdom and United States’ (2021) 54 (1) *New York University Journal of International Law & Politics* 261, 267 < [https://www.nyuujilp.org/wp-content/uploads/2022/02/NYUJILP\\_Vol54.1\\_Ye\\_261-273.pdf](https://www.nyuujilp.org/wp-content/uploads/2022/02/NYUJILP_Vol54.1_Ye_261-273.pdf) > accessed 29 October 2022.

<sup>260</sup> *ibid*, 270 and 272.

<sup>261</sup> *ibid*, 270.

nearly impossible as the plaintiff then must establish that the foreign subsidiary is “at home” within the US to be considered subject to a court’s general jurisdiction.<sup>262</sup> General jurisdiction over a corporation exists only if the corporation’s connection with the forum state is “so continuous and systematic” that the corporation can be considered “at home” in that state.<sup>263</sup>

A possible way is for victims to file torts on supplemental jurisdiction grounds based on Acts that aims to prevent human rights abuses from occurring outside of the US, such as the Torture Victims Protection Act,<sup>264</sup> the Anti-Terrorism Act<sup>265</sup> and the Trafficking Victims Protection Act.<sup>266</sup> However, claims under these federal statutes can only be brought for specific torts and do not allow general jurisdiction to protect all human rights. For example, the Torture Victims Protection Act can only be brought for two torts, torture and extrajudicial killing and claims cannot be sued against non-state actors.<sup>267</sup> All remedies at the place in which the torture or extrajudicial killing occurred must also be exhausted for a claim to be sued within a court in the US.<sup>268</sup> Another possible way is to include a claim based on state law, however, courts’ jurisdictions in these cases vary between different states.<sup>269</sup>

## 2.5 Corporate Accountability for Human Rights Violations in Brazil

Brazil is, alike the US, a federal law system. It does not fit into the scope of this thesis to investigate how corporate human rights violations are regulated within different states in Brazil, therefore, only the regulations on the federal level are examined.<sup>270</sup>

### 2.5.1 Sustainability Reporting

Fundação Instituto de Desenvolvimento Empresarial e Social (FIDES) developed a voluntary reporting model encouraging companies to report on working conditions in the 1980s.<sup>271</sup> In December 2021, the Securities and Exchange Commission of Brazil (CVM) amended the existing Resolução CVM 80 (Resolution CVM 80)<sup>272</sup> and provisions relating to disclosure of information,<sup>273</sup> applicable to public companies, through Resolução CVM 59 (Resolution CVM

---

<sup>262</sup> *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

<sup>263</sup> *ibid*, 8.

<sup>264</sup> Torture Victim Protection Act of 1991.

<sup>265</sup> Antiterrorism Act of 1990.

<sup>266</sup> Trafficking Victims Protection Act of 2017.

<sup>267</sup> Torture Victim Protection Act of 1991, section 2 (a).

<sup>268</sup> *ibid*, section 2 (b).

<sup>269</sup> Paul Hoffman and Beth Stephens, ‘International Human Rights Cases under State Law and in State Courts’ (2013) 3 (1) UC Irvine Law Review 9, 16. <  
[https://heinonline.org/HOL/Page?handle=hein.journals/ucirvlr3&div=5&g\\_sent=1&casa\\_token=635be3eL8G8AAAAA:kli0JE4Alhv-so21J877EvVTcB8WjeSbNPIGZUAh7kTqwdRABgM6E-olua-AEIA3n0vEFzfJhJCE&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/ucirvlr3&div=5&g_sent=1&casa_token=635be3eL8G8AAAAA:kli0JE4Alhv-so21J877EvVTcB8WjeSbNPIGZUAh7kTqwdRABgM6E-olua-AEIA3n0vEFzfJhJCE&collection=journals) > accessed 29 October 2022.

<sup>270</sup> See Constituição da República Federativa do Brasil (Constitution of the Federative Republic of Brazil), art 22-24 for the division of competence between the Union, states, and municipalities.

<sup>271</sup> Thiago Kanashiro Uehara and Glaucia Terreo, ‘Brazil profile (Sustainability reporting policies worldwide)’ (2013) Carrots and Sticks: Sustainability reporting policies worldwide - today's best practice, tomorrow's trends 26 <  
[https://www.researchgate.net/publication/272565387\\_Brazil\\_profile\\_Sustainability\\_reporting\\_policies\\_worldwide](https://www.researchgate.net/publication/272565387_Brazil_profile_Sustainability_reporting_policies_worldwide) > accessed 28 October 2022.

<sup>272</sup> Resolução CVM 80 (Resolution CVM 80) (29 March 2022).

<sup>273</sup> Resolução CVM 59 (Resolution CVM 59) amends existing Resolution CVM 80 from 29 March 2022.

59).<sup>274</sup> Resolution CVM 59 includes the addition of new requirements to increase transparency on sustainability-related matters.<sup>275</sup> The new rule follows mostly a “comply or explain” approach with emphasis on climate-related requirements, but it also introduces disclosure requirements related to other sustainability issues, such as human rights.<sup>276</sup>

Among other requirements listed, Brazilian companies need to disclose an annual sustainability report, indicate where it is possible to find it on the internet and consider the SDGs or explain why they have not done so, and if the report has been reviewed by an independent entity.<sup>277</sup> It is also compulsory to disclose the material effects that the legal and regulatory framework has had on the corporation, with respect to social matters.<sup>278</sup> Public companies have to report on sustainability information concerning their own operations, not concerning subsidiaries’ conduct or other businesses throughout the supply chain. Disclosure according to the new Resolution CVM 59 will become mandatory from 2 January 2023.<sup>279</sup> The CVM will be able to impose several different penalties on corporations, individually or cumulatively, if the requirements are not met. This can be a warning, fines, or a temporary disqualification or prohibition of carrying out activities.<sup>280</sup> Fines must be proportional and not amount to a higher amount than 50 million Brazilian reais.<sup>281</sup>

## 2.5.2 Human Rights Due Diligence

Brazil’s National Guidelines on Business and Human Rights<sup>282</sup> are applicable on large and medium sized public as well as private companies, including multinational companies operating in Brazil.<sup>283</sup> The guidelines direct companies to monitor their entire operation, respect human rights in each step of the production chain, identify human rights risks and adopt measures to prevent human rights violations.<sup>284</sup> The aim with the guidelines is to make public what actions companies take to defend human rights within their company and through their supply chains and corporations are recommended to adopt transparency measures as well as preventive measures within the company.<sup>285</sup> It is voluntary to comply with the guidelines and it does not provide for any penalties in case of non-compliance. Companies might although receive a ‘Human Rights Seal’ if they do comply, which might contribute to a privileged business

---

<sup>274</sup> Resolution CVM 59 (22 December 2021).

<sup>275</sup> CVM, Public Consultation Notice SDM No 09/20, 3.1, 9-10.

<sup>276</sup> *ibid*, 3.1 d), 10.

<sup>277</sup> See item 1.9 of the new Reference Form model provided in Resolution CVM 59, 15.

<sup>278</sup> See item 1.6.b of the new Reference Form model provided in Resolution CVM 59, 13.

<sup>279</sup> Resolution CVM 59, art 9.

<sup>280</sup> Or more, according to other criteria stated in the article. Lei No 6.385 (Law 6.385) (7 December 1976), art 11 and Resolução CVM 45 (Resolution CVM 45) (31 August 2021), art 60.

<sup>281</sup> Law No 6.385, art 11.

<sup>282</sup> Established by Decreto No 9.571 (Decree No 9.571) (21 November 2018).

<sup>283</sup> Decree No 9.571, art 1.

<sup>284</sup> Luciana Renouard, Fernanda Ferraz and Arthur Araújo, ‘Brazil: Decree No. 9,571 (11/21/2018) Establishes National Guidelines For Businesses And Human Rights’ (Mondaq, 18 December 2018) < <https://www.mondaq.com/brazil/human-rights/765618/decreo-no-9571-11212018-establishes-national-guidelines-for-businesses-and-human-rights> > accessed 13 October 2021.

<sup>285</sup> Decree No 9.571, art 11.

position.<sup>286</sup> Brazil also has non-mandatory National Guidelines for a Public Policy on Human Rights and Business.<sup>287</sup>

A draft of the proposed Projeto de Lei 572/2022 (Bill of Law 572)<sup>288</sup> was presented in March 2022, with the aim to surpass the measures provided for by the existing voluntary National Guidelines on Business and Human Rights and National Guidelines for a Public Policy on Human Rights and Business. The Bill of Law 572 proposes to reposition the logic behind the reparation process, through victim-centered reparations and the recognition of “affected communities” as legal subjects.<sup>289</sup> According to the proposed Bill of Law 572, companies domiciled or economically active on Brazilian territory are to be responsible for violations caused directly or indirectly by their own operations and within their entire production chain.<sup>290</sup> Among the measures, appropriate extrajudicial reporting mechanisms should be created for receiving and processing, at the administrative level, companies’ violations of human rights.<sup>291</sup> If companies commit human rights harms, they might be subject to a range of sanctions, including fines, confiscatory measures, civil liability or a prohibition of carrying out their activities until they have taken necessary remedial and preventive measures for the violation to stop.<sup>292</sup>

Companies that are subject to the law will according to the proposal have to draw up a report on human rights every six months, containing, among other things: a summary of the measures that are in progress to be implemented by the company in the following semester, with a risk analysis of human rights violations linked to the business and indicating preventive measures, a summary of violations that have been committed and a damage repair and compensation plan built together with the affected communities.<sup>293</sup> A failure to present this human rights due diligence report may justify a preventive embargo of operations by the competent authority, as well as the liability of directors and the company itself.<sup>294</sup>

### 2.5.3 Corporate Criminal Liability

Brazilian legislation allows for corporate criminal liability in specific cases. Crimes against the economic and financial order as well as environmental crimes are the only crimes that do not require *mens rea*<sup>295</sup> and companies can alone, or together with natural persons, be held criminally liable if such a crime is committed on the decision of a representative of the company, its decision-making body or with the intent to benefit the company.<sup>296</sup> In terms of

---

<sup>286</sup> Renouard, Ferraz and Araújo, ‘Brazil: Decree No. 9,571’ (n 284).

<sup>287</sup> National Human Rights Council, Resolução No. 5 (Resolution No. 5) (12 March 2020).

<sup>288</sup> Projeto de Lei 572/2022 (Bill of Law 572), presented 14 March 2022.

<sup>289</sup> *ibid*, art 13.

<sup>290</sup> *ibid*, art 5 and Lara Haje, ‘Projeto cria marco nacional sobre direitos humanos e empresas’ (1 April 2022) < <https://www.camara.leg.br/noticias/861969-projeto-cria-marco-nacional-sobre-direitos-humanos-e-empresas/> > accessed 15 March 2022.

<sup>291</sup> Bill of Law 572, art 15.

<sup>292</sup> Among other measures. Bill of Law 572, art 18.

<sup>293</sup> *ibid*, art 12.

<sup>294</sup> *ibid*, art 12 para 3.

<sup>295</sup> *Mens rea* is the mental element of a person’s intention to commit a crime.

<sup>296</sup> The Constitution of the Federative Republic of Brazil, art 173 and 225, Lei No. 9.605 (Law No. 9.605) (12 February 1998), art 3.

other crimes, corporations cannot be held liable for the actions of their directors, officers or employees. Thus, no corporate crimes related to human rights violations committed within the corporation or its supply chain can be attributed to the company. Criminal claims due to corporate human rights violations must be directed towards natural persons within Brazilian law, so only the directors, the management, employees or agents of a company can be held criminally liable for their actions on behalf of the company.

#### **2.5.4 Administrative Regulation – the “Dirty List”**

Brazil has an administrative regulation in the form of a state-based public disclosure obligation called “Lista Suja” (Dirty List), which is an offender registry published on the Secretariat of the Labor Inspection’s website.<sup>297</sup> It is a list of companies that have been alleged to have slavery conditions for workers<sup>298</sup> in their operations or throughout their supply chains. These corporations are prohibited from receiving public funds or obtaining tax incentives.<sup>299</sup> The publication of the list acts as unfavorable publicity for companies that breach their obligation to not subject people to slavery-like conditions. The publication of the Dirty List occurs every six months and corporations are placed on the list for two years, after these years they are removed if no further cases of slavery are discovered.<sup>300</sup> Large, Brazilian companies that constitute members of the National Pact for the Eradication of Slave Labor have agreed to restrict their business with the companies on the Dirty List<sup>301</sup> and commit to the prevention and eradication of forced labor within their organizations and supply chains as well as to being monitored.<sup>302</sup>

#### **2.5.5 Corporate Civil Liability**

Any conduct, action or omission, whether purposely or as consequence of negligence, that causes damage to a third party will be considered a tort under Código Civil (Brazilian Civil Code).<sup>303</sup> It is possible for parties to file individual civil claims because of an abuse and if there has been a violation of collective rights, it is also possible to bring public civil actions for compensation.<sup>304</sup> Defendants domiciled or residing in Brazil are entitled to defend claims against them in Brazilian courts.<sup>305</sup> The Brazilian definition of domicile of legal persons is very

---

<sup>297</sup> Portaria Interministerial MTPS/MMIRDH No 4 (Interministerial Ordinance 4) (11 May 2016).

<sup>298</sup> Slavery conditions as it is defined and criminalized in Lei No. 2.848 (Law No. 2.848, the Brazilian Criminal Code), art 149. As this is an administrative offense, the corporations do not have to be convicted for this crime in order to have their name included in the Dirty List.

<sup>299</sup> André Campos, Mariëtte van Huijstee and Martje Theuws, ‘From Moral Responsibility to Legal Liability? Modern Day Slavery Conditions in the Global Garment Supply Chain and the Need to Strengthen Regulatory Frameworks: The Case of Inditex-Zara in Brazil’ (2015) SOMO and Repórter Brasil 30 < <https://www.somo.nl/wp-content/uploads/2015/05/From-moral-responsibility-to-legal-liability.pdf> > accessed 15 March 2022.

<sup>300</sup> Portaria Interministerial MTPS/MMIRDH No 4 (Interministerial Ordinance 4) (11 May 2016), art 3.

<sup>301</sup> National Pact for the Eradication of Slave Labor, website < <https://inpacto.org.br/> >.

<sup>302</sup> Patrícia Trindade Maranhão Costa, ‘Fighting Forced Labour: The Example of Brazil’ (2009) International Labour Office (ILO) Special Action Programme to Combat Forced Labour, V < [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_111297.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_111297.pdf) > accessed 15 October 2022.

<sup>303</sup> Lei No 10.406 (Law No 10.406) (10 January 2002), art 186, 187, and 927.

<sup>304</sup> Lei No 7.347 (Law No 7.347) (24 July 1985), art 1.

<sup>305</sup> Lei No 13.105 (Law No 13.105) (16 March 2015), art 21.

broad, the corporation is considered domiciled in Brazil if its offices, agencies, or branches operate in the country.<sup>306</sup>

When it comes to corporate groups, Lei das Sociedades por Ações (Brazilian Corporation Law) explicitly provides that each entity belonging to a group of companies retains separate legal personality and patrimony.<sup>307</sup> The corporate veil can although be pierced if a subsidiary company is used abusively, like when subsidiaries are used to perform illegal acts.<sup>308</sup> A parent company<sup>309</sup> is also responsible for a subsidiary's human rights violation if it abuses its controlling power and tries to induce the management of the subsidiary to perform the illegal act.<sup>310</sup> If the new Bill of Law 572 on human rights due diligence will pass, corporate civil liability for violations within supply chains will be imposed, which would provide for a higher possibility of holding parent companies accountable, not only for suppliers that are subsidiaries, but also for subcontracting suppliers' damaging conduct.

## 2.6 *Summarization*

### 2.6.1 **International Law**

Soft law instruments provide an international standard of care from corporations in relation to human rights, no matter where they operate. Within states' duty to protect human rights lies the obligation to implement measures to ensure that corporations domiciled in their territory do not violate human rights. There exist global standards on sustainability reporting that provide a global common language concerning sustainability reporting. The UNGPs introduced the important instrument of human rights due diligence to better prevent corporate human rights harms. An obligation to perform human rights due diligence is breached when the necessary steps to prevent or address human rights impacts is not taken and the concept introduced liability within global value chains. The Revised Zero Draft is a draft of an internationally legal binding instrument that will, if it gets implemented, impose an obligation for states to legislate and implement mandatory human rights due diligence and effective sanctions and reparations for victims of human rights harms. No corporate criminal liability is established within international law but states have an obligation to enforce effective access to justice for victims of human rights harms.

### 2.6.2 **European Law**

The NFRD imposed mandatory sustainability reporting for large corporate groups within the EU. The proposed CSRD will widen the scope of the companies that are mandated to perform sustainability reporting and extend the reporting obligation to include the whole supply chain. The CSDD will impose mandatory human rights due diligence through global value chains and establish civil liability in case of non-compliance that results in damage. No corporate criminal liability is established within the EU but parent corporations can be civilly liable for

---

<sup>306</sup> *ibid.*

<sup>307</sup> Law No 6.404, art 266.

<sup>308</sup> Law No 10.406, art 50.

<sup>309</sup> Which constitutes a controlling shareholder according to Law No 6.404, art 116.

<sup>310</sup> Law No 6.404, art 117 e).

subsidiaries' misconduct if they intervene in the management of the supplier's activity in such a way as one can assume a duty of care of the parent company.

### **2.6.3 German Law**

Germany sanctions reluctance to perform sustainability reporting with fines. A new Act on Corporate Due Diligence Obligations in Supply Chains imposes mandatory human rights due diligence with far-reaching provisions that imposes liability within the whole supply chain, also abroad. Concerned companies must report annually on the fulfillment of their human rights due diligence obligations and make the report available to the public on the company's website, which also acts as a method to enhance transparency. Failure to comply with the obligations result in heavy fines and civil liability if damage occurred. The new human rights due diligence law in Germany also expands the procedural opportunities for plaintiffs as they will be able to authorize domestic trade unions or NGOs to bring proceedings to enforce their rights to damages.

There does not exist corporate criminal liability in German law. Corporations can although be administratively liable for offenses, resulting in heavy fines. A parent company can only be found administratively liable for a subsidiary's misconduct if it breached its supervisory duty, resulting in the damage caused by the subsidiary. Germany is at the beginning of imposing heavier sanctions on corporate regulatory offenses and publicly announce convictions. Civil liability can be imposed either due to an actual injury or due to non-compliance with the new human rights due diligence obligations if such non-compliance results in damage.

### **2.6.4 US Law**

No federal laws impose mandatory sustainability reporting or human rights due diligence. The California Act is a state Act that obligates companies based in California to report on measures taken to combat slavery in their supply chains with the intent of enabling consumers to make informed decisions. The NAP encourages companies to conduct human rights due diligence but there does not exist any sanctions if corporations do not comply with the recommendation.

Corporate criminal liability is extensive within the US. US based parent and subcontracting companies can be held liable for crimes committed abroad if they aid or abet the acts that constitute crimes. The main law used to file claims for damages by foreign plaintiffs, ATS, has been severely restricted through case law. ATS allow foreign plaintiffs to sue for damage due to human rights harms in US courts, however, if the harm occurs outside of the US there is a presumption against extraterritoriality for the courts and the claim has to touch and concern the US in a sufficient way for the presumption against extraterritoriality to be displaced. The ability to claim damages from US based parent companies is further restricted, as many corporate conducts are no longer considered aiding and abetting, which is necessary for a parent company to be found civilly liable for a violation committed by a foreign subsidiary.

### **2.6.5 Brazilian Law**

Public companies must disclose an annual sustainability report and failure to do so can result in a variety of different sanctions. It is recommended but voluntary to conduct human rights due diligence. Currently, a law that would make human rights due diligence mandatory

throughout the whole supply chain, and make companies liable for negligence in implementing human rights due diligence within their supply chains, is proposed. The new legislation would provide a more victim-centered approach where affected communities would be granted the possibility to claim damages for non-compliance with the obligations.

Corporations cannot be criminally liable for human rights violations, but companies that are found to have slavery conditions in their supply chain are included in the public “Dirty List”, which acts as unfavorable publicity. Brazilian law allows for human rights violations to constitute torts and parent companies can be liable for damages caused by a subsidiary if it is found to have induced the subsidiary to commit the violation. Brazilian companies will be civilly liable for violations within the whole supply chain if the proposed law on human rights due diligence will pass.

### **3 Practical Differences between the Jurisdictions**

In the next chapter the existing regulations are compared, especially in relation to the society that they operate in. As some regulations provide for obligations on a voluntary basis and other obligations are mandatory, some of these can be enforced with sanctions if a corporation does not comply with them. In the upcoming chapter it is examined if the presented voluntary standards for corporations are a workable basis for businesses to implement transparency and preventive measures, and what the challenges of existing hard laws are. It is also investigated if the established accountability for corporate human rights violations within foreign operations and within supply chains is enough, or if there are problems with accountability that still exist within the different legal and social realities of study.

#### *3.1 Sustainability Reporting*

##### **3.1.1 International Law**

Reporting standards on sustainability reporting, brought by non-profit organizations such as the GRI, are used by enterprises around the world and provide for a standardization of how sustainability reporting should be designed. It is important that information concerning sustainability matters within businesses’ operations is provided to the public. No matter if corporations focus on sustainability issues or not, such information must be communicated to stakeholders and other market actors, in order for them to make informed decisions. Guidelines on sustainability reporting is helpful to provide a common frame of reference as to how non-financial reports should look and what they should contain and makes it easier for stakeholders and consumers, or others that hold interest in corporate activities, to compare different corporate measures and impacts on human rights globally. A large fragmentation in reporting requirements makes it more difficult for stakeholders to compare corporate activities in terms of sustainability measures. With the expanding, global market that we have, it is therefore important to provide for global standards so that no matter where in the world an enterprise operates or has suppliers, it should be possible to compare its sustainability impacts to other corporations’ impacts.

Currently, there does not exist any binding international statute on sustainability reporting. Within the international community, the reporting is only governed by general soft laws on responsible business conduct that acts as guidance on what to include in a sustainability report, and how and where this should be presented. The international community has not agreed on any binding standard as to the structure of the sustainability report, what information that should be included, how it should be reviewed and audited or how non-compliance with such measures should be handled on an international or national level. What it provides is a common framework and an international standard for sustainability reporting in the form of international customs, which both raises and streamlines the requirements that corporations generally must reach. The need for transparency concerning corporate sustainability impacts and measures has risen because investors have a growing need for sustainability information. International standards concerning such practices is hence necessary in order for investors to be able to efficiently compare corporations globally.

The globalization of the economy and corporate activities has aggregated the involvement of multinational enterprises in human rights violations abroad. In order to control this concerning development, the international community has implemented international standards for corporations to follow no matter where they are based or operate. Since corporate operations span all over the world, standards and regulations also need to have a global reach. Even though the existing international standards are not binding, they raise the global standard of sustainability reporting and can inspire domestic lawmakers to construct national measures concerning these aspects, perhaps of a binding nature. As presented, this has happened both in Germany and Brazil. With the global frame of reference that the international framework provides, such national measures will probably not provide for less strict measures than the international community provides, as domestic legislators do not want domestic companies to hold a competitive disadvantage compared to alien corporations. Domestic companies will have a competitive disadvantage if they do not provide non-financial information of the same quality and quantity as alien corporations. It is hence in the interest of legislators to raise the standard of corporate non-financial disclosure. Through this process, international measures raise the standard of domestic transparency measures and human rights due diligence and aligns domestic measures globally.

### **3.1.2 European and German Law**

The EU has taken one step further than international law and since 2014 the NFRD has imposed mandatory sustainability reporting within the jurisdictions of all EU member states. Germany has implemented this directive, but enforcement mechanisms are lacking compared to financial disclosure mechanisms. The legislation does not assume any liability for the company itself if the obligated company provides an incorrect sustainability report that does not fulfil the legal requirements of the law. Even though the NFRD states that corporations should report on human rights due diligence practices implemented by its suppliers and subcontractors when appropriate, corporations can hide from reporting on sustainability issues in terms of human rights far out in their supply chain.

European law is evolving to provide legislation that addresses the limitations of the NFRD and a new directive on corporate sustainability reporting, CSRD is about to be implemented. With the upcoming CSRD on the European level, Germany will have to change its domestic laws to comply with the enlargement of the scope of the directive, all listed companies on regulated markets and non-listed large companies as well as small and medium-sized public interest entities will now be subject to mandatory sustainability reporting, opposed to the current legal order where only the largest corporations with more than 500 employees are obligated to comply with the legislation. According to the current legal order, member states need to impose penalties for not complying with the provisions and these penalties are further defined through the new CSRD directive.

The EU member states are used to have a common legal framework in many aspects, not least in economic matters. Through the already binding directive on sustainability reporting and the implementation of the new binding CSRD, all member states must align their national laws with multinational standards that all point in a direction of a wider scope, more detailed requirements, and effective sanctions for disobedience with the non-financial transparency requirements. According to the NFRD and national laws of Germany, only large companies must comply with the sustainability reporting requirements. The obligation although has effects on smaller corporations, as these often are suppliers to the larger corporations and the larger corporations' obligations includes reporting on practices all the way through their supply chains, which incorporates the smaller enterprises. With enlarging the scope of the CSRD, more companies will have to perform their own sustainability reporting and review their own practices, which can enhance transparency as suppliers have more insight in their own operations than companies that they are producing products for. This will also make more corporations liable for sanctions if they do not comply with the reporting requirements, which creates an incentive for smaller corporations to perform sustainability reporting, which in turn will enhance transparency also in their supply chains.

### **3.1.3 US Law**

Even though US regulators are on the verge of imposing mandatory corporate transparency and the SEC is putting forward initiatives for a uniform reporting network, the US does not have a federal law that regulates corporate sustainability reporting yet. The California Act only obliges corporations to report on specific actions to combat slavery and human trafficking, while corporations do not have to reveal their operations and impacts on other human rights violations in their supply chains. Corporations that are based in the US can find guidance in how to conduct non-financial reporting in international reporting standards, however, as stated, these are not mandatory. This allows for a fragmentation concerning sustainability reporting, not only between different enterprises that are based in different countries, but also within the US itself, which makes it harder for stakeholders to evaluate US companies' sustainability performance through comparing corporate conduct.

The California Act requires corporations to make disclosures about slavery within their supply chains on their website, as long as they do this, they fulfill the obligations of the California act and can continue using forced labor. With other words, a company might disclose a lack of

efforts to stop forced labor within their supply chains and still comply with the law. The only remedy provided under the California Act is that the California Attorney General can bring action for injunction against the company. No sanctions, like fines that are imposed in the EU and Germany, are imposed from the state if a corporation is found to have slavery conditions within their supply chains. The Act's main function is to provide bad publicity and enable market actors, especially consumers, to punish the company by not investing or buying its products or services. The legislation is fundamentally a consumer protection statute, enacted to protect consumers from being unaware that they buy products produced using forced labor. The intent is to regulate consumption and make consumers have an impact on the financial profits of large businesses. Market actors, such as consumers, have an interest in knowing how sustainable corporations are, and the California Act allows for a greater transparency into the corporate operations.

The California Act does not provide for a standardization of how companies should disclose their information, which gives rise to a variety of different ways that companies disclose their information. This makes it hard for consumers to make the informed decision that the Act aims at. A corporation can easily bias the information that they provide on the website in their own favor. Further, subsidiaries might post their disclosure on their parent company's website, which might make it harder for consumers to find relevant information about a subsidiary's measures to combat or not combat forced labor within its supply chain. These are details that derange the aim of the Act.

### **3.1.4 Brazilian Law**

In Brazil, sustainability reporting is encouraged but voluntary up until January 2023. Mandatory reporting has won legitimacy in Brazil and will be implemented with a range of different penalties if corporations do not follow the provision. Public companies will have to disclose an annual sustainability report relating to a variety of factors. The penalties that can be imposed are directed at the company itself and can amount in warnings, fines and prohibition of carrying out activities. The CVM distinctly asserted that they issued the new resolution as they think the legislation would be aligned with other states' legislations,<sup>311</sup> which confirms the importance of the issue and proves that states are not only influenced by international standards, but also by other states' legal frameworks.

Opposed to the California Act and alike the sustainability reporting provisions found in Germany, the Brazilian law does not focus on sanctioning companies by directing consumer behavior. Instead, enforcement mechanisms and sanctions are used to create incentives for companies to comply with the new rules. Although market actors are the main recipients of the sustainability information and hence have a function in sanctioning the corporation by not aiding it financially, public authorities also impose further sanctions, allowing the provision to have a double-sanctioning effect since sustainability reporting enhances transparency and will likely have an impact on consumer patterns as well as how other stakeholders handle the companies.

---

<sup>311</sup> CVM, Public Consultation Notice SDM No 09/20, 2.

With more transparency, it is easier to establish accountability. With the growing need of information when it comes to sustainable practices from stakeholders, all companies have an interest in performing sustainability reports. If the stakeholders do not get access to information about companies' sustainable practices, they will be less willing to invest in those companies, leading to a financial decline for the corporation. Consumers also have a growing interest in knowing how sustainable the supplier of their goods and services are and can influence corporations' financial performances as well. However, if there are no mandatory standards that state how corporations should conduct their reports and the information that should be included in the report, as well as a third party or objective reviewer of the reports, corporations can possibly perform a biased report through displaying the positive aspects and factors of their operations when it comes to sustainability matters. That deters the whole idea of sustainability reporting. It is therefore important to monitor that a corporation puts all its practices on display. Without mandatory standards, this can be hard to achieve as businesses might try to structure the report in a way that the company appears respectful of human rights, even if this in fact is not the case. There is always a risk that corporations report positive information more thoroughly than negative information, this risk still exists if sustainability reporting is mandatory, but it declines with the objective to enhance reporting quality.

## *3.2 Human Rights Due Diligence*

### **3.2.1 International Law**

Voluntary human rights due diligence standards have existed for a long time within the international field of law. The UNGPs introduced the concept of human rights due diligence already 2011 and did not limit the measures to the corporation's own measures or subsidiaries' measures, but also to business partners. Other international instruments also highly value preventive measures taken by corporations to limit their human rights impacts and Germany, the US and Brazil all adhere to the OECD guidelines for multinational businesses, where the states have agreed to follow the OECD recommendations on responsible business conduct, including a duty for companies of adhering countries to conduct human rights due diligence.

All of the existing international instruments on human rights due diligence are voluntary. States have agreed to follow different international instruments that allow for a common frame of reference considering human rights due diligence, as to what the international community considers sufficient regulation. However, these international provisions do not allow for sanctions or consequences if states do not comply with them. As seen, the US is far behind other states when it comes to legislating a mandatory obligation to conduct human rights due diligence. The US will perhaps soon be forced to implement mandatory due diligence, as the current work on the Revised Zero Draft, that will be the first internationally binding instrument on human rights due diligence, will obligate states to implement mandatory human rights due diligence on a domestic level. The Revised Zero Draft also includes an obligation to implement national mechanisms to ensure that corporations comply with the mandatory provisions. Germany and the EU already have mandatory human rights due diligence provisions and Brazil is in the beginning of the legislature work of implementing mandatory human rights due diligence within its domestic legislation. In the likely event that the Revised Zero Draft becomes reality, these jurisdictions are likely to comply with the upcoming international binding norms.

### 3.2.2 European and German Law

The new Act on Corporate Due Diligence Obligations in Supply Chains, that will go into force in January 2023, will enhance the establishment of human rights due diligence in Germany. The proposed CSDD that will be implemented on a European level will establish a far-reaching duty to implement human rights due diligence within all EU member states. The EU member states will have to impose mandatory human rights due diligence legislation for corporations, which will oblige corporations to perform human rights due diligence throughout their whole supply chain. Almost all states on the European continent will, after the implementation of the CSDD, have a uniform regulation system concerning human rights due diligence which also will have a large impact on the international society. More states will probably impose similar legislation to establish corporate accountability within whole supply chains as other domestic regimes do not want domestic companies to be in a competitive disadvantage compared to European companies.

The new German Act will oblige large companies to perform human rights due diligence, even though CSDD has not been implemented yet. Only large companies are covered, however, it is likely that small and medium sized companies also will be affected by the new Act since the larger companies will pass on their due diligence obligations to their suppliers and raise the overall, general standard of human rights due diligence. The Act on Corporate Due Diligence Obligations in Supply Chains provides for increased opportunities to establish corporate accountability within the whole supply chain, domestically as well as abroad. A range of sanctions will be possible to impose if corporations do not comply with the requirements provided by the Act. Businesses can be imposed to pay heavy fines and get excluded from winning public contracts for up to three years if corporations do not comply with the requirements. This creates an incentive for corporations to obey the human rights due diligence requirements and insert preemptive efforts within their operations. In a preventive manner, corporations will have an obligation to prevent violations *before* they take place. It also allows for enhanced mechanisms to establish accountability also *after* a violation has occurred, partly by creating an obligation for the corporations themselves to establish a complaints procedure, to enable people to report corporate violations of human rights obligations, and partly by imposing deterrent sanctions.

This could be an effective tool to make more corporations comply with the obligations, because if they do not, they will have to resolve complaints themselves, which will both be costly and time-consuming. The new Act can also trigger civil liability for non-compliance that leads to damage and it enlarges the procedural possibilities for natural persons whose human rights have been violated. They are allowed to use NGOs or trade unions to bring proceedings to enforce their claim for damages. This will enlarge victims of human rights violations right to an effective remedy and possibility to claim damages and make it easier for them to get resurrection for what they have been exposed to.<sup>312</sup> For individual people without any legal experience, suing a large corporation can be difficult due to procedural as well as economic reasons. This enlargement of natural persons' procedural possibilities can therefore be helpful

---

<sup>312</sup> The right to an effective remedy can be found in for example art 8 of UDHR and art 13 of the European Convention on Human Rights. It is hence an important obligation that states have.

and enable more private persons to enforce their rights, as NGOs and trade unions generally have more competence in carrying out lawsuits. This will in turn not only help victims, but it will also make it easier to establish corporate accountability for human rights violations, in the form of civil liability.

The CSDD proposal would make it easier to find corporations liable for their subsidiaries' misconduct<sup>313</sup> and it has a high level of business support. A group of large businesses called for the implementation of a due diligence directive with a civil liability component<sup>314</sup> since a directive on due diligence would provide predictability on what is expected from global businesses in the context of expanding compliance with human rights. The CSDD will make it more difficult for corporations to argue that they did not or could not know about human rights matters abroad, which will enable the establishment of more corporate accountability in global corporate operations.<sup>315</sup>

### 3.2.3 US Law

It does not exist any mandatory human rights due diligence legislation in the US. The NAP encourages corporations to conduct human rights due diligence, but it does not provide for any enforcement mechanism or any sanctions if corporations do not conduct human rights due diligence within their operations. An effort was made to implement mandatory human rights due diligence for public US companies, however, this was never enacted. Compared to European and German law, the US legislation does not provide for the same incentives for corporations to conduct human rights due diligence. One large difference between German and US law is that the human rights due diligence measures that will be implemented in Germany in January 2023 will impose liability on a concerned company for violations that happen within their whole supply chain, while the US is going in the direct opposite direction, restricting the possibility for plaintiffs to sue corporations in the US for violations that occur in their supply chains abroad.<sup>316</sup>

The US legislation does not extend corporations' responsibility to conduct human rights due diligence more than international law does. Considering that the US is a developed country with an extensive number of multinational companies with complex supply chains both domestically and internationally, it would be natural for the legislative development in the US to go in the same direction as other developed countries that also generally are home states of multinational corporations, such as the European states. Right now, the European states are focused on imposing far-reaching mandatory human rights due diligence to prevent human rights violations in supply chains. Notwithstanding the fact that Brazil is a developing country with another social and economic context than both Germany and the US, as Brazil generally is a host state for multinational corporations, where many human rights violations occur, Brazil is still closer

---

<sup>313</sup> Radu Mares, 'The new EU Directive on Corporate Sustainability Due Diligence: origins, compliance effects and global significance' (The Human Righter, 1 April 2022) < <https://rwi.lu.se/blog/the-new-eu-directive-on-corporate-sustainability-due-diligence-origins-compliance-effects-and-global-significance/> > accessed 18 September 2022.

<sup>314</sup> *ibid.*

<sup>315</sup> Bueno, 'Corporate liability for violations of the human right to just conditions of work' (n 10) 580.

<sup>316</sup> See the discussion in section 3.3.3 *US Law* below.

to implementing detailed legislation that provides for preventive measures and further consequences for corporations that do not respect human rights within their supply chains than the US.

When corporations are found guilty of crimes in the US, their sanctions can be mitigated if they cooperate in the criminal investigation. The argument for this is that the corporations themselves have the most knowledge and insight in what is going on within their own operations, and the incentive to cooperate that the possibility of getting a more lenient sanction constitutes, is considered motivated as accountability for corporate crimes can be established more easily if the company cooperates with the competent authorities. The same logic has made Germany and the EU implement human rights due diligence as one of the main instruments to prevent and redress corporate human rights abuses. It is insufficient that the US does not apply the same logic when it comes to corporate human rights due diligence as they do in corporate criminal liability. Through implementing mandatory human rights due diligence, companies would themselves have to investigate and evaluate human rights risks within the company's supply chain, which could also help in investigations in criminal matters. Due diligence measures would also provide remedies for victims all the way from the extraction of resources to the sale of the final product, which is the preferable result from any protective regulation in the economic context that corporations operate in now, which is currently absent in US legislation.

#### **3.2.4 Brazilian Law**

Voluntary National Guidelines on Business and Human Rights exist in Brazil. These guidelines on human rights due diligence do not provide for any penalties in case of non-compliance, however they convey an inspiring goal of establishing a corporate production chain without human rights issues. A new proposed law will introduce mandatory human rights due diligence with a sanctioning system in Brazil if it gets enacted. This new law would obligate companies to draw up reports on human rights due diligence efforts through their entire production chain, and failure to present such a report will justify a preventive embargo of operations by the competent authority, as well as liability of the company. The new law resembles the German Act on Corporate Due Diligence Obligations in Supply Chains and will hold businesses responsible for violations caused directly or indirectly by their own operations and within their entire production chain.

One peculiar aspect with the proposed Brazilian law is that it will impose a more victim-centered reparation system that also recognizes "affected communities" as legal subjects. Due to this, affected communities will be able to claim damages due to corporate human rights violations. This is an aspect that has not been discussed in terms of other states' legislations on the subject. Perhaps this is due to the regular occurrence of violations on national soil and the knowledge that has been retrieved from seeing the reality of violations within the own state, which does not happen to the same extent in Germany and the US. Brazilian legislators and civil society have identified a need to not only let private people be legal subjects in these cases, but they have also identified a demand for affected communities to be granted a possibility to claim damages in the event of a human rights violation. This provision might increase the

possibility for plaintiffs to get access to remedies, as people in general, and especially natural persons who are subject to exploitation by corporations, do not have the resources to face a large corporation on equal terms in a lawsuit. A whole community would have a greater chance of imposing their collective rights than single plaintiffs.

### *3.3 Corporate Criminal and Civil Liability for Human Rights Abuses*

#### **3.3.1 International Law**

OHCHR's guidance to improve corporate accountability states that domestic civil liability regimes should take into account human rights due diligence measures taken by corporations to prevent human rights impacts. The Revised Zero Draft that has not been implemented yet would create an international obligation to sanction corporate human rights violations through legal liability, might it be criminal, civil, or administrative, and ensure reparations for victims. It also reinstates the same jurisdictional rules as Germany, the US and Brazil provide. With reference to transnational corporate human rights violations and the object of study within this thesis, it is important that courts of the country where the alleged perpetrator is domiciled has jurisdiction when claims are brought by victims, which it has according to the Revised Zero Draft and also, either when it comes to criminal or civil liability, according to all jurisdictions studied in this thesis. It is also important that multinational enterprises are held accountable for violations within their supply chains if they instigate or ignore such violations, which the different jurisdictions have different positions to.

On an international level there does not exist corporate criminal liability for crimes recognized under international law. Neither do international enforcement mechanisms of civil liability. It is thus left to states to ensure that corporations are found criminally or civilly liable, or both, on a domestic level. All states have an obligation to enforce accountability for human rights wrongs committed by corporations and to ensure access to justice for victims of such violations. UNHCR's guidance to improve corporate accountability states that companies' human rights due diligence measures need to be considered when states enforce corporate civil liability, the legal instruments that are used to regulate the studied problem are thus intertwined.

#### **3.3.2 European and German Law**

Corporate criminal liability is not established within the EU, and Germany has not imposed criminal liability for legal entities. Instead, corporate criminal acts are punished as an administrative offense and result in a fine under the Act on Regulatory Offenses. There are some points of concern when it comes to the Act of Regulatory Offenses in relation to transnational corporate violations of human rights. A parent company cannot be liable for administrative offenses committed by its subsidiaries unless it was directly involved in the infringement or if it infringed its duty to supervise the subsidiary and German criminal law must be applicable if the offense is committed abroad for the corporation to be found liable under the Act of Regulatory Offenses. This is unsatisfactory in the context of the globalized economy that we live in, which has been noted by German legislators. The upcoming legislation, called the Corporate Sanctions Act, will hopefully cover these flaws.

The new Corporate Sanctions Act will trigger liability for a parent company of a subsidiary's conduct, if the parent company violated their supervisory duty over the subsidiary and the misconduct could have been prevented. The law will also be applicable even if the violation occurs abroad if the offense would be punishable if it was committed in Germany, it is punishable at the crime scene and the corporation has its registered office in Germany. The Draft of the Corporate Sanctions Act allows for higher fines than the Act of Regulatory Offenses. The fines will also be mitigated if the perpetrator provides an internal investigation which contributes to the effective resolution of the case, which is a provision similar to the US legislation concerning corporate criminal liability. Just like in the US, it is believed that this creates an incentive for corporations to provide internal investigations and cooperate with the authorities, and allegedly also, lead to more resolved cases. The court can also choose to disclose the conviction and sanctions imposed on a company publicly. This will not only help victims to prepare further action for damages, but it will also impose a shaming instrument that criminal sanctions often have, and the market actors will get informed about the corporations' operations so that they can make informed decisions that might harm corporations financially if they are found guilty of a criminal act. Thus, this creates a self-inflicted sanction from market actors.

The legal arrangement in Germany fulfils the main functions of corporate criminal responsibility.<sup>317</sup> The state can hold corporations financially responsible for offenses committed by its agents on the corporation's behalf. Corporations can also be deprived of any illicit profit it may have drawn from violations committed on the corporation's behalf. However, the moral burden of committing a criminal offense does still not affect companies.

The German Civil Code enables private persons to claim damages for not only violations of their human rights but also for violations of human rights due diligence obligations that the corporation holds, if such negligence results in damage. The civil courts in Germany have jurisdiction over violations committed abroad by German corporations. A foreign subsidiary or supplier of a German corporation, that commits an infringement, can also be sued in Germany if the German parent company aided the violation. The ability to claim damages from a company for not complying with its human rights due diligence obligations, that stretches all the way down the supply chain, results in a significant change in a positive direction when it comes to plaintiffs' possibility to get access to remedies and to hold the corporation accountable for their suppliers' violations, without the need to establish parent company liability or secondary liability with standards of aiding and abetting. The due diligence obligations provides the domestic corporations with their own duty to prevent human rights harms in their supply chains, which makes it easier to establish civil liability for corporations with supply chains abroad.

### **3.3.3 US Law**

The only jurisdiction of study in this thesis that imposes criminal liability on corporations for human rights harms is the US. If companies self-report and help the authorities in the criminal investigation, they are also able to mitigate their sanctions. Extraterritorial jurisdiction is

---

<sup>317</sup> Weigend, 'Societas Delinquere Non Potest?' (n 39) 931-932.

granted US courts when US based companies commit crimes abroad, hence crimes committed by corporations in other countries than the US can be prosecuted in the US. US based companies can also be criminally liable for crimes committed by subsidiaries or even suppliers if they aid or abet the corporation to commit the criminal act.

When it comes to civil liability, the US approach to the opportunity for foreign nationals to claim torts arising from acts committed abroad that violates international law has become very narrow lately. Through many cases, the Supreme Court has limited the application of the ATS to nearly making it impossible for victims to bring action for claims in US courts. There exists a presumption that it is not possible to bring action against corporations for acts committed outside of the US under ATS. For foreign plaintiffs to file a claim in US courts for violations of international law that occurred outside of the US, the claims must touch and concern the US in a sufficient way and the corporation needs to be based in the US.

The Supreme Court further restricted the ability to use the ATS when a parent company based in the US aid or abet subsidiaries abroad to commit human rights violations, as the Supreme Court stated that there is no sufficient connection between the parent company's activities and the subsidiary's activities abroad for parent company liability to be implemented. Even a parent company that directs a subsidiary company's activities from the US and gains profit from the subsidiary's abuses abroad, cannot be held civilly liable for the abuse in the US. US based companies that put profits over human rights and aid or abet another business to violate human rights abroad foremost face accountability for doing so through corporate criminal liability.

After the Nestle case, it is uncertain what the scope of "general corporate activities", that would prevent parent companies to be found liable for subsidiaries' human rights abuses, is. However, as in the Nestle case, the Supreme Court did not even find the activity of providing farms that exercised forced labor with resources in return for the exclusive right to buy cacao enough for a US company to be found indirectly liable for the human rights abuses committed by a foreign subsidiary. There is an emerging recognition that the state's duty to protect human rights extends to effective regulation of corporations domiciled in their territory or under their jurisdiction and the actions of the US Supreme Court is going in the opposite direction in this matter. The US is going in a totally different direction than other developed nations, such as Germany, that extends the civil liability of companies throughout global supply chains.

The parent company of a corporate group has a better financial capacity to compensate victims of human rights violations,<sup>318</sup> why it can be of interest for victims to establish parent company liability for human rights violations committed by subsidiaries. If parent company liability cannot be established, victims of human rights violations cannot access justice or remedies in home states where the parent company is based, and they have to resort to local judicial systems and access remedies through local courts where the subsidiary is established or where the violation occurred. As the US is a developed country, corporations generally have the US as a home state and not a host state. To cut off the ability to establish parent company liability for damages also cuts off the ability of the US to counteract corporate human rights abuses

---

<sup>318</sup> Mares, 'Liability within Corporate Groups' (n 14) 5.

committed abroad, if these are committed by subsidiaries of US parent companies. This is problematic, as the US generally is a home state of companies that have subsidiaries abroad.

In the current legal regime in the US, parent companies can be found criminally liable for crimes that their subsidiaries' conduct, but they do not have the same ability to hold parent companies civilly liable for subsidiaries' human rights abuses. Both criminal liability and civil liability result in the same penalty for the company, a monetary penalty. The difference between the different kinds of liability is to whom this monetary penalty is paid. In the case a corporation is found to have aided or abetted a crime abroad, it has to pay fines to the state. In the case a plaintiff sues a company for damages due to violations of human rights law abroad, the damage that a company will have to pay if it is found guilty of the allegations would be paid to the plaintiff, the victim. It is important, and a state obligation, to allow victims an effective right to remedies and restitution if they are subject to corporate human rights violations, but the US legal system does not cater for victims' rights to remedy as the legislation looks today.

### **3.3.4 Brazilian Law**

In Brazil, corporate criminal liability exists, but only in terms of specific crimes, and human rights violations do not enforce corporate criminal liability within Brazilian law. Instead, alike Germany, Brazil uses an administrative regulation to sanction human rights violations, to impose a dimension of shame on corporations. This administrative legal instrument is called the "Dirty List", and it is used to name and shame companies that have been alleged to have slavery conditions in their operations. This regulation does only cover slavery conditions, and no other human rights violations. It has although evidently had a sanctioning effect financially on companies, from market actors. When the Spanish clothing brand Zara was found to have modern-day cases of slavery in their supply chain 2011 and Zara was threatened to be put on the Dirty List,<sup>319</sup> its shares fell with almost four percent on the Madrid Stock Exchange.<sup>320</sup> Not only domestic, Brazilian companies are at risk of being put on the list, also multinational businesses with large supply chains are at fear of being included there, which evidently can have a detrimental effect. Large companies have agreed to restrict their business with corporations on the Dirty List<sup>321</sup> and banks also restrict their business with corporations that are on the List<sup>322</sup> as being put on the Dirty List makes the business a risky investment.

A public shaming mechanism is an effective way to inform market actors about corporations' activities, naming and shaming enables the ones who determine if the corporation will make profits, the consumers and stakeholders, able to punish the corporation financially. Even though fines can reach to a high amount, as in the case with the Act on Regulatory Offenses in Germany, large corporations with a huge turnover will not be bothered enough to stop committing atrocities of human rights, if the profit overrides the fines and makes violations

---

<sup>319</sup> Brazilian authorities reached an agreement with Zara. The agreement constituted that Zara would carry out its own supplier inspections to improve working conditions in their supply chain and by agreeing to this condition, Zara was not put on the Dirty List.

<sup>320</sup> Annie Kelly, 'Brazil's 'dirty list' names and shames companies involved in slave labour' (The Guardian, 24 July 2013) < <https://www.theguardian.com/sustainable-business/brazil-dirty-list-names-shames-slave-labour> > accessed 1 November 2022.

<sup>321</sup> Through the National Pact for the Eradication of Slave Labour.

<sup>322</sup> Kelly, 'Brazil's 'dirty list' names and shames companies involved in slave labour' (n 320).

profitable. Businesses will keep on making profits if the demand for their products or services is high. If the demand is lowered, which it possibly can become if stakeholders are aware of violations within corporate activities, corporations that conduct these atrocities will be more motivated to stop. Market actors can sanction corporations in a way that harms the corporations' purpose, to make profits. Investors can stop investing in the company and consumers can stop buying or using what the corporation is producing or providing. As is evident in the US, it is not the Brazilian government that pushes the new agenda on sustainable finance, it is the market and the market actors. The market actors drive the introduction of more transparency, sustainability reporting, human rights due diligence and preventive measures from corporations because they want to be able to make informed decisions that will be profitable.

Both Germany and Brazil have administrative regulations instead of established corporate criminal responsibility. Because of this, corporations can be shamed without having to go through the whole procedure of establishing criminal liability that requires a higher standard of proof for the perpetrator to be convicted. When it comes to civil liability, human rights violations can constitute torts under Brazilian law, however, it can be hard to establish parent company liability for atrocities committed by subsidiaries. This can although happen if a subsidiary is used as a shield to save Brazilian companies from liability for violations or if the parent company tries to induce the management of the subsidiary to perform the illegal act. If the proposed legislation on human rights due diligence will pass, this would create civil liability for companies for violations occurring within their whole supply chain and would provide for a higher possibility of holding parent companies accountable not only for suppliers that are subsidiaries, but also for subcontracting suppliers' damaging operations, alike the German regulation.

### *3.4 Summarization*

The international community, Germany and Brazil are all moving in a direction with improved non-financial transparency and preemptive measures to prevent human rights violation from occurring. Germany and Brazil are in the process of extending civil and administrative accountability for human rights violations in global supply chains while the US is still largely depending on the establishment of criminal corporate liability for human rights violations in global supply chains. At the same time, the Supreme Court in the US is restricting civil liability of US based parent companies. Surprisingly, despite the difference in geographical locations and social realities, German and Brazilian legislation share many common features with each other than with the US and the legal development seems to go in the same direction in the different jurisdictions. Brazil is a country where many atrocities are committed, and this has made Brazil's legislation more victim-centered. Germany's legislation is also victim-centered, although German companies are most often perpetrators. Since the US share the same reality as Germany, it can be considered peculiar that the US legislators are heading in a totally different direction when it comes to establishing accountability for human rights violations committed abroad. As a home state for many multinational enterprises, US legislation should provide for a higher ability for victims to enforce a right to damages as well as more transparency and preventive measures. Evidently, the studied jurisdictions have different

approaches to establishing accountability for corporate human rights violations in different parts of the world.

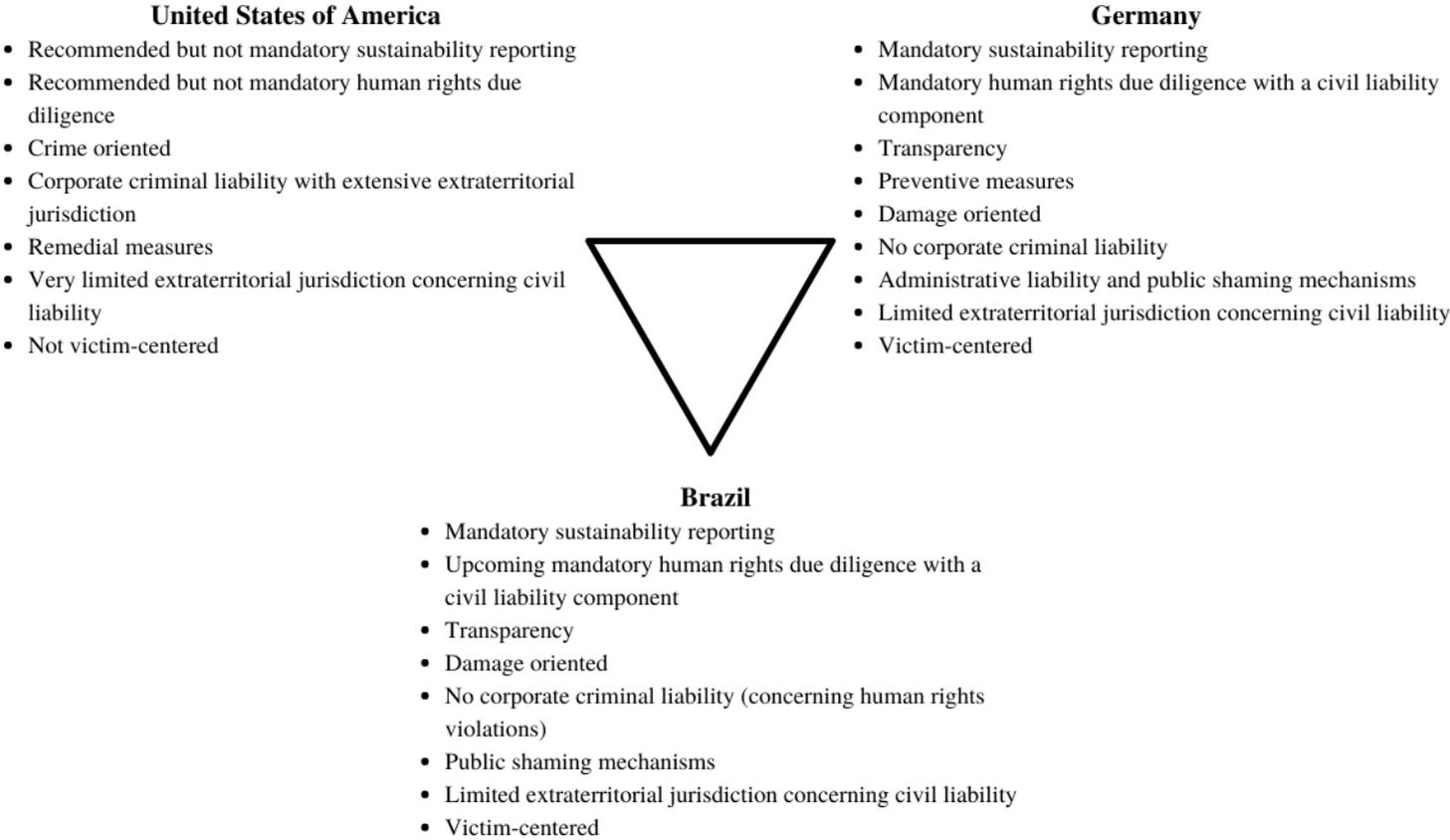


Figure 1. Main features of the jurisdictions of study

## 4 How can Accountability for Transnational Corporate Human Rights Violations Most Efficiently be Established?

In this chapter, the results presented in the previous chapter are summarized, analyzed, and discussed. Further, the possibility of conducting a legal transplant of German law on human rights due diligence into the US is examined.

### 4.1 Transparency and Preventive Measures

The emergence of more detailed and mandatory human rights due diligence and transparency legislation on sustainability is important to establish accountability for corporate violations which occur in supply chains. The old regime with either criminal, administrative or civil liability for corporations is unsatisfactory in the global reality that corporations operate within nowadays, as civil and criminal liability allow for a narrow parent company liability, and it is even harder to find companies liable in home states for subcontracting corporations’ violations abroad. In the US, the ability to find domestic corporations civilly liable has been cramped in

modern time. The legal development through the Supreme Court's case law has made it nearly impossible to establish accountability of a parent company based in the US for atrocities committed by subsidiaries abroad, even when the parent company through an objective point of view has aided or abetted such practices. In this sense the US has taken a step back in the development of providing victims with access to justice and effective remedies. If the US will keep this restricted possibility to establish corporate civil liability for US based parent companies, it is of utter importance that the US also establishes a coherent and preventive legal regime that seeks to stop corporate infringements of human rights abroad before they occur. The US has yet not implemented such legislation and laws focusing on corporate human rights violations focus on accountability measures enforced *after* a violation happens, without enabling an appropriate possibility for victims to seek damages.

The management of a corporation knows more about its operations and conduct than state authorities and they can easier find relevant information on sustainability and detect human rights concerns and violations. If corporations provide for more non-financial reporting, transparency, and human rights due diligence measures, this will be done by conducting more internal investigations, executed by the corporation itself. These investigations will also not only be available for the corporation's own management, but they will also need to be communicated to the public. This will in turn make it easier to find infringements of human rights that previously have gone undetected, which will improve the possibility to establish corporate criminal, administrative or civil liability, depending on what the legal regime of the home state of the corporation allows.

The legal framework of transparency and due diligence measures reach control over subsidiaries and sometimes supply chains or contracting partners, opposed to the legal regime of administrative and civil liability. As the obligations to comply and conform with the transparency and preventive human rights due diligence measures apply to larger corporations, but includes monitoring of their subsidiaries and subcontracting companies, the conduct of smaller corporations that are business partners or in the same corporate group as the larger enterprises will also get featured in the sustainability reports of larger corporations. The smaller corporations will have to perform human rights due diligence as well, otherwise the larger corporations that are subject to the provisions will not fulfill their legal obligations.

Despite the fact that smaller enterprises are not directly obliged to conduct sustainability reporting or human rights due diligence, the legal construction of the provisions makes their practices a matter of interest, and an obligation for the larger corporations to supervise. This has become an even bigger interest for the larger corporations as sustainability reporting and human rights due diligence are becoming mandatory within many jurisdictions, such as in Germany and possibly soon in Brazil. The larger corporations have an obligation to only uphold business relations with sustainable enterprises, not only in order to reach their legal requirements, but also to keep their reputation unsullied. This, in turn, puts pressure on the smaller corporations to act sustainably, as otherwise the larger corporations that often supply them with work, will not do business with them.

Brazil is a developing country with an emerging economy.<sup>323</sup> The corporations that commit transnational human rights violations or aid foreign corporations to commit such violations are often based in developed countries and the violations often happen in developing countries. The fact that Brazil does not have the same vast system of hard laws concerning punishment of multinational corporate human rights abuses as Germany and the US is a natural consequence of the social and economic reality of the state. Such regulations have simply not been needed to the same degree as in developed countries. The social reality of Brazil has although aided the implementation of more preventive provisions than in the US, in this sense Brazil is moving towards a legal regime similar to the one in Europe. The provisions in Brazil offer more shaming instruments in combination with monetary sanctions, and Brazil might adopt more victim-centered legislation with enlarged civil liability for unsustainable enterprises in the future.

Globalization conveys a form of desire for the emergence of international law that is also normative, because international law is stateless and located outside of any domestic, social perspective. In the name of internationalism, organs that stem from popular sovereignty are replaced by organs that are removed from the peoples,<sup>324</sup> an undemocratic development in some sense. The new market with the whole world as its arena has motivated the introduction of international norms to ensure that all states ensure measures that hold corporations liable for human rights abuses. All implementation of international law can be argued to be undemocratic. However, states and private actors have for a long period of time advocated for international standards as to maintain a sustainable development, no matter where corporations or their outsourced suppliers operate.

According to the institutional theory, organizations adopt similar behaviors over time, driven by a variety of pressures in the surrounding environment. According to this theory, organizations look at the characteristics of the environment to conform to the dominant societal rules, norms and routines.<sup>325</sup> The international environment has developed into encouraging more transparency measures and risk analysis for the sake of showing stakeholders what businesses are sustainable and secure investments. The global society needs a common frame of reference for enterprises to know what is expected for them to be considered responsible actors. This common frame of reference is provided by international norms. A general and consistent practice of states over time may result in the crystallization of customary international law norms that reflect that practice. There is a general trend to implement human rights due diligence and non-financial reporting in states all over the world. According to the institutional theory, this should enhance the implementation of more preventive measures, both from domestic legislators and from corporations alone, as such measures have become not only a norm within many domestic jurisdictions, but also in the international society.

---

<sup>323</sup> Flavia Donadelli and Jeroen Van Der Heijden, 'The Regulatory State in Developing Countries: Redistribution and Regulatory Failure in Brazil' (2022) *Regulation & Governance*, 1 < <https://doi.org/10.1111/rego.12459> > accessed 1 November 2022.

<sup>324</sup> Pesqueux, 'What Is Globalization?' (n 4) 2.

<sup>325</sup> Ferri, 'The influence of the institutional context on sustainability reporting' (n 44) 25.

## 4.2 Top-down Regulation and Market Pressure to Promote Sustainability

Sustainable change is influenced by many different sources. One such influence is the top-down regulation implemented by policy makers, another is market pressure implemented by stakeholders. A combination of top-down regulation and market pressure can put increasing pressure on companies to respect human rights through their operations. For market actors to be able to perform this pressure, they need to get efficient non-financial information about corporation's performance, which top-down regulations can provide. The Brazilian Dirty List is an administrative regulation that works not only as a public shaming mechanism, but also as an informative mechanism that influences market actors' decisions. "With the list, nearly all those on it have suffered from a market reaction due to the involvement of their names with cases of contemporary slavery" as "being on the list makes you a risky investment".<sup>326</sup> Public banks restrict their business with these corporations and their reputation is damaged, not only within Brazil but also internationally.

Effectively communicated sustainability reporting and the corporate transparency that it results in reduces asymmetry in information between the corporation and its investors as well as among investors.<sup>327</sup> Investors lack a reliable overview of sustainability-related risks to which companies are exposed if the quality of sustainability reports is bad. Several studies provide evidence that external pressure from stakeholders affects sustainability reporting,<sup>328</sup> hence, stakeholders are important actors in shaping sustainability reporting. Investors increasingly need to know about the impact of companies on people and human rights, partly because they need to meet their own disclosure requirements,<sup>329</sup> and partly because there is a certain aesthetic appeal to investing in companies that are known to be "sustainable". On the other hand, investors are unlikely to invest unless they expect to be able to profit off that investment.<sup>330</sup> Sustainable companies that can still make profit have a certain quality to them. To act sustainably and still increase profits is hence a quality mark for corporations. Investors need to know about the sustainability impact of the companies in which they invest to make the market credible and channel money towards sustainable business activities.<sup>331</sup> High quality and reliable public sustainability reporting by companies helps the creation of a culture of greater public accountability<sup>332</sup> as investors easier can shift to investing in sustainable finance, which further will increase the profit of sustainable businesses.

---

<sup>326</sup> Kelly, 'Brazil's 'dirty list' names and shames companies involved in slave labour' (n 320).

<sup>327</sup> B. Christensen, Hail and Leuz, 'Mandatory CSR and sustainability reporting: economic analysis and literature review' (2021) 26 *Review of Accounting Studies* 1176, 1187 < <https://link.springer.com/article/10.1007/s11142-021-09609-5> > accessed October 30 2022.

<sup>328</sup> Hans B. Christensen, Luzi Hail and Christian Leuz, 'Mandatory CSR and sustainability reporting' (n 13) 1193.

<sup>329</sup> See for example Council Regulation (EC) 2019/2088 on sustainability- related disclosures in the financial services sector (European Sustainable Finance Disclosure Regulation) [2019].

<sup>330</sup> 'ESG Policy Developments in the United States – March 2022' (Ascentys, March 29 2022) < <https://www.ascentys-esg.com/esg-policy-developments-in-the-united-states-march-2022/> > accessed 26 September 2022.

<sup>331</sup> European Commission, 'Questions and Answers: Corporate Sustainability Reporting Directive proposal (21 April 2021) < [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_1806](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1806) > accessed 2 November 2022.

<sup>332</sup> *ibid.*

Corporations themselves claim that being a part of the force of corporate sustainability will ultimately lead to better results financially.<sup>333</sup> It is evidently so as sustainability investing is the fastest growing segment of the asset management industry.<sup>334</sup> Milton Friedman once said that “the social responsibility of a business is to increase its profits”.<sup>335</sup> According to his logic, corporations do not have a responsibility to act sustainably. When he quoted this in 1970, this might have been the reality. This is although not true in modern measures. The call from world-leading businesses to introduce mandatory sustainability reporting and human rights due diligence provisions is clear evidence that the corporate world has shifted perspectives when it comes to valuing sustainability within not only their own operations, but also within their subsidiaries’ and business partners’ operations.

Corporations have the power to themselves transform the market as corporations transcend national boundaries and possess resources that exceed those of many states.<sup>336</sup> Responsible business is thus running ahead of politicians. In Brazil, large corporations have agreed to not strike business agreements with corporations that have been found to have slavery conditions in their supply chains. These corporations now see sustainable operations as essential to achieve positive financial results as well performed sustainability reporting with high information accuracy can lead to competitive advantages for businesses<sup>337</sup> as the corporation will become a reliable investment which has become increasingly important as stakeholders are evolving demands for company sustainability disclosure.<sup>338</sup>

Other important market actors are consumers, the ones who buy the products and services that corporations provide. During one informational lecture about sustainable business at the School of Business, Economics and Law at the University of Gothenburg, the lecturer asked the audience of students if they considered sustainability and corporate impacts on human rights when they decide what products they purchase. A clear majority answered yes. It is evident that the upcoming generations value sustainable development highly. It is therefore preferable for corporations to exercise proper non-financial reporting and human rights due diligence and disclose sustainability information to the public, as this will result in positive publicity if they show a clean record, which will ultimately increase their sales. The other way around, it is important for businesses to not get the bad publicity that a reputation of unsustainable conduct entails, as this will decrease their sales.

There are many positive effects with sustainable finance that motivate corporations themselves to respect human rights throughout their corporate conduct. Responsible business practices

---

<sup>333</sup> Judith Evans, ‘Ben & Jerry’s vs Unilever: how a star acquisition became a legal nightmare’, (Financial Times, 11 Oktober 2022) < <https://www.ft.com/stream/08e3b8d4-3986-4aba-9edf-ed1b132390a9> > accessed 1 November 2022.

<sup>334</sup> *ibid.*

<sup>335</sup> Milton Friedman, ‘A Friedman doctrine-- The Social Responsibility of Business Is to Increase Its Profits’ (New York Times, September 13 1970) < <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> > accessed 1 November 2022.

<sup>336</sup> Andrew J. Hoffman, ‘The Next Phase of Business Sustainability’ (Stanford Social Innovation Review, 2018) < [https://ssir.org/articles/entry/the\\_next\\_phase\\_of\\_business\\_sustainability](https://ssir.org/articles/entry/the_next_phase_of_business_sustainability) > accessed 1 November 2022.

<sup>337</sup> Gerwing, Kajüter and Wirth, ‘The role of sustainable corporate governance in mandatory sustainability reporting quality’ (n 112) 518.

<sup>338</sup> See for example the UN Principles for Responsible Investment < <https://www.unpri.org/> >.

generate greater employee commitment, if corporations take care of their workers they will earn this back in profit as goods will be produced more efficiently and with better quality. Just Capital has reported that companies that cared for their workers' health and safety during the Covid-19 pandemic have outperformed other companies during the crisis and will probably keep this position for the long term.<sup>339</sup> Sustainable businesses want to maintain long-term business relationships with other sustainable businesses. To act sustainably therefore creates business relationships that can function long-term. Many corporations express a will to be transparent so that they can be granted the positive market effects that come with sustainable finance and they hence want to provide non-financial reports of high quality, one problem they might face is *how* they should do this.

Both voluntary and mandatory guidelines provide companies with a standardization of how to conduct sustainability reporting. The mandatory reporting that the NFRD and the proposed CSRD impose on the EU member states is one example of this. As stated, Germany has implemented the NFRD through several domestic laws but lack enforcement mechanisms concerning the implementation of the provision. The pressure from investors to know, not only detailed financial information, but also information concerning sustainability measures, is growing and corporations now need to consider sustainability matters in order to increase their profits. It is alarming that enforcement mechanisms are underdeveloped as corporations could produce biased reports to their favor. To create profit, businesses need to openly act sustainable, but enforcement mechanisms need to ensure that the information that corporations provide is correct and that they live up to the information they are providing.

Over the last decade, an increasing number of corporations have voluntarily reported sustainability information. This shows a growing stakeholder demand for sustainability information and corporations' dedication to meet stakeholders' growing information needs.<sup>340</sup> An increasing percentage of investors consider human rights risks as a part of their investment decision-making process.<sup>341</sup> The current legal approach with mostly voluntary guidelines on sustainability reporting might seem as unsatisfactory on a purely legal level. However, when the social context of the current market is considered and due to the fact that the legal provisions operate within this social context, voluntary measures that provide guidance to corporations on how to conduct sustainability reporting pressure corporations to conduct efficient sustainability reporting, as it also benefits the corporations. With the help of voluntary standards, the market can regulate itself and successful businesses implement sustainable corporate conducts compliant with voluntary guidelines.<sup>342</sup>

The lack of mandatory and voluntary provisions on sustainability reporting within the US does not have a detrimental impact since there exist international standards that indicate how

---

<sup>339</sup> Amanda White, 'Investors focus on human capital' (Top 1000 funds, 28 April 2020) < <https://www.top1000funds.com/2020/04/investors-focus-on-human-capital/> > accessed 2 November 2022.

<sup>340</sup> Gerwing, Kajüter and Wirth, 'The role of sustainable corporate governance in mandatory sustainability reporting quality' (n 112) 517.

<sup>341</sup> Discussion Draft, H.R.6375, to amend the Securities Exchange Act of 1934 to require issuers to make disclosures related to supply chain disruption risk, and for other purposes, 2-3.

<sup>342</sup> This view is supported by Andrew J. Hoffman and Ben Ye.

reporting should be conducted and provide systems for sustainability reporting that is used all around the world, also in the US. However, there exist multiple different international guidelines on how to structure sustainability reports that all provide different standards. Voluntary disclosure of human rights policies, practices, and impacts can result in sparse comparable information, and therefore have limited virtue for investors. Mandatory standards provide a larger ability to compare corporations in terms of sustainability measures, as every corporation must follow the same standard. Mandatory provisions make companies structure and include the same information in their sustainability reports, making it easier for investors and other stakeholders, like consumers, to compare different corporations. Mandatory sustainability reporting requirements are therefore important for a standardization of the presentation as well as the content of sustainability reports, to avoid that businesses present information strategically to influence user perception.<sup>343</sup> In this way the usefulness and quality of sustainability reports can increase.

Voluntary sustainability reporting is heavily criticized for diverging content of the reports and lacking a global reporting standard.<sup>344</sup> Legislation that provides a reporting framework with a materiality threshold and specific content requirements for sustainability reporting increase homogenous reports by harmonizing the sustainability reporting format and presentation, which improves stakeholders' ability to compare sustainability information.<sup>345</sup> However, mandatory reporting legislation has been criticized to be ineffective, unable to be enforced and nothing that leads to a change in corporations' operations as corporations only use the requirements to "tick them off".<sup>346</sup> However, through market pressure from investors and regulators for corporations to fulfill their reporting obligations, and due to the fact that the reports can be used to establish a duty of care for parent companies, such mandatory requirements can act as a real incentive for companies to address potential human rights abuses conducted not only by the own company, but also by subsidiaries abroad.<sup>347</sup>

Corporations are not inherently evil. The many international soft laws on responsible business conduct show an intent by most companies to reach a sustainable level of transnational business conducts. The primary interest of companies is to make profit and an increasing amount of corporations have figured out that the way to make profit is to ensure that human rights are respected through all corporate conducts. As evident in the results part, it is not only the state that imposes obligations on corporations to comply with regulations on responsible business conducts, but it is also encouraged by the companies themselves. Transparency is important to give consumers the opportunity to make informed decisions about their purchases and transparency can therefore change consumer patterns. As sustainability issues become public, consumers can make informed decisions whether to further aid a corporation that does not respect human rights or not. It is evident that it is not the government that pushes a new agenda with enhanced sustainability reporting in the US, it is the market and private market actors that

---

<sup>343</sup> Gerwing, Kajüter and Wirth, 'The role of sustainable corporate governance in mandatory sustainability reporting quality' (n 112) 518.

<sup>344</sup> *ibid*, 520.

<sup>345</sup> *ibid*.

<sup>346</sup> Ye, '*Okpabi v. Shell and Nestle USA v. Doe*' (n 259) 271.

<sup>347</sup> *ibid*, 271-272.

does this, and for them to correctly be able to do this, they need to be informed about corporate practices and be able to compare such practices to other corporations. Mandatory sustainability and due diligence legislation enables stakeholders to compare information more easily if these provisions are complemented with effective enforcement mechanisms to ensure that corporations do not produce biased reports.

### 4.3 *Risk Analysis and Preventive Measures*

Effective human rights due diligence, mandatory or not, can prevent abuse before it happens. Mandatory human rights due diligence can lead to preventing violations before they even occur by effective risk analysis and preventive measures, rather than to punish the corporation after a violation has happened. In this way a violation does not even have to occur, which is the ultimate objective of all protective regulation. It is also easier to establish civil liability for a corporation that has not fulfilled its human rights due diligence duties, which led to damage, than it is to establish civil or criminal liability for violations that has occurred based on existing domestic legislation, as reluctance to implement remedial measures is easy to track and creates an obligation for domestically based parent companies to conduct human rights due diligence throughout their supply chains. Human rights due diligence legislation also creates a possibility to hold corporations accountable through imposing fines also for the mere *risk* that human rights are violated, throughout their whole supply chain. Mandatory human rights due diligence laws require more visibility and monitoring which will push corporations to seek, identify and eliminate human rights abuses in business supply chains, or risk fines and loss of legitimacy.<sup>348</sup>

Judicial intervention due to human rights due diligence non-compliance does not require extraterritorial overreach because the primary subjects of the legislation remain domestic parent companies. Through legislation that codifies a duty from parent companies to exercise due diligence concerning the activities of its subsidiaries and suppliers, victims of human rights abuses may litigate against the parent directly. Given the control of the domestic parent over the operations of the corporate group and the availability of capital for compensation, effective access to remedy against the parent company is desirable for victims<sup>349</sup> and a way for states to ensure that victims are ensured effective access to justice. It is also an appropriate legal invention to ensure that multinational enterprises do not exploit the separate corporate personality doctrine and national boundaries and the difficulties that arise with establishing liability for transnational human rights violations.

Inspection mechanisms considering human rights due diligence must be sufficiently financed and staffed in order for the enforcement mechanisms to actually work practically, otherwise the provisions will in practice maintain voluntary. With the door shut towards civil litigation against parent companies in the US, even when businesses aid or abet foreign subsidiaries to commit human rights violation abroad, it has become increasingly relevant to establish international standards on human rights due diligence in order to determine the level of supervision that a

---

<sup>348</sup> Nahla Davies, 'Are US Business Falling Behind On Human Rights Due Diligence?' (Business & Human Rights Resource Center, 17 February 2022 < <https://www.business-humanrights.org/en/blog/are-us-businesses-falling-behind-on-human-rights-due-diligence/> > accessed 2 November 2022.

<sup>349</sup> Ye, '*Okpabi v. Shell and Nestle USA v. Doe*' (n 259) 273.

parent company should exercise over its subsidiaries. With no mandatory law implemented in the US already, soft law mechanisms are the only way to establish what supervisory obligations parent companies should have over their subsidiaries.

The explicit reference to the legally binding nature of the Revised Zero Draft appears to have intended to emphasize that, unlike the UNGPs, a treaty would expressly define new legal obligations for the state parties, including introducing mandatory human rights due diligence on an international level. If the Revised Zero Draft gets adopted, it will likely be ratified by many states, perhaps also by the US. In this case, the US would have to impose mandatory human rights due diligence that developed countries have been doing for a while now, and that even developing countries like Brazil are in the verge of implementing. Businesses in the US strive for the implementation of mandatory human rights due diligence, and the legislative power will have to step up to maintain a modern legislation. The US does mostly rely on criminal law when it comes to preventing corporate human rights abuses. Although criminal law does have a preventive effect, establishing a legal regime to prevent possible infringements of human rights is the step that the international community and many jurisdictions, including Germany and Brazil, have taken.

#### *4.4 Corporate Criminal, Civil and Administrative Liability*

The corporate criminal liability system that exists in the US, with a broad scope of corporate criminal liability and enforcement policies that enable companies to enter corporate settlements by cooperation with the prosecutor, reduces corporate crime rates.<sup>350</sup> The idea is that if corporations consider crimes, including human rights violations, as costly and non-profitable, this will deter them from conducting human rights harms.<sup>351</sup> Some authors argue that through the stigma that is attached to a criminal prosecution, imposing criminal liability on corporations sends a greater message compared to civil liability, and is a strong motivation to encourage future ethical corporate behavior.<sup>352</sup>

There does although exist several points of concern with criminal liability. Firstly, the standard of proof is much higher in criminal law than in civil law. Also, for criminal law to be implemented, an infringement must have already occurred, which does not offer incentives for corporations to enact adequate measures in a preventive manner to ensure that infringements do not happen. Another important problem with solely relying on criminal law to establish accountability for corporate human rights violations is that victims do not get to claim damages and therefore do not get access to remedies for wrongs committed against them. The fines that sanction criminal violations are paid to the state. Relying on criminal law to establish accountability for corporate human rights violations committed by corporations abroad is an

---

<sup>350</sup> Arlen and W. Buell, 'The Law of Corporate Investigations' (n 239) 701.

<sup>351</sup> *ibid*, 701-702.

<sup>352</sup> Chandler L. Mores, 'Why Corporations Should Be Held Liable for China's Crimes against Humanities in Xinjiang: Seeking Civil and Criminal Solutions' (2021) 106 (2), *Iowa Law Review* 1007, 1033 <[https://heinonline-org.ezproxy.ub.gu.se/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/ilr106&men\\_hide=false&men\\_tab=toc&kind=&page=1007#](https://heinonline-org.ezproxy.ub.gu.se/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/ilr106&men_hide=false&men_tab=toc&kind=&page=1007#)> accessed 3 November 2022.

ineffective way to ensure victims' right to justice and effective remedies, which every state has an obligation to ensure according to international law.

The legal arrangement in Germany basically fulfills the main functions of corporate criminal responsibility. It permits the state to hold the corporation financially responsible for offenses committed by its agents on its behalf and to deprive the corporation of any illicit profit it may have drawn from violations committed on its behalf. Some argue that "corporations should not be treated leniently because of their artificial nature"<sup>353</sup> and that legal persons hence should be punished in the same way as natural persons. Finding a company guilty of an international crime would give it bad publicity, but so does finding it civilly liable for an infringement. The practical implication of enforcing criminal corporate liability is purely the element of moral blame, as the sanction is the same as for administrative liability.

Violations of international human rights law are often associated with criminal liability. Civil liability can although be preferable due to numerous reasons. If civil actions are brought against companies and large damages are awarded to plaintiffs, this will financially motivate the corporations to change their behavior to the same extent, if not more, as criminal liability would. The largest difference is however that civil liability enables victims to get resurrection. The possibility to get granted damages is a way for victims to get recognition and remedy for what they have suffered due to the corporation's acts. From a practical point of view, civil liability also holds certain advantages. Victims can themselves, or through representatives, actuate civil action. Civil liability therefore provides a possibility for redress for victims, opposed to criminal liability. Large damages would also make shareholders more aware of their responsibilities as they would see their profits decrease and the market would also sanction corporations through fear of losing their investments.

#### **4.4.1 Human Rights Due Diligence and Civil or Corporate Criminal Liability**

Since many civil liability regimes provide courts with limited jurisdiction concerning the possibility to rule in a case where the defendant corporation is domestic and the victim of the human rights abuse is an alien, human rights due diligence and reporting obligations tied to sanctions can be an effective way to grant the domestic country the possibility to sanction the possible or occurred human rights violations in other countries. For criminal or civil responsibility to be established in a fragmented supply chain, due diligence is important to trace violations to whoever committed them. The difficulties of establishing parent company civil liability or secondary civil liability for domestic corporations if harms are committed by subsidiaries or business partners are overruled by the implementation of mandatory human rights due diligence measures with a civil liability component. This is due to the fact that the domestic parent company has its own obligation to ensure that no violations occur in its supply chain, and if damage does occur through the operations of a supplier, the parent company can be found directly liable for this damage.

---

<sup>353</sup> See for example the reasoning by the US Department of Justice, Principles of Federal Prosecution of Business organizations < <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations> > accessed 3 November 2022.

## 4.5 Possible Legal Transplantation

There exist distinctive differences between the legislations and civil realities of study. The aim of corporations has always, and no matter the social context, been to make profit. In a modern context corporations have to act sustainably in order to make this profit. The simple notion of having a corporation is to make money, which was the only existing value earlier. As the economy has developed, there has been a shift in the understanding of the value that a corporation can create. Before, the value was solely understood in monetary value, nowadays this value can also constitute societal value, which is clearly reflected in the legal approach of Germany and the upcoming approach in Brazil. As presented, the US has not implemented any mandatory human rights due diligence law on a federal level and recent case law has restricted the possibility for alien plaintiffs to claim damages from US based parent companies. A possible option could be to transplant the German Act on Corporate Due Diligence Obligations in Supply Chains into the US, to ensure that companies based in the US are held accountable for human rights violations throughout their global supply chains.

### 4.5.1 Why Has the US Not Imposed Mandatory Laws on Sustainability?

Both the government and US based businesses have traditionally not been interested in acting as a forerunner for responsible business. In 2014, Northern America had the least amount of business participants in the UN Global Compact out of all continents in the world. Europe had more than eleven and South America had more than four times as many business participants as Northern America.<sup>354</sup> The US government has not been focused on human rights, instead, issues like technological regulations and compliance has received more attention from the legislators and labor protection laws have generally surrounded costs and economic impacts for employers instead of rights for workers.<sup>355</sup> A shift in value is although emerging also in the US, where investors start to prioritize sustainability over solely financial aims,<sup>356</sup> and more investors now seek an implementation of mandatory human rights due diligence legislation.<sup>357</sup> If enterprises do not adapt to the sustainability expectations of investors, they risk losing market share. It is also essential to implement such legislation to continue efficient trade with corporations from the increasing number of states that have implemented mandatory human rights due diligence legislation.<sup>358</sup>

### 4.5.2 A Need to Increase Accountability throughout the Whole Supply Chain

The US does not fulfill its international obligation to enforce regulations to effectively ensure that corporations domiciled in their jurisdiction do not violate human rights.<sup>359</sup> Smart

---

<sup>354</sup> United Nations Global Compact report, 'Guide to Corporate Sustainability: Shaping a Sustainable Future' (2014), 8. < <https://www.unglobalcompact.org/library/1151> > accessed 24 October 2022.

<sup>355</sup> Davies, 'Are US Business Falling Behind On Human Rights Due Diligence?' (n 348).

<sup>356</sup> *ibid.*

<sup>357</sup> List of large businesses, associations & investors with public statements & endorsements in support of mandatory due diligence regulation (Business & Human Rights Resource Centre, 6 June 2019) < <https://www.business-humanrights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/> > accessed 3 November 2022.

<sup>358</sup> Davies, 'Are US Business Falling Behind On Human Rights Due Diligence?' (n 348).

<sup>359</sup> See the obligations in for example the UDHR and the SDGs on sustainable economic growth and decent work, responsible production and strong institutions, which are binding upon the US.

companies will conduct human rights due diligence voluntarily within not only their own operations, but also within their supply chains, as this will help them in many possible matters. It will give them a good reputation, they will be more likely to be perceived as a sustainable investment and workers within their supply chains will have a higher quality of life, allegedly leading to a more effective workforce and more product output. However, some companies do not take these measures to ensure that no human rights violations occur in their supply chain. These companies need to have more than voluntary guidelines as pressure to engage in the matter.

The Supreme Court of the US has increasingly limited the possibility for foreign victims of human rights violations to claim damages from a parent company that is based in the US. As the separation of legal personality between parent companies and subsidiaries exists and has been strengthened through case law in the US, human rights due diligence can help establish accountability where this would not be possible within tort law. This would enable victims to claim damages from parent companies that have not efficiently secured that no human rights violations occur in their foreign supply chains. Civil liability as part of due diligence legislation will provide a possibility of judicial remedy for victims and an incentive for US based companies to prevent harm abroad.

If legal solutions are seen as organs, these can be explanted from one jurisdiction to another.<sup>360</sup> Through observing other legal institutes it is possible to get inspiration and adopt legal solutions to problems, especially when the problem that exists is global and does not limit itself to a domestic setting, such as global enterprises' human rights violations. A legal transplantation of the existing German law into the US is hence possible. The German Act on Corporate Due Diligence Obligations in Supply Chains, which mandates companies to identify and address human rights issues in their own operations and their supply chains, is an imperfect law that could be transplanted into the US to allow the state to impose sanctions and victims to claim damages for damaging non-compliance with the obligations. The law will mandate companies that are reluctant to exert their economic power to prevent human rights risks globally to start doing that, and make their operations and supply chains around the world more sustainable.

Representatives for the civil society organization Human Rights Watch encourage the implementation of the new German Act and state that “respect for human rights in global supply chains is nothing that should be optional”.<sup>361</sup> Under international norms, companies have a responsibility to conduct human rights due diligence throughout their whole supply chain, regardless of whether they knew of such problems or not. The German law does not allow for the same protection as international soft laws, according to the Act on Corporate Due Diligence Obligations in Supply Chains, companies must only take measures in specific incidents if they have “substantiated knowledge” of potential abuses, and the measures can be of a general preventative nature. The Act does also not require companies to undertake thorough and

---

<sup>360</sup> Filippo Valguarnara, 'Komparativ Juridisk Metod', in Maria Nääv and Mauro Zamboni (eds), *Juridisk Metodlära* (Studentlitteratur 2018), 160.

<sup>361</sup> 'Germany: New Supply Chain Law a Step in the Right Direction' (Human Rights Watch, 11 June 2021) < <https://www.hrw.org/news/2021/06/11/germany-new-supply-chain-law-step-right-direction> > accessed 3 November 2022.

systematic due diligence considering indirect suppliers further down in the supply chain. These are all imperfect aspects of the legislation.

German employers have criticized the new Act. According to them it would put German companies at a severe disadvantage in European and global competition as other foreign corporations would replace them on the market<sup>362</sup> and the risk of being fined and sanctioned would likely leave many enterprises with no choice but to withdraw from developing countries with a problematic human rights record. This is not a valid argument anymore. Profits closely follow sustainable business and corporations limit their own profits when they do not engage in sustainability monitoring of their production. The reasoning presented by German employers can on the contrary be used as an argument *for* more developed states to also implement laws like the Act on Corporate Due Diligence Obligations in Supply Chains, to even out the requirements and hold all multinational corporations accountable to the same degree. This would not put any state's enterprises in competitive advantage or disadvantage, and it would raise global human rights standards in developing countries, like Brazil. To implement effective human rights due diligence measures could also mitigate liability because comprehensive and effective due diligence measures should be taken into considerations when determining civil liability.<sup>363</sup>

The positive aspects of implementing a law like the German Act on Corporate Due Diligence Obligations in Supply Chains outweigh the negative aspects of such an implementation. For the US to be a responsible, developed state, an implementation of such a law is necessary to ensure accountability for US corporations that have complex supply chains abroad where human rights violations go undetected with the existing legislation.

## 5 Concluding Remarks

Soft law regulations help companies to uniform their reporting and preventive measures to avoid infringements of human rights in global supply chains. Soft laws do although not inflict civil or criminal liability on companies that have large supply chains abroad, where infringements happen. For accountability to be established for these companies and for victims to get resurrection for violations, it is preferable if the domestic parent or requesting company can be found liable for violations that occur in their supply chains abroad. The global doctrine of separate legal identity and the effects that this doctrine has on the civil liability of corporations limit the possibility to find parent companies civilly liable for damage conducted merely by subsidiaries abroad, even less for damage created by independent companies in their supply chains. Mandatory human rights due diligence establishes civil liability for parent companies for breaches of obligations to conduct due diligence leading to human rights harms, through the whole supply chain. Hence, mandatory human rights due diligence serves as one

---

<sup>362</sup> Holger Hansen and Michael Nienaber, 'German employers cry foul as Merkel's cabinet passes supply chain act' (Reuters, 3 March 2021) < <https://www.reuters.com/article/us-germany-companies-supply-chains-idUSKBN2AV188> > accessed 3 November 2022.

<sup>363</sup> Théo Jaekel Ericsson, 'Key Considerations for Effective Mandatory Due Diligence Legislation' (Business & Human Rights Resource Centre, 8 December 2020) < <https://www.business-humanrights.org/en/blog/key-considerations-for-effective-mandatory-due-diligence-legislation/> > accessed 3 November 2022.

effective way of enlarging victims' right to remedies and enables accountability to be established for human rights violations occurring in corporations' supply chains abroad.

A debate can be held as to how far down in the supply chain a company should be responsible for monitoring human rights risks and levying human rights impacts abroad. It is unacceptable to motivate more lenient and non-mandatory measures to prevent infringements of human rights from happening in supply chains with the argument that multinational companies will not be able to operate within countries with problematic human rights records, and that this in the end will harm developing countries economically. There exist legal instruments like human rights due diligence and other instruments that make it easy and cost-effective to implement the measures. International standards, soft laws as well as binding instruments, should therefore be adopted, and developed states like Germany and the US should implement regulations that hold companies accountable for their human rights risks in supply chains abroad.

In the modern society that we live in today, it is unacceptable to motivate a more lenient approach towards multinational enterprises with a difference in human rights records around the world, and that measures that respect human rights could possibly limit profits. As the whole world is open for corporations to make profit, they should also have to take responsibility for the operations that they carry out and order other alien corporations to do, globally. Instead of lowering the standards provided for in states with implemented mandatory human rights due diligence legislation, standards in states without mandatory due diligence legislations should be higher. Aligning states' protective legislation would ease international trade as all corporations would be subject to the same requirements.

Soft law solutions provide a higher standard of care from corporations and serve as a universal agreement on responsible business conduct that corporations should follow to have less detrimental effects on human rights. The biggest limitation with these soft laws is that they do not impose liability on companies that have contributed to the infringement of human rights abroad. A combination of measures where international soft laws set a standard of conduct and care of corporate measures and national measures that impose a possibility for victims to get access to justice and remedies at the event of infringements is preferable. Such a legal combination provides for guidance as to preventive measures and conduct in general, as well as a legal regime that redress actual violations that happen in supply chains and ensures compensation for victims.

Many corporations have understood that they increase their profit if they act sustainably. They have understood that market actors, investors, consumers, stakeholders, legislators, the civil society in general and their own workers value sustainable operations and that a corporation does not only create economic value anymore. The notion of having a corporation is to make money, which was the value before. The corporate value has shifted from monetary value to societal value, which is reflected in the legal approach with the many international soft laws in this area and through the expressed will of stakeholders and multinational corporations to act sustainably. Instruments need to be implemented to ease companies' ability to perform their obligations so that the positive outcome of acting sustainably outweighs the monetary and

administrative burden of performing preemptive measures. This can be achieved through technological advancements.

There does although exist businesses that do not understand the importance of sustainable operations and still exploit workers and communities around the world. To stop these corporations from committing such infringements it is important to hold such corporations accountable for the violations that they conduct. Through non-financial transparency measures, like sustainability reporting and human rights due diligence, infringements can be traced to the correct perpetrator. It is hence important to align sustainability reporting requirements with due diligence requirements to not create separate reporting standards that would put an administrative burden on corporations, on the contrary, systems that facilitate corporations' sustainability measures, so that corporations can fulfill their obligations cost-efficiently, are important.

The adoption of increasing sustainability reporting and human rights due diligence legislation impose costs and an administrative burden on parent companies, which goes against the idea of corporate law and the separate corporate personality doctrine. Such legislation practically obligates corporations to process detailed information, not only about their own operations but also about the operation of subsidiaries and subcontracting parties. This entails more internal work for corporations, and more work means that it will be more expensive for corporations to carry out their business. However, there are possibilities to amend this friction. New technologies can be used to perform these obligations without a large cost for parent companies, there exist technical advances that can help companies perform their duties cost-effectively with autonomous information collection. With digital technologies physical action move into technological spaces, which limits the expenses for corporations and makes the reporting and collection of information within the company more effective.

The European Commission's proposal of the new CSRD discusses the cost of increased reporting requirements. It states that the proposal most likely will increase additional costs for companies in the short turn but that the aim of the proposed CSRD is to reduce reporting costs in the long term. According to the reasoning of the proposal, reporting costs would increase short term anyways, regardless the implementation of the proposed CSRD, because of the growing demand from stakeholders for information about sustainability. The proposal would hence be a cost-efficient solution as it would build consensus around the information that companies need to disclose.<sup>364</sup> The trend of increased digitalization of sustainability information will further decrease the costs for businesses and increase the comparability of information for stakeholders. The proposed CSRD would require companies to "prepare their financial statements and their management report in XHTML format in accordance with the ESEF Regulation and to 'tag' their reported sustainability information according to a digital

---

<sup>364</sup> European Commission, 'Questions and Answers: Corporate Sustainability Reporting Directive proposal (21 April 2021) < [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_1806](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1806) > accessed 2 November 2022.

categorisation system”.<sup>365</sup> This can serve as inspiration for further legislative work within jurisdictions that lack efficient mandatory requirements, such as the US.

The global society is moving into a new era, with increasing legal measures to establish accountability within supply chains. This is a necessary step in order to make companies respect human rights globally, however, we cannot end here. Accountability should not only be established throughout supply chains, but accountability should also be established throughout value chains, like many international soft laws state. This would make corporations motivated to subcontract and do business with other sustainable companies. Even if the German Act on Corporate Due Diligence Obligations in Supply Chains is a step in the right direction, it will not be sufficient in order to solve the issues with human rights in global value chains. Further, it could be argued that the scope of companies that must meet the requirements of the law should be enlarged. Although the existing laws might have some effects on smaller businesses, the smaller enterprises also need to have an obligation to enact in their own due diligence throughout their supply chains. The technological advancement and development that allows businesses to establish preventive measures and transparency less costly motivates that also smaller businesses that are not covered by the existing regulations should be required to conduct the same preventive measures. The additional cost that such requirements would implicate cannot be used as an argument against the introduction of such requirements, as respect for human rights is non-negotiable. Small businesses are also engaging in or contributing to human rights violations or has supply chains in which violations occur. Victims should not miss out on the opportunity to hold companies accountable based on the size of the company.

One of the largest challenges with corporate human rights violations that emerge due to the globalization of the economy is to find domestic corporations accountable for violations in supply chains abroad. Mandatory human rights due diligence obligations with a civil liability component can overcome the struggle with establishing accountability of parent companies for violations in supply chains abroad, without demolishing the idea of separate assets in corporate groups. Such due diligence obligations mandate corporations to conduct internal investigations within corporate groups, evaluate risks and act upon such risks, which could be considered within the duty of care of a parent company. The due diligence measures that corporations conduct would further ease the collection of information on sustainability for non-financial sustainability reports and meet the increased sustainability information requirements from stakeholders.

In order to enable all of the positive effects that preemptive measures within due diligence and sustainability reporting to become real in practice, and not just an illusion on a paper, it is essential that enforcement systems and mechanisms from authorities are effective. States need to monitor and ensure that corporations follow the obligations, in order to not let due diligence requirements just be a “tick-box” for corporations to fill in. Authorities need to ongoingly monitor that corporations fulfill their obligations, otherwise hard laws will not have any other impact than already existing voluntary standards.

---

<sup>365</sup> *ibid.*

Germany and EU's human rights due diligence legislation has not been implemented yet and at this current state we do not know how the practical effects of the legislations will be. Probably there will be aspects that will need further legal advancement and monitoring, however, we can only know for sure when the law is in practice. An exciting time awaits as to see how the studied jurisdictions will resort to ensure respect for human rights. The aim should be that no matter where a business operates, all people that are employed or in contact with a corporation should be shown the same respect for their human rights. As human rights are global, so must the legislation and measures that ensure the respect of these rights also be. What should be evident for global actors, governments as well as corporations and other organizations, is that a sustainable reputation is worth a lot and an unsustainable reputation can be detrimental, not only for the victims of human rights harms.

# Bibliography

## *Literature*

Anders Henriksen, *International Law* (2<sup>nd</sup> edn, Oxford University Press 2019).

Filippo Valguarnara, 'Komparativ Juridisk Metod', in Maria Nääv and Mauro Zamboni (eds), *Juridisk Metodlära* (Studentlitteratur 2018).

Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006; online edn, Oxford Academic, 2012) 339 < <https://doi.org/10.1093/oxfordhb/9780199296064.013.0011> > accessed 31 October 2022.

## *Case Law*

### **Delaware Court of Chancery**

*Basf Corporation v. Posm II Properties Part.*, C.A. No. 3608-VCS (Del. Ch. 2009).

### **House of Lords**

*Caparo Industries Plc v. Dickman* [1990] 2 AC 605 (HL).

### **International Military Tribunal for the Trial of Major War Criminals**

The International Military Tribunal for the Trial of German Major War Criminals against Goring and others 1946.

### **International Permanent Court of International Justice**

*Germany v Poland* [1927] PCIJ Series A No 9.

### **New Jersey Court**

*John Doe 1, et al. v. Chiquita Brands International, Inc., et al.*, 2:07-cv-03406, New Jersey Court (2007).

### **Supreme Court of the United States of America**

*Anderson v. Abbott*, 321 U.S. 349 (1944).

*Blackmer v. United States*, 284 U.S. 421, 438-41 (1932).

*Daimler AG v. Bauman*, 571 U.S. 117 (2014).

*Jesner v Arab Bank, Plc*, No 16-499, 584 U.S. (2018).

*Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

*Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931 U.S. (2021).

*Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739 (2004).

## *Norms, Legislative Material, Principles and Guidelines*

### **International**

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) UN Doc. A/RES/60/147.

Draft Statute of the International Criminal Court, UN Doc. A/CONF.183/2/Add.1 (1998).

Global Reporting Initiative Standards 2021.

Human Rights Council Resolution. 17/31 2011.

International Covenant on Civil and Political Rights (ICCPR) 1966.

International Covenant on Economic Social and Cultural Rights (ICESCR) 1966.

International Labour Organization, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977.

International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts in *Yearbook of the International Law Commission* (2001 vol. II part 2).

Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights (2003) UN Doc. E/CN.4/Sub.2/2003/12/Rev.2.

Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises, OECD Publishing (2011).

Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG), 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (2021).

Rome Statute of the International Criminal Court 1998.

United Nations, 'Guiding Principles on Business and Human Rights' 2011.

United Nations, 'Transforming our world: the 2030 Agenda for Sustainable Development' A/RES/70/1 2015.

Universal Declaration of Human Rights, 1948.

Working Paper on Article 23, paragraphs 5 and 6, UN Doc. A/Conf.183/C.1/WGPP/L.5/Rev.2 (1998).

### **European Union**

Consolidated Version of the Treaty on the Functioning of the European Union [2012] C 326/49.

Council Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ibis Regulation) [2012].

Council Regulation (EC) 2019/2088 on sustainability- related disclosures in the financial services sector (European Sustainable Finance Disclosure Regulation) [2019].

Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance (Accounting Directive).

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 (NFRD) L 330/1.

European Commission, *Guidelines on non-financial reporting (methodology for reporting non-financial information)* (2017) C 215/01.

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

Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (CSDD) COM [2022] 71 final.

Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC COM (2021) 851 final.

## **Germany**

Aktengesetz (German Stock Corporation Act).

Bürgerliches Gesetzbuch (German Civil Code).

Coalition Agreement, *Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land* (March 12, 2018).

Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft (German Draft Bill to Strengthen the Integrity of the Economy).

Gesetz betreffend die Gesellschaften mit beschränkter Haftung (German Act on Limited Liability Companies).

Gesetzesentwurf der Bundesregierung [Government Draft], Deutscher Bundestag: Drucksachen [BT] 19/23568.

Gesetz über Ordnungswidrigkeiten (German Act on Regulatory Offenses).

Handelsgesetzbuch (German Commercial Code).

Lieferkettensorgfaltspflichtengesetz (German Act on Corporate Due Diligence Obligations in Supply Chains).

Strafgesetzbuch (German Criminal Code).

Verbandssanktionengesetz (German Draft of the Corporate Sanctions Act).

### **United States**

Aliens action for tort, 28 U.S.C. § 1350.

Antiterrorism Act of 1990.

California Civil Code § 1714.43, California Transparency in Supply Chains Act of 2010.

Discussion Draft, H.R.6375, to amend the Securities Exchange Act of 1934 to require issuers to make disclosures related to supply chain disruption risk, and for other purposes.

Model Business Corporation Act.

Responsible Business Conduct, First National Action Plan for the United States of America (December 16, 2016).

Torture Victim Protection Act of 1991.

Trafficking Victims Protection Act of 2017.

### **Brazil**

Constituição da República Federativa do Brasil. Brasília, DF: Senado, 1988 (Constitution of the Federative Republic of Brazil).

Decreto No 9.571 (Decree No 9.571) (21 November 2018).

Lei No. 2.848 (Law No. 2.848) (7 December 1940).

Lei No 6.385 (Law No 6.385) (7 December 1976).

Lei No 6.404 (Law No 6.404) (15 December 1976).

Lei No 7.347 (Law No 7.347) (24 July 1985).

Lei No 9.605 (Law No 9.605) (12 February 1998).

Lei No 10.406 (Law No 10.406) (10 January 2002).

Lei No 13.105 (Law No 13.105) (16 March 2015).

Projeto de Lei 572/2022 (Bill of Law 572).

Portaria Interministerial MTPS/MMIRDH N° 4 (Interministerial Ordinance 4) (11 May 2016).

Resolução CVM 45 (Resolution CVM 45) (31 August 2021).

Resolução CVM 59 (Resolution CVM 59) (22 December 2021).

Resolução CVM 89 (Resolution CVM 80) (29 March 2022).

Securities and Exchange Commission of Brazil, Public Consultation Notice SDM No 09/20.

### *Internet Sources*

#### **Journal Articles**

Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' (2021) *Human Rights Review* 109 < [https://www.researchgate.net/publication/344881058\\_Putting\\_the\\_French\\_Duty\\_of\\_Vigilance\\_Law\\_in\\_Context\\_Towards\\_Corporate\\_Accountability\\_for\\_Human\\_Rights\\_Violations\\_in\\_the\\_Global\\_South](https://www.researchgate.net/publication/344881058_Putting_the_French_Duty_of_Vigilance_Law_in_Context_Towards_Corporate_Accountability_for_Human_Rights_Violations_in_the_Global_South) > accessed 21 September 2022.

André Campos, Mariëtte van Huijstee and Martje Theuws, 'From Moral Responsibility to Legal Liability? Modern Day Slavery Conditions in the Global Garment Supply Chain and the Need to Strengthen Regulatory Frameworks: The Case of Inditex-Zara in Brazil' (2015) *SOMO and Repórter Brasil* 30 < <https://www.somo.nl/wp-content/uploads/2015/05/From-moral-responsibility-to-legal-liability.pdf> > accessed 15 March 2022.

Andrew Sanger 'Corporate Liability for Breaches of International Law Abroad: Canadian Supreme Court Opens the Door But Questions Remain' (2020) 79 (3) *The Cambridge Law Journal* 381 < <https://www-cambridge-org.ezproxy.ub.gu.se/core/journals/cambridge-law-journal/article/corporate-liability-for-breaches-of-international-law-abroad-canadian-supreme-court-opens-the-door-but-questions-remain/27E8B8B054133DC9297ABEAAE09E5504> > accessed 29 October 2022.

Ben Ye, 'Okpabi v. Shell and Nestle USA v. Doe: Trend and Divergence on Parent Company Liability for Human Rights Abuse in the United Kingdom and United States' (2021) 54 (1) *New York University Journal of International Law & Politics* 261 < [https://www.nyujilp.org/wp-content/uploads/2022/02/NYUJILP\\_Vol54.1\\_Ye\\_261-273.pdf](https://www.nyujilp.org/wp-content/uploads/2022/02/NYUJILP_Vol54.1_Ye_261-273.pdf) > accessed 29 October 2022.

Chandler L. Mores, 'Why Corporations Should Be Held Liable for China's Crimes against Humanities in Xinjiang: Seeking Civil and Criminal Solutions' (2021) 106 (2), *Iowa Law Review* 1007 < [https://heinonline-org.ezproxy.ub.gu.se/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/ilr106&men\\_hide=false&men\\_tab=toc&kind=&page=1007#](https://heinonline-org.ezproxy.ub.gu.se/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/ilr106&men_hide=false&men_tab=toc&kind=&page=1007#) > accessed 3 November 2022.

Eric Mongelard, 'Corporate civil liability for violations of international humanitarian law' (2006) 88 (863) *International Review of the Red Cross* 665 < [https://international-review.icrc.org/sites/default/files/irrc\\_863\\_9.pdf](https://international-review.icrc.org/sites/default/files/irrc_863_9.pdf) > accessed 10 October 2022.

Flavia Donadelli and Jeroen Van Der Heijden, 'The Regulatory State in Developing Countries: Redistribution and Regulatory Failure in Brazil' (2022) *Regulation & Governance*, 1 < <https://doi.org/10.1111/rego.12459> > accessed 1 November 2022.

Florian Jessberger, 'Corporate Involvement in Slavery and Criminal Responsibility under International Law,' (2016) 14 (2) *Journal of International Criminal Justice* 327 <

<https://academic.oup.com/jicj/article-abstract/14/2/327/2412040> > accessed 16 September 2022.

Hans B. Christensen, Luzi Hail and Christian Leuz, 'Mandatory CSR and sustainability reporting: economic analysis and literature review' (2021) 26 *Review of Accounting Studies* 1176 < <https://link.springer.com/article/10.1007/s11142-021-09609-5> > accessed October 30 2022.

Henry Hansmann, Richard Squire, 'External and Internal Asset Partitioning: Corporations and Their Subsidiaries' (2016) *The Oxford Handbook of Corporate Law and Governance* 251 < <https://academic.oup.com/edited-volume/43491/chapter-abstract/363882834?redirectedFrom=fulltext> > accessed 24 October 2022.

Horatia Muir-Watt, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* < [https://www.researchgate.net/publication/263147955\\_Private\\_International\\_Law\\_Beyond\\_the\\_Schism](https://www.researchgate.net/publication/263147955_Private_International_Law_Beyond_the_Schism) > accessed 5 October 2022.

Jennifer Arlen and Samuel W. Buell, 'The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement' (2020) 93 (4) *Southern California Law Review* 697 < [https://southerncalifornialawreview.com/wp-content/uploads/2020/09/Arlen\\_website.pdf](https://southerncalifornialawreview.com/wp-content/uploads/2020/09/Arlen_website.pdf) > accessed 15 November 2022.

Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28 (3) *European Journal of International Law* 899 < <https://academic.oup.com/ejil/article/28/3/899/4616670> > accessed 24 October 2022.

Julie De Coninck, 'The Functional Method of Comparative Law: "Quo Vadis"?' (2010) 74 (2) *The Rabel Journal of Comparative and International Private Law* 318 < <https://www.jstor.org/stable/27878873> > accessed 31 October 2022.

Laura Maria Ferri, 'The influence of the institutional context on sustainability reporting. A cross-national analysis' (2017) 13 (1) *Social Responsibility Journal* 24 < <https://www.proquest.com/docview/1872753471?parentSessionId=TMe%2Br0sx5mfr7gG7XSSZA7novsat1R7ahPXv6HgoKR4%3D&pq-origsite=primo&accountid=11162> > accessed 10 October 2022.

Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' (2020) 69 (4) *The International and Comparative Law Quarterly* 789 < <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/implementing-human-rights-due-diligence-through-corporate-civil-liability/89B854AAA7F3ED5AC841DF266E567498> > accessed 30 October 2022.

Nicolas Bueno, 'Corporate liability for violations of the human right to just conditions of work in extraterritorial operations', (2017) 21 (5) *The International Journal of Human Rights* 565 < <https://www.tandfonline.com/doi/full/10.1080/13642987.2017.1298092> > accessed 1 October 2022.

Paul Hoffman and Beth Stephens, 'International Human Rights Cases under State Law and in State Courts' (2013) 3 (1) *UC Irvine Law Review* 9 < [https://heinonline.org/HOL/Page?handle=hein.journals/ucirvlre3&div=5&g\\_sent=1&casa\\_tok](https://heinonline.org/HOL/Page?handle=hein.journals/ucirvlre3&div=5&g_sent=1&casa_tok)

en=635be3eL8G8AAAAA:kli0JE4AIhv-so21J877EvVTCB8WjeSbNPIGZUAh7kTqwdRABgM6E-olua-AEIA3n0vEFzfJCE&collection=journals > accessed 29 October 2022.

Radu Mares, 'Liability within Corporate Groups: Parent Company's Accountability for Subsidiary Human Rights Abuses' (2019) *Research Handbook on Human Rights and Business* < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3481052](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481052) > accessed 5 October 2022.

Repórter Brasil < <https://www.somo.nl/wp-content/uploads/2015/05/From-moral-responsibility-to-legal-liability.pdf> > accessed 15 March 2022.

Sanjay Pareek and Srinivas Subbarao Pasumarti, 'ESG reporting practices in India, UK and USA: An international comparison' (2021) 12 (6) *Turkish Journal of Computer and Mathematics Education* 2984 < <https://www.proquest.com/docview/2623926864> > accessed 24 October 2022.

Sebastian Felix Janka, 'Parent Company Liability in German and EU Competition Law' (2016) 7:9 *Journal of European Competition Law and Practice* 614 < <https://academic.oup.com/jeclap/article-abstract/7/9/614/2647008> > accessed 22 November 2022.

Sijad Allahverdiyev and Marvin Othman, 'Verbandssanktionengesetz' — Corporate Liability for Germany?' (2022) 23 (4) *German Law Journal* 637 < <https://www.cambridge.org/core/journals/german-law-journal/article/verbandssanktionengesetz-corporate-liability-for-germany/DC98C79DA36CB354E8782A9B2CDA024C> > accessed 18 September 2022.

Thiago Kanashiro Uehara and Glauucia Terreo, 'Brazil profile (Sustainability reporting policies worldwide)' (2013) *Carrots and Sticks: Sustainability reporting policies worldwide - today's best practice, tomorrow's trends* 26 < [https://www.researchgate.net/publication/272565387\\_Brazil\\_profile\\_Sustainability\\_reporting\\_policies\\_worldwide](https://www.researchgate.net/publication/272565387_Brazil_profile_Sustainability_reporting_policies_worldwide) > accessed 28 October 2022.

Thomas Grützner, Carsten Momsen and Jonas Menne, 'Draft Bill on German Corporate Sanctions Act' (2019) *CEJ* 26 < [https://www.jura.fu-berlin.de/fachbereich/einrichtungen/strafrecht/lehrende/momsenc/mitarbeiter/momsen\\_carsten/CEJ-Fall-2019-Gru\\_tzner-Momsen-Menne.pdf](https://www.jura.fu-berlin.de/fachbereich/einrichtungen/strafrecht/lehrende/momsenc/mitarbeiter/momsen_carsten/CEJ-Fall-2019-Gru_tzner-Momsen-Menne.pdf) > accessed 17 September 2022.

Thomas Weigend, 'Societas Delinquere Non Potest? A German Perspective,' (2008) 6 (5) *Journal of International Criminal Justice* 927 < <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jicj6&div=69&id=&page=> > accessed 22 September 2022.

Tobias Gerwing, Peter Kajüter and Maximilian Wirth, 'The role of sustainable corporate governance in mandatory sustainability reporting quality' (2022) 92 *Journal of Business Economics* 517 < <https://doi-org.ezproxy.ub.gu.se/10.1007/s11573-022-01092-x> > accessed 20 September 2022.

Wolfgang Kaleck, Miriam Saage-Maag, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes', (2010) 8 *JICJ* 699 < <https://heinonline-org.ezproxy.ub.gu.se/HOL/Page?lname=&public=false&collection=journals&handle=hein.jo>

urnals/jicj8&men\_hide=false&men\_tab=toc&kind=&page=699 > accessed 20 September 2022.

Yvon Pesqueux, 'What Is Globalization? The Paradoxes of the Economic and Political Substance of Markets' (2013) 2 (1) South Asian Journal of Business and Management Cases 1 < [https://www.researchgate.net/publication/258126896\\_What\\_is\\_Globalization\\_The\\_Paradoxes\\_of\\_the\\_Economic\\_and\\_Political\\_Substance\\_of\\_Markets](https://www.researchgate.net/publication/258126896_What_is_Globalization_The_Paradoxes_of_the_Economic_and_Political_Substance_of_Markets) > accessed 3 October 2022.

### **Newspaper Articles**

Annie Kelly, 'Brazil's 'dirty list' names and shames companies involved in slave labour' (The Guardian, 24 July 2013) < <https://www.theguardian.com/sustainable-business/brazil-dirty-list-names-shames-slave-labour> > accessed 1 November 2022.

Judith Evans, 'Ben & Jerry's vs Unilever: how a star acquisition became a legal nightmare', (Financial Times, Oktober 11 2022) < <https://www.ft.com/stream/08e3b8d4-3986-4aba-9edf-ed1b132390a9> > accessed 1 November 2022.

Milton Friedman, 'A Friedman doctrine-- The Social Responsibility of Business Is to Increase Its Profits' (New York Times, September 13 1970) < <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> > accessed 1 November 2022.

### **Websites**

Amanda White, 'Investors focus on human capital' (Top 1 000 funds, 28 April 2020) < <https://www.top1000funds.com/2020/04/investors-focus-on-human-capital/> > accessed 2 November 2022.

Andreas Lohner and Nicolai Behr, 'Corporate Liability in Germany' (Global Compliance News, 2022) < <https://www.globalcompliancencews.com/white-collar-crime/corporate-liability-in-germany/> > accessed 17 September 2022.

Andrew J. Hoffman, 'The Next Phase of Business Sustainability' (Stanford Social Innovation Review, 2018) < [https://ssir.org/articles/entry/the\\_next\\_phase\\_of\\_business\\_sustainability](https://ssir.org/articles/entry/the_next_phase_of_business_sustainability) > accessed 1 November 2022.

Anthony J. Blinken, '10th Anniversary of the UN Guiding Principles on Business and Human Rights' (US Department of State, 16 June 2021) < <https://www.state.gov/10th-anniversary-of-the-un-guiding-principles-on-business-and-human-rights/> > accessed 15 November 2022.

Country profiles: Germany < [https://european-union.europa.eu/principles-countries-history/country-profiles/germany\\_en](https://european-union.europa.eu/principles-countries-history/country-profiles/germany_en) > accessed 10 October 2022.

David Silk and Carmen Lu, 'Environmental, social and Governance Law USA 2022' (ICLG) < <https://iclg.com/practice-areas/environmental-social-and-governance-law/usa> > accessed 26 September 2022.

'ESG Policy Developments in the United States – March 2022' (Ascentys, 29 March 2022) < <https://www.ascentys-esg.com/esg-policy-developments-in-the-united-states-march-2022/> > accessed 26 September 2022.

European Commission, ‘Questions and Answers: Corporate Sustainability Reporting Directive proposal (21 April 2021) < [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_21\\_1806](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1806) > accessed 2 November 2022.

Federal Ministry of Labour and Social Affairs, ‘Act on Corporate Due Diligence in Supply Chains’ (18 August 2021) < <https://www.bmas.de/EN/Services/Press/recent-publications/2021/act-on-corporate-due-diligence-in-supply-chains.html> > accessed 18 September 2022.

‘Germany: New Supply Chain Law a Step in the Right Direction’ (Human Rights Watch, 11 June 2021) < <https://www.hrw.org/news/2021/06/11/germany-new-supply-chain-law-step-right-direction> > accessed 3 November 2022.

Guidelines for Multinational Enterprises < <https://www.oecd.org/els/emp/guidelinesformultinationalenterprises.htm> > accessed 10 October 2022.

Holger Hansen and Michael Nienaber, ‘German employers cry foul as Merkel’s cabinet passes supply chain act’ (Reuters, 3 March 2021) < <https://www.reuters.com/article/us-germany-companies-supply-chains-idUSKBN2AV188> > accessed 3 November 2022.

Lara Haje, ‘Projeto cria marco nacional sobre direitos humanos e empresas’ (1 April 2022) < <https://www.camara.leg.br/noticias/861969-projeto-cria-marco-nacional-sobre-direitos-humanos-e-empresas/> > accessed 15 March 2022.

List of large businesses, associations & investors with public statements & endorsements in support of mandatory due diligence regulation (Business & Human Rights Resource Centre, 6 June 2019) < <https://www.business-humanrights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/> > accessed 3 November 2022.

List of OECD Member countries – ratification of the Convention on the OECD. < <https://www.oecd.org/about/document/ratification-oecd-convention.htm> > accessed 10 October 2022.

Luciana Renouard, Fernanda Ferraz and Arthur Araújo, ‘Brazil: Decree No. 9,571 (11/21/2018) Establishes National Guidelines For Businesses And Human Rights’ (Mondaq, 18 December 2018) < <https://www.mondaq.com/brazil/human-rights/765618/decreo-no-9571-11212018-establishes-national-guidelines-for-businesses-and-human-rights> > accessed 13 October 2021.

Nahla Davies, ‘Are US Business Falling Behind On Human Rights Due Diligence?’ (Business & Human Rights Resource Center, 17 February 2022 < <https://www.business-humanrights.org/en/blog/are-us-businesses-falling-behind-on-human-rights-due-diligence/> > accessed 2 November 2022.

National Geographic Society, ‘The Roles of State and Federal Governments’ (2 June 2022) < <https://education.nationalgeographic.org/resource/roles-state-and-federal-governments> > accessed 31 October 2022.

Patricia Trindade Maranhão Costa, 'Fighting Forced Labour: The Example of Brazil' (2009) International Labour Office (ILO) Special Action Programme to Combat Forced Labour, < [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_111297.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_111297.pdf) > accessed 15 March 2022.

Principles of Federal Prosecution of Business organizations < <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations> > accessed 3 November 2022.

Radu Mares, 'The new EU Directive on Corporate Sustainability Due Diligence: origins, compliance effects and global significance' (The Human Righter, 1 April 2022) < <https://rwi.lu.se/blog/the-new-eu-directive-on-corporate-sustainability-due-diligence-origins-compliance-effects-and-global-significance/> > accessed 18 September 2022.

Théo Jaekel Ericsson, 'Key Considerations for Effective Mandatory Due Diligence Legislation' (Business & Human Rights Resource Centre, 8 December 2020) < <https://www.business-humanrights.org/en/blog/key-considerations-for-effective-mandatory-due-diligence-legislation/> > accessed 3 November 2022.

UNHCR, 'International Bill of Human Rights A brief history, and the two International Covenants' < <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights> > accessed 26 September 2022.

United Nations Global Compact, 'Our mission' < <https://unglobalcompact.org/what-is-gc/mission> > accessed 24 October 2022.

United Nations Global Compact, 'What's the commitment?' < <https://www.unglobalcompact.org/participation/join/commitment> > accessed 25 October 2022.

United Nations Global Compact, 'The Ten Principles of the UN Global Compact' < <https://unglobalcompact.org/what-is-gc/mission/principles> > accessed 24 October 2022.

US Embassy Federal Judicial Center, 'The U.S. Legal System: A Short Description', 1 < [https://ar.usembassy.gov/wp-content/uploads/sites/26/2016/03/U\\_S\\_\\_Legal\\_System\\_English07.pdf](https://ar.usembassy.gov/wp-content/uploads/sites/26/2016/03/U_S__Legal_System_English07.pdf) > accessed 31 October 2022.

### **Reports and Brochures**

Congressional Research Service, 'The Alien Tort Statute: A Primer' (2022) 12 < <https://crsreports.congress.gov/product/pdf/R/R44947> > accessed 30 October 2022.

European Commission, *Study on due diligence requirements through the supply chain: final report* (Publications Office 2020).

German Federal Ministry of Justice and Consumer Protection, *The responsibility of business enterprises for human rights violations: Access to justice and the courts* (November 2019).

International Labour Organization, 'Global Estimates of Modern Slavery: Forced Labour and Forced Marriage' (12 September 2022) < [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ipec/documents/publication/wcms\\_854733.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf) > accessed 16 November 2022.

International Labour Organization, 'Profits and Poverty, the Economics of Forced Labour' (2014), 45 < [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_243391.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf) > accessed 16 September 2022.

OECD Guidelines for Multinational Enterprises - Responsible Business Conduct Matters < <https://www.oecd.org/corporate/mne/responsible-business-conduct-matters.htm> > accessed 22 September 2022.

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

SEC, *Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations* (25 February 2020).

United Nations Global Compact report, 'Guide to Corporate Sustainability: Shaping a Sustainable Future' (2014) < <https://www.unglobalcompact.org/library/1151> > accessed 24 October 2022.

United Nations, 'The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (2018) A/73/163.