

HUMAN RIGHTS

The application of human rights in the economy

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Introduction and background

Due to globalisation, international and cross-border trade transactions and their supply chains have become commonplace. Until recently, business enterprises were not subject to any mandatory requirements to respect human rights within their business activities. This approach has changed over time and attempts have been made to oblige companies to take more care of human rights through binding legal remedies. This article deals with the implementation of the human rights system in business practice and considers its advantages within different legal levels. In the first part, the main components of international human rights sources are discussed in general terms, with particular emphasis on their legally binding effect. Subsequently, it examines to what extent states, apart from the regulations of international law, strive for comparable regulations. Special attention will be paid to the implementation of human rights through targeted regulations and further implementation of European Union law, which is finally supplemented by the inclusion of a national perspective. On the national level, the German legal system is used as paradigm to further illustrate the different levels of regulation. Due to the increased mainstreaming of human rights issues in relation to business within international law, both the European Union and Germany have adopted appropriate legal remedies to regulate future dealings and a comparison of the legal sources should show the consequences for future entrepreneurial duties.

Human rights have been increasingly in the spotlight, but especially their violation by business enterprises within the supply chain. In principle, the system of human rights has been known for centuries. First, fundamentals of these rights are already known from 1750 BC. These fundamental rights differ from our today's understanding, as it was in the past common that human rights only applied to a particular group of society or country.¹ This understanding of the basic definition has changed constantly over time, and it is likely that it will continue to adapt to contemporary events. The definition of the 21st century can be further subdivided based on its background. On the one hand, there are human rights regarding philosophy, where the ideas on human dignity and the rights that belong to everyone everywhere are the focus. On the other hand, there are human rights in the law, with norms and sanctions that over the centuries have been laid down in (international) law, treaties, and declarations. Lastly, there are human rights out of politics and campaigning that arise in the cause of denouncing abuses of countries or governments, to call for solidarity and action for the victims through its external effects.²

The proximity to the political process of law-making is often more of a problem than a basis for legitimacy. International law has its own systemic and peace-promoting logic, which

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¹ Amnesty International 'A brief history of human rights' <<https://www.amnesty.nl/a-brief-history-of-human-rights>> accessed 15th April 2022.

² Ibid.; Cf. Wegener 'Menschenrecht auf Klimaschutz? – Grenzen grundrechtsgeschützter Klimaklagen gegen Staat und Private' Neue juristische Wochenschrift 7 (2022), 428.

derives e.g., from its immanent coherence, from the equal treatment of all subjects of international law by the law and, not least, from its fundamental material goals, such as peacekeeping and human rights protection.³ Due to the strong integration of human rights into political practice, and the juridical binding to states, the meaning of these rights and what they protect becomes to a certain extent relative, to both political interests and the purpose of regulating the interaction of states in the international political sphere. As a result, the individual whose interests are to be protected recedes to some extent into the background - the control of the behaviour of states in the international sphere is seen as the primary purpose of human rights. Moral human rights concepts place the individual, and its fundamental moral claims, at the centre of the idea of human rights.⁴

Over the past decades, it has attempted to define the responsibilities of businesses in the area of human rights protection, which were principally based on the concept of “Corporate Social Responsibility (CSR)” and voluntary approaches. Nevertheless, although the primary duty to protect human rights lies with states, and although there were no legally binding instruments on business accountability for human rights abuses, it is now widely recognised that businesses hold responsibilities in this area.⁵ The main problem was, and is, the separation of compulsory and voluntary action, which states are supposed to counteract by creating legally binding instruments.⁶ Internationalisation and the growth of international supply chains have brought some advantages, especially to developing countries. With the increasing international interdependencies, some disadvantages have also arisen, such as violation of human rights, in areas such as child and forced labour, but also environmental damage through land theft and pollution. Multinational companies in particular play a major role here, as they can have a considerable influence on local conditions. As the UN Secretary-General, António Guterres, said in his inauguration speech “In the end, it comes down to values [...] we want the world our children inherit to be defined by the values enshrined in the UN Charter: peace, justice, respect, human rights, tolerance, and solidarity”.⁷ In this context, the UN Secretary-General indirectly refers to the purposes and principles enshrined in Art. 1.3 of the preamble, as well as chapter IV of the UN Charter, which includes direct reference to the protection of human rights and particularly emphasises the relevance of the topic.

In this article, the authors focus on the legal significance of human rights and their impact on international operating companies, especially their supply chains. The general economic activities of the industrialised countries can be accused of tacitly, if not approvingly, accepting the neglect of human rights in international trade if it benefits individual profit

³ Isabelle Ley, *Opposition im Völkerrecht* (2015), 118; Jost Delbrück, *New Trends in International Law-making – International ‘Legislation’ in the Public Interest* (1997); Jutta Brunnée, “‘Common Interest’ – Echoes from an Empty Shell?”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 49 (1989), 791.

⁴ Julia Brune, *Menschenrechte und transnationale Unternehmen - Grenzen und Potentiale des UN-Framework for Business and Human Rights* (2020), 158.

⁵ Council of Europe CM/Rec (2016)3 of 25th March 2016 Recommendation Committee of ministers to member states Human rights and business.

⁶ John Ruggie ‘Just Business – Multinational Corporations and Human Rights’ (25th March 2013) <https://edisciplinas.usp.br/pluginfile.php/4424946/mod_resource/content/1/Ruggie%20-%20Just%20Business.pdf> accessed 21st January 2022, 120.

⁷ UN Secretary General ‘Secretary-General-designate António Guterres’ remarks to the General Assembly on taking the oath of office’ (12th December 2016) <<https://www.un.org/sg/en/content/sg/speeches/2016-12-12/secretary-general-designate-ant%C3%B3nio-guterres-oath-office-speech>> accessed 5th May 2022.

and national welfare.⁸ For this reason, this article first highlights the most recent sources of human rights from international law, and which legal obligations arise specifically for enterprises. Subsequently, it will examine to what extent states, apart from the regulations of international law, strive for comparable regulations and how these relate to the international rules of human rights. Therefore, the legislation within the European Union will serve as an example, which is completed by the inclusion of a national perspective. On the national level, the German legal system is used as a paradigm to further illustrate the different levels of regulation. The focus of the analysis is further on the individual ways of implementation to guarantee human rights within companies and their supply chains, as well as assessing the binding effect for companies within the framework of the further implementation plans.

The main legal sources under international law

As far back as the history of human rights goes, some sources of law stand out today that have achieved a special significance for its observance. The focus here is on the United Nations (UN), which encourage their member states to implement regulations at national level. Meanwhile 193 of the 195 countries worldwide are UN recognized full statehood states under international law. Currently only Palestine and the Holy See (Vatican City) are not member states.⁹ Thus, in the past century, the UN has been the central organisation responsible for human rights in the international sphere and its embedding within international law through appropriate means. At the same time, the relative success of these international human rights efforts is inconceivable without the commitment of numerous non-governmental organisations, which for many decades have been drawing attention to grievances and making strong demands on the international community, politics, business, and civil society to help human rights to achieve a more binding validity.¹⁰ Historically, the most important sources of human rights law belong to the Universal Declaration of Human Rights,¹¹ the ILO Declaration on Fundamental Principles and Rights at work,¹² such as the Sustainable Development Goals.¹³

UN Guiding Principles on Business and Human Rights

The sources presented thus far together constitute what the UN Guiding Principles on Business and Human Rights describe as internationally recognized human rights. Nevertheless, these do not contain any direct legally binding obligation to force international operating companies to act in a human rights-friendly manner. The point of contention to direct responsibility for enterprises out of international law was the separation of compulsory and voluntary action, which the states are intended to counteract by creating legally binding instruments.¹⁴ Finally, in 2011, the next step was taken. On 16th June 2011, the UN adopted the Guiding Principles on Business and Human Rights (UNGPs).¹⁵ This was preceded in 2003 by the "Draft Norms on the Responsibilities of Transnational Corporations

⁸ Sonja Opper/Joachim Starbatty 'Menschenrechte und die Globalisierung der Wirtschaft – Konflikt oder Chance' (Uni Tübingen, 1999) <<http://hdl.handle.net/10900/47453>> accessed 7th April 2022.

⁹ Klaus Weber, 'Rechtwörterbuch' (27th Ed 2021) 1468.

¹⁰ Brune (n 4) 12.

¹¹ UNGA RES 217 (10th December 1948) UN DOC A/RES/217.

¹² International Labour Conference (86th Session) Declaration on Fundamental Principles and Rights at Work and its Follow-UP (Geneva 18th June 1998).

¹³ UNGA RES 70/1 (25th September 2015) UN DOC A/RES/70/1.

¹⁴ Ruggie (n 6) 130.

¹⁵ UNCHR 2011 'Guiding Principles on Business and Human Right: Implementing the United Nations "Protect, Respect and Remedy Framework' (16th June 2011) UN Doc [ST/] HR/PUB/11/4.

and Other Business Enterprises with Regard to Human Rights“,¹⁶ which were rejected. The norms were developed to constitute a ‘non-voluntary’, comprehensive framework base creating direct obligations for transnational companies, which were accompanied by often fierce opposition from various states and most of the business community.¹⁷

The enacted version of the UNGP is based on existing human rights obligations, within 31 principles, basic obligations and responsibilities in the context of business-related human rights. In turn, these can be divided into three pillars. The first one is to identify the legal obligations of states for human rights; the second includes the independent CSR to the human rights, and the last pillar is a redress mechanism associated with the other pillars.

Overall, the article sets out obligations for states and recommendations for actions of companies. However, it does not contain established boundaries on how to act when users violate these principles.¹⁸ The UNGP requires states to provide for liability of legal persons independently of that of natural persons and not to add civil liability to criminal liability. This means that to establish civil liability, it is not necessary to first establish criminal liability.¹⁹ Professor Dr Krajewski considers the possible liability for companies for their own actions essential, whereby formulations dealing with the presumption of control and joint liability are integrated into the regulations. Furthermore, compliance with human rights due diligence (DD) standards can be a, but not the only, factor to be considered when determining liability.²⁰

The international human rights law is binding, especially when the appropriate articles/sources are covered by customary international law, which is applicable to most the cases.²¹ However, this does not apply directly to companies because they are not legal subject in international law. However, recently the meaning of the term "subject of international law" has been broadened to include multinational enterprises under exceptions,²² whereby these cannot be indisputably bearers of rights and obligations under international law.²³ Indeed, similar expressions of will by the states often contribute to the emergence of customary law.²⁴ States have addressed the human rights responsibilities of business enterprises most directly in soft-law instruments - in the sense means that it does

¹⁶ UNCHR ‘Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights: draft Norms / submitted by the Working Group on the Working Methods and Activities of Transnational Corporations pursuant to resolution 2002/8’ (26th August 2003) UN Doc E/CN.4/Sub.2/2003/12.

¹⁷ Sascha Dov Bachmann/Pini Pavel Miretski ‘Global Business and Human Rights - The UN ‘Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ - A Requiem’ *Deakin Law Review* (12th November 2011)
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1958537> 9 accessed on 26th April 2022.

¹⁸ Cf. UNCHR 2011 ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework’ (16th June 2011) UN DOC [ST/] HR/PUB/11/4 1.

¹⁹ Markus Krajewski ‘Analysis of the Third Draft of the UN Treaty on Business and Human Rights’ (October 2021) 13.

²⁰ *Ibid.* 23.

²¹ Helmut Volger ‘Grundlagen und Strukturen der Vereinten Nationen’ (OUP 2007) 86; Scheuermann (N 12) 39.

²² Katarina Weilert ‘Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards’ *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (69 2009) 905 ff.

²³ Jan Wiegant ‘Internationale Rechtsordnung oder Machtordnung? – Eine Anmerkung zum Verhältnis von Macht und Recht im Völkerrecht’ *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (71 2011) 35; Stephan Hobe, ‘Einführung in das Völkerrecht’ (9 Ed 2008) 64 ff.

²⁴ Cf. Christina Binder, ‘Die Grenzen der Vertragstreue im Völkerrecht’ (OUP 2013) 20.

not by itself create legally binding obligations.²⁵ It furthermore derives its normative force through recognition of social expectations by states and other key actors.²⁶ It is generally agreed that the state duty to protect is a standard of conduct, not a result. What this means in relation to business is that states are not *per se* responsible when a business enterprise commits a human rights abuse. However, states may breach their international human rights law obligations if they fail to take appropriate steps to prevent such abuse. This means a duty investigate, punish, and redress it when it occurs or when the acts of an enterprise may be directly attributable to the state e.g., because it merely serves as the state's agent.²⁷

Despite a lack of obligation under international law, many companies opt for a voluntary commitment to uphold human rights, which have been developed either by themselves, by their industry (multi-stakeholder initiative standard) or by international organisations. However, in most cases they do not contain sanctions for violations (except for the OECD Guidelines and the Global Compact).²⁸ It is true that they contribute to strengthen awareness of the importance of human rights. However, it is problematic that the requirements from these sources sometimes diverge and are not transparent enough or require a considerable (bureaucratic) effort in implementation, which in turn hinders international trade.²⁹ Hereby, the implementation of the UNGP can contribute to standardisation and better comparability.

The UNGP are fundamentally applicable to all companies and states worldwide.³⁰ In this context, states are encouraged to prevent or prosecute and sanction human rights violations by third parties on their territory. To this end, states should enforce existing regulations on the protection of humans in corporate activities, and ensure that e.g., company law regulations do not obstruct human rights protection. In addition, they are encouraged to support companies in the protection of human rights, and if necessary, introduce reporting obligations. Furthermore, states should ensure human rights protection in their relations with business enterprises e.g., by imposing appropriate requirements when granting loans or awarding contracts.³¹ With regard to the increasing focus on legal obligations for companies, they should at least follow the recommendations. Therefore, enterprises should have a publicly available commitment to human rights protection (policy commitment). Further, the implementation of a human rights DD process with a reporting obligation is expected. Moreover, companies must create an effective remedial mechanism, including the establishment of a corporate grievance mechanism.³² However as there is no direct binding effect between companies and international law, it is left to the respective states to implement the requirements of the UNGP.

²⁵ Cf. Marcus Krajewski 'Menschenrechtliche Pflichten von multinationalen Unternehmen in den OECD-Leitsätzen: Taking Human Rights More Seriously?' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (76 2016) 313.

²⁶ Birgit Spießhofer 'Wirtschaft und Menschenrechte – rechtliche Aspekte der Corporate Social Responsibility' *Neue Juristische Wochenschrift* (2014) 2475.

²⁷ Ruggie (n 6) 84.

²⁸ Cf. Ernest Gnan/Christoph Schneider 'Schwerpunkt Außenwirtschaft 2019/2020 - Special topic: International trade and sustainable development' *Wirtschaftskammer Austria* (2020) 146.

²⁹ Thomas Voland 'Unternehmen und Menschenrechte – vom Soft Law zur Rechtspflicht' *Betriebs-Berater* (3 2015) 68.

³⁰ UNCHR 2011 'Guiding Principles on Business and Human Right: Implementing the United Nations "Protect, Respect and Remedy Framework' (16th June 2011) UN Doc [ST/] HR/PUB/11/4 1.

³¹ Thomas Voland 'Unternehmen und Menschenrechte – vom Soft Law zur Rechtspflicht' *Betriebs-Berater* (3 2015) 70 f.

³² UNCHR 2011 'Guiding Principles on Business and Human Right: Implementing the United Nations "Protect, Respect and Remedy Framework' (16th June 2011) UN Doc [ST/] HR/PUB/11/4 15 f.

The connection between the UN and the EU

The EU, the successor to the European Communities, has been an observing member of the UN since 1974. Even if relations between the UN and the European integration project go back into the 1960s, it was only at the beginning of the new millennium that the two actors discovered each other as real pillars in the effort for a peaceful world.³³ On 3rd May 2011, the European Union was granted the privilege of 'special observer status' by the resolution 65/276.³⁴ Therefore, the EU is the only organisation that has an extended right to speak and to make proposals, although the right to vote is still only reserved for the member states.

Thus, the manifestation of the strong connection between the parties is also contained in the most important legal sources. Within EU law, the link to the UN is recognisable e.g., Article 220 I TFEU and Article 34 I TEU contain provisions on cooperation with the UN. At the same time, the EU is active in all UN policy areas because it aims to address all global problems and meet these challenges with multilateral solutions. In 2012, the EU adopted a human rights package to enable the most coherent and efficient possible participation of the EU at the UN level in the primarily intergovernmental policy field of human rights.³⁵ This package of measures to strengthen the EU's voice was also with regard to the UN Human Rights Council, where the EU acts as an observer alongside its member states. The EU has a coordinating body for shaping its human rights policy in the UN of the Political and Security Committee. This Working Group continuously monitors how human rights around the world and prepares positions on general trends and individual events.³⁶

European Implementation of human rights

In October 2011, the EU presented its own strategy for CSR, which contains a strong link to the UNGP.³⁷ This was preceded by the EU's Green Deal,³⁸ and its European Multi-Stakeholder Forum on CSR, the former including sanctions against companies that violate principles, as defined in Art. 7 TEU. Further, in March 2020, the European Commission published the updated EU Action Plan on Human Rights and Democracy for 2020-2024.³⁹ Among other things, the promotion of a global system for human rights and democracy is one of its main priorities. Under the EU Non-financial Reporting Directive (2014/95/EU),⁴⁰ companies are required to disclose their human rights risks, impacts, and DD in their annual reports. Only companies with more than 500 employees are required to publish their reports.

³³ Manuela Scheuermann 'UN-BASIS-INFORMATIONEN 42, Die Europäische Union und die Vereinten Nationen' (Deutsche Gesellschaft für die Vereinten Nationen e.V. 22nd December 2018) <<https://dgvn.de/veroeffentlichungen/publikation/einzel/die-europaeische-union-und-die-vereinten-natione>> accessed on 2nd April 2022 1.

³⁴ UNGA RES 65/276 (3rd May 2011) UN DOC A/RES/65/276.

³⁵ Cf. General Secretariat of the Council 'EU Annual Report on Human Rights and Democracy in the World in 2012' 9431/13 ADD 1 REV 1.

³⁶ Manuela Scheuermann 'UN-BASIS-INFORMATIONEN 42, Die Europäische Union und die Vereinten Nationen' (Deutsche Gesellschaft für die Vereinten Nationen e.V. 22nd December 2018) <<https://dgvn.de/veroeffentlichungen/publikation/einzel/die-europaeische-union-und-die-vereinten-natione>> accessed on 2nd April 2022 7.

³⁷ European Commission 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' COM (2011) 681 final.

³⁸ European Parliament 'Resolution on a European strategy for sustainable, competitive and secure energy (Green paper)' 2006/2113(INI).

³⁹ European Parliament and the Council 'EU Action Plan on Human Rights and Democracy 2020-2024' JOIN (2020) 5.

⁴⁰ European Parliament and the Council 'Disclosure of non-financial and diversity information by certain large undertakings and groups' Directive 2013/34/EU.

However, there are still other direct connections of CSR in regulations such as the Anti-torture Regulation (EU) 2019/125,⁴¹ or the EU regulation on sustainability-related disclosures in the financial services sector (EU) 2019/2088.⁴²

In recent years, there has been a trend towards including human rights and social obligations in EU (free) trade agreements and investment protection agreements. This should be achieved by an expanding trade policy which includes aspects of environmental protection, climate protection, human rights and working conditions, that influence states actions and thereby the general situation in regional territories of the partners country. The legally binding effect of human rights in this type of agreement results less from the resolution itself than from the contractual correlation.⁴³ According to the ECJ (C-581/11 P-Mugraby) a contractual cooperation should not be terminated or suspended in the event of human rights violations, but rather appropriate measures should be taken.⁴⁴

Nevertheless, it is disputed whether companies can be the subject of international agreements.⁴⁵ Numerous agreements recognise that companies – and not only their home states – can invoke the right to property or the principle of a fair trial.⁴⁶ Furthermore, companies can bring proceedings before the European Court of Human Rights based on the European Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols.⁴⁷ Expert opinions differed widely on whether the EU has so far taken sufficient action to regulate human rights. According to a study on corporate DD in the supply chain published in 2020 by the European Commission, it is found that one third of European companies do not comply with human rights DD requirements; fifty-five per cent meet less than half of the tested requirements.⁴⁸ This shows that actual application in practice has not yet arrived to a sufficient extent.

Human Rights under European Law – the EU Supply Chain Act

On 23 February 2022, the European Commission adopted a proposal for a Directive on corporate DD in the field of sustainability. This directive aims to promote responsible and sustainable behaviour by companies in global value chains. Companies will thus be obliged at European level to identify, prevent, end or mitigate adverse impacts of their actions on

⁴¹ European Parliament and of the Council Regulation (EU) 2019/125 of 16th January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

⁴² European Parliament and of the Council Regulation (EU) 2019/2088 of 27th November 2019, sustainability-related disclosures in the financial services sector (Text with EEA relevance).

⁴³ Winfried Huck/Claudia Kurkin ‘Die UN-Sustainable Development Goals (SDGs) im transnationalen Mehrebenensystem‘ *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (78 2018) 379.

⁴⁴ Case C-581/11 *P Mugraby v Council of the European Union and European Commission* (2012) ECR-I 70.

⁴⁵ Katarina Weilert ‘Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards‘ *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (69 2009) 905 ff.

⁴⁶ Thomas Voland ,Unternehmen und Menschenrechte – vom Soft Law zur Rechtspflicht‘ *Betriebs-Berater* (3 2015) 68.

⁴⁷ Ibid.

⁴⁸ European Commission, study on ‘directors’ duties and sustainable corporate governance (29th July 2020) <<https://op.europa.eu/de/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>> accessed on 11th February 2022 97.

the environment and human rights. The purpose is to create legal certainty, transparency for consumers, and a level playing field.⁴⁹

Scope of Application

The Directive affects two groups of EU companies. Firstly, all EU limited liability companies with at least 500 employees and a net turnover of at least 150 million euros worldwide. Secondly, limited liability companies that are active in defined resource-intensive business areas, and who do not meet the thresholds of the first group, but have at least or more than 250 employees and generate a net turnover of at least 40 million euros worldwide. It should be noted that for the latter group, the regulations apply two years later than for the first group. Also included are companies from third countries that are active in the EU and generate a turnover equal to the above-mentioned groups within the EU. The Directive additionally applies to subsidiaries and the value chains.⁵⁰

The Measures

The EU Supply Chain Act imposes measures on the companies concerned, that they must comply with their obligation. Companies must identify their actual and potential negative impacts on the environment and human rights and respond appropriately to prevent, mitigate and remedy these impacts. Furthermore, DD must be implemented in the company's policy and management system, and a grievance mechanism must be established with the assurance that every potentially affected party along the supply chain has access to it. The company is also responsible for providing information to the public to create transparency and demonstrate compliance with DD obligations. This includes an annual report. The measures taken must be controlled and monitored. Further, companies whose annual turnover is higher than 150 million euros must align their internal guidelines with the goal of the Paris Agreement, so that the goal of limiting global warming to 1.5 degrees Celsius can be achieved.⁵¹ Thus, the DD requirements are very similar except for the more far-reaching regulations regarding the environmental aspect.

Liability

The competent national authorities of the Member States will supervise the companies and impose fines in case of non-compliance with the DD obligations carried out. An additional instrument is that victims of violations that could have been avoided by the company will be able to take legal action in the future.⁵²

Art. 1(8) of the Draft Directive requires Member States to guarantee that the national competent authorities act independently and that all auditors, experts and employees act neutrally. The purpose of the Draft Directive is to create a European network of supervisory authorities. Compared to the German Supply Chain Act, the proposed Directive is stricter

⁴⁹ European Commission 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains' (2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 1st May 2022.

⁵⁰ European Commission 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains' (2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 1st May 2022.

⁵¹ Kai Leisering 'EU Supply Chain Law Obliges Companies to Operate in a Fair and Sustainable Manner' (2022) <<https://www.eqs.com/compliance-blog/eu-supply-chain-law/>> accessed 1st May 2022

⁵² European Commission 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains' (2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 1st May 2022.

at the European level. For example, Art. 18(4) provides that one possible official measure after an appropriate period can be to order the omission of violations of the DD obligations as well as their termination or elimination (Art. 18 (5) of the Draft Directive). Another possible sanction is the imposition of fines. Furthermore, it should be possible to demand damages from a company according to Arts. 20, 22 Draft Directive. According to Article 20, Member States are required to impose effective sanctions and to make the decisions public. Furthermore, when imposing sanctions, the efforts made by companies to comply with DD obligations should be considered.

The amount of the fine should be based on the turnover of the companies. With respect to liability, the European Union would prefer to strive for standardisation, as similar laws have already been passed in some Member States containing divergent regulations about liability (Germany, basically, no liability; France, basically, liability). The harmonisation of the internal market, the avoidance of a divergence of legal framework conditions, as well as directives regarding product liability and similar enactments, indicate that the EU has the regulatory competence for this project. Starting with the breach of duty, Art. 22(1) provides that companies shall be liable for damages if they have not fulfilled their duties according to Art. 7 and Article 8 (risk management), and an environmental or human rights violation and damage have occurred as a result. It is still unclear whether fault-based liability will be enforced or whether a breach of duty will remain. National or EU liability provisions remain unaffected if they provide for stricter liability rules, or if they regulate contents that are not addressed by the Draft Directive. This is the case for Directive 2004/35/EC, Recital 62 of the Draft Directive and, at the German level, the Environmental Liability Act.⁵³

Effects for companies from third countries

The European Commission's proposal for a Directive will also affect companies from third countries that sell goods or provide services in the European Single Market. The purpose is to avoid competitive disadvantages for domestic companies compared to those abroad, which are active in the internal market. The European Commission bases this on turnover and not on the number of employees, as uncertainties can arise due to different legal definitions of the term "employee".⁵⁴

Human Rights under German law

In order that regulations of international law can be applied in German law and become binding in domestic law, a legal principle of international law must be incorporated into the respective national legal order by a state decision (constitution or law).⁵⁵ The implementation of general rules of international law are part of federal law. They take precedence over laws and generate rights and obligations directly for the inhabitants (Article 25 of the Basic Law); for which the transposition of European law applies the precedence principle. This implies that European law is superior to the national laws of Member States,

⁵³ Gerald Spindler ‚Der Vorschlag einer EU-Lieferketten-Richtlinie‘ Zeitschrift für Wirtschaftsrecht (16 2022) 773 ff.

⁵⁴ Ibid. 767.

⁵⁵ Bundeszentrale für politische Bildung ‚Völkerrecht – Internationales Recht‘ <<https://www.bpb.de/23189/voelkerrecht/>> accessed on 8th May 2022.

whereas the precedence principle applies to all European acts with a binding force.⁵⁶ States may enact their own regulations, but these may not contradict the relevant European law.

The implementation of human rights is therefore embedded in German Constitutional Law, Article 20a of the Basic Law, “Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.” This is interpreted as a “duty to protect” by public authorities, which extends from environmental subjects to human right questions.⁵⁷ According to the judgment of the German Federal Constitutional Court there is the “(...) obligation to take all steps necessary to minimise the risk of human rights violations.”⁵⁸ Such duty also encompasses putting in place administrative and judicial procedures aimed at preventing and redressing human rights violations.

The UNGPs, and in general the voice of the UN, encourage states to pass legislation on DD. In previous years, several Member States have enacted legislation relating to human rights DD measures as National Action Plans (NAP). For several decades, attempts have been made to encourage these companies to recognise DD in these areas on a voluntary basis. Academic research as well as studies commissioned by the EU institutions have clearly shown that the voluntary approach is insufficient.⁵⁹ This is also clearly shown by the German NAP for Business and Human Rights of 21 December 2016,⁶⁰ which was intended to advance the implementation of the UNGP. For this purpose, companies were surveyed on a multi-year basis to assess the status of the voluntary implementation of these core elements of human rights DD.⁶¹ Within the last monitoring in 2020, only 13 to 17 per cent of the companies surveyed complied with the requirements of the NAP.⁶² An additional 10 to 12 per cent of the companies are on a ‘good path’.⁶³ Further, the NAP’s do not prescribe any penalties for lack of compliance.

The German NAP describes in detail companies’ responsibilities to respect human rights according to the UN Guiding Principles. It *inter alia* sets a goal for 50 per cent of all

⁵⁶ European Union ‘Glossary of summaries - Primacy of EU law’ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:primacy_of_eu_law#:~:text=The%20principle%20of%20the%20primacy,%20EU%20law%20will%20prevail> accessed on 25th April 2022.

⁵⁷ Jessica Stubenrauch ‘Ein Menschenrecht auf Wasser‘ Zeitschrift für Umweltrecht (November 2010) 521.

⁵⁸ German Federal Court (BVerfG), Case 2 BvF 2/90, 2 BvF 4/90, 2 BvF 5/92 (1993).

⁵⁹ European Parliament ‘Towards a mandatory EU system of due diligence for supply chains’ (22nd October 2020) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2020\)659299](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)659299)> Accessed on 9th May 2022.

⁶⁰ The Federal Government ‘National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights 2016 – 2020’ (21st December .2016) <<https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf>> accessed on 20th March 2022.

⁶¹ German Government ‘Interministeriellen Ausschusses Wirtschaft und Menschenrechte der Bundesregierung „Statusbericht“‘ (31st August 2021) <<https://www.auswaertiges-amt.de/blob/2476592/169c6c24c564c6b85da96d33099bcf3c/nap-statusbericht-2021-barrierefrei-data.pdf>> accessed on 30th May 2022 1f.

⁶² Cornelia Heydenreich i.a. ‘Vier Jahre Nationaler Aktionsplan Wirtschaft und Menschenrechte (NAP) - Schattenbericht der Zivilgesellschaft‘ (August 2021) <https://www.germanwatch.org/sites/default/files/Schattenbericht_2021_NAP.pdf> accessed on 10th April 2022 19.

⁶³ German Government ‘Interministeriellen Ausschusses Wirtschaft und Menschenrechte der Bundesregierung, Statusbericht“‘ (31st August 2021) <<https://www.auswaertiges-amt.de/blob/2476592/169c6c24c564c6b85da96d33099bcf3c/nap-statusbericht-2021-barrierefrei-data.pdf>> accessed on 25th March 2022 31.

companies with more than 500 employees to have a human rights system in place by 2020. In addition, there are many other areas where the goals of the NAP's have not been achieved. These include e.g., the lack of ratification of the US social pact or the ILO Convention on minimum wage setting, as well as the lack of participation in the sessions for the Binding Treaty on Business and Human Rights.⁶⁴ Since the NAP, which was to be implemented by 2020, the German government has not published a follow-up document.

The German Supply Chain Act

The Supply Chain Act at federal level was passed by the German Bundestag on 11 June 2021. It will come into force on 1st January 2023. Along with the entry into force, the companies covered by the scope of application will be subject to a series of obligations to ensure that human rights-related and environmental DD obligations are complied with.⁶⁵ The German Supply Chain Act (SCA) is not unique. The United Kingdom, the Netherlands and France have already adopted similar regulations. There is also a proposed directive at the European Union level.⁶⁶ Compliance measures should already be started to meet the challenges of the law.⁶⁷ In the following, first the scope of application of the German Supply Chain Act will be discussed, followed by the measures, special attention being paid to risk management and finally liability.

Scope of Application

According to section 1 I of the SCA, all enterprises that employ more than 3,000 workers in Germany, and have a head office, main office or branch office or their registered office in Germany, are covered by the scope of application. The legal form of the enterprise is irrelevant. It should be noted that the threshold of the scope of application will decrease to 1,000 employees from 1 January 2024. Employees who have been posted abroad will be included. In addition, according to section 1 III SCA, the employees of the affiliated companies of the parent company within the meaning of section 15 German Stock Corporation Act are included. Thus, at least as of 1 January 2024, many companies will be affected by the SCA. Companies that are not covered by the scope of application will nevertheless feel its effects due to a so-called "trickle-down effect", as the companies that fall under the scope of application will transmit the necessary measures for compliance with the statutory provisions to them via contracts.⁶⁸

⁶⁴ Cornelia Heydenreich i.a. 'Vier Jahre Nationaler Aktionsplan Wirtschaft und Menschenrechte (NAP) - Schattenbericht der Zivilgesellschaft' (August 2021)

<https://www.germanwatch.org/sites/default/files/Schattenbericht_2021_NAP.pdf> accessed on 10th April 2022 30

⁶⁵ Eric Wagner/Marc Ruttloff 'Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung' Neue Juristische Wochenschrift (30 2021) 2145.

⁶⁶ European Commission, „Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains” (23rd February 2022)

<https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 30th April 2022.

⁶⁷ Eric Wagner/Marc Ruttloff 'Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung' Neue Juristische Wochenschrift (30 2021) 2145.

⁶⁸ Eric Wagner/Marc Ruttloff 'Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung' Neue Juristische Wochenschrift (30 2021) 2145; Federal Ministry of Labour and Social Affairs 'Supply Chain Act – Act on Corporate Due Diligence Obligations in Supply Chain' <<https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html>> accessed 30th April 2022.

Furthermore, foreign companies are also included, based on the resolution recommendation and a report of the Committee for Labour and Social Affairs. This is the case if a foreign company has a branch within the meaning of section 13 d German commercial code in Germany and employs at least 3,000 workers there.⁶⁹

The Measures

The DD obligations of companies are defined in section 3 SCA. In this context, companies are to observe the duties of care imposed on them in ‘an appropriate manner’. This is to ensure that violations of the prohibitions defined in section 2 II and III SCA are prevented.

The legal position protected by section 2 II SCA can be divided into twelve subsections. These include: the prohibition of the employment of children under the minimum permissible age; slavery, forced labour; disregard of labour protection as well as freedom of association; discrimination; inadequate payment of wages; environmental aspects such as, among others, harmful soil change and water pollution; unlawful forced eviction; the use of security forces if there is an associated threat of injury; as well as a general prohibition of acting in such a way that human rights are violated in a particularly serious manner.

The duties of DD which the enterprises are to observe according to the SCA include the establishment of a risk management system (section 4 I SCA); the performance of the risk analysis associated with risk management (section 5 SCA); the definition of an internal responsibility (section 4 III SCA); the adoption of a policy statement (section 6 II SCA); the creation of preventive measures in the own business operations as well as with regard to direct suppliers (section 6 I, III, IV SCA); remedial measures (section 7 I to III SCA); the implementation of a complaints procedure (section 8 SCA); the implementation of DD obligations with regard to risks that may arise with indirect suppliers (section 9 SCA); and finally a documentation obligation (section 10 I SCA), and reporting (section 10 II SCA). The adequacy of these obligations is defined in section 3 II SCA and is determined by the type and scope of business activity, the possibility of exerting influence on direct polluters, the expected severity of the violation and the probability of its occurrence as well as the contribution to causation about environmental or human rights risks. It should be noted that this is not a guarantor or success obligation.⁷⁰

The Bundestag states that more efforts can be left to the company, measured by the possibility of influence, the probability and severity of the expected violations and the size of the contribution to causation.⁷¹

Risk Management and Risk Analysis

⁶⁹ Michael Nietsch/Michael Wiedmann ‘Adressatenkreis und sachlicher Anwendungsbereich des neuen Lieferkettensorgfaltspflichtengesetz’ *Neue Juristische Wochenschrift* (1 2022) 1.

⁷⁰ Erik Ehmann/Daniel F. Berg ‘Das Lieferkettensorgfaltspflichtengesetz (LkSG): ein erster Überblick’ *GWR Gesellschaft und Wirtschaftsrecht* (15 2021) 287ff.; Federal Ministry of Labour and Social Affairs ‘Supply Chain Act – Act on Corporate Due Diligence Obligations in Supply Chain’ <<https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html>> accessed 30th April 2022.

⁷¹ Deutscher Bundestag ‘Gesetzesentwurf der Bundesregierung – Entwurf eines Gesetzes über die unternehmerische Sorgfaltspflicht in Lieferketten’ (19th April 2021) BT-Drucksache 19/28649 42.

As already explained, every company must implement effective risk management and carry out the associated risk analysis. This part represents the first step in order to comply with the DD obligations laid down in the Supply Chain Act. Thus, the company must first analyse the supply chain and determine in which part of it a potential risk for human rights or environmental law violations could exist.⁷² The company should then identify risks for its own business unit and direct suppliers, as well, if necessary, for indirect suppliers. With the help of this risk analysis, violations of human rights and environmental aspects should be prevented, or stopped, and minimised.⁷³

For example, a company can identify risks through supplier interviews, on-site inspections, and discussions with potentially affected stakeholders such as residents, trade unions or workers. The findings should then be classified into risk areas. The locations in the respective countries, the business areas and the products that are manufactured or sold, can play a role in this. These identified risk areas should then be prioritised. Relevant factors are the type and scope of the business, the assessment of the company's possibilities to influence the direct infringer, the possible severity of the infringement, the reversibility of the infringement, the assessment of the probability that the infringement will occur and finally the type of contribution to causation by the company itself.⁷⁴

Establishing an internal responsibility for the company

In order to fulfil the DD obligations, companies must, among other things, create an internal responsibility. One example is to appoint a human rights officer.⁷⁵

The adoption of a policy statement

The policy statement must contain a description of how the company complies with the DD obligations. Secondly, it must describe what risks have been identified in the risk analysis and the expectations that the company has with regard to human rights and environmental aspects vis-à-vis its employees and suppliers. These policy statements are usually brief and provide an overview of the company's recognition of its responsibilities, the risks identified, and the measures taken against (potential) human rights violations. The company should regularly check whether the policy statement is sufficiently specific. All points should be set out at least in essence. Finally, the policy statement should be considered part of the code of conduct and should be made available and communicated to suppliers, employees as well as the works council and the public.⁷⁶

Establishment of prevention measures in own business operations and direct suppliers

⁷² Federal Ministry of Labour and Social Affairs 'Supply Chain Act – Act on Corporate Due Diligence Obligations in Supply Chain' <<https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html>> accessed 30th April 2022.

⁷³ Initiative Lieferkettengesetz 'What the new Supply Chain Act delivers- and what it doesn't' (11th June 2021) 3.

⁷⁴ Taylor Wessing 'Guide to the German Supply Chain Due Diligence Act' (28th July 2021) <https://www.taylorwessing.com/-/media/taylor-wessing/files/germany/2021/07/tw_2021_guide-to-the-german-supply-chain-due-diligence-act_30072021.pdf> accessed on 30th May 2022 2.

⁷⁵ Federal Ministry of Labour and Social Affairs 'Supply Chain Act – Act on Corporate Due Diligence Obligations in Supply Chain' <<https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html>> accessed 30th April 2022.

⁷⁶ Taylor Wessing 'Guide to the German Supply Chain Due Diligence Act' (28th July 2021) <https://www.taylorwessing.com/-/media/taylor-wessing/files/germany/2021/07/tw_2021_guide-to-the-german-supply-chain-due-diligence-act_30072021.pdf> accessed on 30th May 2022 3.

Following risk analysis, the company must implement effective preventive measures. One way to comply with environmental DD obligations is to develop sustainable purchasing practices. In addition, a significant influence can be exerted on the risk of human rights risks arising by means of contract design. Particularly in the case of contracts with suppliers in the high-risk sector, greater care must be taken to ensure that the contractual design does not increase the probability of violation. Bonus incentives for suppliers can also be an effective system to motivate suppliers to achieve sustainability goals. In addition, it can be helpful to train staff to raise awareness (especially in purchasing). It should be noted that the measures taken must be checked for effectiveness. It is helpful to follow the advice given by the established complaints system. Then the measures must be adapted.⁷⁷

Remedial measures

If (imminent) violations of human rights or of the environment are identified, the company must immediately take appropriate remedial action. The prerequisite is that the measures are appropriate to prevent, end or at least minimise violations. In the case of inadequacy, it is possible that a fine will be imposed on the company. The same applies if this case occurs with indirect suppliers and the company had "reasonable knowledge". If the company is not able to stop the violations at direct or indirect suppliers, the company must at least develop a plan to stop or mitigate the violation. This can be done in cooperation with the supplier. Ultima ratio would be to discontinue the business relationship with the supplier. A company has an obligation to terminate the business relationship with a supplier if there is a serious violation of a protected legal right, the remedial plan is not effective, and the company has no other mitigating means at its disposal.⁷⁸

The implementation of a complaint's procedure

Companies are obliged to establish a complaints procedure to give affected persons the opportunity to report violations of human rights and environmental aspects. This can be associated with the problem that those affected may not even know the suppliers or companies and therefore do not know who they can turn to. To counter this problem, companies should disclose their supply chains in such a way that potentially affected persons could access the complaints procedure. It is helpful to establish a comprehensive grievance mechanism, such as industry wide.⁷⁹

Documentation and reporting obligation

Companies must report once a year on the fulfilment of their DD obligations. For this purpose, companies should document the steps taken on an ongoing basis. After the preceding DD obligations have been presented an outlook for the future should be provided. The Federal Office of Economics and Export Control (BAFA) is responsible for this and provides electronic access to the report format.⁸⁰

⁷⁷ Taylor Wessing 'Guide to the German Supply Chain Due Diligence Act' (28th July 2021) <https://www.taylorwessing.com/-/media/taylor-wessing/files/germany/2021/07/tw_2021_guide-to-the-german-supply-chain-due-diligence-act_30072021.pdf> accessed on 30th May 2022 4.

⁷⁸ Initiative Lieferkettengesetz 'FAQ on Germany's Supply Chain Due Diligence Act' (2021) <https://lieferkettengesetz.de/wp-content/uploads/2021/11/Initiative-Lieferkettengesetz_FAQ-English.pdf> accessed on 30th May 2022 10f.

⁷⁹ Ibid. 18.

⁸⁰ Taylor Wessing 'Guide to the German Supply Chain Due Diligence Act' (28th July 2021) <https://www.taylorwessing.com/-/media/taylor-wessing/files/germany/2021/07/tw_2021_guide-to-the-german-supply-chain-due-diligence-act_30072021.pdf> accessed on 30th May 2022 8.

Liability

In cases where companies do not comply with their DD obligations under the Supply Chain DD Act, fines can be imposed. The amount of these fines is up to 2 per cent of the annual global turnover or up to 8 million euros. There is the restriction that the fine system based on turnover only applies to companies with an annual turnover of more than 400 million euros. In addition, there is the possibility that companies may not participate in the awarding of public contracts if a fine of a certain amount has been imposed.⁸¹

Conclusions

In summary, human rights protection has now reached all levels of the legal system. The cornerstone for the observance of human rights is above all the UN, which encourages its member states to take more responsibility by issuing corresponding regulations. The extent to which individual countries submit to these must be assessed on a case-by-case basis, as not all 193 member states undertake a general ratification of new legal sources. Moreover, the application of the national exhaustion of remedies may bypass the question with respect to human rights, and specifically whether companies can constitute a subject in the sense of international law and thus form part of international treaties. Within Europe, many countries have already addressed this issue and enacted independent remedies to protect human rights in relation to the economic activities of companies and their supply chains.

In general, the EU's proposed Directive contains similar measures to the Supply Chain Sourcing Obligations Act at the German level, but includes stricter liability rules. In both, the focus is on risk management and associated risk analysis. These two components form the starting point for companies to adequately fulfil their human rights DD obligations. Companies from third world countries are also held responsible. Both the German Supply Chain Act and the proposed Directive at the EU level provide for DD obligations to be fulfilled by companies falling under the respective scope of their application. These obligations are very similar in both laws, whereby the EU Directive proposal is more far-reaching on environmental obligations. The starting point in each case is risk management and the associated risk analysis. As soon as this is not implemented in a functional manner and thus violations of DD obligations occur, sanctions or liability can be imposed. Under the German Supply Chain Act, violations result in fines or exclusion from public procurement. At EU level, liability is more extensive, so that additional damages can be claimed. As things stand, the German government has not yet published a renewed version of the NAP to implement human rights into the economy.

Although some points are covered by the introduction of the German Supply Chain Act, other important objectives of the NAP have fallen out of focus. Overall, it can be said that both the German Supply Chain Act and European regulation meet the expectations of the UNGP and, thus, the legal ideas of international law regarding the integration of human rights into business practice.

⁸¹ Business and Human Rights „Supply Chain Act” <<https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html>> accessed 1st May 2022.