Responsibilities of Transnational Corporations Under the UN Guiding Principles on Business and Human Rights: A Case Study of Uyghur Forced Labour

Eve Wahlström
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University of Helsinki
Faculty of Law
International Law
Supervisor: Jan Klabbers
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HELSINGIN YLIOPISTO
HELSINGFORS UNIVERSITET
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Abstract

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Abstract: Chinese labour programs in Xinjiang allow the use of Uyghurs and members of other Muslim minority groups for forced labour in factories owned by private entities. In this thesis, the Uyghur forced labour scheme is researched through the lens of corporate responsibility to respect human rights under the UN Guiding Principles on Business and Human Rights (UNGPs).

The purpose of this thesis is to provide a legal assessment of the scope and extent of transnational corporations' responsibility under the UNGPs' business and human rights regime for relying on goods, components, and materials sourced from China implicated in forced labour in the Xinjiang region.

Uyghur forced labour is a human rights violation, and under the UNGPs, transnational corporations are expected to respect human rights in all their business activities wherever they operate. As part of the corporate responsibility to respect human rights, transnational corporations should address the risk of Uyghur forced labour by conducting human rights due diligence.

Transnational corporations have a non-binding responsibility to respect human rights under the UNGPs. The analysis shows that transnational corporations do not have obligations under international law to respect human rights in their extraterritorial activities. Transnational corporations are bound by domestic laws prohibiting international human rights violations and forced labour in their extraterritorial activities.

The analysis shows that home states of transnational corporations have extraterritorial jurisdiction in certain situations to incur legal liability on the extraterritorial activities of corporate nationals or their overseas subsidiaries where they fail to respect human rights and the prohibition of forced labour.

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Muyi Xiao, Haley Willis, Christoph Koettl, Natalie Reneau and Drew Jordan, ‘China Is Using Uighur Labor to Produce Face Masks’ (*New York Times*, 19 July 2020) available at < https://www.nytimes.com/2020/07/19/world/asia/china-mask-forced-labor.html > last accessed 25 February 2021

Abbreviations

China	People's Republic of China
EP	European Parliament
EU	European Union
Framework	UN 'Protect, Respect and Remedy' framework
ILO	International Labour Organization
MNE Declaration	ILO Declaration on Fundamental Principles and Rights at Work
MNE Guidance	OECD Due Diligence Guidance for Responsible Business Conduct
MNE Guidelines	OECD Guidelines for Multinational Enterprises
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
Special Representative	Special Representative of Secretary-General on the issue of human rights and transnational corporations and other business enterprises
UN	United Nations
US	United States
UNGPs	The UN Guiding Principles on Business and Human Rights
Xinjiang region	Xinjiang Uyghur Autonomous Region

1 Introduction

1.1 Purpose of the Study

The People's Republic of China (China) has been in the global spotlight about the gross human rights violations in Xinjiang Uyghur Autonomous Region (Xinjiang region).[1] Reports estimate that the Chinese officials have arbitrarily detained[2] over a million Uyghurs and individuals from other Muslim ethnic minority groups[3] to internment camps, which are officially called vocational education and training centres,[4] in the Xinjiang region. Pursuant to credible reports, some factories adjacent to these internment camps benefit from Uyghur forced labour for manufacturing products and components for well-known Western business enterprises.[5] A state-sponsored labour transfer program expands Uyghur forced labour outside the internment camps and beyond the Xinjiang region.[6] The fashion industry sources

[1] Maya Wang, 'More Evidence of China's Horrific Abuses in Xinjiang' (*Human Rights Watch*, 20 February 2020) [online]. *See* Adrian Zenz, 'Xinjiang's Militarized Vocational Training System Comes to Tibet' (2020) 20(17) China Brief [online] [hereinafter Zenz 2020a] about the human rights violations and mass labour program in Tibet. *See also* Adrian Zenz, *Sterilizations, IUDs, and Mandatory Birth Control: The CCP's Campaign to Suppress Uyghur Birthrates in Xinjiang* (Washington, DC: Jamestown Foundation, 2020), in which CCP refers to Chinese Communist Party, and Adrian Zenz, 'Beyond the Camps: Beijing's Long-Term Scheme of Coercive Labor, Poverty Alleviation and Social Control in Xinjiang' (2019) 7(12) *Journal of Political Risk* [online].

[2] No one shall be subjected to arbitrary arrest or detention under Article 9 of Universal Declaration of Human rights and Article 9 of International Covenant on Civil and Political Rights. *See* Universal Declaration of Human Rights, UNGA Res 217 A(III), adopted 10 December 1948, and International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23 March 1976.

[3] The Chinese government's suppressive 're-education' policies have mainly targeted the Uyghurs but also other Turkic speaking Muslim minorities such as the Kazakhs, Uzbeks, Tartars, Tajiks, Kyrgyz and Hui. This study refers to them collectively as 'Uyghurs and other Muslim minorities' for brevity. *See* Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, S. 3744, 116th Cong., Sec. 3(2) [hereinafter US Uyghur Human Rights Policy Act], and European Parliament resolution 2020/2913(RSP) on forced labour and the situation of the Uyghurs in the Xinjiang Uyghur Autonomous Region [2020] P9_TA(2020)0375, 1 [hereinafter EP Uyghur forced labour Resolution].

[4] US Uyghur Human Rights Policy Act, Sec. 3(2) and EP Uyghur forced labour Resolution, C. Re-education camps are often referred to as internment camps due to the mass internment, forced cultural assimilation, political indoctrination, intrusive surveillance of the camp detainees and the limits to their fundamental freedoms. The persecution of Uyghurs and their detention in internment camps could account crimes against humanity and genocide under international law. As of 23 February 2021, US and Canada call the China's treatment of Uyghurs as 'genocide'.

[5] US Uyghur Human Rights Policy Act, Sec. 3(4) and EP Uyghur forced labour Resolution, 1.

[6] Australian Strategic Policy Institute (ASPI) reports that more than 80 international brands owned by multinational corporations allegedly profit directly or indirectly from Uyghur forced labour in their supply chains. At least 80 000 Uyghurs were transferred from Xinjiang to other Chinese provinces between 2017 and

materials and products from the Xinjiang region and is one of the most significant contributors to the Uyghur forced labour scheme. The Xinjiang region produces almost a fifth of the world's cotton, and more than half a million Uyghurs are forced to pick cotton there.[7] However, the Uyghur forced labour scheme is not limited to the garment industry, as it provides products and components for various industries.[8]

The forced labour and situation of Uyghurs in the Xinjiang region will form the case study of this thesis for the reason that the prevalence of forced labour and other labour abuses in the Xinjiang region raises concerns globally about the connection of transnational corporations to the Uyghur labour programs.[9] Xinjiang products are deeply integrated into product supply chains around the world. The corporate responsibility to respect human rights has specific importance and significance in this case study because the labour programs in Xinjiang are government-led. The Chinese officials do not protect the human rights of the Uyghurs and other Muslim minority groups. For that reason, transnational corporations have a significant role in preventing the use of Uyghur forced labour in their business activities. The remarkable position of Chinese production in global value chains puts transnational corporations in the threat of contributing to the Uyghur forced labour scheme. Therefore, this thesis is based on research devoted to understanding the use of Uyghurs and individuals from other Muslim minority groups for forced labour in Xinjiang and how it relates to the business and human rights regime set by the UN Guiding Principles on Business and Human Rights (UNGPs).[10]

2019. Vicky Xiuzhong Xu, Danielle Cave, Dr James Leibold, Kelsey Munro and Nathan Ruser, Uyghurs for sale: 're-education', forced labour and surveillance beyond Xinjiang [online] (Australian Strategic Policy Institute (ASPI), 2020) [online], 5 [hereinafter ASPI Report 2020].

[7] Xinjiang region supplies fifth of the world cotton, and 85 percent of Chinese cotton. Report shows that Uyghur forced labour in the region is much more widespread than first thought. Adrian Zenz, *Coercive Labor in Xinjiang: Labor Transfer and the Mobilization of Ethnic Minorities to Pick Cotton* (Center for Global Policy, 2020) [online], 3, and John Sudworth, 'China's Tainted Cotton' (*BBC*, December 2020) [online].

[8] ASPI Report 2020, 4, *supra* note 6. Uyghur forced labour is reportedly used in supply chains of garment, technology and automotive sectors. ASPI identified 27 factories in nine Chinese provinces using Uyghur forced labour.

[9] The human rights responsibilities of transnational corporations are the primary focus of this thesis due to potential concerns of their extraterritorial activities tied to forced labour in Xinjiang.

[10] The UNGPs consist of 31 principles, framed in three main pillars: the state duty to protect against human rights abuses, the corporate responsibility to respect human rights, and the need to help victims achieve remedy. Office of the United Nations High Commissioner for Human Rights, 'Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/04 [hereinafter UN Guiding Principles or UNGPs].

The UNGPs is an instrument consisting of 31 principles implementing the UN 'Protect, Respect and Remedy' framework (Framework)[11] conceived by John G. Ruggie as the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (Special Representative). The UNGPs is one of the principal instruments setting up standards for transnational corporations to address human rights risks such as forced labour in their business activities.[12] It is thus the global foundation for business and human rights regime.[13] The UNGPs aim to tackle corporate human rights violations by providing guidance on human rights due diligence. The 'Respect' pillar of the Framework expects companies to undertake human rights due diligence as part of their corporate responsibility to respect human rights. Human rights due diligence is a risk management tool for transnational corporations to identify, prevent, mitigate, and account for how they address the actual and potential adverse human rights impacts in their own operations and the operations of their subsidiaries and suppliers.[14]

China constantly denies all alleged human rights violations and the existence of programs transferring hundreds of thousands of Uyghurs and members of other Muslim minority groups into work in the Xinjiang region.[15] Although China has not ratified the main

[11] UN General Assembly (UNGA), 'Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' UN Human Rights Council 8th session (2008) UN Doc A/HRC/8/5. This thesis will study transnational corporations relying on goods sourced in Xinjiang or from factories elsewhere in China implicated in the forced labour of Muslim individuals in the Xinjiang region from the perspective of parent company liability related to its overseas subsidiaries and transnational corporations' responsibility for their suppliers' adverse impacts on human rights.

[12] Other international soft law instruments include OECD, *OECD Guidelines for Multinational Enterprises*, 2011 [hereinafter MNE Guidelines], OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018 [hereinafter MNE Guidance] and the ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 5th ed. 2017 [hereinafter MNE Declaration]. All these instruments refer to the UN Guiding Principles on business and human rights and on the implementation of human rights due diligence. The OECD MNE Guidelines and Guidance and the ILO MNE Declaration draw upon the UN Framework and are in line with the UNGPs for its implementation, and therefore these legal developments will not form the focus of this paper. They will be referenced where relevant, but the analysis of corporate responsibility on human rights and conduct of human rights due diligence will be made with reference to their alignment with the UNGPs.

[13] The OECD Due Diligence Guidance for Responsible Business Conduct provide more detailed guidance for human rights due diligence. OECD has also developed detailed due diligence guidance for some specific sectors such as the textile and garment supply chains.

[14] UN Guiding Principle 17. *See also* Mark B. Taylor, Zandvliet Luc and Forouhar Mitra, *'Due Diligence for Human Rights: A Risk-Based Approach' Corporate Social Responsibility Initiative Working Paper No. 53* (MA: John F. Kennedy School of Government, Harvard University, 2009). The writers consider corporate responsibility to respect human rights as a risk assessment tool for business enterprises.

[15] At the 43rd UN Human Rights Council in Geneva, 2020, to which I attended, China hold an exhibition and distributed CCP's reports about their own narrative of the Xinjiang conflict situation.

ILO conventions prohibiting forced labour or international human rights agreements such as the UN Covenant on Civil and Political Rights,[16] transnational corporations should refrain from contributing to labour programs in Xinjiang since Uyghur forced labour is a human rights violation,[17] and under the UNGPs, transnational corporations are expected to respect human rights in all their business activities wherever they operate.[18] By conducting human rights due diligence, transnational corporations should address the risks of Uyghur forced labour in their activities. They may be directly or indirectly linked to Uyghur forced labour through their own activities, subsidiaries or business relationships with other legal entities such as suppliers.[19] To understand the corporate responsibility to respect human rights and its application to the case of Uyghur forced labour, one must consider the relevant background and context of the UNGPs, which liberties they are meant to protect, and the mechanism by which they protect them.[20]

1.2 Methodology

The research question is: What is the scope and extent of transnational corporations' responsibility under the UNGPs business and human rights regime for relying on goods, components, and materials sourced in China implicated in Uyghur forced labour?

The research focuses on transnational corporations that cause or contribute, either directly or indirectly, to Uyghur forced labour in their business activities. In the case study dedicated to Uyghur forced labour, the UNGPs human rights due diligence approach is

[16] US Uyghur Human Rights Policy Act, Sec. 3(3) and EP Uyghur forced labour Resolution, G.
[17] The use of forced labour is against international human rights law, and its use has been prohibited in numerous international agreements, including ILO Conventions and international human rights agreements such as the International Covenant on Civil and Political Rights. *See* e.g. Forced Labour Convention (ILO No. 29), 39 UNTS 55, entered into force 1 May 1932 and International Covenant on Civil and Political Rights. The legal framework of forced labour will be discussed further below.
[18] UN Guiding Principle 11. The Commentary on the Guiding Principle 11 states that '[t]he responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations'.
[19] ILO, Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), Para. 4(j). In the Commentary to UN Guiding Principle 13 'Business relationships' are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services'.
[20] With appropriate human rights due diligence processes, transnational corporations have abilities to deal with conflicts between Chinese laws and practices and their responsibilities to respect human rights in their business activities.

applied to Uyghur forced labour. The case study examines how the UNGPs can be applied to address, prevent and mitigate the use of Uyghur forced labour in China, where domestic laws and practices conflict with international human rights and labour standards.

The research objective of this thesis is to identify the legal framework governing transnational corporations' responsibility for human rights violations, form a case study of the Uyghur forced labour scheme and apply it to the identified legal framework. The research includes assessing the scope, nature, and extent of transnational corporations' responsibility and potential legal liability to respect human rights in their extraterritorial activities. Additionally, their responsibility to carry out human rights due diligence on their supply chains will be studied.

The methodology implemented to achieve this thesis' aim is the doctrinal approach.[21] The reason for using this research method is that the purpose of this thesis is to describe the letter of the law of the corporate responsibility to respect human rights under the UNGPs and apply it to the case study of Uyghur forced labour. It includes commentary on the legal rules used and identifies and describes the underlying theme and system and how each source of law[22] and case are connected to the legal framework identified in this thesis. Moreover, the doctrinal method is implemented to explain areas of difficulty and to predict legal reforms.[23] The last section of this thesis establishes some *de lege ferenda* views to understand the current development of business and human rights due diligence regime. The section will also study gaps in the current legal framework of business and human rights due diligence.

The material for this doctrinal research falls into two categories: primary sources and secondary sources according to their hierarchy. Non-legally binding instruments, which are also called 'soft law',[24] fall between these two categories, as they trigger doctrinal debates

[21] Doctrinal approach adopts an internal viewpoint which involves close analysis of primary sources, consisting of judicial decisions, often at the appellate level, and various kind of legislation. Doctrinal analysis aims to understand how these sources fit together to 'attempt to draw out the patterns of normative understanding,' at Christopher Mccrudden, 'Legal Research and the Social Sciences' (2006) 122 *The Law Quarterly Review*, 632-650, 634. *See also* Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed.), *Methodologies of legal research: which kinds of methods for which discipline?* (Oxford, Hart Publishing Ltd, 2011), 1-18.

[22] In this context, the term law includes both soft law and hard law.

[23] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review*, 83-119, 101.

[24] There is no consensus of the definition of soft law, but it is commonly understood to include soft rules that are included in treaties, nonbinding or voluntary resolutions, recommendations, codes of conduct, and

about their very existence and role in the hierarchy of sources.[25] In this thesis, soft law is included in primary sources because the UNGPs is the principal instrument in the business and human rights approach. Nevertheless, as it is a soft law instrument, references are made to international law and national legislation where applicable.[26] Primary sources in international law consist of sources that state the actual law, such as treaties, cases, custom, and general principles of international law.[27] The primary sources of data in this doctrinal research include 'hard law'[28] instruments such as ILO Conventions, UN Covenant on Civil and Political Rights and case law generated under extraterritorial jurisdiction,[29] and UN Guiding Principles on Business and Human Rights as a soft law instrument.[30] Secondary sources include sources that explain, criticize, discuss, or help interpret primary sources such as law books, law articles, legal encyclopaedias and dictionaries, legal treatises and guides, and newspaper articles. Secondary sources used in this thesis support the doctrinal approach providing an examination and critical evaluation of the existing research pieces and putting

standards. Some scholars debate that soft law instruments are not law at all, whereas some scholars argue that they are quasi-legal instruments which lack legally binding force. *See* Teresa Fajardo, 'Soft Law' (2014) Oxford Bibliographies Online [online], and Francesco Francioni, 'International 'Soft Law': a Contemporary Assessment' in Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996), 167-178, 167.

[25] In international law, non-legally binding instruments are often referred as 'soft law' whereas 'hard law' means other primary sources of international law. Daniel Thürer, 'Soft Law' (2009) Max Planck Encyclopedias of International Law [online], 1. *See also* Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 Nordisk Journal of International Law, 167–182 and Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization*, 421–456.

[26] Transnational corporations are not bound by international law, but they must comply with domestic laws, and most states have implemented international law relevant to this thesis to their domestic law. *See* OHCHR, 'Frequently asked questions about the guiding principles on business and human rights*'* (2014) UN Doc HR/PUB/14/3, 8 [hereinafter FAQ about the UN Guiding Principles].

[27] The International Court of Justice (ICJ) identifies the sources of international law in the ICJ Statute, Article 38 to be international conventions, international custom, general principles of law, writings of highly qualified publicists and judicial decisions. Although the sources of international law presented in the ICJ Statute are not exhaustive and some scholars debate it as outdated, it acts as a general guidance for hierarchy of sources.

[28] Hard law refers generally to legal obligations that are binding on the parties involved and which can be legally enforced before a court.

[29] Since the UNGPs have no international enforcement mechanism, claims of corporate human rights violations need to be heard in home state courts exercising extraterritorial jurisdiction.There are no cases explicitly referring to UN Guiding Principles as a source because its soft law, and therefore the case law examined in this thesis is based on tort law of UK, Canada, US and the Netherlands courts exercising extraterritorial jurisdiction. In recent years the number of cases concerning the parent company liability and application of extraterritorial jurisdiction have increased. As supplementary material, I have used relevant domestic legislation. Currently, there is no case law about extraterritorial jurisdiction on third-parties' adverse impacts on human rights. *See Jabir and others v. KiK Textilien und Non-Food GmbH* [2019] Case No. 7 O 95/15, in which the German court dismissed on procedural grounds, leaving the question of liability open.

[30] Other soft law instruments include the European Parliament Resolutions.

this thesis in context. The secondary sources used include mainly commentaries and legal articles on the UNGPs,[31] and reports about the Uyghur forced labour scheme.[32]

Legal scholars have not yet written on the topic of this thesis, particularly on the subject of this case study.[33] Although there are relatively many articles written about the UNGPs and human rights due diligence, the relation between transnational corporations and their suppliers have got less attention. The legal articles about the Uyghurs mainly examine the persecution of Uyghurs from the perspective of cultural genocide and crimes against humanity.

This thesis limits its review on existing and emerging legislation that addresses Uyghur forced labour in transnational corporations' business activities related to parent companies' responsibility for their overseas subsidiaries and transnational corporations' responsibility for adverse human rights impacts caused by their suppliers. The Uyghur transfer programs will be looked at primarily through the lens of forced labour and not regarding human trafficking. This thesis concentrates on the second pillar of the Framework: the Respect pillar,[34] and has only a shallow study on the other pillars, Protect and Remedy pillars when needed to support the study. This paper does not analyse profoundly the state duty to endorse responsible business conduct or the impact of public procurements, as the focus is on private entities. The remedy approach, international criminal law, and adoption of penal offences are also out of the scope of this thesis. This thesis will not study criminal accountability, as

[31] The leading scholars in the business and human rights area are Robert McCorquodale and John G. Ruggie, who have published several articles concerning the subject area. Ruggie created the Framework and UN Guiding Principles on Business and Human Rights, and after their implementation he has commented on their interpretation. McCorquodale has actively commented on the interpretation of the UNGPs and examined the scope of transnational corporations responsibility on human rights and the human rights due diligence approach. McCorquodale has researched subtopics of business and human rights such as the business and human rights due diligence and its application to subsidiaries, third-parties and conflict risked areas.

[32] As resources about the human rights situation in the Xinjiang region, I have used foreign reports published by credible news agencies and think-tanks and government publications to ensure the credibility of information. The reports and articles cited have been widely accepted and peer reviewed. Adrian Zenz is one of the leading scholars on People's Republic of China government policies towards Xinjiang. Australian Strategic Policy Institute and Congressional-Executive Commission on China have also published credible reports about the Xinjiang conflict situation. China does not let UN officials or any international organisations to the Xinjiang region, and therefore the reports are only available sources about the actual human rights situation in XUAR. I have not used Chinese sources as their credibility cannot be guaranteed.

[33] In contrast, Uyghur forced labour has been mainly studied in reports published by think-tanks, human rights organizations, and individual countries such as the United States.

[34] UN Guiding Principle 11. The 'Respect' pillar consists of an independent corporate responsibility to respect human rights, which means to avoid infringing on the rights of others and address adverse impacts with which companies are involved.

enforcement usually falls under domestic law. Lastly, this thesis will not discuss in depth the international human rights mechanisms available such as the OECD National Contact Points.

1.3 Structure

This thesis comprises six chapters. Chapter one, titled 'Introduction' introduces basic ideas used repeatedly in the remainder of this thesis. Chapter two, titled 'Transnational Corporations Linked to Uyghur forced labour: A Legal Framework', explores the legal framework of the corporate responsibility to respect human rights and the prohibition of forced labour. Specifically, chapter two presents the concepts of forced labour, business and human rights, and human rights due diligence and assesses the Uyghur forced labour scheme in the legal framework of forced labour. Chapter three, titled 'Human Rights Due Diligence in the UN Guiding Principles on Business and Human Rights', gives a more detailed analysis of how to apply the legal framework of human rights due diligence and what is meant by the concept of 'due diligence' in this context. Furthermore, chapter three studies the application of human rights due diligence with conflicting requirements coming from domestic law and practices. The purpose of chapter four, titled 'Transnational Corporations' Linked to Uyghur Forced Labour: The Question of Legal Liability', is first to examine the scope of business enterprises' responsibility of their overseas subsidiaries' contribution to human rights violations from the perspective of recent case law, and secondly, to study the business enterprises' responsibility for their suppliers' adverse human rights impacts. The aim of chapter five, titled 'Limits of Corporate Responsibility to Respect Human Rights: The Use of Uyghur forced labour Persists', is to assemble the arguments presented in the previous chapters and study the challenges of compliance and contractual terms developed by business enterprises for due diligence purposes. Chapter five will also address the gaps in the current business and human rights regime from the *de lege ferenda* perspective. Chapter six concludes the arguments presented in this thesis and presents some ideas for future research.

2 Transnational Corporations Linked to Uyghur Forced Labour: A Legal Framework

This chapter will introduce the existing legal framework of business and human rights and forced labour to understand the scope of transnational corporations' responsibility for relying on products, components or materials sourced from China implicated in Uyghur forced labour. This chapter divides into three parts. It is first necessary to examine how the forced labour prohibition is infringed in the Xinjiang region to understand the legal framework of forced labour and the human rights situation in Xinjiang. The second part bases the following chapters and sections by making an overview of the role of transnational corporations in international human rights law. The last section will study the question of extraterritoriality in human rights due diligence.

2.1 Business Enterprises and the Prohibition of Forced Labour

Reports estimate that the Chinese government has arbitrarily detained as many as 1.8 million Uyghurs, ethnic Kazakhs, Kyrgyz, and other Muslim minority groups in the Xinjiang region into internment camps, officially called vocational education and training centres, operated by the local officials.[35] The figure is estimated conservatively, and the actual figure is likely to be far higher.[36] The Chinese authorities defend the vocational education campaign,[37] while reports say that forced labour is being used in the internment camps.[38] There is strong

[35] ASPI 2020, 3, *supra* note 6; US Uyghur Human Rights Policy Act, Sec. 3(2) and EP Uyghur forced labour Resolution, C. China has built nearly 400 camps in the Xinjiang region, with ongoing constructions of dozens more. The Uyghurs and individuals from other Muslim minority groups have been detained to the internment camps without a trial. *See also* Canada House of Commons, Opposition Motion, Vote no. 56, 266-0, 22 February 2021, 43rd Parliament, 2nd Session and Michael R. Pompeo, Secretary of State, *Determination of the Secretary of State on Atrocities in Xinjiang* (Press Statement, January 19, 2021), determination 2. The US and Canada have declared the arbitrary detention of Uyghurs and other Muslim minority groups as a genocide.
[36] ASPI 2020, 3, *supra* note 6; John Sudworth, 'China's Hidden Camps' (*BBC*, 24 October 2018) [online].
[37] ASPI 2020, 4, *supra* note 6. *See also* Helen Davidson, 'Clues to scale of Xinjiang labour operation emerge as China defends camps' (*Guardian* 18 September 2020) [online], in which is reported about a Chinese white paper defending the 'vocal education' camps.
[38] ASPI 2020, 3, *supra* note 6. Victim testimonies, news media, and think tanks report about forced labour in internment camps where Uyghurs and members of other Muslim minorities are arbitrarily detained. *See* also Dake Kang, Martha Mendoza and Yanan Wang, 'US Sportswear Traced to Factory in China's Internment

evidence of forced labour by force, threats or other abusive practices under the guise of vocational training occurring in internment camps,[39] large industrial parks, and residential locations.[40] Some reports show that some internment camps are located within and adjacent to industrial parks using the detainees for forced labour. [41]

Credible reports show the involuntary mass transfers of Uyghurs and other Muslim minority groups 'graduating' from these camps. These 'graduates' are transferred from Xinjiang, sometimes directly from camps to factories across China taking part in the Chinese government's labour transfer program.[42] The factories taking part in the labour transfer program include various industries, including garments, electronics, and automobiles.[43] The Chinese government and officials consistently deny all accusations of the commercial use of forced labour from Xinjiang.[44] They claim that participation in vocational education and labour transfer program is voluntary,[45] and a part of a poverty alleviation program.[46]

The International Labour Organization (ILO) has adopted several legal instruments to prevent forced labour. These include the 1930 ILO Forced Labour Convention, 1957 Abolition of Forced Labour Convention,[47] and the 2014 Protocol to the Forced Labour

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Camps' (*Associated Press*, December 19, 2018) [online], and Emily Feng, 'Forced Labour Being Used in China's 'Reeducation' Camps' (*Financial Times*, December 15, 2018) [online].

[39] EP Uyghur forced labour Resolution, E.

[40] US Department of State, *Risks and Considerations for Businesses with Supply Chain Exposure to Entities Engaged in Forced Labor and other Human Rights Abuses in Xinjiang* (Xinjiang Supply Chain Business Advisory, 2020), 6 [hereinafter US Xinjiang Supply Chain Business Advisory].

[41] *Ibid*, 6. The Chinese government has adopted a 'mutual pairing assistance' program for Chinese companies to establish satellite factories adjacent to internment camps in Xinjiang.

[42] ASPI 2020, 4, *supra* note 6. Australian Strategic Policy Institute estimate that 'between 2017 and 2019, at least 80,000 Uyghurs were transferred out of Xinjiang and assigned to factories through labour transfer programs under a central government policy known as 'Xinjiang Aid'.

[43] US Xinjiang Supply Chain Business Advisory 2020, 4, and ASPI 2020, 28, *supra* note 6. In its report, ASPI identified 27 factories claiming to manufacture products for 83 well-known global brands in nine Chinese provinces taking part in the labour transfer program endorsed by the Chinese government and Xinjiang officials.

[44] *See* Sean R. Roberts, *The War on the Uyghurs: China's Internal Campaign against a Muslim Minority* (Princeton University Press, 2020).

[45] US Congressional-Executive Commission on China, Global Supply Chains, Forced Labor, and the Xinjiang Uyghur Autonomous Region (Staff Research Report, March 2020), 5 [hereinafter CECC Report 2020].

[46] Zenz 2019, *supra* note 1. Internment camps are often referred to vocational education centers, implementing the Chinese government's poverty-alleviation program with a stated objective of eradicating poverty across China. Although there are legitimate poverty-alleviation programs in Xinjiang, certain programs are focus specifically on Muslim minority groups such as Uyghurs.

[47] Abolition of Forced Labour Convention (ILO No. 105), 320 U.N.T.S. 291, entered into force 17 January 1959.

Convention.[48] Other international human rights instruments prohibiting forced labour include the 1966 International Covenant on Civil and Political Rights, which almost all UN member states have signed and ratified. Despite international pressure, China has not ratified the 1966 International Covenant on Civil and Political Rights nor the main ILO conventions.[49]

All indicators of forced labour have been reported occurring in the Xinjiang region.[50] ILO defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'[51] The Uyghurs and members of other Muslim minority groups arbitrarily detained in the internment camps have not offered themselves voluntarily for the labour. They have not given free and informed consent to take a job, and they do not have the freedom to leave the camps or the production sites at any time.[52] Additionally, the camp 'graduates' have their freedom of movement restricted and are subject to fenced-in factories, lower than minimum wages, and excessive overtime.[53] Another indicator of forced labour in the Xinjiang region is that the Uyghurs and individuals from other Muslim minorities are pressured to work through violence and are intimidated and threatened with a penalty to compel them to work.[54]

Although there are some exceptions to forced labour, prison labour and forced labour imposed by state authorities are allowed solely under certain conditions under international law.[55] The Abolition of Forced Labour Convention prohibits governments from using forced labour as a means of political coercion or education,[56] economic development,[57] or racial or

[48] ILO, Protocol of 2014 to the Forced Labour Convention, 1930 (P029) Geneva, 103rd ILC session (adopted 11 June 2014, entered into force 09 November 2016) [hereinafter The Forced Labour Protocol].
[49] US Uyghur Human Rights Policy Act 2020, Sec. 3(3). On the contrary, the Chinese government and officials are endorsing the use of Uyghurs and other Muslim minorities for forced labour.
[50] CECC Report 2020, 10, *supra* note 46; ASPI Report 2020, 6, *supra* note 6.
[51] ILO Forced Labour Convention (No. 29), Art. 2.
[52] The Forced Labour Protocol, Art. 1(3); Zenz 2019, Sec. 2.2, *supra* note 1.
[53] ASPI 2020, 6, *supra* note 6; Zenz 2019, Sec. 7.3, *supra* note 1, and Amy K. Lehr and Mariefaye Bechrakis, 'Connecting the Dots in Xinjiang - Forced Labor, Forced Assimilation, and Western Supply Chains' (*Center for Strategic & International Studies*, 2019) [online], 5 [hereinafter CSIS Report 2019].
[54] The Forced Labour Protocol, Art. 1(3) where menace of any penalty refers to a wide range of penalties used to compel someone to work. *See* CSIS Report 2019, 5, *supra* note 54. The workers are being subjected to intimidation and threats, such as the threat of arbitrary detention, and they are constantly being monitored by security personnel and digital surveillance tools.
[55] ILO Forced Labour Convention (No. 29), Art. 2(2).
[56] Abolition of Forced Labour Convention (No. 105), Art. 1(a).
[57] *Ibid*, Art. 1(b).

religious discrimination.[58] In Xinjiang, forced labour is practised under coercive measures with evidence of social control, pervasive surveillance and a large-scale internment program with arbitrary detentions of Muslim Uyghurs and individuals from other Muslim minority groups. The Uyghurs and other detainees do not receive reasonable remuneration, work voluntarily, or have decent work conditions.[59] As the exception of forced labour, prison labour does not apply because the Uyghurs and individuals from other Muslim minority groups are used for commercial purposes. Prison labour is not allowed when public authority places the detainees at the disposal of private companies.

The wide-spread use of forced labour in Xinjiang in garment and agriculture industries poses legal and reputational risks for transnational corporations sourcing goods, components or materials from China. As the reporting about human rights violations in Xinjiang has increased, transnational corporations should assess and identify the risks of forced labour in their operations or products, services or operations they may be linked to.[60] Therefore, the following two sections will introduce transnational corporations' role in eliminating forced labour under international human rights law.

2.2 Business Enterprises and International Human Rights Law

The 1948 Universal Declaration of Human Rights is generally agreed to be the foundation of international human rights law. The Universal Declaration of Human Rights does not address forced labour as a human rights subject. However, Article 4 states that '[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.'[61] The Universal Declaration of Human Rights is not a treaty, so it does not directly create legal obligations for states nor transnational corporations. Nevertheless, the Universal Declaration of Human Rights has given rise to a range of other international agreements legally binding on the state that ratify them. These include the 1930 ILO Forced

[58] Abolition of Forced Labour Convention (No. 105), Art. 1(e).
[59] ASPI 2020, 6, *supra* note 6; Zenz 2019, Sec. 7.3, *supra* note 1, and CSIS Report 2019, 5, *supra* note 54.
[60] ILO, Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), Para. 4(j). *See also* UN Global Compact, 'Principle 4: Labour' [online] and UN Sustainable Development Goals, 'Goal 8.7' [online].
[61] Universal Declaration of Human Rights, Art. 4.

Labour Convention, the 1966 International Covenant on Civil and Political Rights and the 2014 Protocol to the Forced Labour Convention.

According to the traditional understanding of international law, generally, only states are considered subjects of international law possessing international legal personality and being hence capable of possessing and exercising international law rights and duties.[62] It means that states can be parties to international agreements and have a duty to respect them. Private enterprises, which can also be referred to as 'non-state actors',[63] are not generally agreed to be subjects of international human rights law.[64] They cannot, in consequence, be imposed legal obligations to respect international human rights standards.[65] *Ruggie* notes that private enterprises are with rare exceptions solely subject to domestic law, not to international law, in countries where they are domiciled and operate.[66] However, the international human rights law sets the foundation for the business and human rights regime, even if it is a topic of debate whether business enterprises can be considered subjects of international human rights law or not. The UNPGs is an example of a set of guidelines governing the major elements of international conduct of business enterprises. The UNGPs are a non-binding legal instrument aiming to clarify standards of responsible corporate conduct regarding human rights.[67]

[62] Martin Dixon, *Textbook on International Law*, 7th edn. (Oxford University Press, 2013), 116.
[63] Markus Wagner, 'Non-State Actors' (2013) *Max Planck Encyclopedia of Public International Law* [online], 1.
[64] Malcolm N. Shaw, *International Law*, 5th edn. (Cambridge University Press, 2003), 225. For more detailed discussion about non-state actors and international human rights law *see* Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors' in Philip Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press, 2005), 3-36.
[65] Hersch Lauterpacht, 'The Subjects of International Law' in Andrea Biachi (ed.), *Non-State Actors and International Law* (Oxfordshire: Routledge, 2009), 136-150, 136.
[66] John G. Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights' (2014) 20(1) *Global Governance*, 5-17, 9.
[67] For discussion about the relation between the UNPGs and international human rights law *see* Robert McCorquodale, 'Corporate Social Responsibility and International Human Rights Law' (2009) 87(2) *Journal of Business Ethics*, 385-400.

2.2.1 Interpreting International Human Rights Law to Extend to Transnational Corporations

As mentioned above, non-state actors are passive objects of international law,[68] and they interact indirectly through domestic laws. Nevertheless, scholars approve that transnational corporations are candidates for functionally limited international legal personality.[69] The current main conclusion in international human rights law is that business enterprises have at least the responsibility to refrain from violating international human rights law.[70] It is the basis of the business and human rights regime set out by the UNGPs.[71] The UNGPs distinguishes between the state's 'duty to protect' and the 'corporate responsibility to respect', reflecting the traditional division between the roles of states and non-state actors in international human rights law.[72]

In this thesis, the focus is on transnational corporations which source goods, materials or components manufactured in the Xinjiang region or factories elsewhere in China implicated in the forced labour of individuals from Xinjiang, given the prevalence of forced labour and other labour abuses in the region. Most transnational corporations source goods or raw materials from Chinese suppliers. In these situations, the transnational corporations have externalized their production to China, and they do not own or operate the factories or using forced labour themselves. Suppliers and transnational corporations are separate legal entities not belonging to the same corporate family. In the context of this thesis, the human rights infringements caused by suppliers, subcontractors and other business relationships are referred to as third-parties' adverse impacts on human rights.

Some transnational companies have subsidiaries in Xinjiang and elsewhere in China, directly or indirectly contributing to the Uyghur forced labour scheme. In general, businesses

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[68] Jonathan I. Charney, 'Transnational Corporations and Developing Public International Law,' (1983) *Duke Law Journal*, 748-788, 753; Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (London and New York: Routledge, 2016), 86.
[69] Christian Walter, 'Subjects of International Law' (2007) *Max Planck Encyclopedias of Public International Law* [online], 19.
[70] *See* UN Guiding Principle 11.
[71] The business and human rights regime will be discussed more thoroughly in chapter three. For analysis of the human rights violations and protection of human rights by transnational corporations *see* John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton & Company, 2013).
[72] Björn Fasterling and Geert Demuijnck, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights' (2013) 116(4) *Journal of Business Ethics*, 799-814, 800.

are responsible for their own conduct. The parent company and each subsidiary are separate legal persons, and it can be debated whether the parent company can be liable for its subsidiaries. *Ruggie* argues that generally, the parent company is not liable for wrongdoings committed by its overseas subsidiary even where the parent company is its sole shareholder.[73] However, the recent case law of *Vedanta*[74] and *Nevsun*[75] has shown that, in certain situations, a claim against an overseas subsidiary can be processed in the home state where the parent company is domiciled.

Pursuant to the UNGPs, transnational corporations have a responsibility to respect human rights wherever they operate. It is clear from the domestic law that transnational corporations are not allowed to use forced labour in their own business activities, but despite that, questions arise related to transnational corporations' responsibility for their subsidiaries', suppliers' and other business relationships' adverse human rights impacts. UNGPs involve a whole supply chain approach,[76] meaning that human rights infringements such as the use of forced labour are not allowed even in their business relationships' activities. The UNGPs do not formulate a definition for a supply chain, but in spite of that, it states that 'business relationships' are defined broadly to encompass relationships with business partners and entities in its supply chain, including direct and indirect business relationships and beyond first-tier suppliers.[77] The UNGPs leave uncertainty to the transnational corporations' responsibility related to their business relationships. The UNGPs does not explain how business enterprises can be legally responsible for the activities of their foreign suppliers and how the human rights violations caused by suppliers can be attributed to a separate legal entity not belonging to the same corporate family.[78] As will be discussed below, the UNGPs are based on a moral principle, and the respect for human rights is a business enterprises' social license to operate.[79] Despite the UNGPs' moral ideals, the

[73] Ruggie 2014, 9, *supra* note 67.
[74] Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Ors. [2019] UKSC 20.
[75] Nevsun Resources Ltd v. Araya, [2020] SCC 5 (CanLII).
[76] FAQ about the UN Guiding Principles, 32.
[77] *Ibid*, 32.
[78] *See* Commentary to UN Guiding Principle 13. *See also* chapter 2.3 for the discussion about the legal nature of the Principles in the UNGPs.
[79] John Ruggie and John F. Sherman, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquadale' (2017) 28(3) *European journal of international law*, 921-928, 924.

question of legal liability is left to national law provisions in relevant jurisdictions.[80] The following section will provide background on how national jurisdiction extends to business activities abroad.

2.2.2 Extending National Jurisdiction to Business Enterprises' Activities Abroad: The Question of Extraterritoriality

The legal status of the UNGPs leaves ambiguity on the scope and application of corporate responsibility to respect human rights at the transnational level. The UNGPs do not create extraterritorial jurisdiction, as they refer to and derive from states' obligations under existing international law.[81] Consequently, they rely on the existing rules of extraterritorial jurisdiction. The purpose of the UNGPs is to clarify and elaborate on the implications of relevant provisions of existing international human rights standards. Accordingly, the UNGPs constitute a legal instrument that the states cannot ratify. The UNGPs do not create new legal obligations meaning that domestic legislation is required to ensure the UNGPs' effective implementation and enforcement. In general, states must ensure that businesses operating on their territory do not violate human rights recognized in their domestic legislation. UNGPs may be reflected in domestic law regulating business activities,[82] as companies are bound by such domestic law.[83] While transnational corporations do not generally have legal obligations under international human rights law, they often have legal obligations deriving from domestic law that 'incorporate international standards or contractual obligations with regard to respecting international standards.'[84]

Since international human rights law and domestic law interconnect, most countries have domestic legislation prohibiting forced labour. These legislations provide obligations for business enterprises operating in their territory. However, China has not ratified the main

[80] Commentary on the Guiding Principle 12 states: 'The responsibility of transnational corporations to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.' The transnational corporations' responsibility for third-parties' adverse impacts on human rights and the attribution dilemma will be discussed further in chapters 4 and 5.
[81] FAQ about the UN Guiding Principles, 8.
[82] *Ibid*.
[83] *Ibid*, 9.
[84] UN Human Rights Council 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2013) UN Doc. A68/279, Para. 19.

ILO conventions on forced labour or UN Covenant on Civil and Political Rights. Given that the Chinese government endorses the Uyghur forced labour scheme, the Chinese officials are not holding local or foreign companies legally liable for Uyghur forced labour. Hence, the transnational corporations sourcing from the Xinjiang region and nearby provinces have been able to devoid responsibilities at the international level and operate in a legal vacuum. It raises the question of extraterritorial jurisdiction on transnational corporations having business activities in China.

In international law, extraterritorial jurisdiction means the legal ability of a state to claim jurisdiction over acts occurring beyond its boundaries.[85] Due to state sovereignty and territoriality, disputes are heard generally in the state where the human rights impact has occurred.[86] In some cases, to ensure *access to justice*,[87] extraterritorial jurisdiction is exercised to provide access to home state courts, but despite that, the question of extraterritorial jurisdiction of businesses remains debated.[88] Sometimes the exercise of extraterritoriality is considered problematic.[89] Extraterritorial jurisdiction is different from universal jurisdiction, under which 'some crimes are so abhorrent that all states can legislate and prosecute, regardless of the involvement of their territory or nationals.'[90] Universal jurisdiction is mainly utilized in gross human rights violations,[91] but its use remains controversial.[92] Probably the most well-known example of universality and extraterritoriality is the Alien Tort Statute,[93] which grants jurisdiction to US federal courts over any civil action brought by an alien[94] for a tort in violation of international law or a US treaty. The US Supreme Court has ruled that the Alien Tort Statute cannot be used to sue foreign corporations for their human rights violations, even if the company is a subsidiary of a US parent company.[95] *Ruggie* argues that even 'though the extraterritorial jurisdiction by home

[85] Jan Klabbers, *International Law* (Cambridge University Press, 2013), 96.
[86] Shaw 2003, 254, *supra* note 65.
[87] *Ibid*, 255.
[88] Ruggie 2014, 9, *supra* note 67.
[89] Klabbers 2013, 96, *supra* note 86.
[90] *Ibid*, 94.
[91] *Ibid*. *See Filártiga v. Peña-Irala* [1980] 630 F.2d 876.
[92] Klabbers 2013, 95, *supra* note 86.
[93] Alien Tort Claims Act, also known as Alien Tort Statute, refers to US law 28 USC § 1350.
[94] A foreign national.
[95] *Kiobel v. Royal Dutch Petroleum Co.* [2013] 569 US 108. The decision did not hold whether parent company can be held liable of human rights infringements caused by its subsidiaries. *See also Jesner v. Arab Bank*,

states is increasing modestly, it remains highly contested and cannot, in any event, serve as a general solution to business and human rights challenges.'[96] The recent case law of *Vedanta* and *Nevsun*, which will be further discussed in chapter four, indicates the increase of extraterritorial jurisdiction by home states in the parent company liability cases.

2.3 Transnational Corporations and the UN Guiding Principles on Business and Human Rights

As the exercise of extraterritorial jurisdiction remains debated, there is a legal vacuum concerning Uyghur forced labour in business activities. As mentioned above, the UNGPs impose non-binding responsibilities on business enterprises. Pursuant to the UNGPs, transnational corporations having business activities in China should respect international human rights standards and undertake appropriate human rights due diligence to address, prevent and mitigate adverse human rights impacts caused by their subsidiaries, suppliers or other business relationships. This section will clarify the concept of transnational corporations acting as non-state actors and the role of the UNGPs in regulating corporate conduct.

In a globalized world, despite their non-binding nature, the UNGPs encompass business activities at the transnational level.[97] A corporation is transnational if its scope of company operations, customer base or supply chains extend across national borders.[98] The business activities of transnational corporations often connect into regulatory and governance gaps in states where goods and products are sourced.[99] Non-state actors have various types of power and authority, which raises global challenges and dilemmas, as some transnational corporations have remarkable power and authority compared to states.[100] However, non-state

[2018] PLC - 138 S. Ct. 1386, in which the court hold that the Alien Tort Statute cannot be used to sue foreign corporations.

[96] Ruggie 2014, 9, *supra* note 67.

[97] For the history and development of the business and human rights regime and the UNGPs *see* John G. Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) *American Journal of International Law*, 819-840.

[98] Shaw 2003, 225, *supra* note 65.

[99] Denis G. Arnold, 'Corporations and Human Rights Obligations' (2016) 1(2) *Business and Human Rights Journal*, 255-275, 257.

[100] United Nations Research Institute for Social Development, *Corporate Social Responsibility and Business Regulation, Research and Policy Brief 1* (Geneva, 2004), 1.

actors have no legal obligations under international human rights law. It creates challenges, at least in regions where the domestic laws and practices conflict with international human rights standards, such as in the Xinjiang region.

The UNGPs distinguish two kinds of responsibilities for non-state actors: a responsibility to respect human rights[101] and a responsibility to refrain from harming human rights.[102] Besides, corporations may voluntarily promote and support human rights.[103] The responsibility to respect human rights includes a responsibility to refrain from violating human rights and conduct due diligence and transparent reporting on human rights impacts.[104] According to the UN Guiding Principle 13, the responsibility to respect human rights requires that transnational corporations:

> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

The Interpretive Guide of OHCHR on UNGPs states that 'the human rights risks related to an enterprise's activities and business relationship vary depending on the context in which it operates.'[105] In their efforts to fulfil the responsibility to respect human rights, transnational corporations may confront situations with particular challenges. These challenges could include situations in which 'local requirements appear to compel a business to act in a manner that is contrary to internationally recognized human rights,'[106] as in the Xinjiang region. As *Griffith, Smit* and *McCorquodale* have stated, transnational corporations find themselves in a difficult position whenever a subsidiary or a 'business partner is subject

[101] UN Guiding Principle 13.
[102] *Ibid*. *See* David Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 12 *SUR - International Journal on Human Rights*, 199-229, 210. *Bilchitz* criticizes the 'Ruggie Framework' for not including a positive responsibility to actively protect and promote human rights.
[103] Commentary on the UN Guiding Principle 11.
[104] David J. Karp, *Responsibility for Human Rights: Transnational Corporations in Imperfect States* (Cambridge University Press, 2014), 4-5. The scope and nature of this responsibility will be further discussed in the following chapters.
[105] Office of the United Nations High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide,* (2012) U.N. Doc. HR/PUB/12/02, 77 [hereinafter OHCHR Interpretive Guide].
[106] *Ibid*, 77.

to the laws of a state which is either not upholding its human rights obligations or has applied those obligations in a way that makes it difficult for the business enterprise to comply with its responsibilities.' [107]

The UNGPs are non-binding for corporations, as it is a soft law instrument.[108] The UNGPs does not set legal obligations or duties on transnational corporations to respect human rights and to prevent the use of Uyghur forced labour. The UNGPs cannot be legally enforced before a court. They do not clarify how overseas subsidiaries' or suppliers' wrongdoings can be attributed to a transnational corporation.[109] Transnational corporations are legal entities with economic aims. It is challenging to hold transnational corporations legally liable for human rights violations, especially in states with significant governance gaps. However, it does not 'alter the force of morally grounded human rights obligations,'[110] as international human rights can be justified independently of morally justified human rights.[111] It must be noted that human rights are unique as a legal matter because they are at once 'moral and legal rights' and may create moral duties for transnational corporations.[112] However, moral duties cannot be legally enforced before a court, which leaves the legal basis of UNGPs' Guiding Principles vague.

Hence, the responsibility to respect human rights under the UNGPs rests on the ability of transnational corporations to identify and assess human rights impacts in their subsidiaries' and suppliers' activities. The nature of human rights and the wording of the UNGPs indicate that the corporate responsibility to respect human rights rests largely on transnational corporations' business ethics and moral agency when their actions have human

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[107] Arianne Griffith, Lise Smit, Robert McCorquodale, *'Responsible Business Conduct and State Laws: Addressing Human Rights Conflicts'* (2020) 20(4) Human Rights Law Review, 641–673, 646.

[108] *See* Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or No Law?' in Surya Deva and David Bilchitz (eds.), Human Rights Obligations of Business: Beyond a Corporate Responsibility to Respect? (Cambridge University Press, 2013), 138-161.

[109] Ruggie and Sherman 2017, 924, *supra* note 80. Interestingly, *Ruggie*, who developed the UNGPs as the Special Representative, considers that the respect for human rights serves as a company's social license to operate. The 'social license' theory does not fulfil the gaps in the legal interpretation of corporate responsibility to respect human rights under international human rights law.

[110] Arnold 2016, 264, *supra* note 100. *See* Peter Muchlinski, *Multinational Enterprises and the Law*, 3rd. edn. (Oxford International Law Library, 2021), 507-536.

[111] Arnold 2016, 265, *supra* note 100. *See also* Allen Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford University Press, 2010), 53.

[112] Samantha Besson, 'Sources of International Human Rights Law: How General is General International Law?' in Samantha Besson and Jean D'Aspremont (ed.) The Oxford handbook of the sources of international law (Oxford University Press, 2017) [online], Sec. 1.

rights impacts.[113] As the developer of the UNGPs, *Ruggie* aligns his view of human rights with *Sen*, who opposes the narrow legalistic view of human rights, and claims that human rights are something more than legal standards.[114] When adopting the Framework, and later drafting the UN Guiding Principles, *Ruggie* sought to consciously:

> '[M]ove beyond "the conceptual shackles" of traditional international human rights law by drawing upon the interests, capacities and engagement not only of states but also of market actors, civil society and workers organizations and the intrinsic power of ideational and normative factors.'[115]

The UNGPs have been criticised for hardly expressing the nature and justification of business responsibilities to respect human rights. Scholars such as *Fasterling* and *Demuijnck* criticise that the Framework is grounded 'implicitly on pragmatic, enlightened self-interest or strategic considerations than on moral duty.'[116] *Ruggie*'s conceptualization of human rights drives more recognition for the individuals impacted by human rights violations. However, at the same time, it creates confusion for understanding how the standards set by UNGPs should be interpreted and applied because the human rights due diligence scheme set by the UNGPs differs from the traditional understanding of due diligence in international law and international human rights law.[117]

There are several compelling and overlapping justifications of corporate human rights obligations. As mentioned above, it remains contentious whether transnational corporations are considered moral agents with moral obligations and legal obligations to respect human rights in their business operations and global supply chains.[118] It is generally understood that international human rights law includes explicit expectations for transnational corporations to respect the international human rights regime,[119] but it does not set them obligations.

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[113] In particular, related to transnational corporation's responsibility for human rights violations caused by their suppliers and other business relationships, to which the transnational corporation has not directly contributed. As will be discussed in chapter four, in certain situations, parent companies can be held liable for the adverse human rights impacts caused by their subsidiaries.

[114] Ruggie and Sherman 2017, 926, *supra* note 80; Amartya Sen, 'Elements of a Theory of Human Rights', (2004) 32(4) *Philosophy & Public Affairs*, 315-356, 319. *Ruggie* and *Sherman* quote *Sen*'s writing that 'a narrow legalistic view [of human rights] threatens to 'incarcerate' the social logics and processes other than law that drive public recognition and respect for human rights'.

[115] John G. Ruggie, 'Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights', (January 25, 2015) [online].

[116] Fasterling and Demuijnck 2013, 800, *supra* note 73.

[117] This dilemma will be further discussed in the chapter 3.3.3.

[118] Arnold 2016, 255, *supra* note 80.

[119] *Ibid*, 276.

Fasterling and *Demuijnck* argue that respecting human rights is an explicit ethical obligation.[120] Transnational corporations must meet basic human rights obligations in all of their operations regardless of whether such duties are recognized by host nation laws or whether the host nation enforces such laws, for the reason that human rights are considered minimal ethical requirements. Therefore, the Framework should be interpreted in a moral sense.[121] Accordingly, *Arnold* argues that respecting human rights is 'a necessary cost of doing business,'[122] which is in line with *Ruggie*'s Framework and intention to codify the moral responsibility to respect human rights into the UNGPs. However, the existence of moral duties for transnational corporations does not fulfil the gaps related to legal liability.

International law and ethics have close connections.[123] Moral agency means the ability of a legal entity to make moral judgments on some notion of rights and wrong and to be responsible for these moral actions. Questions about the moral agency and responsibility of transnational corporations as non-state actors have increased interest.[124] However, it raises debate, whether transnational corporations can be considered human-rights-responsible agents,[125] when their subjectivity in international human rights law remains debated.

Although the corporate responsibility to respect human rights is distinct from the state-duty to respect human rights in its nature, *Karp* suggests that the responsibility for human rights is universal. Consequently, all moral agents have it,[126] despite their status in international human rights law. Thus, the responsibility to respect human rights is a minimum expectation of all business enterprises. *Karp* notes that even if ethics of global governance, responsibility and moral agency and human rights raise significant interest, there is insufficient scholar research on the non-state actors' responsibility for human rights.[127] If transnational corporations are moral agents, it requires consideration of the extent to which they can be responsible. The opinion that transnational corporations count as moral agents for the sake of assigning responsibility for human rights to them can be

[120] Fasterling and Demuijnck 2013, 801, *supra* note 73.
[121] *Ibid*.
[122] Denis G. Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights' (2010) 20(3) *Business Ethics Quarterly,* 371-399, 384.
[123] Klabbers 2013, 304, *supra* note 86.
[124] Karp 2014, 1, *supra* note 105.
[125] *Ibid*, 3.
[126] *Ibid*, 4.
[127] *Ibid*, 1.

questioned.[128] The existence of the UNGPs does not automatically assign moral or legal duties to transnational corporations to respect human rights in their activities. To be effective, the corporate responsibility to respect human rights must derive from the willingness of transnational corporations to respect human rights in their business activities.

Consequently, *Griffith, Smit* and *McCorquodale* interpret that transnational corporations have a moral responsibility with legal effects to 'honour' the principles of internationally recognized human rights when faced with conflicting requirements,[129] which resembles the legal obligations of states under international human rights law.[130] Under Article 23 of the UNGPs:

> 'In all contexts, business enterprises should:
> (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
> (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
> (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.'[131]

It indicates that despite the state-sponsored forced labour scheme and debate on the extraterritoriality and non-state actors role in international human rights law, transnational corporations having business operations in the Xinjiang region should seek ways to honour the prohibition of forced labour and treat the risk of causing or contributing to the Uyghur forced labour scheme as a legal compliance issue. When transnational corporations face such situations, they should be prepared with 'a basic compass', as there are no best practices or easy answers for such situations.[132] The following section will study further the human rights due diligence regime set by the UNGPs, to understand what is meant by the concept of human rights due diligence in the context of Uyghur forced labour.

[128] Karp 2014, 10, *supra* note 105.
[129] Griffith, Smit and McCorquodale 2020, 647, *supra* note 108.
[130] *Ibid*.
[131] UN Guiding Principle 23.
[132] OHCHR Interpretive Guide, 77. The concept of human rights due diligence will be further discussed in chapter three and the dilemma with conflicting requirements in chapter four.

2.4 Transnational Corporations and the Responsibility to Conduct Human Rights Due Diligence

The UNGPs set an expectation for transnational corporations to undertake human rights due diligence to address potential and existing human rights impacts in their business activities.[133] To comply with the UNGPs, companies should incorporate responsible business conduct expectations into their business activities and engagement with their suppliers and other business relationships. *OHCHR* defines the term of human rights due diligence ambiguously as follows:

> 'Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the [UN] Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.'[134]

The UNGPs identify four essential components of human rights due diligence.[135] Conducting human rights due diligence starts from identifying and assessing the nature of the actual and potential adverse human rights impacts. A transnational corporation may be involved in Uyghur forced labour through its own activities or through its subsidiaries or business relationships.[136] Accordingly, transnational corporations should identify their business activities links to the Xinjiang region and address the human rights situation and labour conditions in the factories they use.

The human rights due diligence involves a whole supply chain approach,[137] and therefore transnational corporations should assess the labour conditions in their

[133] UN Guiding Principle 17.
[134] OHCHR Interpretive Guide, 4.
[135] UN Guiding Principle 17. The four elements include: (1) Assessing actual and potential human rights impacts; (2) integrating and acting upon the findings; (3) tracking responses; and (4) communicating how impacts are addressed.
[136] Commentary on the UN Guiding Principle 18.
[137] FAQ about the UN Guiding Principles, 32.

subsidiaries', suppliers' and other business relationships'[138] business activities. Although many transnational corporations do not have transparency into the upstream of their supply chains beyond the first-tier suppliers, it does not exclude their responsibility to respect human rights in their whole supply chain under the UNGPs.[139]

However, the UNGPs do not clarify how a supplier's wrongdoings can be attributed to a transnational corporation with which it has a business relationship. Multiple corporate social responsibility regimes deriving from the UNGPs such as the MNE Guidance and the planned mandatory EU system of due diligence for supply chains,[140] include an expectation to conduct human rights due diligence on suppliers, even if the question of attribution remains open.[141] Home state courts have systematically rejected the application of a duty of care to workers of foreign suppliers.[142] *Muchlinski* argues that 'legal supply chain liability is not a closed chapter', and it would be consistent with the UNGPs.[143] In *Jabir v. KiK Textilien,* the German court dismissed the case on procedural grounds, leaving the question of liability open.[144] The soft law initiatives expect business enterprises to remedy individuals impacted by the adverse human rights, but the expectation is non-binding, and thus not all business enterprises respect it. The OECD MNE Guidance involves implementing government-backed National Contact Points, which decisions are non-binding recommendations for business enterprises to encourage responsible business conduct.[145]

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[138] Commentary on the UN Guiding Principle 13. The Guiding Principles considers "business relationships" as a transnational corporation's relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products, or services.
[139] OHCHR Interpretive Guide, 42.
[140] European Parliament, *Towards a mandatory EU system of due diligence for supply chains* (European Parliamentary Research Service Briefing, 2020), 2.
[141] *See Arica Victims KB v. Boliden Mineral AB* [2018] T 294-18. In the *Arica* case, the Swedish district court ruled that extraterritorial jurisdiction cannot be exercised based on the grounds that the Chilean law was the correct law in this case. Almost 800 Chileans had sued a Swedish mining company for damages in a class action lawsuit. They claimed that the Swedish mining company had exported toxic waste to its Chilean subcontractor. The court held that the Swedish mining company was not liable for damages to the Chilean claimants.
[142] *See Das v. George Weston Limited* [2017] ONSC 4129 (CanLII). The Canadian court dismissed a class action lawsuit related to the collapse of an industrial building in Bangladesh. The class action was brought against several Canadian business enterprises which used Bangladeshi garment manufacturers as their suppliers. The Canadian court dismissed the case based on the grounds that the Bangladeshi law was the correct law in this case, and the Bangladeshi law does not disclose a reasonable cause of action for the claimants.
[143] Muchlinski 2021, 533, *supra* note 111.
[144] *See Jabir and others v. KiK Textilien und Non-Food GmbH* [2019] Case No. 7 O 95/15.
[145] *See* OECD, *Guide for OECD National Contact Points on issuing Recommendations and Determinations, OECD Guidelines for Multinational Enterprises* (OECD, 2019).

Transnational corporations with links to Xinjiang or workers from Xinjiang should pay special attention to human rights due diligence and assess potential reputational, economic, and legal risks. Transnational corporations should examine the upstream of their supply chain to reduce the likelihood that they contribute, maintain or support the business enterprises that employ forced labour or activities that enable human rights abuses, including the coercive transfer of ethnic minority groups, to a reasonable extent.[146]

When conducting human rights due diligence, transnational corporations may notice that they directly or indirectly cause or contribute to Uyghur forced labour in their business activities.[147] In these situations, transnational corporations should integrate and act upon the findings, track responses and communicate how impacts are addressed.[148] Where convenient, transnational corporations should consider collaboration with stakeholder groups and industry groups to exercise leverage to address and prevent human rights abuses in their supply chains.[149] However, the definition of human rights due diligence presented in this chapter leaves uncertainty to the application of the standards. Therefore, the implementation and definition of human rights due diligence will be studied further in the following chapter.

[146] Businesses and individuals providing goods and services to Chinese entities that may be operating in Xinjiang or using laborers from Xinjiang are also encouraged to conduct appropriate due diligence measures regarding the employment of forced labor.
[147] UN Guiding Principle 18.
[148] UN Guiding Principle 19, 20 and 21.
[149] UN Guiding Principle 18(b).

3 Business and Human Rights Due Diligence in the UN Guiding Principles on Business and Human Rights

As stated in the previous chapter, transnational corporations are responsible for respecting human rights and refraining from using Uyghur forced labour in their business activities. It includes a responsibility to undertake human rights due diligence with a whole supply chain approach. To examine the scope and extent of transnational corporations' responsibility for using Uyghur forced labour under the business and human rights due diligence approach, this chapter analyses the human rights due diligence regime set by the UNGPs. The first part of this chapter will study the application of human rights due diligence to transnational corporations' business activities. The second part will analyse the debated concept of 'due diligence' in the UNGPs to understand the scope of transnational corporations' responsibility to conduct due diligence and address Uyghur forced labour in their business activities. The third part of this chapter studies the implementation of human rights due diligence in regions where domestic laws and practices conflict with international human rights standards.

3.1 Implementation of the Human Rights Due Diligence Requirements

In the words of *Fasterling* and *Demuijnck*, 'human rights due diligence is the heart of [UN Guiding] Principles' conception of corporate responsibility to respect human rights.'[150] *Ruggie* and *Sherman* oppose that by stating that human rights due diligence is only one component of UNGPs in a more complex system of the 'Protect, Respect and Remedy' Framework,[151] which is codified into the UNGPs. They state that from the perspective of business enterprises, the UNGPs focus on beyond compliance with legal obligations to include means by which individuals affected by harmful practices of the businesses can be

[150] Fasterling and Demuijnck 2013, 801, *supra* note 73.
[151] John G. Ruggie and John F. Sherman, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquadale' (2017) 28(3) *European journal of international law*, 899-919, 923.

'further empowered to realize remedy through judicial and non-judicial means.'[152] *Ruggie* and *Sherman* argue that UNGPs focus on preventing and addressing adverse human rights impacts, and human rights due diligence is the solution for it.[153] *Shavin* argues that human rights due diligence will only achieve this impact if transnational corporations find the implementation of it useful.[154] Hence, public-facing transnational corporations avoiding reputational and legal risks caused by negative publicity may find the implementation of human rights due diligence more useful than non-public-facing corporations.

Ruggie argues that 'to discharge the responsibility to respect [human rights] requires due diligence.'[155] Five of the 31 Guiding Principles in the UNGPs appear under the heading 'Human Rights Due Diligence', underlining the importance of due diligence in *Ruggie*'s scheme. Human rights due diligence is an on-going process,[156] and it aims to seek human rights risks in the business enterprise's operations and its whole supply chain.[157] *Ruggie* does not consider how human rights risks can be attributed to business enterprises. He merely concentrates on the ideological perspective that all business enterprises have to respect human rights because it is their moral duty. As will be discussed later in this chapter, *Ruggie*'s concept of 'due diligence' is not consistent with the traditional understanding of 'due diligence' in international law.

Due diligence is traditionally understood to be concerned with the legal, commercial or reputational risks to the transnational corporation in the corporate governance.[158] In turn, human rights due diligence, as understood in the UNGPs, focuses directly on the human rights risks to people, rather than legal, commercial or reputational risks to the transnational

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[152] Ruggie and Sherman 2017, 923, *supra* note 151. For discussion about the remedy approach *see* Gwynne Skinner, Robert McCorquodale, Olivier De Schutter and Andie Lambe, *The Third Pillar – Access to Judicial Remedies for Human Rights Violations by Transnational Business* (The International Corporate Accountability Roundtable, CORE and The European Coalition for Corporate Justice, 2013) [online].
[153] Ruggie and Sherman 2017, 923, *supra* note 151.
[154] Catie Shavin, 'Unlocking the Potential of the New OECD Due Diligence Guidance on Responsible Business Conduct' (2019) 4(1) *Business and Human Rights Journal*, 139-145, 141.
[155] UN General Assembly (UNGA), 'Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' UN Human Rights Council 8th session (2008) UN Doc A/HRC/8/5, Para. 56.
[156] UN Guiding Principle 17(c).
[157] UN Guiding Principle 11.
[158] UN Human Rights Council, 'Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability : report of the United Nations High Commissioner for Human Rights' UN Human Rights Council 38th session (2018) UN Doc. A/HRC/38/20/Add.2, Para. 8.

corporation itself.[159] Therefore, to be compliant with the UNGPs, transnational corporations should assess the actual and potential human rights impacts of Uyghurs rather than assessing the legal, commercial or reputational risks posed to the corporation itself for contributing to the Uyghur forced labour scheme. However, the corporate responsibility to respect human rights may work *vice versa* as transnational corporations could avoid clear linkage to the Uyghur forced labour scheme to avoid legal, commercial or reputational risks.

Questions of complicity may arise if a transnational corporation is seen to contribute to adverse human rights impacts, such as Uyghur forced labour, caused by other parties.[160] It may be the case when transnational corporations' activities are tied to Uyghur forced labour used by its subsidiaries, suppliers or other business relationships. In a modern globalized world, transnational corporations may have hundreds or thousands of suppliers and business relationships in their supply chains. Hence, transnational corporations may not have transparency to the actions of their business relationships beyond the first-tier suppliers, which may make it unreasonably difficult to conduct human rights due diligence through them all.[161] It creates actual and potential human rights risks, as some business relationships, beyond the first-tier suppliers, may be using Uyghur forced labour.

As stated above, under the UNGPs, transnational corporations breach their corporate responsibility to respect human rights if they indirectly, through their subsidiaries or business relationships, cause or contribute to the Uyghur forced labour scheme. However, as noted above, the legal ground of this breach is unclear, as the UNGPs do not set a legal basis for corporate attribution. As will be studied in chapter four, in certain situations, there are legal grounds for keeping parent companies accountable for the human rights infringements caused by their overseas subsidiaries. Nevertheless, currently, there are no legal grounds under international law to hold transnational corporations accountable for contributing to their suppliers' human rights violations. However, from the perspective of business ethics, human rights due diligence processes may have positive impacts on the corporate conduct.

By conducting appropriate human rights due diligence, transnational corporations might avoid legal, commercial or reputational risks if they can show that they have taken every

[159] OHCHR, 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies' (2020) [online], 9.
[160] Commentary on the UN Guiding Principle 17.
[161] *Ibid*.

reasonable step to avoid involvement in Uyghur forced labour.[162] However, transnational corporations should not assume that by conducting human rights due diligence, in itself, would release them from legal liability for causing or contributing to the Uyghur forced labour scheme.[163] The risk of legal liability is higher related to the human rights violations caused by overseas subsidiaries than related to foreign suppliers, as the attribution of foreign suppliers' human rights violations to transnational corporations domiciled in another state remains an open question.

All transnational corporations should conduct human rights due diligence despite their size, sector, operational context or structure.[164] Human rights due diligence processes vary in complexity with the size of the transnational corporation, the risk of severe human rights impacts and the nature and context of its operations.[165] In their human rights due diligence process, transnational corporations should pay 'special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization.'[166] As stated above, China's repression and imprisonment of Uyghurs and other ethnic minorities in Xinjiang reflect a genocide, which has put them at substantial risk of vulnerability and marginalization. Therefore, transnational corporations should pay special attention to Uyghur forced labour and other human rights impacts on Uyghurs in their human rights due diligence processes. The following section will discuss further the undertaking of human rights due diligence processes in regions in which laws and practices conflict with international human rights standards.

3.2 Human Rights Due Diligence and Conflicting Requirements

Transnational corporations have a crucial role in preventing forced labour within regions from which they source goods and products. The Covid-19 pandemic has shown how dependent the modern world is on Chinese production. Many reports have found that personal protective and other emergency medical equipment have been made using forced

[162] Commentary on the UN Guiding Principle 17.
[163] *Ibid*. Legal liability will be further discussed in chapter 4.
[164] UN Guiding Principle 14.
[165] UN Guiding Principle 17(b).
[166] Commentary on the UN Guiding Principle 17.

labour in Xinjiang.[167] The use of Uyghur labour presents a severe reputational and legal challenge for foreign companies operating in China and sourcing from Xinjiang. The use of Uyghur labour has expanded rapidly. It makes it difficult for foreign companies to protect their brands from the risk of being associated with forced and abusive labour practices.[168] The labour transfer scheme presents a challenge for transnational corporations to ensure that their products are not associated with Xinjiang forced labour practices. As defined by the UNGPs, human rights due diligence is potentially the most helpful tool to assess businesses' standard of conduct related to Uyghur forced labour.

Human rights due diligence begins with the identification of actual or potential human rights impacts.[169] The Commentary states that the 'initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved.'[170] This initial identification includes assessing the nature, scope and severity of all the transnational corporation's actual and potential human rights impacts.[171] Transnational corporations should pay special attention to 'any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization.'[172] Consequently, in their human rights due diligence process, transnational corporations should pay special attention to Uyghurs and other ethnic minorities in China. They are at heightened risk of vulnerability or marginalization due to China's repression of Uyghurs and forced labour programs.

Pursuant to the UNGPs, the potentially affected stakeholders, in this case Uyghurs, should be consulted directly to understand the concerns and to assess their human rights impacts accurately.[173] It is not possible to consult Uyghurs and other ethnic minorities in Xinjiang directly about their working conditions, since workers inside and outside Xinjiang may not speak honestly about their working conditions due to the threat of detention to

[167] Muyi Xiao, Haley Willis, Christoph Koettl, Natalie Reneau and Drew Jordan, 'China Is Using Uighur Labor to Produce Face Masks' (*New York Times,* 19 July 2020) [online].
[168] CECC Report 2020, 4, *supra* note 46.
[169] UN Guiding Principle 17.
[170] Commentary on the UN Guiding Principle 18.
[171] *Ibid.*
[172] *Ibid*.
[173] *Ibid.*

themselves and their family members.[174] Therefore, the Commentary on the Guiding Principle 18 states that 'transnational corporations should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.'[175] However, China is not letting human rights defenders or international investigation groups into Xinjiang,[176] making it impossible to comply with the Guiding Principle 18.

Despite the difficulties mentioned above, human rights due diligence on forced labour is of particular importance in situations where the state-based enforcement of labour and human rights standards within business activities is insufficient and when the violation of those standards is government-led. [177] As set out in article 23 of the UNGPs: 'Although particular country and local contexts may affect the human rights risks of an enterprise's activities and business relationships, all business enterprises have the same responsibility to respect human rights wherever they operate.'[178] Therefore, transnational corporations have to respect human rights and refrain from using forced labour in the Xinjiang region, although the forced labour scheme is state-sponsored. Nevertheless, the existing international legal framework of business and human rights provide no hierarchy of laws that would enable a business enterprise to address this 'quandary of corporations being simultaneously bound in opposite directions.'[179]

At the core of human rights due diligence on forced labour is the assessment of actual and potential risks of fundamental labour rights violations and abuses within 'a company's operations and supply chain, integrating and acting upon the findings, tracking progress and communicating on these efforts.'[180] As set out in the commentary of article 23 of UNGPs:

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[174] CSIS Report 2019, 11-12, *supra* note 54.
[175] Commentary on the UN Guiding Principle 18.
[176] EP Uyghur forced labour Resolution, Recital I, states that 'Chinese Government has refused numerous requests from the UN Working Group on Enforced or Involuntary Disappearances (WGEID), the UN High Commissioner for Human Rights and other UN Special Procedures mandates to send independent investigators to Xinjiang and give them access to the camps'.
[177] International Labour Organization (ILO), Organisation for Economic Co-operation and Development (OECD), International Organization for Migration (IOM) and United Nations Children's Fund (UNICEF), *Ending child labour, forced labour and human trafficking in global supply chains* (ILO, OECD, IOM and UNICEF Report, 2019) [online], 60 [hereinafter ILO, OECD, IOM and UNICEF Report 2019].
[178] Commentary on the UN Guiding Principle 23.
[179] Griffith, Smit &McCorquodale 2020, 649, *supra* note 108.
[180] ILO, OECD, IOM and UNICEF Report 2019, 60, *supra* note 177.

> 'Where the domestic context renders it impossible to meet [the responsibility to respect human rights] fully, business enterprises are expected to respect the principles of internationally recognised human rights to the greatest extent possible in the circumstances and to be able to demonstrate their efforts in this regard.'[181]

The OECD MNE Guidelines has also integrated a similar reference to conflicting standards.[182] The MNE Guidelines provide a similar wording to the UNGPs related to how transnational corporations should respond to conflicting standards by stating that the MNE Guidelines do not substitute or should be considered to override domestic laws and regulations.[183] By March 2021, the provision has been invoked in six complaints to National Contact Points, which are the national supervisory bodies for the MNE Guidelines in OECD member states but are without enforcement powers and which decisions are recommendations by nature.[184] In all of these cases, the National Contact Points have considered that 'the enforcement of local laws is a matter for local authorities in host states.'[185]

In the interpretive guidance, *OHCHR* has divided the requirement to respect human rights in conflicting requirements into two categories: where domestic laws or customs 'require' and those where they 'allow for' transnational corporations to act in ways that conflict with the businesses human rights responsibilities.[186] *Griffith, Smit* and *McCorquodale* interpret that the UNGP 23 indicated that businesses should adhere to higher human rights standards in a situation where domestic laws or practices 'allow' behaviour that contradicts human rights.[187] They continue, that '[h]owever, where domestic laws or practices "require" corporate behaviour which has actual or potential adverse human rights impacts, transnational corporations are faced with a dilemma when having both to comply

[181] Commentary on the UN Guiding Principle 23.
[182] MNE Guidelines, Chapter I Para. 3. Business enterprises are encouraged to 'observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country'.
[183] *Ibid*, Chapter I Para. 6.
[184] *Former employee v. Banro Corporation* (filed 24 December 2018); *ADIMED v. Pharmakina S.A.* (filed 16 May 2018); *Obelle Concern Citizens &FOCONE v Shell NCP Netherlands* (filed 29 January 2018); *Trade Unions v Suzuki Motor Corporation NCP Japan* (filed 10 May 2016); *Former Employees v Banro in the DRC NCP Canada* (filed 26 February 2016; *Miningwatch Canada et al v Centerra Gold NCP Canada* (filed 15 March 2012); all cases available online at OECD Watch website.
[185] Griffith, Smit &McCorquodale 2020, 648, *supra* note 108. *See* e.g. 'Initial Assessment of the Canadian National Contact Point' in *Miningwatch Canada et al. v Centerra Gold*, at Para. 6, *supra* note 184.
[186] OHCHR Interpretive Guide, 78.
[187] Griffith, Smit and McCorquodale 2020, 653, *supra* note 108.

with all applicable laws and also to meet the responsibility to respect human rights in all contexts.'[188]

It is not clear whether the government-led Uyghur forced labour scheme 'allows'[189] or 'requires'[190] to oppress Uyghurs and their working conditions. It can be stated that the Chinese government consciously oppresses Uyghurs and other ethnic minorities and that the Chinese labour programs have an objective to at least partly to reduce the population density of the Uyghur ethnic minority group.[191] However, it might be too much stated that the Chinese government 'requires' using Uyghur forced labour at factories owned by private entities. It is apparent that the Chinese labour programs and the imprisonment of Uyghurs and other ethnic minorities to internment camps based on their religion and ethnicity are terrible human rights abuses under international human rights law. However, the Chinese laws and practices merely 'allow' companies to benefit from Uyghur forced labour through promotional campaigns and incentives.

Despite the circumstances, transnational corporations operating in the Xinjiang region should adhere to higher human rights standards and not allow Uyghur forced labour in their activities or products. By conducting human rights due diligence on their subsidiaries, suppliers, and other business relationships, transnational corporations should identify and address the possible contribution to the Chinese labour programs. The corporate responsibility to respect human rights extends beyond compliance with domestic laws and regulations protecting human rights and entails respect for all internationally recognized human rights,[192] and apply where there are no domestic laws to protect these rights.

The ideological opposite of the business and human rights view is the theory of shareholder primacy. According to the traditional shareholder primacy theory in corporate law,[193] transnational corporations could increase shareholder value by profiting from low

[188] Griffith, Smit and McCorquodale 2020, 653, *supra* note 108. *See* also OHCHR Interpretive Guide, 78.
[189] Legal definition of allow refers 'to give approval of or permission for', *See* Merriam Webster, 'Allow' *Merriam-Webster.com Dictionary* [online].
[190] Require means 'to claim or ask for by right and authority' or 'to impose a compulsion or command on', *see* Merriam Webster, 'Require' *Merriam-Webster.com Dictionary* [online]
[191] Helen Davidson, 'Chinese labour schemes aimed to cut Uighur population density – report' (*Guardian*, March 3, 2021) [online].
[192] UN Guiding Principle 12.
[193] Arnold 2016, 259, *supra* note 100. Arnold notes that the orthodox view of the purpose of companies is to maximize economic value for company owners while adhering to law. However, he notes that 'almost no

human rights and labour rights standards, and they should only meet human rights standards when it is profitable.[194] Scholars have widely criticized the ideology of the shareholder primacy view.[195] Under the UNGPs, transnational corporations are expected to operate to the higher standards regarding human rights, which 'also means that enterprises should not take advantage of operating environments that provide insufficient protection for human rights to lower their own standard of conduct.'[196] The corporate social responsibility theories hold that business enterprises should engage in pro-social or ethical conduct when doing so will improve the return on equity.[197] Conversely, the business and human rights approach is not based on voluntariness.[198] However, without adequate surveillance, the business and human rights approach may be based on the voluntariness of transnational corporations. In theory, it expects business enterprises to respect human rights in all their business activities despite its impacts on financial returns.[199] Pursuant to the business and human rights approach, transnational corporations should not take advantage of Uyghur forced labour to cut production costs and increase profits for their shareholders.

Getting back to the conflicting requirements, a clear example of conflicting requirements described in UNGP 23(b) is a situation where national laws or practices

management, finance, or economics scholars explicitly defend the idea that companies should violate the law in the interest of additional wealth creation.'

[194] Arnold 2016, 268, *supra* note 100.

[195] *See* Lynn A. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (San Francisco: Berrett-Koehler Publishers, 2012); Thomas M. Jones and Will Felps, 'Stakeholder Happiness Enhancement: A Neo-Utilitarian Objective for the Modern Corporation' (2013) 23(3) *Business Ethics Quarterly*, 349-379; Lynn A. Stout, 'New Thinking on "Shareholder Primacy' (2012) 2 *Accounting, Economics, and Law*, 1-22; Thomas M. Jones and Will Felps,'Shareholder Wealth Maximization and Social Welfare:A Utilitarian Critique'(2013) 23(2) *Business Ethics Quarterly*, 207–38. *See also* Arnold 2016, 269: "The shareholder primacy ideology is grounded in a faulty interpretation of corporate law,namely,that the sole obligation of TNC executives and managers is to maximize economic value. In practice this entails that managers have the legal right to take into account the actions of their companies on other stakeholders and on society in general".

[196] OHCHR Interpretive Guide, 77.

[197] *See* Abagail McWilliams, Donald S. Siegel and Patrick M. Wright, 'Corporate Social Responsibility: Strategic Implications' (2006) 43(1) *Journal of Management Studies* 1–18. For criticism on corporate social responsibility view *see* Jean-Pascal Gond, Guido Palazzo and Kaushik Basu, 'Reconsidering Instrumental Corporate Social Responsibility through the Mafia Metaphor' (2009) 19(1) *Business Ethics Quarterly*, 57–85.

[198] *See* Florian Wettstein, 'CSR and the Debate on Business and Human Rights:Bridging the Great Divide' (2012) 22(4) *Business Ethics Quarterly*, 739–70, about the debate between corporate social responsibility theories and the business and human rights approach.

[199] Florian Wettstein, 'From side show to main act: can business and human rights save corporate responsibility?' in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice* (Oxfordshire: Routledge, 2016), 78-87, 84-85.

directly contradict international human rights standards.[200] As mentioned above, even if the Chinese government and officials do not require the use of Uyghur forced labour in factories, their laws and practices contradict human rights standards as they allow the abuse of Uyghurs and other ethnic minorities for labour purposes. The responsibility to respect human rights applies in all contexts. Therefore, business enterprises should '[s]eek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements'[201] in China.

Transnational corporations should demonstrate their efforts in addressing and mitigating the use of Uyghur forced labour in Xinjiang in the factories with which they have business linkages. However, it is not clear what is meant by the expectation to respect the prohibition of forced labour to the greatest extent possible in the given circumstances. Even if the actual use of Uyghur forced labour would continue without notable improvements to the working conditions, the UNGPs indicate that a transnational corporation would be compliant with the UNGPs if it demonstrates its efforts to enhance the working conditions in the factories using Uyghur forced labour. It would, of course, be contrary to the purpose of the Principle 23, which aims to promote the principles of international human rights law in circumstances where the local context makes it impossible to meet the responsibility to respect human rights altogether. To better understand what is meant by the Principle 23, more interpretation is needed, as the prohibition of forced labour is such a fundamental human right that it cannot be respected only partially 'to the greatest extent possible'.

Currently, to be compliant with the UNGPs, transnational corporations are expected to respect the prohibition of forced labour ad undertake due diligence to ensure that their business conduct does not infringe upon Uyghurs' labour rights or any other human rights. By conducting adequate human rights due diligence, transnational corporations should be able to demonstrate that despite the government-led Uyghur forced labour scheme, the factories in which they operate, respect the prohibition of forced labour and do not benefit from Uyghur forced labour. Not all production sites in Xinjiang are contaminated with Uyghur forced labour. In those situations, transnational corporations should demonstrate that the working conditions are sufficient, and there is no Uyghur forced labour involved. For

[200] Griffith, Smit and McCorquodale 2020, 653, *supra* note 108.
[201] UN Guiding Principle 23(b).

such situations, human rights due diligence is useful. However, *Bonnitcha* and *McCorquodale* argue that the unclarity in the UNGPs' formulation 'encourages the incorrect view that implementing due diligence processes is sufficient to discharge businesses' responsibility to respect human rights.'[202] Transnational corporations do not discharge their responsibility to respect human rights by solely implementing due diligence processes.[203]

It remains contentious whether the soft law approach of UNGPs is effective and sufficient to protect Uyghurs and other ethnic minorities in the Xinjiang region from infringing their human rights.[204] Therefore, the concept of 'due diligence' in the UNGPs will be assessed in the next section to further understand the scope of corporate responsibility under the business and human rights due diligence approach.

3.3 The Definition of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights

Bonnitcha and *McCorquodale* note that the relationship between due diligence processes and legal obligations exist independently of the scheme established by the UNGPs.[205] Even though human rights due diligence as a 'legal standard is still in the early days of development,' it can provide a compass for transnational corporations where 'domestic requirements conflict with [international human rights] standards,'[206] as in the Xinjiang region. To be effective, human rights due diligence should involve clear standards that encompass transnational corporations to address Uyghur forced labour in their business activities and relations with their subsidiaries and suppliers. However, the definition of human rights due diligence remains open, making it difficult for transnational corporations to understand the scope and extent of the human rights due diligence process they are

[202] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *The European Journal of International Law*, 899-919, 910 [hereinafter Bonnitcha and McCorquodale 2017a].
[203] The legal liability of Uyghur forced labour will be discussed in chapter four. Some states have adopted domestic legislation with special transparency and mandatory reporting requirements, which will be further discussed in chapter five.
[204] These concluding remarks will be further discussed in the end of chapter five.
[205] Bonnitcha and McCorquodale 2017a, 914, *supra* note 202.
[206] Griffith, Smit and McCorquodale 2020, 651, *supra* note 108.

expected to conduct, and the scope and extent to which human rights infringements can be attributed to them.

The term 'due diligence' is generally understood to mean in law: 'the care that a reasonable person exercises to avoid harm to other persons or their property,'[207] and in business: 'research and analysis of a company or organization done in preparation for a business transaction.'[208] *Bonnitcha* and *McCorquodale* criticize that the term 'due diligence' is not used consistently in the UNGPs,[209] which creates confusion around the meaning of due diligence in the human rights due diligence regime set by the UNGPs. *Bonnitcha* and *McCorquodale* explain that in international human rights law, 'due diligence' is generally understood 'as a standard of conduct required to discharge an obligation, whereas business people normally understand "due diligence" as a process to manage business risks'.[210] *Bonnitcha* and *McCorquodale* argue that the UNGPs raise two very different understandings of 'due diligence' without describing how they are interconnected, which is problematic in practice because it leaves uncertain the extent of businesses' responsibility to respect human rights,[211] and it creates confusion on due diligence as a standard of conduct to fulfil the corporate responsibility to respect human rights.[212] It does not clarify when a transnational corporation infringing human rights can be said to have breached its responsibility to respect human rights and when it needs to provide a remedy for the individuals impacted by the adverse human rights impact.[213]

Ruggie and *Sherman* oppose the interpretation of two different understandings of due diligence as a non-existing problem.[214] *Bonnitcha* and *McCorquodale* reply to the argument made by *Ruggie* and *Sherman*, noting that the two different understandings of due diligence in UNGPs result in confusion and practical problems, as *Ruggie*'s and *Sherman*'s

[207] Merriam Webster, 'Due Diligence', *Merriam-Webster.com Dictionary*, [online].
[208] *Ibid*.
[209] Bonnitcha and McCorquodale 2017a, 908, *supra* note 202.
[210] *Ibid*, 900.
[211] *Ibid*, 901.
[212] *Ibid*, 905.
[213] *Ibid*, 911.
[214] Ruggie and Sherman 2017, 925, *supra* note 80.

understanding of due diligence is not internally consistent and does not have an origin in international human rights law.[215]

As stated above, the UNGPs is a soft law instrument aimed to 'clarify and elaborate on the implications of relevant provisions of existing international human rights standards,'[216] referring to and deriving from existing international human rights law. Accordingly, it is not supposed to create new standards. That does not seem to be the case regarding the understanding of the term due diligence in the context of human rights due diligence, which causes dilemmas and challenges for the interpretation of the UNGPs since *Ruggie* and *Sherman* state that the UNGPs 'establish their own scheme for corporate human rights due diligence, as any international instrument is entitled to do.'[217]

Bonnitcha and *McCorquodale* see that the 'basic understanding of due diligence in a business context is a procedural practice to assess risk in a company's own interest.'[218] Under the basic understanding of due diligence in a business context, transnational corporations considering to have business operations in the Xinjiang region would assess legal, reputational and financial risks linked to the human rights situation of the Xinjiang region towards the company itself before starting the operations, rather than assessing actual and potential human rights risks to the individuals impacted by the company's business operations. *Ruggie* opposes viewing due diligence in strictly transactional terms, such as an investor or buyer assessing a target asset or venture.[219] *Ruggie* understands due diligence as 'a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.'[220] Under this view, transnational corporations should undertake human rights due diligence on an on-going basis to comply with the UNGPs.

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[215] Jonathan Bonnitcha and Robert McCorquodale (2017), 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F. Sherman' (2017) 28(3) *European Journal of International Law*, 929-933, 930 [hereinafter Bonnitcha and McCorquodale 2017b].
[216] FAQ about the UN Guiding Principles, 8.
[217] Ruggie and Sherman 2017, 924, *supra* note 80.
[218] Bonnitcha and McCorquodale 2017a, 902, *supra* note 202.
[219] Ruggie and Sherman 2017, 924, *supra* note 80.
[220] UN HRC, 'Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework: report to the UN Human Rights Council' UN Human Rights Council 11st session (2009) UN Doc. A/HRC/11/13, Para. 25.

Bonnitcha and *McCorquodale* interpret that businesses have a strict responsibility for their own adverse human rights impacts,[221] meaning it includes a 'no-fault element'. Consequently, transnational corporations have a responsibility to remedy whenever they violate human rights. On transnational corporations' own infringement of human rights, 'due diligence, understood as a standard of conduct is not relevant.' [222] *Bonnitcha* and *McCorquodale* state that '[h]owever, due diligence, as a standard of conduct, is relevant in defining the extent to which businesses are responsible for the adverse human rights of third parties. Due diligence processes are the means by which businesses should ensure that they discharge these responsibilities.'[223]

Bonnitcha and *McCorquodale* argue that '[i]n international law, due diligence functions primarily as a standard of conduct that defines and circumscribes the responsibility of a state in relation to the conduct of third parties.'[224] *Bonnitcha* and *McCorquodale* argue that if due diligence is understood as a standard of conduct, transnational corporations are solely responsible for adverse human rights impacts caused by third parties. An example could be a supplier using Uyghur forced labour that 'results from its failure to act with reasonable diligence.'[225] According to their interpretation, a transnational corporation does not breach its responsibility to respect human rights and responsibility to refrain from using forced Uyghur labour, 'if it has acted diligently in its attempt to avoid causing adverse human rights impacts, but, due to unfortunate or unforeseen events, it has caused serious adverse human rights impacts.'[226]

Bonnitcha and *McCorquodale* continue that on the contrary, related to transnational corporations own infringements of human rights, transnational corporations 'breach their responsibility to respect human rights whenever they infringe human rights.'[227] They see their own infringements of human rights similar to a strict liability standard that does not include a fault element. [228] Under strict liability, transnational corporations are responsible for all adverse human rights 'regardless of whether those impacts were unexpected or costly

[221] Bonnitcha and McCorquodale 2017a, 912, *supra* note 202.
[222] *Ibid.*
[223] *Ibid*.
[224] *Ibid*, 903.
[225] *Ibid*, 911.
[226] *Ibid*.
[227] *Ibid*.
[228] *Ibid*.

to prevent.'[229] In their view, transnational corporations' responsibility to provide a remedy for individuals impacted by its own infringements of human rights 'is independent of any debate about whether the business has acted with sufficient diligence or care.'[230]

Ruggie and *Sherman* oppose the 'propose and justify' interpretation of *Bonnitcha* and *McCorquodale* as fundamentally inappropriate because it aligns the corporate responsibility to respect human rights with state-based international human rights law and the state obligations of human rights violations.[231] They claim that the corporate responsibility to respect human rights is distinct from state obligations. *Ruggie* and *Sherman* argue that *Bonnitcha* and *McCorquodale* 'analogize from state-based legal concepts and contexts to private sector non-legal processes and miss critical elements in the logic and provisions of the Guiding Principles.'[232] *Ruggie* and *Sherman* claim that 'move to state-based law is unnecessary, given the fact that the Guiding Principles stipulate their own constitutive construct of human rights due diligence.'[233] They state that 'due diligence as a standard of conduct is irrelevant to corporate responsibility to respect human rights under the Guiding Principles,'[234] as it is not based on nor analogizes from state-based law. *Ruggie* argues that 'without conducting human rights due diligence, companies can neither know nor show that they respect human rights and, therefore, cannot credibly claim that they do,'[235] which has mostly to do with business ethics and debate about whether a company's responsible business conduct reports and sustainability claims hold true.

Ruggie and *Sherman* continue that corporate responsibility to respect human rights is based on 'transnational social norm, not an international legal norm.'[236] *Ruggie* and *Sherman* hold of their view that the corporate responsibility to respect human rights is a 'company's social license to operate, not its legal license; it exists "over and above" all applicable legal

[229] Bonnitcha and McCorquodale 2017a, 911, *supra* note 202.
[230] *Ibid.*
[231] Ruggie and Sherman 2017, 925, *supra* note 80.
[232] *Ibid*, 922.
[233] *Ibid*, 925.
[234] Ruggie and Sherman 2017, 923, *supra* note 80.
[235] *Ibid*, 924.
[236] *Ibid*, 923. *See also* UNGA, 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework : Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' UN Human Rights Council 11th session (2009) UN Doc A/HRC/11/13, Para. 46.

requirements; and it applies irrespective of what states do or do not do.'[237] *Ruggie* aims to show that human rights are something more than law, and therefore the corporate responsibility to respect does not need to base on existing international human rights law. It is in line with the view that human rights are both moral and legal rights, but in spite of that, it is problematic because the actualization of this responsibility rests heavily on business ethics and not on law, which makes the legal liability and corporate attribution of human rights infringements unreasonably tricky. Furthermore, the social license theory presented by *Ruggie* is not universal as social norms vary by region and industry.

The debate of the meaning of 'due diligence' under human rights due diligence leaves unclarity to the concept of due diligence in the UNGPs. Both parties agree that transnational corporations should undertake human rights due diligence, but they have different reasoning for it. *Ruggie* and *Sherman* argue that corporate responsibility to respect human rights, and human rights due diligence as an integral part of it, is a company's social license to operate. Whereas *Bonnitcha* and *McCorquodale* argue that human rights due diligence has to align with international human rights law, and transnational corporations have different responsibilities towards their own infringements of human rights and third-parties' adverse impacts. As the definition of human rights due diligence remains controversial, the due diligence regime does not clarify how transnational corporations causing or contributing to adverse human rights impacts through their own operations or by third parties can be held accountable for those infringements. Therefore, the following chapter will study the question of legal liability related to the corporate responsibility to respect human rights.

[237] Ruggie and Sherman 2017, 924, *supra* note 80.

4 Transnational Corporations Linked to Uyghur Forced Labour: The Question of Legal Liability

Different standards apply in relation to businesses' responsibility for their own adverse human rights impacts than to their responsibility for third party impacts on human rights. Businesses are expected to 'avoid' causing or contributing to adverse human rights impacts through their own activities.[238] However, they should only 'seek to prevent' adverse human rights impacts directly linked to their operations, products or services by their business relationships.[239] As explained in the previous chapter, related to human rights due diligence, transnational corporations have strict responsibility for their own human rights infringements. Nevertheless, the standard of conduct applies to human rights infringements caused by transnational corporations' business relationships. The first section studies transnational corporations' responsibility for their own infringements of human rights, as some transnational corporations have their own business operations in the Xinjiang region. The second section studies the parent company liability and grounds it in case law to understand the corporate responsibility to respect the human rights of transnational corporations consisting of a parent corporation and subsidiaries. Finally, the third part studies the transnational corporations' responsibility for human rights violations committed by third parties,[240] and to what legal basis such responsibility could be construed.

4.1 Transnational Corporations and the Responsibility for Human Rights Violations

This section will study the corporate responsibility to 'avoid' causing or contributing to Uyghur forced labour through their own activities. Under the UNGPs, transnational corporations are expected to avoid causing or contributing to Uyghur forced labour in their operations, even if its use is allowed and promoted in China. The UNGPs do not associate

[238] UN Guiding Principle 13(a).
[239] UN Guiding Principle 13(b), and Bonnitcha and McCorquodale 2017a, 912, *supra* note 202.
[240] Third parties include the first-tier suppliers and beyond them until the upstream of the supply chain containing raw material suppliers.

human rights impacts with legal liability for companies,[241] but despite that, scholars interpret that 'human rights impacts' of companies should be understood in the same way as 'human rights violations'. [242] As stated in the previous chapter, transnational corporations should seek ways to honour international human rights standards when faced with conflicting requirements.[243] The following section shows that, in some circumstances, parent companies can be held liable under extraterritorial jurisdiction for adverse human rights impacts caused by their overseas subsidiaries.[244]

Transnational corporations have a strict responsibility to avoid causing or contributing to Uyghur forced labour through their own business activities. It means that transnational corporations should not authorize the use of Uyghur forced labour in the factories they own or otherwise directly cause or contribute to it.[245] The view that transnational corporations have a strict – or no-fault – responsibility for their own adverse human rights impacts is also consistent with the Guiding Principle 22, which states that '[w]here transnational corporations identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.'[246] Even if the remediation falls out of the scope of this thesis, it can be said that this formulation clarifies that a transnational corporations' responsibility for remediation does not depend on whether 'the infringement resulted from its failure to act diligently or on any other fault element.'[247]

This interpretation aligns with the statements in the previous chapter about strict responsibility. If transnational corporations were responsible for only those adverse human rights impacts that result from their failure to act diligently, there would be ample room for dispute about whether the corporate responsibility to respect human rights had been

[241] Commentary on the Guiding Principle 12 states: 'The responsibility of transnational corporations to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions'.
[242] *See* Andrew Clapham, 'Human Rights Obligations for Non-State-Actors:Where Are We Now?' in Fannie Lafontaine and François Larocque (eds.), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Cambridge: Intersentia, 2015), 1-18.
[243] Griffith, Smit and McCorquodale 2020, 649, *supra* note 108. International law provides no hierarchy of laws that would aid transnational corporations to address this 'quandary of corporations being simultaneously bound in opposite directions'.
[244] The question of extraterritoriality was introduced in the chapter 2.2.2.
[245] The next section will study further the parent company liability in case law.
[246] Bonnitcha and McCorquodale 2017a, 913, *supra* note 202.
[247] *Ibid*.

breached.[248] The UNGPs is a soft law instrument that relies significantly on self-regulation by transnational corporations. The self-regulation mechanisms, which are often based on soft law instruments, include non-judicial grievance mechanisms and industry standards. In these situations, 'the evidence needed to determine whether a transnational corporation acted diligently is likely to be in the possession of the business itself.'[249] It is problematic because many transnational corporations may be willing to hide evidence of their contribution to adverse human rights impacts, such as Uyghur forced labour, in fear of legal and reputational risks caused by the disclosure of such information. Consequently, they may decide not to provide a remedy for individuals impacted by their harmful practices. Therefore, the self-regulation mechanisms treat individuals impacted by adverse human rights impacts unequally because they are based on non-binding recommendations.

In the case study of Uyghur forced labour, transnational corporations are implicated in forced labour practices in another state than where they are domiciled. Generally, states have a duty to ensure that human rights are respected and process claims filed by their nationals. In the case of Xinjiang and Uyghur forced labour, the forced labour scheme is government-led, and other states have no authority to contravene the situation and end the human rights violations due to state sovereignty. Even though it is not generally agreed that private actors can be imposed state-like duties to respect human rights under international human rights law, transnational corporations have partially received the role to prevent human rights violations committed in Xinjiang.[250] This expectation is not grounded in international law but merely on business ethics. It aligns with *Fasterling* and *Demuijnck,* who argue that by the distinction between the state duties and business responsibilities, it is not up to businesses to assume the role of a state to 'prevent human rights violations committed by others'.[251] Transnational corporations have no legal obligations to prevent or end the use of Uyghur forced labour, and many companies consciously benefit from human rights violations, even if it is contrary to the UNGPs.

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[248] Bonnitcha and McCorquodale 2017a, 917, *supra* note 202.
[249] *Ibid*.
[250] However, it must be noted that under the first pillar of the UNGPs, states are obliged to protect human rights and provide legislation that promote corporate responsibility to respect human rights with extraterritorial nature. As will be discussed in the chapter five, some states have already made legislation which aims to prohibit importation of goods and products manufactured with Uyghur forced labour.
[251] Fasterling and Demuijnck 2013, 800, *supra* note 73.

Where a company identifies its human rights impacts and conducts human rights due diligence carefully, 'it is more likely to be able to show to any external regulator or court that it has done everything reasonable that it could have done, should an adverse impact occur,'[252] or if it faces legal risks or claims. *McCorquodale, Smit, Neely* and *Brooks* indicate that companies have 'a general legal obligation of due diligence'. [253] The Commentary and *Nolan* support their interpretation by emphasizing that 'simply having an [human rights due diligence] process does not mean that there is no consequent legal liability.'[254] The following section will study the parent company liability in international case law.

4.2 Parent Company Liability in International Case Law

This section studies the scope of transnational corporations' responsibility and legal liability for their overseas subsidiaries alleged human rights violations in the Xinjiang region from the perspective of recent case law. Although being parts of the same corporate family, it is traditionally understood that parent companies and their overseas subsidiaries are different legal entities, and they should be primarily held liable for their own actions. Therefore, claims of human rights violations should be primarily heard in the courts of the state where the wrongdoing occurred. However, the level of supervision over human rights violations varies from state to state, as will be noted in the case law discussed in this chapter. Consequently, *access to justice* for individuals impacted by the adverse human rights infringements is not provided in all states.

In recent case law, specifically in tort law related to the extraterritorial jurisdiction,[255] it is held that a parent company may be liable for its subsidiary if it has a degree of knowledge

[252] Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2(2) Business and human rights journal, 195-224, 199.
[253] *Ibid*..
[254] Commentary on the Guiding Principle 17: 'Transnational corporations conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.' *See also* Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or No Law?' in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond a Corporate Responsibility to Respect?* (Cambridge University Press, 2013), 138-161.
[255] For discussion about tort law and human rights *see* Cees van Dam, 'Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights' (2011) 21 *Journal of European Tort Law*, 221-254.

of and control over the activities of its subsidiary that caused the human right infringement. Accordingly, centralized decision-making may expose a transnational corporation to legal risks and cause an overseas subsidiary's human rights breaches to be attributed to the parent company. Recent case law on parent company liability in jurisdictions such as the UK, Canada and the Netherlands suggests that if the parent company exercises control over the activities of its subsidiary, the parent company could have a duty of care to remedy for the individuals impacted by its overseas subsidiary's wrongful actions.[256] As noted above, the remedy falls out of the scope of this thesis, but even so, the case law will be studied as it provides valuable information about the questions of jurisdiction, attribution and admissibility before the home state courts. It also provides useful information about possible corporate accountability for human rights violations since the UNGPs do not include an international mechanism to file claims against transnational corporations for alleged human rights violations in their business activities.[257]

4.2.1 Vedanta Resources plc v. Lungowe

In *Vedanta v. Lungowe*, the UK Supreme Court clarified the parent company liability issue. The Supreme Court delivered its judgment on 10 April 2019 and determined that English courts could proceed with the tort claim alleging Zambia-based Konkola Copper Mines Plc and its English-based parent Vedanta Resources Plc of negligence. The case is a domestic tort law case and not explicitly a business and human rights case. Considering civil claims brought by Zambian claimants for damages experienced in Zambia, the decision is significant for interpreting the UNGPs and international efforts to hold transnational corporations accountable for human rights infringements that occurred overseas.[258]

Following the lower courts, the UK Supreme Court addressed the jurisdiction claim by stating that the Zambians would be denied *access to justice* if the proceedings were not

[256] Griffith, Smit and McCorquodale 2020, 662, *supra* note 108. *See Vedanta Resources plc v. Lungowe* [2019] UKSC20 at Paras. 52-57 [hereinafter Vedanta v. Lungowe].
[257] Even if the UNGPs included a non-judicial grievance mechanism, its decisions would probably be non-binding recommendations, such as in the National Contact Points adopted in the OECD MNE Guidelines.
[258] Tara Van Ho, 'Vedanta Resources Plc and Another v. Lungowe and Others' (2020) 114(1) *American Journal of International Law*, 110-116, 110-111.

permitted to take place in England.[259] The Supreme Court noted that Zambia would, in the ordinary course, be the proper place for the proceedings, as Zambian courts are prepared to interpret the Zambian laws which are applied in this case. Besides the claimants, the alleged damage, the evidence and the mine personnel were located in Zambia, which further supports that the proceedings should be held in Zambia.[260]

The extent of Vedanta's involvement in its subsidiaries mine was a factual issue relevant to the negligence and statutory liability claims. The UK Supreme Court held that it was arguable that Vedanta, as a parent company, owes a duty of care to the Zambian claimants. Vedanta had published a sustainability report emphasizing how the Board of the parent company had oversight over its subsidiaries. It had entered into various agreements obligating it to provide various services to its subsidiary, including employee training, and provided financial support to the subsidiary. In public disclosures, Vedanta emphasized its commitment to address risks and shortcomings in the subsidiaries mining infrastructure.[261] When assessing the criteria for parent company liability, *Lord Briggs* stated that the parent company had acknowledged its responsibility for overseeing and controlling the operations in Zambia, showing that Vedanta has had a sufficient level of intervention in its subsidiaries operations in Zambia.[262] The entire disclosure of Vedanta's internal documents and communications between the parent company and subsidiary support the interpretation that the negligence claims can be attributed to Vedanta as the parent company.[263]

Lord Briggs, writing for a unanimous Court, suggests that parent companies who oversee the human rights and labour standards employed by their subsidiaries have a duty of care to those harmed by the subsidiary.[264] The *Vedanta* decision has the potential to transform corporate approaches to human rights due diligence and accountability. However, it leaves ambiguity in telling the exact circumstances where a parent company might be liable for its subsidiaries' activities overseas and when such wrongdoings can be attributed to the parent company. As noted above, the parent company cannot limit its duty of care

[259] Vedanta v. Lungowe, Para. 89.
[260] *Ibid*, Para. 71.
[261] *Ibid*, Para. 52-53.
[262] *Ibid*, Para. 55.
[263] *Ibid*, Para. 61.
[264] *Ibid*, Para. 55.

towards its subsidiary by issuing group-wide policies and guidelines and expecting the subsidiary to comply.

Forced labour is addressed both in the case of *Vedanta* and the Uyghurs. Therefore, the *Vedanta* decision implicates that transnational corporations having subsidiaries in the Xinjiang region may be claimed in their home state courts if their subsidiaries directly contribute to the use of Uyghur forced labour. The tort claims may be attributed to the parent company if the state where the overseas subsidiary is domiciled cannot provide *access to justice* for individuals impacted by the human rights violation. So far, no case provides that a parent company could be claimed for its subsidiary's indirect cause or contribution to human rights violations, even though the UNGPs indicate that transnational corporations are responsible for also an indirect contribution to human rights violations. Such a decision would be tricky from the perspective of attribution since it would be difficult to demonstrate how a parent company can be liable for human rights infringement it has not directly contributed via management or supervision.

It must be noted that in the case of parent company liability in home state courts, the claimants should be individuals impacted by Uyghur forced labour. In Xinjiang's current circumstances, it is rather unlikely that the individuals affected by Uyghur forced labour could file a claim against the parent companies in their home state courts. The Uyghurs and other ethnic minorities are under constant surveillance, and their freedom of speech and movement is limited. Nevertheless, the *Vedanta* decision implicates a ray of light for the end of corporate impunity related to human rights violations caused by extraterritorial business activities. Based on the *Vedanta* decision, the transnational corporations having business activities through their subsidiaries in the Xinjiang region might be willing to comply with the UNGPs and implement human rights due diligence processes.

4.2.2 Shell's Subsidiary's Alleged Pollution in the Niger River Delta

A few weeks later after the *Vedanta* decision, on 1 May 2019, a Dutch court issued a significant decision in the *Kiobel v. Shell* case.[265] The District Court of the Hague accepted

[265] *Esther Kiobel v. Royal Dutch Shell PLC* [2019] ECLI:NL:RBDHA:2019:4233. The final decision has not been published yet.

that hearing the claims against a Nigeria-based subsidiary and its parent company Shell together fills the legal requirements and allowed the case to go forward, ruling that it has jurisdiction to continue proceedings. The court accepted the joint hearing as the claims against the European 'anchor defendant' Shell and its Nigerian-based subsidiary have a connection. The claims base on the same legal grounds and facts.

In the Netherlands, the claimants claimed that Shell was involved in the unlawful arrest, detention, and execution of their family members by the Nigerian military following protests against Shell's alleged pollution of the Niger delta. Shell opposed and claimed that the Dutch court does not have jurisdiction to hear the case as there are no legal requirements to hear the Nigeria-based subsidiary in the Netherlands. The main question for courts was whether the Dutch courts have jurisdiction over claims against Shell's Nigerian subsidiary, which jointly operates with the Nigerian government. The lawyers of both parties also contest whether the case is similar to Vedanta, and the parent company has liability over the subsidiaries human rights violations.

Oil company Shell was sued in the Netherlands by Esther Kiobel and three other women. Esther Kiobel had filed a claim against Shell earlier in the United States at the beginning of the 2000s. The case came to an end when the US Supreme Court ruled that it did not have jurisdiction to hear the case under the Alien Tort Statute.[266] *McCorquodale* argues that the *Kiobel* decision by the US Supreme Court is 'unlikely to have a significant effect on the development of litigation outside the United States against corporations for their extraterritorial actions that violate human rights.'[267]

The Nigerian Ogale and Bille communities also filed a claim against Shell in the UK. On 12 February 2021, the UK Supreme Court ruled that the case can be heard in England and that the Nigerians can bring negligence claims against Shell in the UK,[268] based on the decision on *Vedanta v. Lungowe.*

[266] *See Kiobel v. Royal Dutch Petroleum Co.* [2013] 569 U.S. 108.
[267] Robert McCorquodale, 'Waving Not Drowning: *Kiobel* Outside the United States' (2013) 107(4) *American Journal of International Law*, 846-851, 851. The analysis of *McCorquodale* has held true for the reason that the UK, the Netherlands and Canada have enabled effective litigation of the parent company liability related to extraterritorial actions.
[268] *See Okpabi and others v. Royal Dutch Shell Plc and another* [2021] UKSC 3.

On 29 January 2021, the Dutch Court of Appeals of the Hague delivered its judgments in *Four Nigerian Farmers and Milieudefensie v. Shell*.[269] The court held that the Dutch parent company was under a duty of care to the Nigerian claimants, and thus, liable for the oil spills in Nigeria. The decision resulted in a victory on the merits of the victims and has importance for improving the accountability of transnational corporations causing or contributing to human rights and environmental rights violations in foreign countries.

Although the Dutch Court found a parent company liability in the *Milieudefensie v. Shell* case, the finding should be approached with some caution. The decision does not indicate that all human rights violations caused by overseas subsidiaries would result in parent company liability. As the *Milieudefensie v. Shell* case is similar to the *Vedanta* and other English cases and based on the same reasoning, the Dutch decision is only relevant for cases where the English precedents can be applied.

Interestingly, a Dutch court applied English precedents to the *Milieudefensie v. Shell* case. Both cases are mainly concerned about the arguments that a subsidiary must commit a tort before the parent can incur a duty of care, which does not directly follow the reasoning behind the English cases cited by the Dutch court. In addition, the Dutch court does not clarify why Royal Dutch Shell, as a parent company, has a duty of care for oil spills caused by its Nigerian subsidiary, which has strict liability for the pollution. The court's reasoning behind the parent company's duty of care relates to the parent company's specific interventions in its subsidiaries operations rather than its central position of authority in the Shell corporate group. In the *Milieudefensie v. Shell* case, the Dutch court ruled that a parent company's duty of care is based on actual interventions to its subsidiaries operations rather than on its capacity to intervene and the position of authority in the corporate group. It could create an incentive for transnational corporations to stop interfering with their overseas subsidiaries' operations, as broad interference may lead to legal liability.

[269] *Milieudefensie et al. v. Royal Dutch Shell plc.* [2021] ECLI:NL:GHDHA:2021:134.

4.2.3 Nevsun Resources Ltd. v. Araya

In its judgment delivered on February 28, 2020, on the *Nevsun* case,[270] the Supreme Court of Canada held that claims against a Canadian mining corporation related to alleged violations of customary international law, including forced labour and modern slavery at a mine in Eritrea, could proceed to trial in Canada. The court held that Canadian domestic law does not 'contain an all-encompassing doctrine of non-justiciability based on foreign acts of state.[271] The alleged breaches of customary international law arguably provide a novel cause of action in tort.'[272]

A Canadian mining company, Nevsun Resources Ltd., owns Bisha Mining Share Company which has operations in east African state Eritrea. Nevsun started building a mine owned by its subsidiary Bisha Mining Share Company in Eritrea in 2008. In Eritrea, all citizens have to do military or other public services when they turn eighteen. The 'National Service Program' means forced work for years on projects supported by military or political party officials. The workers from the National Service Program helped to build the Bisha mine. The workers have described that they were forced to work under dangerous and violent conditions for years without the possibility to leave.

The workers of the Eritrean subsidiary sued Nevsun, stating there were violations of customary international law in the Bisha mine. They claimed that Nevsun, as the parent company, was responsible for slavery, forced labour, cruel, unusual or degrading treatment, and crimes against humanity that occurred in its subsidiary's production site. The workers sued Nevsun in Canada, saying that the violations are against customary international law, which is an integral part of Canadian law and international law. Canadian courts should hold Nevsun responsible for the human rights violations taking place in Eritrea, as customary international law is similar to the common law of the international legal system. The workers claimed that the violations were violations of peremptory norms of customary international law, which are fundamental rules that can never be avoided or broken.

[270] *Nevsun Resources Ltd v. Araya* [2020] SCC 5 (CanLII) [hereinafter Nevsun v. Araya].
[271] By majority 7-2.
[272] Narrow majority 5-4.

The Supreme Court of Canada did not decide whether Nevsun was responsible for violating the worker's rights and breaking customary international law. A trial judge should make such a decision. However, it ruled that Nevsun's subsidiary in Bisha Mining Share Company might have violated customary international law in Eritrea, and hence, the lawsuit against Nevsun could go forward in Canada.[273] The Supreme Court decision allows the Eritrean workers to go forward with a claim alleging Nevsun for violation of customary international law in its subsidiary's mine operation in Eritrea.

The *Nevsun* decision represents a landmark case and a shift in Canadian law regarding the potential liability of Canadian corporations who operate globally. By majority, the court held that violations of peremptory norms are serious violations universally, and slavery is a *jus cogens* violation.[274] The decision also suggests forced labour to be a *jus cogens* violation or at least a norm of customary international law, recognizing that its *jus cogens* definition remains contentious.[275] Customary international law is an integral part of Canadian law, and therefore, the Canadian courts could proceed with claims alleging Canadian companies responsible for violating it.

At the end of 2020, Nevsun decided to settle with Eritrean claimants.[276] The details of the settlement were not disclosed. Nevsun might have wanted to avoid the legal and reputational risk of a public court decision and decided to settle with the Eritrean claimants. It implies that the landmark decision had a deterrent effect on Nevsun that made it provide a remedy for the Eritrean workers. However, it has not been disclosed whether Nevsun's subsidiary has ended the harmful practices in Eritrea.

The *Nevsun* decision did not mention the UNGPs or corporate responsibility to respect human rights. Nevertheless, the decision indicates that transnational corporations having subsidiaries in China could face legal suits in their home state courts for contributing to Uyghur forced labour, as forced labour can be considered a peremptory violation of customary international law.

[273] Nevsun v. Araya, Para. 266.
[274] *Ibid*, Para. 101.
[275] *Ibid*, Para. 102.
[276] *See* Bernise Carolino, 'Nevsun settles with Eritrean plaintiffs in relation to landmark Supreme Court of Canada case' (*Canadian Lawyer*, 5 Nov 2020) [online].

4.2.4 Consideration of the Effects of the Recent Case Law on the Protection of Uyghurs and other Muslims in the Xinjiang region

In the case of Uyghur forced labour, all the cases studied above imply that for the alleged human rights violations, the claims against transnational corporations should be filed in China, as China has jurisdiction for alleged human rights violations taking place in its territory. However, as noted above, the Uyghur forced labour scheme is state-sponsored, so it is improbable that a Chinese court would hear a case against a Chinese company causing or contributing to Uyghur forced labour, resulting in corporate impunity.

Victims of corporate human rights violations face severe obstacles in obtaining an effective remedy.[277] The recent case law indicates that claimants could file a claim against a transnational corporation in the state where it is domiciled, but in spite of that, it is unclear whether the home state courts would have jurisdiction to hear the case and could the claims be attributed to the parent company. In light of the above cases, claims about an overseas subsidiary's involvement in Uyghur forced labour could be heard at least in the UK and Canada, which practice common law and approve extraterritorial jurisdiction in certain circumstances. Nevertheless, the legal proceedings against an overseas subsidiary's parent company require that the home state courts rule that *access to justice* could not be provided in China, which could also raise problems. Moreover, the Uyghurs and other ethnic minorities as right-holders should be able to file the claim in another state, which seems doubtful since their communication and free movement are restricted, and they cannot communicate with lawyers.

There is a ray of light for corporate accountability for Uyghur forced labour based on the recent case law. *Croser, Day, Van Huijstee* and *Samkalden* have argued that the *Vedanta* and *Shell* decisions are land-mark cases and a significant development which 'may pave the way for a more fundamental breakthrough in terms of access to home state courts.'[278] The ruling in *Nevsun* follows the same path of earlier rulings of *Vedanta* and *Shell*. The case law is based mainly on international human rights law and customary international law and does

[277] Marilyn Croser, Martyn Day, Mariëtte Van Huijstee and Channa Samkalden, 'Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability' (2019) 5(1) *Business and Human Rights Journal,* 1-7, 1.
[278] Croser, Day, Van Huijstee and Samkalden 2010, 1, *supra* note 277.

not explicitly mention the UNGPs and corporate responsibility to respect human rights. However, as mentioned above, UNGPs refer to international law and international human rights law, and thus explicit references to UNGPs are not needed. *Croser, Day, Van Huijstee* and *Samkalden* argue that '[c]oncerning duty of care, the Vedanta judgment is undoubtedly a critical development in holding parent companies to account for their corporate social responsibility-type statements.'[279] The recent case law of parent companies duty of care and potential liability towards their overseas subsidiaries may have a 'chilling effect on companies' willingness to set and implement human rights and environmental policies centrally.'[280]

All these cases presented in this chapter base on common law, and the question of parent company liability remains contentious. Even if a parent company's duty of care would be applied to the cases of Uyghur forced labour, the level of duty of care remains controversial. Some courts require the parent company to directly contravene the subsidiary's operations, whereas some courts require the parent company to have a sufficient level of authority for the subsidiary. In *Vedanta,* the UK Supreme Court identified three ways by which a parent company liability and duty of care to individuals harmed by the operations of its overseas subsidiary by group-wide policies and guidelines could rise: '(i) disseminating defective or inadequate group-wide policies and guidelines; (ii) taking active steps to implement group-wide policies; and (iii) by formulating such policies, holding itself out as exercising supervision and control of its subsidiaries, even if it does not in fact do so.'[281] This ruling has been referred to in many scholarly articles and provides guidelines on how human rights abuse caused by an overseas subsidiary can be attributed to the parent company.

In all of these landmark cases, the claim has been brought against a subsidiary whose mother company is domiciled in another state than where the human rights abuse occurred. Although some transnational corporations have subsidiaries operating in Xinjiang, most of the factories are operated by Chinese owners. The transnational corporations using such factories and which source through suppliers might not face claims under the same legal grounds as in *Vedanta, Shell* and *Nevsun* decisions. Based on the case law, some

[279] Croser, Day, Van Huijstee and Samkalden 2010, 5, *supra* note 277.
[280] *Ibid*.
[281] *Ibid*, 4, and Vedanta v. Araya, Paras. 52-53.

transnational corporations may prefer to source through suppliers to avoid the parent company liability. Therefore, the next chapter will examine transnational corporations' responsibility for their business relationships' adverse impacts on human rights.

4.3 Transnational Corporations' Responsibility Related to Human Rights Violations Caused by Business Relationships

This chapter differentiates from the previous chapter by studying the responsibility of transnational corporations related to their business relationships which are not part of their corporate families. Business relationships are separate legal entities from the transnational corporations' corporate families, and transnational corporations are not involved in their business relationships' operations. The Commentary on the UNGPs states that having large numbers of suppliers may render it 'unreasonably difficult to conduct due diligence for adverse human rights impacts across them all.'[282] Therefore, transnational corporations with business activities in the Xinjiang region should prioritize this region in their human rights due diligence processes since the risk of human rights and labour rights abuses is significant.[283]

The UNGPs expect that transnational corporations trace the origins of the goods and materials they use and examine whether the upstream supplier or raw material producer is potentially contributing to Uyghur forced labour in the Xinjiang region. There are challenges in identifying specific components and products made with forced labour,[284] since supply chains of transnational corporations are fragmented and scattered, which makes conducting human right due diligence complex. The complexity of supply chains may obstruct the visibility of suppliers and business partners in many contexts. Transnational corporations may not have transparency to their suppliers beyond the first-tier supplier, making it complex to trace suppliers upstream of their supply chain. The production process and sourcing of materials may consist of multiple actors if business enterprises use intermediaries and subcontracting. A supply chain may have a complex structure with several layers of

[282] Commentary on the UN Guiding Principle 17.
[283] *Ibid*.
[284] ILO, OECD, IOM and UNICEF Report 2019, 63, *supra* note 177.

subcontracting interlinks. Successful traceability on a supply chain remains challenging, as collecting information on business partners demands the full cooperation of all actors on a supply chain.

It may be difficult to assess the level of transnational corporations' contribution to the use of Uyghur forced labour in the Xinjiang region. As discussed in the previous section, the attribution of a subsidiary's human rights abuses to its parent company requires that the parent company has had a considerable level of interference in its subsidiary's operations. The case is different regarding the suppliers and other business relationships since transnational corporations rarely interfere with their suppliers' operations. Generally, transnational corporations sign a supply contract with the supplier, perhaps with clauses about responsible business conduct,[285] and the contract begins. Some transnational corporations conduct due diligence on their suppliers' operations before signing a supply contract and regularly conduct audits on their factories to mitigate legal and reputational risks towards the company itself.

Under the UNGPs, human rights violations caused by suppliers and other business relationships are not attributed to the transnational corporations in a legal sense. The UNGPs rely on the self-governance of business enterprises, but despite that, the UNGPs may confuse transnational corporations to assume that the principles of the UNGPs are binding under international law and that the transnational corporations may face legal risks for not complying with them. Although the UNGPs' principles about the third-parties' adverse impacts are not binding on transnational corporations, they may be bound by the contractual terms they sign with their business relationships, such as their clients. It is a whole another discussion and will not form the focus of this thesis. Hence, it will be discussed below what kind of responsibilities the UNGPs assign to transnational corporations related to third-parties.

The UNGPs expect a different standard of responsibility insofar as they concern the adverse human rights impacts of third parties.[286] *Bonnitcha* and *McCorquodale* argue that businesses have strict liability for their own infringements of human rights, and human rights due diligence is a standard of conduct defining 'the extent businesses' responsibilities for

[285] Contractual terms related to human rights due diligence will be further discussed in chapter five.
[286] Bonnitcha and McCorquodale 2017a, 914, *supra* note 202.

the adverse human rights impacts of third parties.'[287] The scope of transnational corporations' responsibility related to third parties is limited to preventing and mitigating their adverse human rights impacts.[288] *Bonnitcha* and *McCorquodale* hold that in their view, business enterprises discharge their responsibility to respect human rights if they act with due diligence to prevent and mitigate the adverse human rights impacts of suppliers with which they have business relationships.[289] They justify their view by stating that the UNGPs' 'seek to prevent' qualification 'clearly introduces a fault element in relation to third party impacts,'[290] and that the 'Framework repeatedly draws attention to the difference between a business's responsibility for its own adverse human rights impacts and its responsibility for the impacts of third parties.'[291] Therefore, transnational corporations that undertake the appropriate level of human rights due diligence on their Xinjiang business relationships comply with the UNGPs.

The 'leverage' is understood in human rights due diligence to mean the standard of conduct required assessing what is reasonable in the given circumstances.[292] *Bonnitcha* and *McCorquodale* continue by stating that the concept of 'leverage' is used in the UNGPs to 'define the extent of a transnational corporation's responsibility for the adverse human rights impacts of third parties.'[293] To that extent, as the impacts of third parties that are 'directly linked' to a transnational corporation, it should use its 'leverage' to prevent or mitigate such adverse impacts.[294] Whereas when a transnational corporation 'causes' adverse human rights impacts, it should 'take the necessary steps to cease and prevent' that impact.[295] The Commentary of Principle 19 states that 'leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.'[296] Therefore, transnational corporations having linkages to the Xinjiang region must assess

[287] Bonnitcha and McCorquodale 2017a, 916, *supra* note 202.
[288] *Ibid*, 917.
[289] *Ibid*, 914.
[290] *Ibid*.
[291] *Ibid*.
[292] For discussion about the impact of leverage on the business and human rights regime s*ee* Stepan Wood, 'The Case for Leverage-Based Corporate Human Rights Responsibility' (2012) 22(1) *Business Ethics Quarterly*, 63-98.
[293] Bonnitcha and McCorquodale 2017a, 915, *supra* note 202; Commentary on the UN Guiding Principle 19.
[294] Bonnitcha and McCorquodale 2017b, 931, *supra* note 215. *See also* Commentary on the Guiding Principle 19.
[295] *Ibid*.
[296] Commentary on the UN Guiding Principle 19.

how much leverage they could exercise on suppliers involved in Uyghur forced labour to change their practices. A transnational corporation will not necessarily be responsible for its suppliers' adverse human rights and labour rights impacts on Uyghurs if it has taken reasonable steps to acquire and exercise leverage on its suppliers to prevent and mitigate their use of Uyghur forced labour.[297] It aligns with understanding due diligence as a standard of conduct.[298] If transnational corporations identify that their suppliers or other business relationships use Uyghur forced labour, they should affect change in the practices of that business relationship based on their leverage.

Pursuant to the UNGPs, transnational corporations should understand their actual and potential human rights impacts and ensure that they adhere to the international standard,[299] to discharge the corporate responsibility to respect human rights. If a transnational corporation contributes or is seen as contributing to adverse human rights impacts caused by its suppliers, the question of complicity may arise. The Commentary explicitly states that the conduct of due diligence does not, in itself, automatically and entirely absolve business enterprises from liability for causing or contributing to human rights abuses.[300] By conducting appropriate human rights due diligence, transnational corporations can demonstrate that they took every reasonable step to avoid involvement with an alleged human rights violation and limit legal risks.[301] However, *Bonnitcha* and *McCorquodale* argue that 'satisfying a due diligence standard of conduct – is not, and should not be, sufficient to absolve businesses from accountability for their own adverse human rights impacts.'[302] Even if the transnational corporations undertake a reasonable level of human rights due diligence, they have legal and reputational risks. Therefore, transnational corporations must acquire and exercise leverage to prevent adverse human rights impacts before they occur.

Bonnitcha and *McCorquodale* conclude that the distinction between businesses' responsibility for their own conduct and third-parties' adverse impacts on human rights makes sense under international human rights law. They continue that different standards of

[297] Commentary on the UN Guiding Principle 19.
[298] Bonnitcha and McCorquodale 2017a, 915, *supra* note 202; Commentary on the UN Guiding Principle 19.
[299] Griffith, Smit and McCorquodale 2020, 655, *supra* note 108.
[300] Commentary on the UN Guiding Principle 17.
[301] *Ibid*.
[302] Bonnitcha and McCorquodale 2017a, 914, *supra* note 202; Commentary on the UN Guiding Principle 17.

conduct apply in relation to the responsibility of businesses for their own activities and related to third parties.[303] They state that '[i]t would be illogical and impractical for a business to be held responsible for the conduct of every one of its "business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services" to the same standard as it is held responsible for its own conduct.'[304] Case law supports the distinction made by *Bonnitcha* and *McCorquodale* that transnational corporations cannot be held liable for their foreign business relationships, even if the transnational corporation had contributed to the human rights violation by generating the business activity which led to the human rights violation. Home state courts have systematically dismissed claims faced by transnational corporations related to the liability for foreign suppliers' human rights violations based on procedural grounds.[305] Due to the dilemma of ensuring *access to justice*, multiple transnational corporations have adopted contractual provisions and codes of conduct to influence their business relationships' conduct. These contractual terms will be studied in the following chapter.

Many details about human rights due diligence remain open. Therefore, the following chapter will deep-dive into the application of human rights diligence in the context of forced labour in Xinjiang. The chapter will examine the limits of human rights due diligence, given that despite the existence of the UNGPs, Uyghur forced labour persists in product supply chains. The legal framework of human rights due diligence will be applied to the supply chains implicated in Uyghur forced labour. Furthermore, the following chapter will address the gaps in the business and human rights regime and introduce some legal reforms and voluntary contractual initiatives aiming to tackle human rights violations, and especially the use of Uyghur forced labour.

[303] Bonnitcha and McCorquodale 2017a, 913, *supra* note 202.
[304] *Ibid*, 912-913.
[305] In *Jabir v. KiK Textilien* case, the German court dismissed the case on procedural grounds, leaving the question of liability open. *See also Arica Victims KB v. Boliden Mineral AB* [2018] T 294-18. In the *Arica* case, the Swedish district court ruled that extraterritorial jurisdiction cannot be exercised based on the grounds that the Chilean law was the correct law in this case. Almost 800 Chileans had sued a Swedish mining company for damages in a class action lawsuit. They claimed that the Swedish mining company had exported toxic waste to its Chilean subcontractor. The court held that the Swedish mining company was not liable for damages to the Chilean claimants.

5 Limits of Corporate Responsibility to Respect Human Rights: The Use of Uyghur Forced Labour Persists

The forced labour and the situation of the Uyghurs and other Muslim minorities in the Xinjiang region raise dilemmas for conducting human rights due diligence and complying with the UNGPs. The first part of this chapter studies the compliance with human rights due diligence expectations set by the UNGPs and its applicability to the circumstances of business activities in the Xinjiang region. The second part of this chapter examines the contractual terms developed by businesses for due diligence purposes. The third and last part addresses the gaps in the current human rights due diligence regime that permit and exacerbate forced labour and other business-related human rights violations in the Xinjiang region, and views some legal reforms aiming to tackle Uyghur forced labour.

5.1 Compliance with the Human Rights Due Diligence Requirements in Xinjiang

The repressive conditions in Xinjiang and other parts of China make unique challenges for conducting appropriate human rights due diligence. For human rights due diligence to be effective, transnational corporations need reliable information about the human rights situation and working conditions on their suppliers' business operations. While the UNGPs supports independent onsite inspections, social audits and supplier cooperation for human rights due diligence, repressive conditions in Xinjiang production sites make it unlikely that transnational corporations will have the necessary access to their suppliers in Xinjiang. Third-party audits may not be a piece of trustworthy evidence for indicators of Xinjiang labour abuses for various reasons. Audits for human rights due diligence typically occur when transnational corporations enter contractual relationships with suppliers. Regular audits are used to monitor suppliers' compliance with human rights standards and implement the company's policies.[306] Generally, traditional audits lack the effectiveness to 'detect,

[306] Lise Smit, Gabrielle Holly, Robert McCorquodale and Stuart Neely, 'Human rights due diligence in global supply chains: evidence of corporate practices to inform a legal standard' (2020) The International Journal of Human Rights, 1-29, 13.

report or correct human rights impacts.'[307] *The US Congressional-Executive Commission on China* is concerned about the impossibility of obtaining accurate information from the Xinjiang region.[308] The US government notes that:

> '[A]udits to vet products and supply chains in the Xinjiang Uyghur Autonomous Region are not possible due to the extent forced labour has contaminated the regional economy, the mixing of involuntary labour with voluntary labour, the inability of witnesses to speak freely about working conditions given heavy government surveillance and coercion, and the strong incentive of government officials to conceal government-sponsored forced labour.'[309]

There is an actual risk that the Chinese government will have its best efforts to make the use of Uyghur labour untraceable in supply chains. Due to the Chinese government's interference and heavy surveillance, third-party audits are unlikely to be useful as the government prevents third-party auditors from doing their work,[310] and even entering the Xinjiang region. Generally, the information received in auditor interviews is not reliable as the workers are surveilled, and they are afraid of sharing accurate information about their labour conditions.[311] Conducting audits in the Xinjiang and Chinese factories is more likely to endanger workers than to provide reliable evidence about infringements of human rights or labour standards.

The US Congressional-Executive Commission on China worries that companies will intentionally rely on audits of supply chains in the Xinjiang region based on inaccurate information to protect themselves from legal and reputational risks of being connected to Uyghur forced labour.[312] In theory, transnational corporations are compliant with the UNGPs if they conduct human rights due diligence relying on the inaccurate information provided about the Xinjiang production sites and address no actual or potential adverse human rights impacts. However, it would defeat the whole purpose of conducting human rights due

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[307] Genevieve Le Baron and Jane Lister, *Ethical Audits and the Supply Chains of Global Corporations*, Sheffield Political Economy Research Institute Report, (University of Sheffield, 2016), 1.
[308] CECC Report 2020, 7, *supra* note 46.
[309] US Uyghur Forced Labour Prevention Act, sec. 2(3).
[310] *See* CSIS Report, *supra* note 54. The report notes that auditors have reportedly been detained, harassed, threatened or stopped at the airport in Xinjiang. Besides, the Chinese officials have required auditors to use government translators that give misinformation.
[311] US Xinjiang Supply Chain Business Advisory, 9, *supra* note 41.
[312] CECC Report 2020, 7, *supra* note 46.

diligence if transnational corporations would consciously rely on inaccurate information in order to protect themselves from legal and reputational risks.

5.1.1 Compliance Challenges Related to the Beyond First-Tier Suppliers

According to the UNGPs, transnational corporations are responsible for third-parties' adverse impacts on human rights, which indicates that they should carefully consider the scope of their human rights due diligence practices.[313] However, as stated before, this responsibility is not based on international human rights law, and the question of attribution remains open.[314] The complex supply chains and the varied nature of the workforce in Chinese factories make it difficult for foreign companies to trace the origin of their products and ensure that they are produced in decent work conditions without using Uyghur forced labour.[315] Many transnational corporations may find themselves indirectly linked to forced labour practices, as the Uyghur labour is used in any part of China – inside and outside Xinjiang.[316] *Zenz* warns that soon, many or most products made in China relying on low-skilled, labour-intensive manufacturing could be manufactured with forced labour in Xinjiang. [317]

A study shows that companies face challenges of undertaking human rights due diligence and exercising leverage beyond the first tier of suppliers.[318] First-tier suppliers may be required to comply with codes of conduct that require the suppliers to impose similar standards on their own suppliers.[319] Leverage may also be exercised 'through collective

[313] Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2(2) *Business and human rights journal*, 195-224, 200. Their survey showed that almost half of the respondents had never undertaken any human rights due diligence process or a human rights impact assessment.
[314] *See* Julia Hartmann, 'Chain liability in multitier supply chains? Responsibility attributions for unsustainable supplier behavior' (2014) 32(5) *Journal of Operations Management*, 281-294.
[315] ASPI Report 2020, 27, *supra* note 6.
[316] *Ibid*, 27.
[317] *See* CECC Report 2020, *supra* note 46 and Zenz 2020b, *supra* note 7.
[318] McCorquodale, Smit, Neely and Brooks, 211, *supra* note 252. *See also* Genevieve LeBaron and Jane Lister, 'Ethical Audits and the Supply Chains of Global Corporations', Sheffield Political Economy Research Institute (2016) 1 *Global Political Economy Brief*, 1-8, note 80.
[319] Smit, Holly, McCorquodale and Neely 2020, 18, *supra* note 306. Codes of conduct and contractual terms will be discussed in section 5.2.

engagement with peers or other stakeholders,'[320] and organizations representing some industry could require all the stakeholders to exercise leverage and prevent the use of Uyghur forced labour. In human rights due diligence, most companies focus on immediate suppliers, but some companies are going further and disclosing information about the upstream suppliers of their supply chains.[321] Nevertheless, the majority of business enterprises only undertake due diligence of first-tier suppliers, thus failing to identify and address risks in lower tiers of supply chains, where forced and child labour risks are the highest.[322]

Interviews conducted on human rights due diligence show that many companies lack transparency on their supply chain and do not have 'end-to-end visibility over which entities are in their supply chain and under what circumstances they are operating.'[323] Many companies find it challenging to define their supply chain for the human rights due diligence,[324] because the 'modern supply chains are vast, complex and changeable'.[325] '[F]irst-tier suppliers may not wish to disclose information about their own suppliers and often 'protect their own supply chain fiercely'.'[326] Transnational corporations may have large numbers of entities in their supply chains, making it demanding to conduct due diligence for adverse human rights impacts across the whole supply chain. Hence, the UNGPs, the OECD Guidelines and the guidance from the UN Global Compact support a 'prioritisation approach'.[327]

Van Dam states that businesses are likely to be responsible for human rights impacts of which they have the knowledge or which they ought to have known, had they been diligent and used relevant information on the internet and from international and human rights

[320] Smit, Holly, McCorquodale and Neely 2020, 18, *supra* note 306. Most business enterprises focus solely on first-tier suppliers when conducting human rights due diligence. To exercise leverage beyond the first tier and engage with further suppliers, it typically requires that the first-tier suppliers undertake human rights due diligence on their own suppliers.
[321] Remi Edwards, Tom Hunt and Genevieve LeBaron, *Corporate Commitments to Living Wages in the Garment Industry* (SPERI & University of Sheffield, 2019).
[322] British Institute of International and Comparative Law, Civic Consulting, Directorate-General for Justice and Consumers (European Commission), LSE, *Study on due diligence requirements through the supply chain* (2020) [online], 151.
[323] Smit, Holly, McCorquodale and Neely 2020, 6, *supra* note 306.
[324] *Ibid*, 5.
[325] *Ibid*, 6.
[326] *Ibid*.
[327] Commentary on the Guiding Principle 17. In this approach, the corporations should 'identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence'.

organizations and government bodies.[328] So far, there are multiple credible reports about Uyghur forced labour published in almost every news media globally. Therefore at least industries that rely on cotton and other raw materials produced in Xinjiang ought to be aware of the human rights issues in the area. As a relevant aspect, *OHCHR* notes that assessing whether the business enterprise is aware that industry peers are causing or contributing to adverse human rights impacts, [329] such as Uyghur forced labour at the time, has an impact.

There is a particular dilemma with third parties because transnational corporations may not have a direct contractual relationship with the second-tier suppliers.[330] However, they may still face legal and reputational risks,[331] due to their cause or contribution to Uyghur forced labour. Therefore, many transnational corporations struggle to satisfy themselves as to 'how far is far enough' to conduct human rights due diligence into a supply chain.[332] When conducting human rights due diligence, transnational corporations must assess how far they are willing to go to trace Uyghur forced labour. It depends on how adverse human rights impacts they consider Uyghur forced labour to be and how much effort they are willing to pay to prevent and mitigate its use in their business relationships' activities. The UNGPs nor scholars give easy answers to it. Transnational corporations may mitigate adverse human rights impacts such as contribution to Uyghur forced labour by terminating business relationships with suppliers using it. The following section will discuss such a decision further.

5.1.2 Termination of a Business Relationship Due to the Use of Uyghur Forced Labour

In the event of contributing to adverse human rights impacts such as Uyghur forced labour, transnational corporations should take necessary steps to cease or prevent their contribution and exercise leverage to mitigate the adverse human rights impacts to the greatest extent possible.[333] A sufficient level of leverage is considered to exist where the business

[328] Van Dam 2011, 244, *supra* note 255.
[329] *See* OHCHR Response to the Chair of OECD Working Party on Responsible Business Conduct, 27 November 2013, Paras. 13–14.
[330] Le Baron and Lister 2016, note 80, *supra* note 307.
[331] McCorquodale, Smit, Neely and Brooks 2017, 200, *supra* note 252.
[332] *Ibid*, 222.
[333] Commentary on the UN Guiding Principle 19.

enterprises can effect change in the wrongful practices of entities that cause harm.[334] The situation is more complex, where a transnational corporation has not directly contributed to Uyghur forced labour, but its use is directly linked to its operations, products or services by its relationship with another entity.[335] In these situations, transnational corporations should terminate business relationships with entities contributing to Chinese labour programs if they lack leverage to prevent or mitigate the use of these harmful labour practices and if they are unable to increase their leverage.[336]

Transnational corporations identifying Uyghur forced labour in their extraterritorial activities or product supply chains have to decide whether to remain in the jurisdiction or leave the Xinjiang region. If they consider the whole region to be contaminated with Uyghur forced labour practices, they can leave the region entirely. They could also terminate business relationships with suppliers using Uyghur forced labour in their operations and continue business relationships with other entities in the Xinjiang region. When deciding whether to exit a jurisdiction or not based on human rights concerns, they should consider the general environment and the rule of law in the Xinjiang region. *OHCHR* advises transnational corporations to consider such a decision carefully.[337] China's repression and imprisonment of Uyghurs and other ethnic minorities put transnational corporations at risk of being involved in gross human rights abuses such as the Uyghur forced labour scheme. Transnational corporations have to consider carefully can they operate with integrity in the Xinjiang region or should the activities be terminated as a whole.[338] If a transnational corporation considers it can continue activities in the Xinjiang region. It must demonstrate

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[334] Commentary on the UN Guiding Principle 19.
[335] *Ibid*.
[336] *Ibid*. The UNGPs recommend terminating business relationships with suppliers who use Uyghur forced labour if a transnational corporation cannot exercise enough leverage to prevent its use. Even though the remedy approach of the UNGPs falls out of the scope of this thesis, it can be shortly stated that even if a transnational corporation ends up deciding to terminate a business relationship with a supplier using Uyghur forced labour, it should nevertheless provide a remedy for the individuals impacted by the forced labour. The remedy approach will not be studied further, as the circumstances and dilemmas in Xinjiang lead to a situation in which it would be almost impossible to remedy the victims of Uyghur forced labour. The Uyghurs are under suppressive conditions, and no international lawyers, human rights activists or aid organizations are let to the region to aid Uyghurs and other ethnic minorities. It is improbable that the Chinese authorities and officials would cooperate with the remedy actions due to the government-led labour programs.
[337] OHCHR Interpretive Guide, 79. 'In the rare situations where local law or other requirements put an enterprise at risk of being involved in gross abuses of human rights such as international crimes, it should carefully consider whether and how it can continue to operate with integrity in such circumstances, while also being aware of the human rights impact that could result from terminating its activities'.
[338] UN Guiding Principle 23.

its efforts to respect international human rights and labour rights standards in its activities in the region.[339]

As the UNGPs do not provide a legal accountability mechanism, the public pressure and reputational risks work as an informal accountability mechanism. It is questionable whether sanctions and boycotts can incentivize human rights improvements.[340] There is a risk that non-public facing transnational corporations, which mainly operate on business to business relationships, may not feel pressure to respect human rights, which affects their business conduct. However, as will be examined in the next section, transnational corporations increasingly use codes of conduct and contractual provisions related to human rights and sustainability in their supply contracts. Additionally, shareholders and investors can require business enterprises to comply with human rights standards to the greatest extent possible,[341] especially if they have agreed to sustainable finance strategies.

Getting back to the question of terminating a business relationship due to Uyghur forced labour. The decision to leave a region is often complicated and costly for transnational corporations. Therefore, many transnational corporations have decided to first 'engage with the government or supplier in order to see if the operating conditions can be improved through leverage.'[342] In the situation of the Xinjiang region, it seems unlikely that transnational corporations would have much leverage on the Chinese government. Some multinational corporations may have enough authority to be heard by the Chinese government. Transnational corporations are nevertheless likely to try to exercise leverage on their suppliers to improve the labour conditions and prevent the use of Uyghur forced labour since supply contracts may be long, and their termination might not be simple.

There is often a difference between 'what is legal and what is right.'[343] Transnational corporations may source from the Xinjiang region because the production costs are low due to the Uyghur forced labour scheme, which, in turn, increase profits for their shareholders.

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[339] UN Guiding Principle 17.
[340] Alexander Kriebitz and Raphael Max, 'The Xinjiang Case and Its Implications from a Business Ethics Perspective' (2020) 21 *Human Rights Review*, 243-265, 259.
[341] UNGA, 'Working Group on the issue of human rights and transnational corporations and other business enterprises: Note by the Secretary-General' UN General Assembly 73rd session (2018) UN Doc A/73/163, 22. These developments raise a question about the impact of UNGPs on this development, as the general change in public opinion towards requiring and expecting more responsible business conduct from transnational corporations has also promoted the awareness of adverse human rights impacts in business operations.
[342] OHCHR Interpretive Guide, 79; Griffith, Smit and McCorquodale 2020, 669, *supra* note 108.
[343] Griffith, Smit and McCorquodale 2020, 658, *supra* note 108.

Some transnational corporations with the sole aim to increase profits with the cost of causing adverse human rights impacts may not be interested in complying with the UNGPs because it is a soft law mechanism. Especially in some industries, it is more like an industry-wide practice to reduce production costs at the expense of human rights. Due to the large scale of harmful practices, they may not be concerned about the actual and potential legal and reputational risks, as the whole industry is implicated in the same practices. Particularly considering the problematic nature of extraterritorial jurisdiction and the non-existing legal basis of transnational corporations' binding responsibility related to their suppliers.[344]

It must be noted that the termination of an individual business relationship does not end the Uyghur forced labour scheme in Xinjiang, but in spite of that, it has an impact on the mitigation of the scheme and prevents its expansion. As a setback, the production sites using Uyghur forced labour may raise efforts to hide the use of harmful labour practices and China's repression and imprisonment of Uyghurs and other ethnic minorities. There is also the question of what would happen to the Uyghur forced labour scheme if all well-known transnational corporations terminated their business relationships with companies using Uyghur forced labour. It is, of course, improbable, but there is an actual risk that the Uyghur forced labour scheme would continue, and the labour conditions would deteriorate even more since there would be no entities willing to exercise leverage on the harmful labour practices. As the discussion about Uyghur forced labour has increased, the question of forced labour in Tibet has been put away. There are still gross human rights abuses in Tibet, and Tibetans are used for forced labour,[345] but it has not got international attention.

It remains contentious whether the soft law approach of UNGPs is sufficient to protect Uyghurs and other ethnic minorities in the Xinjiang region from infringing their human and labour rights.[346] Therefore, the following section will introduce contractual terms developed by business enterprises for human rights due diligence purposes.

[344] The section 5.3 studies is a shift to binding business and human rights due diligence needed.
[345] *See* Zenz 2020a, *supra* note 1.
[346] For non-legal ways to address forced labour of Muslim minorities in the Xinjiang region *see* Amy Lehr, 'Addressing Forced Labor in the Xinjiang Uyghur Autonomous Region: Towards a Shared Agenda' (*CSIS Briefs*, 2020) [online].

5.2 Contractual Terms Developed by Business Enterprises for Human Rights Due Diligence Purposes

The responsibility to respect human rights may also be incorporated in binding contractual requirements between companies and their corporate family, suppliers and private clients.[347] As discussed above, transnational corporations may face practical and legal limitations to how they can influence or affect business relationships to cease, prevent or mitigate adverse impacts on reasonable business conduct issues or remedy them. Transnational corporations can seek to overcome these challenges to influence business relationships through contractual arrangements, which assume many forms and roles. In the business and human rights context, transnational corporations may use contractual terms such as codes of conduct and contractual provisions to hold suppliers accountable for human rights violations.[348] Besides, the development of industry and corporate-wide codes of conduct may offer a method to protect workers' rights.[349]

Transnational corporations often use contractual provisions to enforce human rights standards within their supply chains.[350] Human rights clauses or incorporation of supplier codes of conduct that contain human rights standards 'may include legally binding instructions to suppliers as to whether and when domestic or international human rights standards take precedence in situations of conflict.'[351] The Bangladeshi Accord describes itself as a legally binding agreement with a private enforcement mechanism to remedy the workers affected by the adverse impacts on their labour rights.[352] *Muchlinski* argues that

[347] FAQ about the UN Guiding Principles, 9.
[348] *See* Harry Arthurs, 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation' in Joanne Conaghan, Richard Michael Fischl, and Karl Klare (eds.), *Labour Law in an Era of Globalization Transformative Practices and Possibilities* (Oxford University Press, 2004), 470-487. Transnational corporations have the most leverage on their first-tier suppliers, subcontractors and other business relationships, but they can expand the contractual terms beyond the first-tier.
[349] Muchlinski 2021, 535, *supra* note 111.
[350] *See* S. Prakash Sethi, *Globalization and Self-Regulation - The Crucial Role That Corporate Codes of Conduct Play in Global Business* (Palgrave Macmillan: New York, 2011).
[351] Griffith, Smit and McCorquodale 2020, 662, *supra* note 108.
[352] *See* Bangladesh Accord Foundation, '2018 Accord on Fire and Building Safety in Bangladesh: May 2018' [online], which was created in the aftermath of the Rana Plaza building collapse that led to more than 1,100 deaths and more than 2,000 injuries. The Accord describes itself as a legally binding agreement between global brands and retailers and IndustriALL Global Union and UNI Global Union and eight Bangladeshi affiliated

while courts resist the development of supply chain liability, corporate self-regulation mechanisms such as codes of conduct 'may create a sense of legal obligation'.[353] Traditionally codes of conducts applicable to suppliers have been viewed as voluntary standards, [354] 'but are increasingly being given contractual force by being incorporated into binding contractual obligations.'[355] Some contractual clauses and codes of conduct include public disclosures to back up the reputation of the supplier that adopts them.

Transnational corporations that rely heavily on their brand value and customer satisfaction tend to adopt codes of conduct more quickly.[356] *Smit, Holly, McCorquodale* and *Neely* acknowledge that the language in some codes of conduct indicates legally binding obligations.[357] Some transnational corporations require their suppliers to inform immediately if the requirements of the contractual terms contradict domestic laws or regulations.[358] Transnational corporations may require their suppliers to respect human rights and labour rights standards. In international supply contracts, transnational companies usually carefully define sustainability requirements for their suppliers in their code of conducts. Suppliers are not mandated to make subcontracts with suppliers who do not comply with the transnational company's sustainability requirements. Transnational corporations putting legally binding contractual terms to their codes of conduct could require that their suppliers and other business relationships do not cause or contribute to the adverse human rights impacts and forced labour in the Xinjiang region. They could also require their business relationships to avoid business operations in the whole region.

Even if the sustainability requirements do not go hand in hand with human rights and labour rights standards, the voluntary corporate sustainability mechanisms may prevent the business relationships from causing or contributing to Uyghur forced labour. Codes of

garment industry unions. *See also* Jaakko Salminen, 'The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?' (2018) 66(2) *The American Journal of Comparative Law*, 411-451.

[353] Muchlinski 2021, 534, *supra* note 111.

[354] Lara Blecher, 'Codes of Conduct:The Trojan Horse of International Human Rights Law?' (2016) 38 *Comparative Labor Law and Policy Journal*, 437, 462–64.

[355] Smit, Holly, McCorquodale and Neely 2020, 9, *supra* note 306. *See* Blecher 2016, 462-464, *supra* note 354.

[356] Smit, Holly, McCorquodale and Neely 2020, 9, *supra* note 306. The publicity of the codes realizes the ever-present threat of media exposure of human rights abuses.

[357] *Ibid*.

[358] For example, IKEA requires its suppliers to inform IKEA immediately if IKEA's requirements contradict national laws or regulations. *See* Ikea, IWAY Standard,available at:about.ikea.com/en/sustainability/fair-and-equal/ building-a-better-business-with-iway; Blecher 2016, 451, *supra* note 354.

conduct and contractual provisions often require compliance with international human rights standards. They also often require disclosure of human rights infringements and involve clauses with a termination right.[359]

Codes of conduct and contractual provisions are not generally legally enforceable.[360] Ensuring the effective compliance of these contractual arrangements and codes of conduct might be difficult, as the transnational corporations may lack transparency and leverage in their business relationships, particularly beyond the first-tier suppliers, to influence the contractual terms.[361] There also lies a risk in relying on the information provided by suppliers.[362] What is noteworthy is that one supplier might 'be subject to multiple parallel or even inconsistent codes of conduct, processes or procedures from their various buyers.'[363] Transnational corporations should be cautious with relying on information about the human rights situation provided by suppliers and subcontractors in the Xinjiang region.

Transnational corporations having connections to the Xinjiang region must acknowledge that '[t]here is no "one size fits all" solution and there is "no blueprint for how to respond" to these conflicts.'[364]A study shows that codes of conduct and contractual provisions are beneficial within supply chains, as they may form a contractual obligation 'in which case a breach would result in a contractual remedy such as a refusal to renew a contract, termination, compensation or implementation of enforcement mechanisms.'[365] Such control mechanisms ensure that the human rights due diligence standards are part of the suppliers' and other business relationships' performance expectations.

Contractual expectations often include termination rights, reflecting the Commentary to UNGP 17,[366] which notes that human rights risks can be mitigated when structuring contracts. A supply contract with termination rights authorizes transnational corporations to

[359] Griffith, Smit and McCorquodale 2020, 669, *supra* note 108. As set out in the UNGPs, home state law encompasses a justification for higher human rights standards where applicable.
[360] Smit, Holly, McCorquodale and Neely 2020, 9, *supra* note 306. Nevertheless, the supply contracts in which they are integrated are, in most part, confidential and have arbitration clauses.
[361] Griffith, Smit and McCorquodale 2020, 662, *supra* note 108. Business enterprises might not be willing to arbitrate about a human rights, a sustainability clause or a code of conduct if they consider a business relationship to be more valuable than the potential risks caused by the arbitration.
[362] Smit, Holly, McCorquodale and Neely 2020, 9, *supra* note 306.
[363] *Ibid*.
[364] Griffith, Smit and McCorquodale 2020, 669, *supra* note 108.
[365] McCorquodale, Smit, Neely and Brooks 2017, 215, *supra* note 252.
[366] Commentary on the Guiding Principle 17.

comply with the UNGPs, as terminating a business relationship is a way to prevent and mitigate adverse human rights impacts. Therefore, if a transnational corporation addresses that its supplier or other business relationship uses Uyghur forced labour, it may terminate or deny renewing the business contract. A study shows that contractual human rights provisions have led to the termination of contracts in some situations. However, usually 'the company exercises what leverage it has for the duration of the contract and refuses to renew the contract or place any new orders going forward.'[367] The following section will address gaps in the business and human rights regimes and provide insights on possible future legislation.

5.3 Addressing Gaps in Business and Human Rights Regime with Legal Reforms

The Xinjiang region has regulatory[368] and governance gaps[369] that permit infringements of international human rights law and international labour laws. Transnational corporations can violate human rights in Xinjiang, and it is difficult to hold them to account. The forced labour in Xinjiang is an example of corporate human rights violations that are not adequately prevented and remedied. The business and human rights regime seeks to enhance the accountability of business enterprises in the human rights and labour rights area. This thesis has presented methods in which transnational corporations can and could respect human rights in Xinjiang and has evaluated the extent to which the various methods in the field can protect the human rights and labour rights of Uyghurs in Xinjiang. Furthermore, this thesis has examined the business and human rights approach and explored the relevance of international human rights law and case law for corporate human rights violations in Xinjiang. In addition, international soft law and policy initiatives have been evaluated, and it has been examined how domestic law of home states can be used to prevent and address

[367] Smit, Holly, McCorquodale and Neely 2020, 9, *supra* note 306.
[368] Regulatory gaps in protection at international level and within countries at the receiving end of goods made with forced labour, permit forced labour in global supply chains. *See also* Diane Hampton, 'Modern Slavery in Global Supply Chains: Can National Action Plans on Business and Human Rights Close the Governance Gap?' (2019) 4(2) *Business and Human Rights Journal*, 239-263, 249.
[369] Governance gaps exist where transnational corporations operate in states that cannot, or will not, fulfill their obligations to protect the rights of their own citizens.

corporate human rights violations. This chapter will present initiatives of individual states to tackle corporate human rights violations in Xinjiang and adopt mandatory human rights due diligence regimes.

Arnold argues that the traditional logic of the shareholder primacy perspective encourages companies to exploit regulatory and governance gaps in order to increase shareholder value,[370] as a violation of international human and labour rights standards may result in cost savings, increased access to markets or greater sales.[371] A violation of international human and labour rights standards may be a routine and incorporated into a business strategy, or it might be a decision of a subsidiary with an autonomous management, or it may be undertaken by suppliers who are not carefully monitored by human rights due diligence.[372] The Chinese labour programs targeted at the Uyghurs are state-sponsored, resulting in transnational corporations having fewer incentives for compliance with the international agreements and corporate responsibility for human rights as the legal risks for contributing to the programs are low.

Human rights due diligence processes set by companies face many shortcomings despite the increasing focus on mandatory and voluntary disclosure.[373] First, only a few companies focus on their human rights due diligence processes on their most adverse human rights impacts.[374] A report made by *ILO, OECD, IOM* and *UNICEF* shows that most human rights due diligence reports focused on first-tier suppliers and did or could not address business activities further upstream in the supply chain. [375] The upstream production activities, which are generally most vulnerable to human rights and labour rights abuses and violations, were not often reviewed. It implies that many transnational corporations do not undertake human rights due diligence on upstream suppliers who have business activities in Xinjiang and potentially cause or contribute to Uyghur forced labour.

Human rights due diligence processes focusing only on first-tier suppliers do not fulfil the requirements of transnational corporations to respect human rights set out in the UNGPs. The UNGPs suggest a whole supply chain approach, extending in scope beyond first-tier

[370] Arnold 2016, 271, *supra* note 100.
[371] *Ibid*, 270.
[372] *Ibid.*
[373] ILO, OECD, IOM and UNICEF report 2019, 68, *supra* note 177.
[374] *Ibid*.
[375] *Ibid*.

suppliers to actors in the upstream of the supply chain, including production activities such as raw material production.[376] For transnational corporations, this means that they should expand the focus on their due diligence processes from where they have greater leverage to where there is a greater risk of adverse human rights impacts. Generally, the risk of human rights and labour rights violations is most significant in the upstream segments of the supply chain and raw material production, where transnational corporations may have less transparency and limited leverage over suppliers. Transnational corporations should not use these challenges as a reason not to undertake human rights due diligence beyond first-tier suppliers,[377] especially as Uyghur forced labour is generally used in the upstream segments of transnational corporations' supply chains.

As stated in the previous section, monitoring the compliance of human rights due diligence is unreasonably difficult in the Xinjiang region. The human rights due diligence regime cannot function correctly unless the Chinese government begins to give transnational corporations unfettered access to investigate forced labour practices in Chinese factories. In the given situation, the human right due diligence processes would not be effective even if mandatory human rights due diligence legislation was adopted. *Australian Strategic Policy Institute* notes that some brands have instructed to terminate relationships with suppliers using Uyghur forced labour.[378] However, there is no evidence if they have actually terminated cooperation, as many transnational companies have denied having direct contractual relationships with the suppliers implicated in the Uyghur forced labour scheme since the *Australian Strategic Policy Institute* notes that 'no brands were able to rule out a link further down their supply chain.'[379]

Several scholars propose that human rights due diligence processes required by the UNGPs are not 'sufficient to discharge the responsibility to respect human rights.'[380] The implementation of human rights due diligence processes does not in itself mean release from possible legal liability for contributing to adverse human rights impacts. However, it can encourage transnational corporations to pay more attention to the human rights impacts of

[376] ILO, OECD, IOM and UNICEF report 2019, 72, *supra* note 177.
[377] *Ibid*.
[378] ASPI Report 2020, 5, *supra* note 6.
[379] *Ibid*.
[380] Bonnitcha and McCorquodale 2017a, 918, *supra* note 202. *See also* Fasterling and Demuijnck 2013, 805-806, *supra* note 73.

their business activities. It is controversial whether business enterprises can be obliged to respect international human rights law and have a duty of care towards their suppliers, particularly for suppliers in the upstream segments.[381] *Tomuschat* insists on the importance of soft law, despite its lack of binding power. He notes the major influence of soft law initiatives on the development of the law, which he refers to as a 'process of hardening into law.'[382]

Forced labour in the Uyghur region brings massive economic benefits to the garment[383] and electronics industries.[384] The labour scheme is accelerated by economic globalization, which permits transnational corporations to source products and goods from regions that permit labour abuses.[385] OECD has developed a specific due diligence guidance for responsible supply chains in the garment industry,[386] which is based on the definition of due diligence in the UNGPs. The regulatory gaps in the protection and enforcement,[387] permit the use of Uyghur forced labour to flourish, as transnational corporations have no legal obligations to avoid using Uyghur forced labour, and the risk of legal liability is trivial. Therefore, the following section considers whether states have responsibilities to prevent Uyghur forced labour in business activities.

[381] Cees Van Dam and Filip Gregor, 'Corporate responsibility to respect human rights vis-à-vis legal duty of care' in Juan José Álvarez Rubio and Katerina Yiannibas (eds.), *Human Rights in Business* (London: Routledge, 2017), 119-138, 130-133.
[382] *See* Christian Tomuchat, *Human Rights: Between Idealism and Realism* (Oxford University Press, 2014) 3rd ed., 45.
[383] The Coalition to End Forced Labour in the Uyghur Region, 'End Uyghur Forced Labour in China Now' (*The Coalition to End Forced Labour in the Uyghur Region*) [online], argues that one in five cotton garments in the global apparel market are tainted by Uyghur forced labour.
[384] *See* BBC, 'Apple and Nike urged to cut China Uighur ties' (*BBC*, July 23, 2020) [online]. *See also* Ana Swanson, 'Nike and Coca-Cola Lobby Against Xinjiang Forced Labor Bill' (*The New York Times*, January 20, 2021) [online].
[385] Hampton 2019, 247-248, *supra* note 368.
[386] *See* OECD, OECD Due Diligence Guidance for Responsible Supply Chains in the Garment & Footwear Sector, 2017.
[387] Hampton 2019, 249, *supra* note 368.

5.3.1 State Duty to Protect Human Rights and the Corporate Responsibility to Respect Human Rights

Under international human rights law, states are not generally required to regulate the extraterritorial activities of business enterprises domiciled in their territory.[388] As noted above, the UNGPs create no new international law obligations for states,[389] but despite that, states are not prohibited from regulating extraterritorial activities of business enterprises domiciled in their territory, and there is a provided jurisdictional basis for doing so. Some states want to regulate extraterritorial activities to set out clearly the expectation to respect human rights in business activities abroad and throughout their operations.[390] States have adopted a range of approaches in regulating the extraterritorial activities of business enterprises domiciled in their territory or jurisdiction. Some states have adopted domestic measures with extraterritorial implications.[391] Examples include mandatory human rights due diligence reporting, transparency statements, import prohibitions for certain goods or from certain regions and multilateral soft law instruments such as the OECD Guidelines for Multinational Enterprises.

States should take additional steps to protect against human rights infringements by state-owned enterprises or enterprises that receive financial support or export credits from state agencies. States should require such enterprises to conduct human rights due diligence through contractual terms, [392] and exercise appropriate oversight to meet their international human rights obligations. [393] The extraterritorial activities of transnational corporations causing negative human rights impacts can give rise to state attribution and home state responsibility in some situations.[394] States in which transnational corporations have domiciled have obligations under international law, in certain situations, to 'regulate the

[388] Commentary on the UN Guiding Principle 2.
[389] UN Guiding Principles, General Principles.
[390] UN Guiding Principle 2; Commentary on the UN Guiding Principle 2.
[391] Commentary on the UN Guiding Principle 2.
[392] UN Guiding Principle 4.
[393] UN Guiding Principle 5.
[394] Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) *The Modern Law Review Limited,* 598-625, 598. *See also* Robert McCorquodale, 'Spreading Weeds Beyond Their Garden: Extraterritorial Responsibility for Violations of Human Rights by Corporate Nationals' (2006) 100 *Proceedings of the American Society of International Law Annual Meeting,* 95-102, 96.

extraterritorial activities of corporate nationals or the latter's foreign subsidiaries and can incur international responsibility where they fail to do so.'[395] While states may not intend to allow transnational corporations to infringe human rights in their extraterritorial activities, states may facilitate or contribute to situations in which such infringements may occur. States may face legal and reputational risks for adverse human rights impacts caused by business enterprises with which they conduct commercial transactions.[396] Therefore, some states have regulated the extraterritorial activities of business enterprises domiciled in their territories, avoiding legal and reputational risks to themselves.

5.3.2 Is A Shift to a Legally Binding Business and Human Rights Regime Needed?

The business and human rights field is deeply divided since the effective governance and due to the non-existence of accountability mechanisms for corporate human rights violations, the UNGPs are non-binding for states and business enterprises.[397] There is an extensive discussion amongst scholars of the binding treaty option.[398] The debate of a binding business and human rights legislation persist,[399] as NGOs and business enterprises do not consider the due diligence expectations in the current form to be effective.[400] Many opposers of the current business and human rights due diligence regime support mandatory human rights due diligence regime, which would create a legal obligation for transnational corporations to conduct human rights due diligence. The opponents of the soft law approach argue that non-binding instruments are unlikely to change business conduct and end 'widespread corporate impunity for human rights violations.'[401] The concept of mandatory human rights due diligence refers to explicit binding legal duties on business enterprises to

[395] McCorquodale and Simons 2007, 598, *supra* note 394.
[396] UN Guiding Principle 6.
[397] Hampton 2019, 243-244, *supra* note 368.
[398] *Ibid*, 243-244. *See* Claret Vargas, 'ATreaty on Business and Human Rights? A Recurring Debate in a New Governance Landscape,' in Cesar Rodriguez-Garavito (ed.), *Business and Human Rights:Beyond the End of the Beginning* (Cambridge University Press, 2017), 111-126, 113. *See also* David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1(2) *Business and Human Rights Journal*, 203–227;
[399] Hampton 2019, 243-244, *supra* note 368.
[400] ASPI Report 2020, 27, *supra* note 6.
[401] Hampton 2019, 244, *supra* note 368.

conduct human rights due diligence and to prevent harmful impacts on human rights through the exercise of due diligence.[402]

At the domestic level, multiple states have adopted mandatory human rights due diligence regimes intending to end corporate impunity of human rights violations occurring in business activities abroad. Several governments have recently introduced or have announced their intention to consider the instruction of mandatory human rights due diligence regime, requiring business enterprises to carry out human rights due diligence. Some countries have already adopted or proposed national legislation to address modern slavery in business operations and supply chains. Amongst them are France[403] and Germany.[404] The EU is also building an EU-wide approach to mandatory human rights due diligence.[405] Some countries have established requirements for human rights due diligence reporting under penalty if the reporting requirement is neglected.[406] It has raised concerns that an 'exclusive focus on due diligence processes that are not tethered to the foundational responsibility to respect human rights may encourage 'tick-box' exercises that allow businesses to claim that they are compliant with the Guiding Principles.'[407] *Hampton* argues that superficial disclosure requirements without significant consequences are unlikely to lead to structural and organizational advancements to abolish labour abuses from supply

[402] Mandatory human rights due diligence is different from the transparency approach that requires mandatory reporting of due diligence. Some acts such as UK Modern Slavery Act 2015 and California Transparency in Supply Chains Act of 2010 are human rights reporting regimes distinguishable from mandatory human rights due diligence regimes as they solely require companies to transparently report about the acts, they are taking on human rights. *See* Hampton 2019, 252, *supra* note 368. Hampton argues that a public reporting requirement is relatively weak accountability measure.

[403] *See* the French 'duty of vigilance' law: LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. The 'duty of vigilance' law contain an explicit reference to the UNGPs.

[404] *See* the proposal for German law on corporate due diligence in supply chains: Referentenentwurf des Bundesministeriums für Arbeit und Soziales, Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, February 28, 2021. The proposal of mandatory due diligence law permits Germany to file business enterprises whose suppliers abuse human rights and environmental standards.

[405] A European Commission study on due diligence requirements through supply chains, published in 2020, confirmed the need for regulatory action at EU level, as the study showed that only one in three businesses in the EU is currently undertaking human rights due diligence. British Institute of International and Comparative Law, Civic Consulting, Directorate-General for Justice and Consumers (European Commission), LSE, *Study on due diligence requirements through the supply chain* (2020) [online]. *See also* European Parliament resolution 2020/2129 (INL) with recommendations to the Commission on corporate due diligence and corporate accountability [2021] P9_TA-PROV(2021)0073;

[406] *See* the UK Modern Slavery Act 2015 and the California Transparency in Supply Chains Act of 2010.

[407] Bonnitcha and McCorquodale 2017a, 910, *supra* note 202; *see also* Fasterling and Demuijnck 2013, 805-806, *supra* note 73 and Hampton 2019, 252, *supra* note 368.

chains.[408] There is a concern that business enterprises can hide behind their reporting requirements and appease consumers without making any actual changes since business enterprises meet their legal requirements by publishing a statement even if no actual steps were taken.[409]

At the international level, the UN has been developing a new UN treaty on business and human rights for many years now.[410] UN Human Rights Council addressed in its resolution that the mandate of the intergovernmental working group, set up in 2014, is to 'elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.'[411] However, the draft UN treaty on business and human rights does not extend human rights obligations to business enterprises.[412] The draft mainly focuses on states as primary duty bearers of human rights obligations, limiting businesses' responsibilities to the no-harm approach, which is in line with the current understanding of non-state actors' responsibilities regarding international human rights law.

In mandatory human rights due diligence regimes, the designed main driver of corporate action are the legal duties imposed by such a regime, rather than the voluntary reporting obligations. In such regimes, legal liability attaches to the infringement of a legal duty of care rather than a failure to meet reporting obligations. *OHCHR* notes that 'it is not possible for companies to comply with mandatory human rights diligence regimes merely by

[408] Hampton 2019, 252, *supra* note 368.
[409] *Ibid*, 252; Jolyon Ford and Justine Nolan, 'Regulating transparency on human rights and modern slavery in corporate supply chains: the discrepancy between human rights due diligence and the social audit' (2020) 26(1) *Australian Journal of Human Rights*, 27-45, 36.
[410] *See* Daniel M. Aragão and Manoela C. Roland, 'The Need for a Treaty' in Surya Deva and David Bilchitz (eds.), *Building a treaty on business and human rights: context and contours* (Cambridge University Press, 2017), 131-153. It is noteworthy that the development of business and human rights approach mainly occurs on a domestic level. Under international human rights law, there is no consensus that businesses could be duty-bearers of international human rights obligations, but in spite of that, at the domestic level, businesses can be set obligations to comply with domestic law.
[411] United Nations Human Rights Council (UN HRC), 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (2014) HRC Resolution 26/9, UN Doc A/HRC/RES/26/9, Para. 1.
[412] *See* 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* (OEIGWG Chairmanship Second Revised Draft, August 8, 2020).

reporting on the steps that they did or did not take.'[413] Mandatory due diligence regimes put the burden of proof on companies to demonstrate that they are taking all necessary measures to identify, prevent and mitigate incidences of modern slavery in their operations and supply chains.[414]

5.3.3 Legal Reforms Preventing the Use of Uyghur Forced Labour

The measures to undertake a satisfactory level of human rights due diligence indicate that the non-binding human rights due diligence is not enough to safeguard against human rights and labour rights violations.[415] Some states have already established strict legislation prohibiting imports from the Xinjiang region on a domestic level. These recent regulatory developments imply that the corporate responsibility to respect human rights and the human rights due diligence scheme set by the UNGPs is not enough to prevent the use of Uyghur forced labour in business activities. Therefore, regulatory actions on the domestic level are needed. These developments are likely to ease the threshold for legal proceedings and keep the transnational corporations liable for infringements of human rights and labour rights to use Uyghur forced labour.

The US government has taken several actions in response to human rights abuses in Xinjiang.[416] In the US, transnational corporations tainted with Uyghur forced labour in their supply chains could infringe laws prohibiting importing goods made with forced labour or

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[413] OHCHR, 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies' (2020) [online], 3. *See also* OHCHR, 'Mandatory Human Rights Due Diligence Regimes: Some Key Considerations' (2020) [online], 2, in which OHCHR notes that in the EU model, 'mandatory human rights due diligence obligations are highly likely to extend to cover subsidiaries and supplier in other, non-EU jurisdictions'.

[414] Business & Human Rights Resource Centre, 'Modern Slavery in Company Operation and Supply Chains: Mandatory transparency, mandatory due diligence and public procurement due diligence' (*International Trade Union Confederation*, 2017) [online], 4. Some mandatory human rights regimes include also provisions that allow civil and criminal proceedings to be filed against companies that fail to carry out the required due diligence.

[415] *See* Justine Nolan and Gregory Bott, 'Global supply chains and human rights: spotlight on forced labour and modern slavery practices' (2018) 24(3) *Australian Journal of Human Rights*, 1-26. In this article, *Nolan* and *Bott* identify emerging legislative disclosure regimes as a mechanism for regulating forced labour in supply chains and consider how regulatory frameworks could be crafted to maximize their effectiveness.

[416] On June 17, 2020, the US President signed into law the US Uyghur Human Rights Policy Act of 2020, which directs United States resources to address human rights violations and abuses of specified ethnic Muslim minority groups in the Xinjiang region in China.

mandatory disclosure of forced labour supply chain risks.[417] The UK, Canada and Australia are also taking measures to prohibit companies from sourcing goods produced with Uyghur forced labour. The UK and Canada have announced measures to help ensure that transnational corporations are not complicit in, nor profiting from, human rights violations in Xinjiang.[418] Canada's measures include the prohibition of imports of goods produced wholly or partly by forced labour and a Xinjiang Integrity Declaration for Canadian companies.[419] Australia has also introduced a bill to the federal parliament to ban importing goods from the Xinjiang region.[420] The European Parliament passed a resolution on forced labour and the situation of the Uyghurs in the Xinjiang region, including a request for China to allow access to Xinjiang camps.[421] By conducting appropriate human rights due diligence, transnational corporations can demonstrate that they took every reasonable step to avoid involvement with Uyghur forced labour and limit their legal risks caused by these legislative initiatives.

[417] Uyghur Forced Labour Prevention Act is a bill in the US Congress that would block products from the Xinjiang region unless transnational corporations could prove that forced labour was not involved in making. *See also* the United State's Tariff Act of 1930 and Australia's Modern Slavery Act 2018. US Tariff Act of 1930 prohibits the importation of all products manufactured wholly or in part by forced labour. The US bans all cotton and tomato imports from China's Xinjiang region, as US Customs and Border Protection alleged the goods are made with Uyghur forced labour.
[418] *See* Dominic Raab, *Human rights violations in Xinjiang and the government's response: Foreign Secretary's statement* (Oral Statement to Parliament, January 12, 2021) [online].
[419] Canada amended the Customs Tariff Act to include a prohibition on the importation of goods that are produced wholly or in part by forced labour.
[420] *See* Customs Amendment (Banning Goods Produced By Uyghur Forced Labour) Bill 2020.
[421] EP Uyghur forced labour Resolution, Para. 5.

6 Conclusion

This thesis studied with a case study approach the scope and extent of transnational corporations' responsibility for contributing to Uyghur forced labour under the business and human rights regime set out in the UNGPs. This chapter will present the conclusions on the research question, summarize and reflect on the research, and recommend future work on the topic.

The introduction chapter reviewed the Chinese government-sponsored forced labour in the Xinjiang region and mainland China and presented the research question studied in this thesis. The evidence shows that many transnational corporations, some consciously, either directly or indirectly, contribute to Uyghur forced labour. The second chapter analyzed that the use of Uyghur forced labour contravenes international human rights law and is consistent with the definition of forced labour under the ILO international agreements. This research aimed to study what is meant by the corporate responsibility to respect human rights imposed by the UNGPs and apply it to the case study of Uyghur forced labour.

The business and human rights approach introduced in chapters two and three stated that under the UNGPs, transnational corporations are responsible for respecting human rights, thus avoiding causing or contributing to the use of Uyghur forced labour in their business activities. Transnational corporations are expected to conduct human rights due diligence to fulfil their responsibility to respect human rights in their business activities. The human rights due diligence includes identifying, addressing and mitigating the possible contribution to the Uyghur forced labour scheme. The human rights due diligence entail a whole supply chain approach, meaning that transnational corporations are responsible for the adverse human rights impacts of their subsidiaries, suppliers and other business relationships despite their position in the supply chain. While it is impossible to confirm that all factories in the Xinjiang region are using Uyghur forced labour for manufacturing products, the cases for which adequate detail has been available showcase the use of Uyghur forced labour in breach of the human rights due diligence recommendations set out in the UNGPs.

To elaborate on the main research question, under the UNGPs, the scope of transnational corporations' responsibility for contributing to Uyghur forced labour in their

business activities depends on the role of the entity causing the adverse human rights impact. Consequently, the UNGPs involve two understandings of due diligence. Transnational corporations' responsibility for adverse human rights impacts caused by third parties such as suppliers is different from parent company liability. In certain situations, if transnational corporations have involved in their overseas subsidiaryies' operations, they may be legally liable to remedy the individuals impacted by such adverse impacts on human rights.

Due to the non-binding nature of the UNGPs, the Guiding Principles do not set a legal basis for attributing human rights violations caused by a supplier to a transnational corporation. While transnational corporations are expected to respect human rights in their whole supply chain, they have a lower level of responsibility towards their suppliers' business conduct than towards their overseas subsidiaries. Transnational corporations are expected to conduct human rights due diligence on their suppliers. The due diligence understood as a standard of conduct, involves a fault element, meaning that a transnational corporation does not breach its responsibility to respect human rights and responsibility to refrain from using Uyghur forced labour if it has acted diligently in its attempt to avoid causing or contributing to Uyghur forced labour, but, due to unfortunate or unforeseen events, it has caused or contributed to it.

According to the UNGPs, the threshold of diligent action might be higher in the case of Uyghur forced labour, as the Xinjiang region can be considered a region with a high risk of human rights abuses and violations. Uyghurs and other ethnic minorities are at significant risk of becoming vulnerable. Hence, transnational corporations should pay special attention to the Xinjiang region when conducting human rights due diligence, which indicates that they should be conscious of the adverse labour abuses occurring in the region. Although some business enterprises claim they have no transparency on their business relationships beyond their first-tier suppliers, the UNGPs involve a whole supply chain approach meaning that a lack of transparency is not a mitigating factor of the responsibility.

Due to the non-binding status of the UNGPs, business ethics have an essential role in the responsible business conduct of transnational corporations. The UNGPs do not involve an international mechanism to remedy the victims of adverse human rights impacts or hold transnational corporations liable for causing or contributing to Uyghur forced labour. There are few cases of home state courts exercising extraterritorial jurisdiction on parent

companies' liability of their overseas subsidiaries' adverse human rights impacts. However, there is no international case law related to third-parties' adverse impacts on human rights due to the attribution problem.

Although the codes of conduct and other contractual terms may enable arbitration of breaches of the contractual terms, it remains unlikely that transnational corporations would be willing to arbitrate about the use of Uyghur forced labour in their business relationships' operations. It would be expensive and not bring notable reputational or financial benefits for the companies. Due to the confidentiality of the contractual terms and codes of conduct, it is not possible to know whether the business entities comply with the responsibility to respect human rights and whether some companies have started arbitrations of the use of Uyghur forced labour.

Currently, transnational corporations are not required to publish their human rights due diligence reports and disclose information about the adverse human rights impacts on their supply chain. Thus, it cannot be known how well transnational corporations conduct human rights due diligence. With public reports, transnational corporations may not want to disclose any adverse human rights impacts since public disclosure might cause them legal, financial, and reputational risks. Nevertheless, in some industries, such as in the cotton and garment industries, the use of Uyghur forced labour is so widespread that the reputational challenges have not prevented the corporations to source from suppliers using it at the expense of human rights. The more responsible alternatives could be much more expensive and more difficult to reach, which would affect the businesses' profitability.

Public-facing companies and prestigious global well-known brands might be more interested in avoiding legal and reputational risks connected to the Uyghur forced labour scheme. Nevertheless, non-public facing corporations operating business to business might not feel the pressure for responsible business conduct. Even though awareness of the Xinjiang labour abuses has increased notably in recent years, the use of Uyghurs and members of other Muslim minority groups persist. A contributory cause might be that some industries are dependent on sourcing from Xinjiang, as there are no alternatives to the raw materials and products sourced from the Xinjiang region.

Due diligence processes face many challenges in China, especially in the Xinjiang region, as it might be unreasonably challenging to undertake human rights due diligence on

the Xinjiang factories, as audits are almost impossible to conduct. The information provided by the Chinese authorities and suppliers is unlikely to be trustworthy because the Chinese government tries to hide the use of Uyghur forced labour in Chinese factories. To comply with the UNGPS, transnational corporations tied to the Xinjiang region through their business activities should address and mitigate the adverse human rights impacts by terminating the business relationships with the suppliers using Uyghur forced labour if they cannot exercise leverage on their suppliers to prevent and mitigate such impacts. Some transnational corporations have already decided to leave the Xinjiang region because they have assessed that they are unlikely to be able to exercise enough leverage on their suppliers to prevent the use of Uyghur forced labour.

Despite the UNGPs and the implementation of human rights due diligence processes, the use of Uyghurs and other ethnic minorities for forced labour persists. The continuing use of Uyghur forced labour might indicate that the non-binding business and human rights diligence regime based on the UNGPs is not enough to prevent the use of Uyghur forced labour in business activities. Some organizations and scholars support a shift to mandatory human rights due diligence, obliging transnational corporations to conduct human rights due diligence. Due to the above-presented challenges with conducting human rights due diligence, a binding treaty or national law of mandatory human rights due diligence is highly unlikely to solve the problems and prevent the use of Uyghur forced labour. There is a risk with implementing such a regime that a tick-the-box model could only limit the legal risks of companies and let the adverse human rights impacts persist, and leave the question of legal accountability mechanisms unclear.

Due to these dilemmas and challenges, some states have recently established new regulation to strictly prohibit imports from the Xinjiang region to end corporate impunity related to Uyghur forced labour, as the whole region is considered to be contaminated with adverse labour abuses. It implies that the voluntary methods of UNGPs do not affect transnational corporations enough to make them respect human rights and undertake a sufficient level of due diligence in their supply chains if domestic legislation is needed.

Despite the flaws in the UNGPs, the corporate responsibility to respect human rights and the human rights due diligence regime have paved the way for more responsible business conduct and awakened the customers to require responsible business conduct from

transnational corporations. The current understanding of non-state actors human rights obligations under international human rights law does not support the view that transnational corporations are duty-bearers to respect human rights in their activities. The soft law approach of the UNGPs can yet be proven effective, at least to a certain point. The UNGPs consist of both legal and ethical responsibilities for transnational corporations to respect human rights. Therefore, transnational corporations valuing business ethics and not solely profit maximization could be the pioneers for refraining from the use of Uyghur forced labour. Although the challenges of Uyghur forced labour persist, transnational corporations increasingly comply with the corporate responsibility to respect human rights and, as part of their human rights due diligence process, have decided to terminate Xinjiang suppliers' business relationships. It means that these transnational corporations have conducted at least some level of human rights due diligence on their suppliers to identify and address Uyghur forced labour if they have decided to mitigate their impact on the scheme by terminating their business relationships with Xinjiang suppliers.

There has been only a little previous legal research about Uyghur forced labour and the concept of human rights due diligence under the UNGPs. In contrast, the corporate responsibility to respect human rights set out by the UNGPs has been the topic of several research articles and monographs. The conclusions of this thesis are in line with the previous research done about corporate responsibility to respect human rights. The analysis demonstrates how dependent the business and human rights regime is on business ethics since transnational corporations are not bound by international human rights or labour standards. The responsibility of transnational corporations related to third parties remains controversial as the question of attribution persists. Through parent company liability, transnational corporations may be held liable for their overseas subsidiaries' adverse impacts on human rights.

Although this case study has concerned Uyghur forced labour, the outcome can be applied to other business and human rights due diligence cases regarding adverse human rights impacts caused by businesses activities. In particular, the outcome of this thesis can be applied to similar cases in other jurisdictions where human rights violations are government-led.

Nevertheless, many details about the corporate responsibility to respect human rights remain open. Particularly concerning the human rights due diligence and how transnational corporations can be responsible for their suppliers' adverse impacts on human rights. Future research could shed light on the scope and extent of transnational corporations' responsibility on adverse human rights impacts caused by their suppliers in the upstream segments of the product supply chain and on the possible mechanisms to remedy individuals impacted by the human rights infringements. Furthermore, the requirements of the parent company liability could be further researched.

Chinese labour programs create a challenge for the international protection of human rights. Multiple transnational corporations are complicit in the forced labour and human rights violations being perpetrated in the Xinjiang region through their own activities or through their subsidiaries, suppliers or other business relationships. With the UNGPs' recommendations on responsible business conduct, transnational corporations can identify and address their involvement in forced labour in the Xinjiang region and exercise leverage to prevent and mitigate such impacts. Even though the effectiveness of the business and human rights regime remains debated, it has paved the way for requiring more responsible business conduct from transnational corporations, as can be seen from the rising amount of legislative initiatives related to human rights due diligence.