THE INTERNATIONAL LEGAL FRAMEWORK ON BUSINESS AND HUMAN RIGHTS AND ITS DOMESTIC OPERATIONALISATION

Strategic litigation on mining and a healthy environment in South Africa

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SUMMARY IN ENGLISH

The traditional idea that human rights are fundamental rights held by individuals against their state is under pressure, in part because of the emergence of non-state actors who in terms of power and leverage stand alongside and sometimes even above the state. One category of such non-state actors are business enterprises. Business enterprises can contribute significantly to the protection and promotion of human rights, but they can also interfere with human rights. From a legal perspective, however, associating ‘business’ and ‘human rights’, albeit increasingly commonplace in public discourse, is not straightforward, precisely because traditionally the duty bearer under human rights law is the state. The fundamental question is thus whether business enterprises have a responsibility for human rights and, if so, how that responsibility looks like (or should look like). Some specific questions arising in that regard concern the nature of the responsibility, the concrete rights binding on business enterprises, the types of duties borne under those rights and the beneficiaries thereof, and the possible ways of enforcement.

Point of departure to understand the responsibility of business enterprises for human rights is international law and, in particular, the United Nations Guiding Principles on business and human rights. These principles, which have been endorsed by the Human Rights Council, were drafted by the Special Representative of the Secretary-General in order to rationalize the debate on business and human rights by unifying the existing standards and practices under international law in a single framework. According to this international legal framework, states remain the sole duty bearers under international human rights law as it stands today. In other words, business enterprises cannot hold any direct human rights duties under international law. There are at least two important nuances, however. First, business enterprises have a moral responsibility to respect human rights, which is grounded in social expectations. Second, states must protect human rights, which means that they must take the necessary steps to prevent, investigate, punish and redress human rights abuse by business enterprises.

The state obligation to protect implies that within the domestic legal order the conduct of business enterprises should be constrained by human rights – it should be noted that under national law human rights (generally taking the form of constitutional rights) may directly affect business enterprises or indirectly, meaning through the laws, regulations and policies that implement human rights in private relationships. Hence, to understand the extent to which business enterprises are actually responsible for human rights, also the operationalisation of the state obligation to protect at the national level must be examined.

In light of these findings, the dissertation begins with discussing the international legal framework and then proceeds with examining the possible legal impact of human rights on business enterprises under national law. For that purpose an abstract analytical framework is developed, which is then used to scrutinize the relationship between human rights and business in a specific legal order, namely South
Africa. It is, moreover, not sufficient to look at the law on the books. Business enterprises are only effectively responsible for human rights, if rights holders can vindicate their rights, either by directly calling business enterprises to account or by forcing the state to protect their rights (better). Therefore, the dissertation also examines the opportunities and challenges for victims of human rights violations by business enterprises to enforce their rights through judicial remedies. Again, this issue is scrutinised in abstracto as well as in concreto, through a case study on the use of strategic litigation to vindicate the rights of mineworkers or neighbouring communities who are exposed to environmental degradation caused by mining companies.

Finally, the dissertation returns to the international arena and, based on the findings of the study, reflects on how the international legal framework should be developed further. Accepting that at least for the time being international human rights law only binds states, and not business enterprises, two proposals are formulated to reinforce the existing international legal framework.
SAMENVATTING IN HET NEDERLANDS

Het traditionele idee dat mensenrechten fundamentele rechten zijn die individuele burgers hebben ten aanzien van hun staat, is onder druk komen te staan deels omwille van de opkomst van niet-statelijke actoren die evenveel, zo niet meer, macht en invloed hebben als de staat. Eén categorie van dergelijke niet-statelijke actoren zijn ondernemingen. Ondernemingen kunnen aanzienlijk bijdragen tot de bevordering en bescherming van mensenrechten, maar kunnen mensenrechten ook aantasten. Vanuit een juridisch perspectief is het associëren van ‘ondernemingen’ en ‘mensenrechten’ – zij het meer en meer gebruikelijk in het publieke discours – echter niet vanzelfsprekend, net omdat de staat traditioneel gezien de plichtdrager is voor mensenrechten. De fundamentele vraag is dus of ondernemingen een verantwoordelijkheid hebben voor mensenrechten en, indien dit zo is, hoe die verantwoordelijkheid eruit zou moeten zien. Een aantal specifieke vragen die rijzen in dat verband, hebben betrekking op de aard van die verantwoordelijkheid, de concrete rechten die ondernemingen (zouden) verbinden, het type plichten dat zij onder die rechten (zouden) dragen en de begunstigden daarvan, en de mogelijke afdwingingsmechanismen.

Het vertrekpunt om de verantwoordelijkheid van ondernemingen voor mensenrechten te begrijpen is het internationale recht en, in het bijzonder, de Richtinggevende Principes van de Verenigde Naties inzake ondernemingen en mensenrechten. Deze principes, die bekrachtigd zijn door de Mensenrechtenraad, werden opgesteld door de Speciale Vertegenwoordiger van de Secretaris-General om het debat inzake ondernemingen en mensenrechten te rationaliseren door de bestaande normen en procedures onder het internationale recht te verenigen in één enkel kader. Volgens dit internationaal rechtskader blijven staten de enige plichtdragers onder het vigerende internationale recht inzake mensenrechten. Bijgevolg kunnen ondernemingen geen rechtstreekse verplichtingen dragen onder internationale mensenrechten. Er gelden echter minstens twee belangrijke nuances. Ten eerste hebben ondernemingen een morele verantwoordelijkheid om mensenrechten te respecteren die gegrond is in sociale verwachtingen. Ten tweede moeten staten mensenrechten beschermen, hetgeen inhoudt dat zij de noodzakelijke stappen moeten nemen om misbruik van mensenrechten door ondernemingen te vermijden, te onderzoeken, te bestraffen en te remediëren.

De beschermingsplicht van staten brengt met zich mee dat mensenrechten het gedrag van ondernemingen binnen de nationale rechtsorde zouden moeten beheersen – er kan reeds worden opgemerkt dat onder het nationale recht mensenrechten (die veelal de vorm aannemen van grondwettelijke rechten) ondernemingen direct kunnen raken of indirect, dit wil zeggen via wetgeving, regelgeving en beleid uitgevaardigd om mensenrechten te implementeren in private betrekkingen. Om te begrijpen in welke mate ondernemingen daadwerkelijk verantwoordelijk zijn voor mensenrechten, moet bijgevolg de operationalisering van de beschermingsplicht van de staat op nationaal niveau worden onderzocht.
In het licht van deze vaststellingen begint dit proefschrift met een bespreking van het internationale rechtskader, waarna de mogelijke juridische impact van mensenrechten op ondernemingen binnen de nationale rechtsorde wordt onderzocht. Daartoe wordt een abstract analytisch kader ontwikkeld, dat vervolgens gebruikt wordt om het verband te onderzoeken tussen mensenrechten en ondernemingen in een specifieke rechtsorde, namelijk Zuid-Afrika. Het volstaat bovendien niet om alleen naar ‘the law on the books’ te kijken. Ondernemingen zijn enkel effectief verantwoordelijk voor mensenrechten, indien rechthebbenden hun rechten kunnen doen gelden, ofwel door ondernemingen rechtstreeks aan te spreken ofwel door de staat te verplichten hun rechten (beter) te beschermen. Daarom onderzoekt dit proefschrift ook de mogelijkheden en uitdagingen voor slachtoffers van mensenrechtschendingen door ondernemingen om hun rechten af te dwingen middels gerechtelijke middelen. Het proefschrift analyseert deze kwestie opnieuw zowel in abstracto als in concreto, middels een gevalstudie naar het gebruik van strategische procesvoering om de rechten te beschermen van mijnbouwwerkers en naburige gemeenschappen die blootgesteld worden aan milieuverontreiniging veroorzaakt door mijnbouwbedrijven.

Tot slot keert het proefschrift terug naar het internationale niveau en reflecteert, op basis van de bevindingen van het onderzoek, over de wijze waarop het internationale rechtskader verder ontwikkeld zou moeten worden. Terwijl aanvaard wordt dat minstens op dit ogenblik internationale mensenrechten enkel staten, en niet ondernemingen, rechtstreeks verbinden, worden twee voorstellen geformuleerd ter versterking van het bestaande internationale rechtskader.
# TABLE OF CONTENTS

List of abbreviations .......................................................................................................................... xv

List of figures ......................................................................................................................................... xvi

List of tables ......................................................................................................................................... xvi

List of boxes .......................................................................................................................................... xvi

**PART I. A BOTTOM-UP APPROACH TO BUSINESS AND HUMAN RIGHTS: WHY, WHAT AND HOW?** ........................................................................................................................................ 1

1. General justification of the research approach ................................................................................ 2

   1.1. Business and human rights: a polycentric governance system .......................................................... 3

   1.2. Strengthening the framework for business and human rights .............................................................. 5

   1.3. Recent history and political context of business and human rights ...................................................... 9

   1.4. Bottom-up law-making ........................................................................................................................ 14

   1.5. First things first: host state regulation and enforcement through litigation ............................................. 17

2. ‘Business and human rights’ and ‘strategic litigation’: some definitions .............................................. 20

   2.1. Disentangling ‘the private’ and ‘the public’ .............................................................................................. 20

   2.2. Private actors and human rights: which norms and duties? ................................................................. 22

   2.3. Business enterprises: what’s in a name .................................................................................................... 25

   2.4. ‘Strategic’ litigation for ‘change’ ............................................................................................................. 27

3. Research questions and objectives ..................................................................................................... 29

4. Structure of the dissertation .................................................................................................................. 31

5. Methodological setting ....................................................................................................................... 32

   5.1. The case of the South African mining industry ....................................................................................... 32

   5.1.1. Mining in South Africa: the pertinence of the case ............................................................................. 32

   5.1.1.1. South Africa .................................................................................................................................. 33

   5.1.1.2. The mining industry ..................................................................................................................... 35

   5.1.2. The demarcating factors ..................................................................................................................... 35

   5.1.2.1. Direct human rights violations ....................................................................................................... 35

   5.1.2.2. … associated with environmental health hazards ............................................................................ 36
2.2. Variables of strategic litigation ............................................................................................................. 78
  2.2.1. Access to justice ................................................................................................................................. 78
    2.2.1.1. Standing in court .............................................................................................................................. 79
    2.2.1.2. Free or cheap legal services ........................................................................................................... 80
    2.2.1.3. Intimidating litigation ................................................................................................................... 82
  2.2.2. Remedies .............................................................................................................................................. 82
    2.2.2.1. Type of judicial proceedings .......................................................................................................... 83
    2.2.2.2. Relief: looking for adequate court orders ....................................................................................... 86
  2.2.3. The counterparty ................................................................................................................................. 88
    2.2.3.1. Government versus corporate liability .......................................................................................... 88
    2.2.3.2. Institutional versus individual corporate liability ........................................................................... 89
    2.2.3.3. Liability of parent companies ....................................................................................................... 92
  2.2.4. Human rights in legal argument ......................................................................................................... 95
    2.2.4.1. International and national human rights ......................................................................................... 97
    2.2.4.2. Legal effect of human rights .......................................................................................................... 98
      (i) A legally binding norm ......................................................................................................................... 99
      (ii) A self-executing norm ....................................................................................................................... 100
      (iii) Prescriptive, persuasive or moral force ............................................................................................ 101
  2.2.5. Effectiveness and success .................................................................................................................. 102
  2.2.6. Contextual factors .............................................................................................................................. 106
    2.2.6.1. History ............................................................................................................................................ 107
    2.2.6.2. Socio-political context ................................................................................................................... 107
    2.2.6.3. Legal context .................................................................................................................................. 108
    2.2.6.4. Institutional setting ....................................................................................................................... 109

PART III. A REALITY CHECK: MINeworkers AND NeIGHBOuring COMMUNITIES’ (UN)HEALTHY WORKING AND LIVING ENVIRONMENT IN SOUTH AFRICA ........................................................................................................................................ 112

1. Setting the scene: business, human rights and access to remedies in South Africa... 114
  1.1. Business and human rights: a state of affairs in South Africa............................................................. 114
    1.1.1. A history of business and human rights ........................................................................................... 114
    1.1.2. South Africa’s position in the international debate .......................................................................... 116
    1.1.3. The domestic regulatory space and international investment law .............................................. 118
  1.2. Business and human rights according to South African law .............................................................. 122
    1.2.1. Constitutional dispensation for business and human rights......................................................... 122
1.2.1.1. A quick overview ......................................................................................... 122
1.2.1.2. Horizontality............................................................................................ 124
   (i) Horizontal effect ....................................................................................... 124
   (ii) Horizontal scope ..................................................................................... 126
   (iii) Horizontal application .......................................................................... 130
1.2.1.3. Protective duties ................................................................................... 134
1.2.2. Company law and corporate governance ............................................... 137
1.3. The liaison between international human rights and the Bill of Rights ......... 138
1.4. Remedies to enforce corporate accountability for human rights ................. 141
   1.4.1. Practicalities of accessing justice through the court system ................. 141
      1.4.1.1. Standing in court ............................................................................ 142
      1.4.1.2. Free or cheap legal aid .................................................................. 147
      1.4.1.3. SLAPP suits .................................................................................. 148
   1.4.2. Type of remedies available .................................................................... 151
      1.4.2.1. Judicial remedies .......................................................................... 151
         (i) Criminal proceedings ........................................................................ 151
         (ii) Administrative proceedings ...................................................... 153
         (iii) Constitutional proceedings ..................................................... 155
      1.4.2.2. Non-judicial state-based remedies .............................................. 157
         (i) Public Protector ............................................................................ 157
         (ii) South African Human Rights Commission .................................. 158
         (iii) Alternative dispute resolution mechanisms .................................. 160
         (iv) Special commissions of inquiry ................................................ 160
      1.4.2.3. Non-state-based remedies ............................................................ 161
   1.4.3. Relief sought in court .......................................................................... 161
      1.4.3.1. Wide remedial powers of the judiciary ....................................... 161
      1.4.3.2. Limit: separation of powers ...................................................... 164
2. Mining and the right of mineworkers and communities to a healthy environment .. 167
2.1. The factual background ................................................................................. 168
   2.1.1. Mining in South Africa ....................................................................... 168
      2.1.1.1. The mining industry and its impact on human rights ................. 168
      2.1.1.2. The susceptibility of the South African mining industry for human rights abuses ................................................................. 170
   2.1.2. A brief outline of the civil society landscape ......................................... 172
2.2. The legal framework .............................................................................................................. 175

2.2.1. Mining and environmental degradation: the human rights at stake ........................................ 175

2.2.1.1. Categories of rights and their judicial enforcement ......................................................... 176

2.2.1.2. The specific rights at stake ............................................................................................... 178

(i) The right to an environment not harmful to health and well-being ........................................... 178

(ii) The rights to life, human dignity and security of the person ..................................................... 181

(iii) The rights to housing, water, food and health ........................................................................ 182

(iv) The rights to information and just administrative action ...................................................... 183

2.2.2. Implementing legislation ...................................................................................................... 185

2.2.3. Social and labour plans and the question of horizontal scope .............................................. 189

2.2.3.1. A history of mining villages ............................................................................................... 189

2.2.3.2. The legal framework ......................................................................................................... 192

2.2.3.3. An assessment by civil society ............................................................................................ 195

2.3. The focus matters: three cases in the spotlight ......................................................................... 197

2.3.1. Tudor Shaft: informal settlement exposed to radiation ......................................................... 198

2.3.1.1. Factual background ............................................................................................................ 198

2.3.1.2. Legal framework ................................................................................................................ 199

2.3.1.3. The litigation ...................................................................................................................... 202

2.3.1.4. Follow-up, out-of-court processes ...................................................................................... 204

2.3.1.5. Case file ............................................................................................................................. 205

2.3.2. Carolina: contaminated water for disadvantaged communities ........................................... 206

2.3.2.1. Factual background ............................................................................................................ 206

2.3.2.2. Legal framework ................................................................................................................ 207

2.3.2.3. The litigation ...................................................................................................................... 209

2.3.2.4. Out-of-court processes and related litigation ................................................................. 210

2.3.2.5. Case file ............................................................................................................................. 213

2.3.3. Silicosis class action: thousands of mineworkers suffering from silicosis .............................. 215

2.3.3.1. Factual background ............................................................................................................ 215

2.3.3.2. Legal framework ................................................................................................................ 216

2.3.3.3. The litigation ...................................................................................................................... 217

2.3.3.4. Preceding, parallel and follow-up litigation and out-of-court processes ............................ 221

2.3.3.5. Case file ............................................................................................................................. 224

2.4. The use of strategic litigation .................................................................................................. 226

2.4.1. Determinants to use litigation as a strategy .......................................................................... 226

2.4.1.1. General rule: engagement first ......................................................................................... 226
2.4.1.2. Pros and cons of litigation ................................................................. 227
2.4.1.3. Contextual factor of considerable importance: the responsiveness of judges .... 228
2.4.2. Preliminary question: local or transnational litigation? ............................... 229
2.4.3. Strategic litigation as explorative litigation and the importance of test cases .......... 231
2.4.4. The dilemma of settling strategic court cases ....................................... 233
2.5. Practicalities of access to justice .................................................................. 235
  2.5.1. Availability of legal services ................................................................. 235
  2.5.2. Practical barriers .................................................................................. 239
  2.5.3. Standing rights ...................................................................................... 240
  2.5.4. Difficulties during the proceedings ....................................................... 243
2.6. The design of strategic lawsuits ................................................................. 246
  2.6.1. Strategizing: starting position and mission .......................................... 246
  2.6.2. The preferred remedies ................................................................ ........ 247
    2.6.2.1. The road of civil, criminal or judicial review proceedings ............... 247
    2.6.2.2. Adequate relief ................................................................................ 250
  2.6.3. The counterparty .................................................................................. 253
    2.6.3.1. Government versus mining companies ............................................ 254
      (i) A matter of strategy ............................................................................. 254
      (ii) A matter of practice and feasibility .................................................. 255
        ii.a) Financial capacity of the counterparty ............................................. 255
        ii.b) The counterparty’s attitude .......................................................... 256
        ii.c) The counterparty’s existence ........................................................ 256
        ii.d) Complexity of the proceedings ..................................................... 256
        ii.e) Stigma ........................................................................................... 258
        ii.f) Illegal or substandard conduct ......................................................... 258
      (iii) A matter of principle ........................................................................... 259
      (iv) A matter of principled pragmatism: the role of civil society ................. 260
      (v) Schematic recapitulation ..................................................................... 262
  2.6.3.2. Suing mining companies: who? ......................................................... 263
      (i) Institutional versus individual corporate liability ................................... 263
      (ii) Parent company liability ..................................................................... 264
  2.6.4. Use of human rights .............................................................................. 266
    2.6.4.1. The role of international (and foreign) law ..................................... 267
    2.6.4.2. Human rights in cases relating to corporate accountability: questions of protective duties and horizontality ......................................................... 272
2.6.4.3. The impact of human rights ................................................................. 277
   (i) The symbolism of human rights arguments ........................................... 277
   (ii) Human rights and the proceedings of a case ........................................... 278
      ii.a) Costs orders .................................................................................. 279
      ii.b) Suspensive effect of appeals ........................................................... 280
      ii.c) Condonation .................................................................................. 281
      ii.d) Urgency ......................................................................................... 283
   (iii) Human rights and substantive law ......................................................... 284
      iii.a) Human rights providing a direct cause of action or a reason to develop
               the common law ........................................................................... 284
      iii.b) Human rights to interpret and apply statutory and common law ........ 288
      iii.c) Human rights influencing the available types of relief ....................... 291

2.7. Assessing ‘success’ .................................................................................... 292

2.8. Strategic litigation for corporate accountability in South Africa: some findings .... 300

PART IV. TAKING STOCK AND MOVING FORWARD: STRENGTHENING
CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS .................................... 303

   operationalisation ...................................................................................... 305

1.1. The law on the books .................................................................................. 305
   1.1.1. The international legal framework: a recap ......................................... 305
   1.1.2. The domestic legal order as the centre of gravity ............................... 306
   1.1.3. The international legal and political landscape for moving forward ...... 309

1.2. The law in action: strategic litigation on human rights and environmental health hazards
   caused by mining ...................................................................................... 310
   1.2.1. Lessons learnt .................................................................................. 310
      1.2.1.1. The legal picture of corporate responsibility for human rights ......... 310
      1.2.1.2. Possible barriers to remedies ......................................................... 313
         (i) Practical barriers .............................................................................. 313
            i.a) Good practices .......................................................................... 313
            i.b) (Potential) obstacles ................................................................. 315
         (ii) Procedural barriers .......................................................................... 315
            ii.a) Good practices .......................................................................... 315
            ii.b) (Potential) obstacles ................................................................. 316
         (iii) Legal barriers ............................................................................... 317

   xiii
iii.a) Good practices ................................................................. 317
iii.b) (Potential) obstacles.......................................................... 317
(iv) Overview of the barriers ..................................................... 318

1.2.2. Limitations to the scope of the research .................................. 318
1.2.2.1. Country focus: South Africa............................................... 319
   (i) Contextualism........................................................................ 319
   (ii) Special note: not a conflict zone ............................................. 320
1.2.2.2. Thematic focus: direct human rights violations associated with environmental health hazards caused by mining ................................................... 320
1.2.2.3. Remedy: litigation in the host state ..................................... 321
1.2.2.4. Other elements beyond the scope of the dissertation ................ 321

2.  The window of opportunity for international law: Proposals for new ‘building blocks’ .................................................. 323
2.1. Developments at the UN concerning access to remedies .................. 323
2.2. Proposals .............................................................................. 325
   2.2.1. Introduction ...................................................................... 325
      2.2.1.1. The context of the further development of the international legal framework.... 326
      2.2.1.2. The approach adopted .................................................. 328
   2.2.2. The role of international and regional human rights courts .................. 330
      2.2.2.1. The human rights responsibilities of companies ......................... 331
      2.2.2.2. The interaction between different accountability regimes .................. 333
   2.2.3. Principles based on mapping and best practices .......................... 336
      2.2.3.1. The approach ................................................................ 336
      2.2.3.2. Some issues to be covered .............................................. 339
         (i) Access to legal services ........................................................ 340
         (ii) Standing rights ................................................................ 340
         (iii) Costs ............................................................................. 342
         (iv) Parent company liability .................................................... 342
   2.3. Need for further mapping and research ...................................... 344

ANNEXES .............................................................................. 346

SOURCES ............................................................................... 381
### LIST OF ABBREVIATIONS

**General**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AS</td>
<td>Anonymous source</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>R</td>
<td>Respondent</td>
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<tr>
<td>SLAPP</td>
<td>Strategic litigation against public participation</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNGPs</td>
<td>United Nations Guiding Principles on Business and Human Rights</td>
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<tr>
<td>US</td>
<td>United States of America</td>
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**South African Acts**

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<td>CFA</td>
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<td>Criminal Procedure Act</td>
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<td>COIDA</td>
<td>Compensation for Occupational Injuries and Diseases Act</td>
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<td>Legal Aid South Africa Act</td>
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<td>MHSA</td>
<td>Mine Health and Safety Act</td>
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<td>MPRDA</td>
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<td>WSA</td>
<td>Water Services Act</td>
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</table>
LIST OF FIGURES

Figure 1. Two illustrations in a brochure of a to-be-constructed mine ................................................................. 46
Figure 2. Excerpts from a pamphlet of a mine seeking to expand its operations ......................................................... 46
Figure 3. Triangular relationship victims/state/company under international law .......................................................... 53
Figure 4. Multifaceted relationship victims/state/company under domestic law .......................................................... 69

LIST OF TABLES

Table 1. Voting pattern for Resolution 26/9 ...................................................................................................................... 11
Table 2. Impacts of litigation ............................................................................................................................................. 104
Table 3. Typology of ‘power’ ............................................................................................................................................. 105
Table 4. The Tudor Shaft matter: case file ...................................................................................................................... 205
Table 5. The Carolina matter: case file ......................................................................................................................... 213
Table 6. The silicosis class action: case file .................................................................................................................... 224
Table 7. Standing rights in the focus matters .................................................................................................................. 241
Table 8. Determinants to sue government or mining company ....................................................................................... 262
Table 9. Possible impacts of litigation according to respondents .................................................................................. 293
Table 10. The impacts of the Batlhabe and Bareki cases ............................................................................................... 295
Table 11. The legal effect of human rights on business enterprises in the domestic legal order: the example of South Africa ............................................................................................................................. 311
Table 12. Overview of barriers to judicial remedies in South Africa .............................................................................. 318
Table 13. Respondents ..................................................................................................................................................... 348
Table 14. Observations .................................................................................................................................................... 350
Table 15. Directly relevant and related cases ................................................................................................................ 352
Table 16. Legally relevant cases ....................................................................................................................................... 353
Table 17a. Elements of the litigation in directly relevant cases (i): parties and rights .................................................. 357
Table 17b. Elements of the litigation in directly relevant cases (ii): attorneys and remedies ........................................ 359

LIST OF BOXES

Box 1. Blyvooruitzicht: from mining village to anarchy ................................................................................................. 190
Box 2. The Marikana massacre: unfulfilled promises ...................................................................................................... 194
Box 3. Mankayi v. AngloGold Ashanti: test case for the silicosis class action ............................................................ 232
Box 4. Contingency fees and the silicosis class action .................................................................................................. 236
Box 5. The applicants in the Carolina and Tudor Shaft matters ......................................................... 237
Box 6. Factual causation in the silicosis class action ..................................................................................... 244
Box 7. The quest for information in the silicosis class action ................................................................. 245
Box 8. The Batlhabine criminal case: a first .................................................................................................. 248
Box 9. The Carolina matter: order for meaningful engagement and structural interdict ........................ 252
Box 10. Was the Carolina matter a ‘war against the state’? ...................................................................... 257
Box 11. Parent company liability in the silicosis class action .................................................................. 264
Box 12. The Tudor Shaft matter: a preliminary health risk assessment ................................................. 269
Box 13. A rare reference to international law in the Carolina matter ................................................... 270
Box 14. The silicosis class action and the UNGPs ..................................................................................... 271
Box 15. The silicosis class action: positive human rights duties ............................................................... 273
Box 16. Will the silicosis class action set a precedent on constitutional causes of action? ..................... 274
Box 17. Infusing the common law with the Constitution in the silicosis class action ............................... 275
Box 18. Tudor Shaft and the protective duties of government .................................................................. 276
Box 19. The silicosis class action: certifying judges reproach the mining industry ............................... 277
Box 20. The Carolina matter: appeal without suspensive effect ............................................................. 280
Box 21. The Carolina matter: no condonation for cross-appeal ............................................................ 282
Box 22. Urgency in the Carolina matter .................................................................................................... 283
Box 23. The constitutional cause of action in the Carolina matter ......................................................... 284
Box 24. The possible constitutional cause of action in the silicosis class action ..................................... 285
Box 25. Certifying the class action and developing the common law ..................................................... 285
Box 26. The silicosis class action and the causation requirement ............................................................ 287
Box 27. The silicosis class action: is certification necessary for constitutional litigation against private parties? .................................................................................................................. 287
Box 28. The right to basic water supply in the Carolina matter ............................................................. 288
Box 29. Integrating environmental protection and socio-economic needs in the Tudor Shaft matter .......................................................................................................................................................... 289
Box 30. The constitutional provisions at stake in the silicosis class action ............................................ 290
Box 31. The silicosis class action: what about constitutional damages? .................................................. 291
Box 32. Evaluating the success of the urgent application in the Carolina matter ................................ 296
Box 33. Evaluating the success of the certification of the silicosis class action ...................................... 298
PART I.
A BOTTOM-UP APPROACH TO BUSINESS AND HUMAN RIGHTS:
WHY, WHAT AND HOW?
1. GENERAL JUSTIFICATION OF THE RESEARCH APPROACH

The relationship between business and human rights and, in particular, the extent to which business enterprises are responsible for human rights have triggered heated debates.¹ Consensus about the best strategy to ensure such responsibility is far from within reach. At present, the business and human rights field is governed by a polycentric governance system or ‘regime complex’.² Discussions on how to enhance the effectiveness of this regime have primarily focused on three regulatory approaches, that is on direct (legally binding) international regulation, on private regulation by (predominantly) non-state actors and, in the case of companies operating across borders, on the exercise of jurisdiction by states other than the state where the human rights violations (may) occur, including the state where the transnational corporation is domiciled, the so-called home state.³

Regulation and enforcement by host states, where the human rights violations actually take place, is all too often overlooked. Nonetheless, this dissertation submits that neglecting host state regulation and enforcement could jeopardise the comprehensiveness and effectiveness of the whole regulatory framework.⁴ Therefore, without denying the respective significance of international, private and extraterritorial regulation, this dissertation concentrates on the role of host state regulation and enforcement in ensuring that business enterprises are responsible for human rights and argues that, at present, the legal framework of the host state is the most realistic and readily available avenue to enforce corporate accountability for human rights (Section 5). To substantiate that argument, Chapter 1 discusses the specific advantages of host state regulation over the three other regulatory approaches (Section 2), the recent history and political context of the debate on business and human rights (Section 3), and the value of a bottom-up approach (Section 4). The Chapter begins, however, with unravelling, in broad outline, the architecture of the polycentric governance system that, as was said, currently governs the business and human rights field (Section 1).

¹ For legal scholarship on business enterprises as rights holders, see e.g. M. Emberland, The human rights of companies: exploring the structure of ECHR protection (Oxford University Press, 2006).
³ See also D.K. Anton and D. Shelton, Environmental Protection and Human Rights (Cambridge University Press, 2011), 863-864.
⁴ Cf. O. Amao, Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries (New York: Routledge, 2011), 2-3 and 71 (criticising the little attention paid to the legal framework in developing countries (host states) and writing that international law should complement and not substitute home state and host state regulation).
1.1. Business and human rights: a polycentric governance system

The responsibility of business enterprises for human rights is regulated by four regimes that each comprise infinite sources of norms:\(^5\) (1) national and international public law; (2) private regulation; (3) national and international private law; and (4) corporate governance, which internalises the first three regimes.\(^6\) Key to such a polycentric system is that governance is not only sourced in the state, but also in other actors.\(^7\) Before explaining these regulatory regimes, it should already be observed that ‘national’ private or public law can comprise laws from the host state, the home state or even a third state, which is discussed further in Section 1.2.

First of all, national and international public law encompasses all rules developed by one or more states that govern the public sphere, namely intra-state relations as well as (vertical) relations between states and natural or legal persons. Included in this regulatory regime are international human rights law and constitutional law. Moreover, international ‘law’, as used here, consists of hard law as well as soft law, which includes any “international instrument other than a treaty that contains principles, norms, standards or other statements of expected behaviour”.\(^8\) For the purposes of this dissertation, and contrary to some other writings,\(^9\) the term ‘soft law’ only refers to instruments adopted, endorsed or acceded to exclusively by public power and, accordingly, does not comprise private standards which form part of the regulatory regime discussed next.

The second regime, ‘private regulation’ is a form of civil governance based on social compliance mechanisms and comprises all regulatory standard-setting initiatives that are developed and monitored by a variety of non-state actors, ranging from business enterprises themselves, over civil society organisations to intergovernmental organisations and sometimes even states – two examples are the Voluntary Principles on Security and Human Rights and the Ten Principles of the International

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\(^7\) Prenkert, supra note 5, 204.


Council on Mining and Metals. They are called ‘multi-stakeholder initiatives’ when different of these stakeholders are involved at the same time. Precisely because of the implication of actors other than states, this regulatory regime is often called ‘private regulation’, which should evidently be distinguished from ‘private law’. However, given that states sometimes endorse, or participate in, such initiatives, the use of the term ‘private regulation’ can be confusing – although, allegedly, the role of states in private regulation has recently decreased. In any case, and as was said previously, instruments that stem exclusively from public power, even if states act in the context of an intergovernmental organisation, are included in the definition of soft law and belong to the previously discussed regulatory regime. The significant increase in private standard-setting initiatives has by some scholars been described as ‘civil regulation’, ‘re-regulation’ or even as a ‘regulatory renaissance’. 

Thirdly, national and international ‘private law’ governs the horizontal relationships amongst private actors, as opposed to the vertical relationships between states and natural or legal persons (see infra Section 2.1). Any given business enterprise can in principle be affected by rules of private ‘law’ adopted by either the host state, the home state or a third state.

Corporate governance, lastly, concentrates on the management of business enterprises, namely on issues dealing with ownership and control, such as decision-making procedures at companies,

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10 Abbott and Snidal have developed a governance triangle to depict the variety in private regulation, ranging from schemes developed exclusively by either the business community or non-governmental organisations to schemes resulting from a joint initiative, which may even be supported by the state. K.W. Abbott and D. Snidal, “Strengthening International Regulation through Transmittal New Governance: Overcoming the Orchestration Deficit,” Vand. J. Transnat'l L. 42 (2009), 512 and 516-518. See also E.P. Mendes, Global Governance, Human Rights and International Law: Combating the Tragic Flaw (Abingdon: Routledge, 2014). 191. For the two examples, see http://www.voluntaryprinciples.org and https://www.icmm.com/en-gb/about-us/member-commitments/icmm-10-principles.


13 Abbott and Sindal, supra note 10, 541.

14 An example of an instrument on business and human rights that stems exclusively from public power are the Guidelines for Multinational Enterprises adopted by the Organisation for Economic Cooperation and Development. For other examples, see Abbott and Snidal, supra note 10, 514. The UN Global Compact and the International Labour Organization Tripartite Declaration of Principles concerning multinational enterprises and social policy, on the other hand, are classified as private regulation as they involve the participation of stakeholders other than states.

reporting requirements and the ethical responsibilities of directors. Corporate governance generally also reckons with the responsibility that business enterprises have for human rights in accordance with the first three regulatory regimes as part of their so-called ‘corporate social responsibility.’ \(^{16}\) The latter responsibility is concerned with a more extensive set of interests, including aside from human rights also environmental protection and the prevention of corruption, for instance, and is in essence regarded as optional. \(^{17}\) ‘Internalisation’ by a company of its responsibility for human rights generally finds expression in a code of conduct, which does not mean, however, that they accept to be legally bound by such norms. \(^{18}\)

1.2. Strengthening the framework for business and human rights

Although host state regulation and enforcement has attracted some scholarly interest, three discourses seem to remain prominent in the debate as to how the effectiveness of the above-depicted polycentric governance system for business and human rights can be strengthened. Those dominant discourses concentrate on the adoption of legally binding international regulation (a segment of the first regulatory regime, namely ‘hard’ international public law), the development of non-binding standards (a segment of the first regime, namely soft law codes, as well as the second and fourth regulatory regimes) and the exercise of extraterritorial jurisdiction (the third regulatory regime, namely private law, and a segment of the first regulatory regime, namely national public law, but each time by a state other than the one where the violations (may) occur). \(^{19}\) To substantiate the argument that host state regulation and enforcement is an essential component of an effective polycentric system governing business and human rights, this Section briefly explains the downsides to private regulation and the problems with the exercise of extraterritorial jurisdiction. The option of directly binding international regulation, in turn, is discussed in Section 1.3, which describes the recent history and political context


\(^{17}\) C. López, “The ‘Ruggie process’: from legal obligations to corporate social responsibility?” in eds S. Deva and D. Bilchitz, Human Rights Obligations of Business 58 (Cambridge University Press, 2013), 59. Mendes discerns five generations of stakeholder expectations: corporate governance (relating to issues like legal compliance, confidential information, the structure of boards); the prevention of corruption; the interests of voluntary stakeholders (namely employees, customers and suppliers); the interests of involuntary stakeholders (local communities and the environment); and, the public interest. Mendes, supra note 10, 191-195. According to Addo and Martin, the main problem in the field of corporate governance is that there exist too many initiatives and that a common strategy is presently lacking. M. Addo and J. Martin, “The Evolving Business and Society Landscape. Can Human Rights Make a Difference?” in eds. J. Martin and K.E. Bravo, The Business and Human Rights Landscape 348 (Cambridge University Press, 2016), 351 and 367.

\(^{18}\) Zerk (2006), supra note 16, 43.

\(^{19}\) See also Anton and Shelton, supra note 3, 864.
of the debate on business and human rights at the international level so as to show how this option is currently constrained by geopolitical interests.

A first regulatory option that attracts a lot of attention consists of the development of non-legally binding standards through soft law, private regulation and company codes of conduct. Although, as a matter of principle, they are not legally binding, these standards may harden thanks to, first, their consistent application (see also infra Section 1.4) and, second, their impact through the ‘courts of public opinion’. It should be noted that these standards may not only be concerned with the responsibility of business enterprises for human rights but can cover the entire spectrum of corporate social responsibility. Accordingly, they fill the lacunae that presently exist under international law as regards the social responsibilities of business enterprises.

This first regulatory option has its critics, however. A lot of criticism boils down to their very essence, which is that they are voluntary initiatives so that they cannot be judicially enforced when business enterprises, notwithstanding a commitment, pay little attention to them. Moreover, they tend to be developed only after a serious incident caused public outcry. The procedures through which such voluntary standards are developed and subsequently monitored are also believed to offer insufficient guarantees with respect to transparency, participation, deliberation and accountability. Finally, studies into their actual impact on the behaviour of business enterprises have been

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22 See e.g. Mendes, supra note 10, 197 and further.

23 C. Avery, “Business and Human Rights in a Time of Change,” in eds. M.T. Kammenga and S. Zia-Zarifi, Liability of Multinational Corporations under International Law 17 (Den Haag: Kluwer, 2000), 58. Contra Tamo (2016b), supra note 11, 169 (stating that the narrow conceptualisation of multi-stakeholder initiatives as non-binding is no longer sufficient); J. Nolan (2014), supra note 15, 13 (arguing that “the differentiation between soft and so-called hard (legally-binding) law is not binary but one that should be viewed as developing on a continuum”).

24 A good example is the Accord on Fire and Building Safety in Bangladesh that was adopted following the Rana Plaza disaster, resulting in the death of over 1,100 people. Note, however, that this is a legally binding agreement, concluded between trade unions, brands and retailers, albeit that they accede to this agreement on a voluntary basis. See http://bangladeshimaccord.org.

inconclusive.⁴⁶ Without being opposed against voluntarism, also John Ruggie, the former Special Representative on Business and Human Rights (see infra Section 1.3), has expressed his concern that “companies do not necessarily recognize those rights on which they have the greatest impact” and that “some interpretations [of international human rights] are so elastic that the standards lose meaning, making it difficult (…) to assess performance against commitments.”²⁷

In the case of transnational corporations,²⁸ another regulatory option to strengthen the polycentric system governing business and human rights relies on the exercise of extraterritorial jurisdiction by states other than the host state, namely by the state where the holding company is based (the home state) or even by a third state where that corporation is also active. Generally, the home states or third states that are expected to exercise extraterritorial jurisdiction are developed countries, or at least emerging economies, so that, arguably, their position of power vis-à-vis business enterprises is stronger, their legal institutions better developed and their human, financial and technical resources less scarce.²⁹ These states could assume either one or more of the following authorities: to regulate how business enterprises vested or active within their territory act abroad (prescriptive or legislative jurisdiction); to make their judiciary competent to scrutinise the foreign conduct of such enterprises (adjudicative or judicial jurisdiction); and, to deploy their own resources to induce or compel legal compliance by these enterprises when acting abroad (enforcement or executive jurisdiction).³⁰

Given that under general international law jurisdiction is, in principle, founded on a territorial basis and thus limited to a state’s territory, any state that seeks to subjugate a company to its authority for its conduct in another state, should have a legitimate basis for exercising such extraterritorial

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²⁸ For a definition and discussion, see infra Section 2.3.
jurisdiction. Hence, notwithstanding a few exceptions, such as the principle of universal jurisdiction for genocide, crimes against humanity, war crimes and torture, a sufficiently close nexus is generally required between the state exercising jurisdiction and the facts over which it exercises jurisdiction, for instance when the perpetrator or the victim is a national of the state (active versus passive personality principle) or when the facts have adverse effects within the state’s territory. In principle, however, the exercise of extraterritorial jurisdiction is considered permissible but not obligatory.

Nevertheless, some scholars have called upon states to exercise extraterritorial jurisdiction vis-à-vis business enterprises that commit human rights violations abroad, precisely because in the archetypical case of corporate human rights abuse, the host state is a developing country where government lacks the resources and political willingness to regulate and monitor the conduct of business enterprises that bring investment to their country, and sometimes even is the main perpetrator of human rights violations. An exception to the principle of territorial jurisdiction would mainly serve, first, to admit (or even require) that home states regulate the foreign activities of transnational corporations vested within their territorial jurisdiction (home state regulation) and, second, to allow that victims of human


35 See e.g. Baughen, supra note 32, 7.
rights violations, if they wish, pursue a remedy in the home state or possibly even in a third state in which the transnational corporation is active (transnational litigation\textsuperscript{36}).

Notwithstanding such calls, however, home state regulation and transnational litigation remain exceptional, as many states refuse to adopt such regulations and deny adjudicative jurisdiction over claims related to events abroad.\textsuperscript{37} In any case, home state regulation and transnational litigation are unlikely to constitute an effective remedy for all victims due to the various obstacles that they would encounter in accessing such remedies, not in the least because they generally belong to poor and vulnerable groups who lack the necessary resources to seek redress in any state other than their own – which is already hard in itself as the case study will demonstrate.

1.3. Recent history and political context of business and human rights

In order to explain why also the third regulatory option, namely directly binding international regulation, arguably constitutes too big a leap for the time being, the history to the debate on business and human rights must be outlined. Concerns about business enterprises\textsuperscript{38} (dis)respecting human rights already arose at the birth of contemporary international human rights law, and were soon accompanied by a call to have the responsibility of business enterprises for human rights directly regulated under international law.\textsuperscript{39} The first few decades, however, the call for regulation was only accommodated by private regulation and soft law, until in the early 2000s the strife for directly binding international regulation was nearly successful. Indeed, after years of work, in 2003, the Sub-Commission on the Promotion and Protection of Human Rights approved the UN ‘Norms on the Responsibilities of


\textsuperscript{37} One argument against home state ‘regulations’ reads that they interfere with the sovereignty of the host state, whereas \textit{forum non conveniens} (the finding that there exists another forum that is more appropriate to hear the claim) constitutes a typical exception to ‘transnational litigation’ in common law countries. See the discussion in e.g. Broecker, \textit{supra} note 34, 187-195 and Seck (2008), \textit{supra} note 34, 185-196.

\textsuperscript{38} Similar concerns have been raised in relation to other non-states actors. See e.g. Reinisch, \textit{supra} note 31, 77 (referring \textit{inter alia} to the loss of control by states over transnational corporations, liberalisation, privatisation and deregulation).

\textsuperscript{39} The Havana Charter of 1948 for an International Trade Organisation already stipulated fair labour standards. The Charter never entered into force, however, \textit{inter alia} because the Senate of the United States of America refused to ratify the agreement. Nevertheless, most authors only start their historical account of the debate in the 1970s when the UN Economic and Social Council commissioned a study into the impact of multinational corporations. This resulted in the creation of a commission to elaborate a code, which was never adopted, however. For a brief discussion of the history to the business and human rights debate, see e.g. Bilchitz (2008), \textit{supra} note 29, 754 and further; D. Bilchitz and S. Deva, “The human rights obligations of business: a critical framework for the future,” in eds. S. Deva and D. Bilchitz, Human Rights Obligations of Business 1 (Cambridge University Press, 2013), 4-10; J. Nolan (2013), \textit{supra} note 9, 146-154.
Transnational Corporations and Other Business Enterprises with regard to Human Rights’, in short the ‘UN Norms’. Nevertheless, the consensus reached amongst the experts that sit on the Sub-Commission did not set a precedent for the former Commission on Human Rights itself (the present Human Rights Council), which could not endorse the UN Norms in view of the strong opposition by the business community and a number of states who were eager to protect the interests of businesses. In order to placate the supporters of the UN Norms, the Commission instead appointed John Ruggie Special Representative to the Secretary-General on business and human rights.

Years of research by the Special Representative and his team, which included consultations with relevant stakeholders, culminated in the UN Guiding Principles on Business and Human Rights (the UNGPs), which were adopted (without a vote) by the Human Rights Council in 2011. These Principles are meant to guide the implementation of the three-pillar Framework that had been introduced by John Ruggie three years earlier. Under the latter ‘protect, respect, remedy’ Framework, states have a (legal) obligation to protect human rights against possible interferences by business enterprises, which themselves have a (moral) responsibility to respect human rights, while victims should be ensured access to effective – judicial and non-judicial, state-based and non-state-based – remedies.

The fundamental difference between the UN Norms and the UNGPs is that the latter do not create any direct, legally binding duties for business enterprises, nor do they establish an international enforcement mechanism. At the same time, business enterprises are assumed to be ‘morally’ obliged to respect human rights. The UNGPs are then best understood as restating international law, without

42 This is not necessarily a sign of unanimity. According to Deva, for instance, no vote was organised in order to prevent that certain states would be forced to either vote against or to abstain. S. Deva, “Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles,” in eds. S. Deva and D. Bilchitz, Human Rights Obligations of Business 78 (Cambridge University Press, 2013), 90-91.
43 UNGPs, annexed to Report A/HRC/17/31, supra note 33, endorsed by Resolution 17/4 of the Human Rights Council of 16 June 2011, UN Doc. A/HRC/RES/17/4 (6 July 2011). The endorsement of the UNGPs was a first in the sense that the Council (nor the former Commission on Human Rights) had never before endorsed a normative instrument that was not negotiated by states themselves. Ruggie (2016), supra note 41, 64.
45 Notwithstanding scepticism about this moral duty, as discussed previously (supra Section 1.2), various (general or thematic) voluntary initiatives have been adopted at different levels of governance (national, regional and international) to promote compliance therewith.
46 Contra O. De Schutter, “Foreword,” in eds S. Deva and D. Bilchitz, Human Rights Obligations of Business xv (Cambridge University Press, 2013), xxi-xxii (denying that they are a restatement of international law and calling them a tool and practical guidance).
creating new law: “they elaborate upon the implications of already existing standards and practices for states and businesses” and “unify these standards and practices under a single framework”. The advocates of the UN Norms were evidently not satisfied with the UNGPs, precisely because they believe the time has come to change this paradigm of international human rights law. The launch of a new attempt to move international law in that direction was thus only a matter of time.

This happened in June 2014, when the Human Rights Council voted a resolution establishing an open-ended intergovernmental working group ‘for the elaboration of a legally binding instrument on business and human rights’ (Resolution 26/9). Nevertheless, at least pending the process of negotiating, drafting and adopting such instrument, the UNGPs remain vitally important, which was underscored in another resolution adopted by the Human Rights Council the following day (Resolution 26/22). Notwithstanding the impression that Resolution 26/9 may create, this process of developing a binding treaty on business and human rights has, at least presently, little prospect of success. This was already evidenced by the fact that whereas Resolution 26/22 was adopted without a vote, the vote on Resolution 26/9 was divided, with twenty members of the Council voting in favour, fourteen against and thirteen abstaining. Furthermore, as displayed in Table 1 below, amongst the ‘no’ voters were the United states of America (US), the member states of the European Union (EU) as well as Japan. This voting pattern demonstrates that the debate on business and human rights is not free from geopolitical interests. Evidently, a binding treaty on business and human rights cannot be effective if it is signed and ratified mainly by developing countries.

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<th><strong>Table 1. Voting pattern for Resolution 26/9</strong></th>
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<td><strong>Yes</strong></td>
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<td><strong>African Group</strong></td>
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<td><strong>Asia-Pacific Group</strong></td>
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47 Bird, Cahoy and Dhooge, supra note 26, 622.
50 This is not necessarily a sign of unanimity, however. See also supra note 42.
51 The composition of the Human Rights Council should be taken into account, however, as its membership is limited to forty-seven states, elected by the UN General Assembly.
This pattern was largely mirrored in the attendance list of the first session of the intergovernmental working group that took place in July 2015. The EU only attended the first meetings – France stayed throughout the session, however – while the US, Australia and Canada, for instance, were not represented. Moreover, during its short attendance the EU recalled its position on Resolution 26/9 and insisted that a panel discussing the implementation of the UNGPs would be added to the programme. The attendance list of the second session of the intergovernmental working group, in October 2016, was already an improvement, with the EU attending the entire session this time, as well as states like Germany, the United Kingdom (UK), Australia, Japan and the Republic of Korea amongst others. Nevertheless, the policy position of these states does not seem to have changed much. This is illustrated, for instance, by the EU’s persistence that “that any further steps must be inclusive, rooted in the Guiding Principles” and that “the motto should remain to implement existing obligations”.

Since the adoption of Resolution 26/9 there are thus two parallel processes: (preliminary discussions on) the elaboration of a binding treaty and the implementation of the UNGPs by states adopting

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52 Human Rights Council, Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument, UN Doc. A/HRC/31/50 (5 February 2016), paras 6-7.

53 Ibid. para. 13.


55 Ibid. para. 112. In advance of the meeting, the EU had also contributed views in writing, reiterating that a dedicated agenda item should be included in the programme to reaffirm the commitment by all States to implementing the UNGPs.

national action plans, in which they identify priority measures to operationalise their obligation to protect (for a discussion of these plans, see infra Part II, Section 1.1.1.2). The question is then whether these two processes are competitive or complementary. Opinions diverge. On one side of the spectrum, a fear exists that the treaty process diverts already scarce resources, that some states use it as an excuse to rest on their laurels, awaiting its outcome, and that the precious consensus that had been achieved on the UNGPs will fade away.\(^{57}\) In relation to the latter objection, it is in any case true that the adoption of Resolution 26/9 immediately sparked opposition.\(^{58}\) On the other side, Blackwell and Vander Meulen,\(^{59}\) for instance, discern at least five mutual benefits of the two ongoing processes, including the fact that by adopting and reviewing national action plans, states can identify gaps in protection that should be addressed in the treaty as well as common ground with other states on which consensus for a treaty is within reach.

Whilst, ideally, the two processes should indeed reinforce each other,\(^{60}\) the answer to the question whether the elaboration of a binding treaty and the implementation of the UNGPs through the adoption of national action plans are competitive or complementary processes is probably located somewhere in-between. A (possible) treaty would definitely benefit from the prospecing exercises that states undertake when they prepare, draft and review their national action plans, provided that those experiences are adequately taken into account by the treaty drafters, while the protection of human rights would likely be bolstered by a treaty. Nevertheless, it is noticeable that those countries that have already published a national action plan or that are in the process of drafting one, are known to be opposed to the treaty, whereas the sponsors and supporters of the binding treaty have not yet taken any step towards drafting a national action plan and seem to be awaiting the outcome of the treaty process.\(^{61}\)

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60 See also J. Nolan (2016c), supra note 34, 72.

61 The countries that have already published a national action plan (dd. 1 May 2017) are Colombia, Denmark, Germany, Finland, France Italy, Lithuania, the Netherlands, Norway, Sweden, Switzerland, the UK and the US. Several other countries are in the process of developing a plan, and most of these are either European or Latin American countries, with only a few African (Kenya, Mozambique, Mauritius and Morocco) and Asian countries (Japan, Malaysia, Myanmar, Thailand).
1.4. Bottom-up law-making

Creating international law has long been a monopoly of sovereign states, who negotiated and ratified treaties, for instance, depending on whether they coincided with their interests. This conservative, Westphalian narrative is bygone. On the one hand, non-state actors, like intergovernmental organisations and international nongovernmental organisations, are increasingly implicated in international law-making. On the other hand, international rules no longer emerge only from the traditional sources of international law stipulated in Article 38(1) of the Statute of the International Court of Justice, but emerge from diverse sources, which are not necessarily legally binding, or even state-based. In sum, contemporary international law makes provision for multiple methods of law-making and for the involvement of diverse actors – ‘global legal pluralism’.

International norms can thus not only be imposed from the top down, but also be developed from the bottom up. In the latter scenario, the norms flow from the practices of relevant stakeholders, which are, according to Levit, practitioners who have “intimate knowledge of their niche trade and/or interest areas and who constitute norms rooted in the nitty-gritty technicalities of their trade rather than the winds of geopolitics.” A crucial gain of bottom-up law-making is that even norms that do not coincide with the interests of states may arise, although, on the flipside, the independence and impartiality of the different stakeholders involved in such law-making is not always guaranteed. Aside from their development through practice, Levit identifies a second ‘defining feature’ of bottom-up law-making, which is that these norms (which are voluntary at least from the perspective of international law) gradually become more restrictive thanks to their repeated and consistent application in practice and, sometimes, their subsequent endorsement by states.

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64 Article 38(1) of the Statute stipulates the following: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions (…) establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” Statute of the International Court of Justice, adopted on 26 June 1945, 993 UNTS 25.
65 See also Levit (2007), supra note 62, 395; Osofsky, supra note 62, 193-194.
67 Ibid. 417.
68 Ibid. 409.
A bottom-up approach that capitalises “on the acquired knowledge of local actors as an essential resource for developing international norms and policies” seems all the more pertinent for international ‘human rights’ law. This branch of the law is, after all, designed to confer rights to individuals, which makes that the parties that are primarily interested in compliance with human rights are individual rights holders, whose first priority is protection in everyday life, at the local level. This is poetically captured in the following well-known quote from Eleanor Roosevelt.

In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: The neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

As international human rights law is meant to empower people, the extent to which rights holders are actually capable of enforcing their rights is an indicator of its effectiveness. In many instances, human rights are the only recourse that vulnerable people have left to defend themselves against injustice. Besides, that human rights should foremost be protected at the local level also finds expression in the general principle of international law according to which domestic remedies should be exhausted before having recourse to any available international remedy.

The specific issue of business and human rights, arguably, even demands bottom-up law-making. One reason is that companies are fundamentally different from states, as their birth-right is profitmaking rather than social welfare. While opinions on the precise meaning of the responsibility of business

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72 De Feyter and Parmentier, supra note 70, 1-2 (writing inter alia that “[i]t is at the local level that the possession of human rights either proves real or illusory”).


74 De Feyter (2011), supra note 73, 14-15.
enterprises for human rights still differ – due to diverging philosophical and political ideologies – there is little disagreement that this responsibility cannot be identical to that of the state (see also infra Part II, Section 1.2.1.2). Practical needs and experiences at the domestic level could then guide the delimitation and definition of corporate human rights duties. As other scholars have argued, an additional reason why the business and human rights debate requires a bottom-up approach, is that the needs of potential victims should be at the centre of attention, as well as the experiences of local actors from civil society who seek to create responsibility for human rights on the part of business enterprises. A third consideration is that when international law is developed from the bottom up, it is more likely to leave the required margin for local stakeholders, in particular government actors, business enterprises, civil society and potential victims of human rights violations, to internalise the emerging norms. Without such margin international law risks to be in vain. Fourthly and finally, a bottom-up approach is inherent to polycentric governance, which is exactly aimed at providing parties with various mechanisms to solve conflicts at different levels of governance.

Evident sources of bottom-up law-making in the business and human rights field are private standard-setting initiatives and company codes of conduct. Another source with high potential, however, are domestic judgments. National courts are crucial for the enforcement and development of international law, not only because they offer the first line of defence, but also because each time domestic courts are asked to engage with international law, they need to determine the existence and

75 Cf. Alvarez, supra note 63, 30 (arguing that corporate obligations (and rights) should be defined from the bottom-up, having regard to what companies are and what they are not).
76 See also Deva (2015), supra note 81, 30 (exploring bottom-up options to concretise the corporate human rights duties); A. Ramasastry, “Closing the governance gap in the business and human rights arena: lessons from the anti-corruption movement,” in eds. S. Deva and D. Bilchitz, Human Rights Obligations of Business 162 (Cambridge University Press, 2013), 183-184 (arguing that state practice can help other states to understand what it means to prohibit certain types of conduct and that national legislation is an important source of potential global norms); H.F.C. Rivera, “Business & Human Rights: From a ‘Responsibility to Respect’ to Legal Obligations and Enforcement,” in eds. J.L. Černič and T. Van Ho, Human Rights and Business 303 (Oisterwijk: Wolf Legal Publisher, 2015), 318 (acknowledging the possible role of domestic courts).
80 Prenkert and Shackelford, supra note 2, 460-461.
82 See also Bilchitz and Deva, supra note 39, 25; Rivera, supra note 76, 304-305.
content of those norms.\textsuperscript{83} Moreover, given that judicial dialogue amongst different jurisdictions is increasingly common, these determinations are likely to influence the application of international law by other courts as well.\textsuperscript{84} International law may thus emerge from national practices, especially when domestic legal systems start converging.\textsuperscript{85}

1.5. First things first: host state regulation and enforcement through litigation

The two greatest achievements of the UNGPs are, firstly, that they have rationalised the current international legal framework and thereby set a clear, common baseline for all future discussions on business and human rights, and, secondly, that they have received an enormous degree of endorsement by the different stakeholders, which was a first with respect to this issue\textsuperscript{86} – although this is not to say that the UNGPs are without criticism.\textsuperscript{87} These two achievements align with the general thrust of the former Special Representative (1) to secure “thick stakeholder consensus” on a conceptual and normative framework (2) which would establish “the parameters and perimeters” for the gradual further development of the international regime governing business and human rights – a ‘building blocks’ approach, as it were.\textsuperscript{88} Hence, the adoption of the UNGPs merely represented the “end of the beginning”\textsuperscript{89}.

International, private and extraterritorial regulation are each valuable in their own right and contribute to the construction of the international regime. It is submitted, however, that host state regulation is


\textsuperscript{85} Tully (2012b), \textit{supra} note 30, 41.


\textsuperscript{87} See e.g. the analysis of the UNGPs in S. Deva and D. Bilchitz (eds), \textit{Human Rights Obligations of Business} (Cambridge University Press, 2013).

\textsuperscript{88} Report A/HRC/17/31 on the UNGPs, \textit{supra} note 33, para. 13; Ruggie (2014), \textit{supra} note 6, 8 and 10; Ruggie (2016), \textit{supra} note 41, 64. To achieve those goals, Ruggie adopted an approach of, what he himself called, “principled pragmatism”, “an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most - in the daily lives of people.” Commission on Human Rights, “Promotion and Protection of Human Rights.” Interim report of the Special Representative, John Ruggie, UN Doc. E/CN.4/2006/97 (22 February 2006), para. 81. For a critique of ‘principled pragmatism’ and the search for ‘thick stakeholders consensus’, see e.g., Bilchitz and Deva, \textit{supra} note 39; Deva (2013), \textit{supra} note 42.

\textsuperscript{89} Report A/HRC/17/31 on the UNGPs, \textit{supra} note 33, para. 13; Ruggie (2014), \textit{supra} note 6, 15. See also De Schutter (2013), \textit{supra} note 46, xviii (describing the UNGPs as “a step in a process that is still unfolding”).
too often demoted by scholars, practitioners and politicians alike. Nonetheless, international, private, extraterritorial and host state regulation should complement and reinforce each other, because in tandem these different regulatory regimes have the best chance of establishing a comprehensive framework within which victims are actually able to vindicate their rights vis-à-vis business enterprises. What is needed is a “multi-pronged, multi-layered and multi-stakeholder approach that institutionalizes a networked form of governance”.

Furthermore, the most urgent concern in the contemporary business and human rights debate is accountability, namely how the human rights duties of business enterprises can and should be enforced. In comparison with a binding treaty, non-legally binding standards and extraterritorial regulation, which each have their limitations as was discussed earlier, host state mechanisms (host state regulation and litigation) are “easier to access, require fewer resources and provide relief more quickly”. They are the most efficient and single readily-available trajectory to enforce the responsibility of businesses for human rights, and should in any case be part of the story.

Admittedly, focusing on the host state is no panacea either. For one, many host states lack the willingness and/or capacity to ensure adequate regulation and enforcement — note, however, that the focus of this dissertation is not on weak governance zones (see infra Part IV, Section 1.2.2.1). Another evident drawback is that the approaches by different states likely diverge. Such divergence is not to be heartened, since it could affect a state’s locational environment and thus result in companies moving their business to the countries where the risk of incurring liability is the lowest.

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91 See also Amao, supra note 4, 2-3 and 110; McBeth and Nolan, supra note 90, 243. Cf. J. Nolan (2014), supra note 15, 9, 15 and 21 (concluding that private regulation alone is insufficient and that ultimately states must be involved).


94 De Feyter (2011), supra note 73, 14-15.

95 Cf. E. De Brabandere, “Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility,” Hum. Rts. & Inf'l Legal Discourse 4 (2010), 67 (arguing that the focus should lie on existing mechanisms and obligations); J. Nolan (2014), supra note 15, 9-10 (noting, however, that “the reality is that in many countries this simply is not happening”); C. van Dam, “Human Rights Obligations of Transnational Corporations in Domestic Tort Law,” in J.L. Černič and T. Van Ho, Human Rights and Business: Direct Corporate Accountability for Human Rights 475 (Oisterwijk: Wolf Legal Publisher, 2015), 475 (describing tort law as one of the main instruments for holding companies legally accountable).


97 Ibid. 3.

being subjected to different rules depending on the country in which they operate also creates uncertainty, which again affects the investment climate. Some kind of international initiative could, at least partially, respond to this challenge. The question is, however, how such intervention should look like, in form and substance. Indeed, an international initiative should not necessarily take the form of hard law (a treaty) and, as was previously explained (supra Section 1.3), insufficient support currently exists for an instrument that would directly regulate the human rights obligations of business enterprises as a matter of international law and, possibly, create an international enforcement mechanism. A less far-reaching, more ‘minimalist’ approach thus seems better suited. In that regard, any international initiative should be concerned, first and foremost, with enhancing the effectiveness of the international legal framework on business and human rights as it was shaped by the UNGPs.\textsuperscript{99} This will, however, be discussed more in detail in Part IV.

Ensuring that business enterprises can effectively be held accountable for human rights is essential. Therefore, one of the first concerns should be to secure the ‘boundary conditions’ that safeguard rights holders’ ability to enforce their rights \textit{vis-à-vis} business enterprises at the domestic level. In order to identify those elements, the domestic operationalisation of the UNGPs has to be scrutinised, both in theory and in practice. As the Working Group on Human Rights and Business has acknowledged, this issue is underrepresented in research.\textsuperscript{100}

Research in the field of business and human rights lacks comprehensive data on the number and nature of complaints against companies for their adverse impacts and the effectiveness of the bodies tasked with investigating and remediating those impacts.\textsuperscript{100}

Consequently, this dissertation tackles the business and human rights debate, firstly, by focussing on the host state and, secondly, by reviewing the challenges and opportunities for victims of human rights violations by business enterprises to vindicate their rights, in particular through litigation. Local stakeholders take centre stage in this perspective, but the higher objective is to identify gaps in the business and human rights framework which could be addressed through an international initiative. Accordingly, the question of strengthening the responsibility and accountability of business enterprises for human rights is tackled from the bottom-up and benefits from the advantages of that approach, which were discussed previously (\textit{supra} Section 1.4).\textsuperscript{101}

\textsuperscript{99} Cf. J.H. Knox, “Horizontal Human Rights Law,” Am. J. Int’l L. 102 (2008), 45 (arguing that the real need is to specify the duties of companies so that they may be implemented more effectively at the domestic level). See also Ratner, \textit{supra} note 98, 543.

\textsuperscript{100} Report A/70/216 of the Working Group on human rights and business, \textit{supra} note 86, para. 88.

\textsuperscript{101} According to Aguilar, research on why and how victims use human rights claims is lacking. Aguilar, \textit{supra} note 69, 131.
2. ‘BUSINESS AND HUMAN RIGHTS’ AND ‘STRATEGIC LITIGATION’: SOME DEFINITIONS

Details matter in law, and lawyers like to dispute the exact meaning of legal terms. Therefore, a clear definition of key legal concepts that are used throughout this dissertation is indispensable. Many of these concepts serve to distinguish between different forms of, or dimensions to, one phenomenon, construct or idea, creating so-called ‘typologies’. Although these typologies are crucial to rationalise and understand the law, also in this dissertation they are not intended to be absolute and merely serve an academic purpose.  

(…) typologies are not the point. Typologies are at best abstract instruments for temporarily fending off the complexities of concrete reality that threaten to overwhelm our circuits. Be they dichotomous or trichotomous, typologies are ladders to be climbed and left behind, not monuments to be caressed or polished.  

2.1. Disentangling ‘the private’ and ‘the public’

Originally, legal traditions inspired by Roman law adhered to a strict separation between private and public law. Human rights, as they were codified in international law and entrenched in numerous constitutions since the 1950s, were traditionally classified as public law, because they governed the relationship between citizens and the state. Compared with this traditional approach, the very idea of ‘private human rights duties’ constitutes a paradigm shift. The distinction between private and public law is, however, a tenuous one in contemporary society. Not only do different areas of law combine corrective (private) and social (public) objectives, but also the basic idea that the private sphere is subject to a purely private market logic is challenged, since public power defines private law and,  

102 As Westerman has written “rational reconstruction is not carried out for its own sake but is a means to a further end”. P.C. Westerman, “Open or autonomous? The debate on legal methodology as a reflection of the debate on law,” in ed. M. Van Hoecke, Methodologies of Legal Research 87 (Oxford: Hart Publishing, 2013), 92.

103 Shue acknowledged this caveat when he distinguished between duties to avoid depriving, to protect from deprivation and to aid the deprived. H. Shue, Basic Rights: Subsistence, Affluence and U.S. Foreign Policy (Princeton University Press, 1996), 160.


105 Traditionally, private law is considered to be concerned with correcting wrongdoings between individuals and public law with the social good and duties owed towards society. Environmental law, however, is a typical example of an area of law displaying both corrective and social objectives. See also McLeod-Killmurray, supra note 93, 292-293; D. Oliver and J. Fedtke, “Human Rights and the Private Sphere: The Scope of the Project,” in eds. D. Oliver and J. Fedtke, Human Rights and the Private Sphere 3 (Abingdon: Routledge, 2007b), 22.
hence, creates private power.  

106 How the distinction between ‘the private’ and ‘the public’ is blurred is fittingly expressed in the following quote from a judgment of the South African Constitutional Court.

Much of this interesting debate is concerned with an analysis of power relations in society; the shift which has taken place in the demarcations between “private law” and “public law”; how functions traditionally associated with the state are increasingly exercised by institutions with tenuous or no links with the state (…). Suffice it to say that it could be dangerous to attach consequences to or infer solutions from concepts such as “public law” and “private law” when the validity of such concepts and the distinctions which they imply are being seriously questioned.  

Although defining ‘private law’ as non-public law thus seems faulty, for reasons of clarity and academic consistency the concept is still used in this dissertation to designate those rules that regulate the relationships between private actors.  

107 ‘Private actors’, in turn, are all natural and legal persons that are not organs of the state and that do not act as a public actor, whose conduct is attributable to the state.  

108 The latter scenario occurs when a private actor is empowered by law to exercise public or regulatory functions, when it acts under the instructions, directions or control of the state or when it is entirely dependent on the state, and violates human rights in that context.  

110 Generally, a different term is used to describe ‘actors other than the state’ when that discussion concerns actors operating on the international scene or ‘transnationally’, without representing a single state. Examples are intergovernmental organisations, international nongovernmental organisations and transnational corporations. Instead of ‘private actors’ those actors are commonly called ‘non-state actors’. Accordingly, to designate actors other than (organs of) the state this dissertation employs the term ‘private actors’, when they operate domestically, and ‘non-state actors’, when they operate transnationally.

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107 Fose v Minister of Safety and Security (CCT14/96) [1997] ZACC 6 (5 June 1997), para. 57.

108 For an interesting legal-philosophical argument as to why private law should be preserved alongside public law, see F. Du Bois, "Private Law in the Age of Rights," in E. Reid and D. Visser, Private Law and Human Rights 12 (Edinburgh University Press, 2013).

109 The increased use of ‘public’ human rights and constitutional rights in the private sphere is sometimes called the ‘constitutionalisation’ or ‘publicisation’ of the private sphere or the ‘privatisation’ of constitutional law. Grabowska, supra note 104, 63; Oliver and Fedtke (2007b), supra note 105, 22.

110 Also this term can be contested, as private relationships are constituted by the state and private actors exercise the powers that are conferred on them by the state. See e.g. M. Tushnet, “The Issue of State Action/Horizontal Effect in Comparative Constitutional Law.” Int'l J. Const. L. 1 (2003), 79.

Finally, in the context of the case study, the term ‘civil society actors’ embraces any private actor that constitutes some kind of organisation or association – hence, excluding individual natural persons – and that has specialised knowledge about issues related to business and human rights as well as practical experience with trying to safeguard human rights against possible violations by business enterprises. They are thus a sub-category of private actors, which seek to hold companies accountable without themselves being directly affected by the corporate conduct, either because they advocate for particular issues, such as environmental protection, sustainable development and/or human rights, or because they offer legal services. Mostly they are domestic private actors, although they may be assisted by transnational agents, such as international nongovernmental organisations.

The individuals who work for, or are a member of, civil society actors, are either called ‘members of civil society’ or are designated with the term describing their position, such as ‘lawyers’ or ‘activists’ (see also infra Part III, Section 2.1.2).

2.2. Private actors and human rights: which norms and duties?

When used in this dissertation, the concept ‘human rights norms’ encompasses all norms whether they are codified in national or international instruments and emanate from hard law, soft law or private regulatory initiatives. Every ‘norm’ consists of the substantive right itself, the duties imposed by that right, and the underlying values and purposes. Accordingly, also the terms ‘human rights’ and ‘human rights duties’ have a generic meaning. No distinction is made a priori based on whether they concern international human rights or constitutional rights, and first, second or third generation rights, nor on whether they are incorporated in a legally binding or voluntary norm and have prescriptive or persuasive force.

The question regarding the possible human rights duties that private actors may bear has arisen in two, very different ways. A first way is through the idea of ‘converse duties’, which are duties that rights holders owe to society or to the state, like the duty to place certain physical abilities at the service of the state. Such duties have been criticised, because they actually reduce the protection of rights holders.

112 See also M. Langford, “Introduction: Civil Society and Socio-Economic Rights,” in ed. M. Langford, Socio-Economic Rights in South Africa 1 (Cambridge University Press, 2015), 2 (defining civil society actors as organisations that have some organised or associational form).

113 Compare with Levit’s definition of ‘practitioners’ in her discussion of bottom-up law-making and with Handmaker’s definition of ‘civic actors’. Levit (2007), supra note 62, 409. See also J. Handmaker, Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa (Antwerp: Intersentia, 2009), 2.

114 In this regard it is interesting to note that, according to Roseman and Gloppen, transnational agents rarely drive litigation and that the main drivers are domestic actors who are, however, motivated by problems associated with transnational evolutions. M.J. Roseman and S. Gloppen, “Litigating the right to health: Are transnational actors backseat driving?” in eds. A.E. Yamin and S. Gloppen, Litigating Health Rights 246 (Cambridge: Harvard University Press, 2011), 264.

and could be abused by states either to deny certain rights or to overly restrict them. In contrast, the duties that rights holders owe vis-à-vis each other, like the duty not to interfere with the rights held by others, are called ‘correlative duties’. Such duties should strengthen the protection of rights holders, and are not meant to alter the obligations of the state. This dissertation is only concerned with correlative duties, since what is at stake is the protection of rights holders against business enterprises, which in principle also hold certain rights.

That business enterprises have human rights duties does not automatically entail that such duties are imposed by a legally binding and judicially enforceable norm. The binding nature of a human rights norm can range from making business enterprises merely ‘responsible’ for human rights, to triggering their ‘accountability’ and perhaps even their ‘liability’.

First of all, a norm creates a ‘responsibility’ for human rights as soon as the duty bearer is (morally or ethically) expected to respect those rights and to comply with the duties that they create. Accordingly, in this dissertation the term ‘responsibility’ is not meant to designate secondary norms of responsibility for human rights violations, unless it is explicitly stated so. Any human rights norm – provided that it is capable of taking effect against private actors (see the discussion on horizontal effect, infra Part II, Section 1.2.2.1) – can create a responsibility on the part of business enterprises to respect the right incorporated therein. The social expectation that business enterprises respect human rights is hardly controversial and is reflected in the second pillar of the UNGPs. Nowadays, also the business community is unlikely to dispute that companies bear a responsibility for human rights; it is

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117 See also M. Karavias, Corporate Obligations under International Law (Oxford University Press, 2013), 177; Mendes, supra note 10, 190. See also the discussion on attributing obligations and apportioning responsibility in W. Vandenhole, “Obligations and responsibility in a plural and diverse duty-bearer human rights regime,” in ed. W. Vandenhole, Challenging Territoriality in Human Rights Law 115 (Abingdon: Routledge, 2015). Note, however, that international law is not very familiar with the idea of shared responsibility.

increasingly accepted that business should not only be concerned with profit but also with people and planet (the triple bottom line).\textsuperscript{120}

Nevertheless, when a human rights norm is not accompanied by a mechanism through which rights holders can demand duty bearers to justify non-compliance, the binding force of that norm remains quite limited. In that case, the norm may create a responsibility, but there is no ‘accountability’. Such human rights norms are mere privileges that rights holders can use to restrain others who try to prevent them from exercising their rights.\textsuperscript{121} For accountability to exist, rights holders should have the opportunity to demand that duty bearers formally justify their conduct in light of their duties, through judicial, state-based non-judicial or non-state based remedies. These mechanisms only create real accountability, however, if they ensure transparency, answerability and controllability.\textsuperscript{122} Many non-legally binding standards are accompanied by a (non-state-based) accountability mechanism, and the number of companies committing themselves to such standards is increasing as well. Accordingly, aside from recognizing their responsibility for human rights, many companies have also come to accept, at least to a certain extent, that they can be called to account for their conduct.

When a human rights norm is codified in a legal norm that is embedded in a system of rules that also create a forum and prescribe the procedures for the (quasi-)judicial enforcement of the norm in that forum, the responsibility of duty bearers for the human right at stake is not merely a moral or social responsibility, but a legal responsibility.\textsuperscript{123} In that case, business enterprises can be called to account for their behaviour in court. Hence, they may be liable for the legal consequences of their behaviour provided that the specific elements for such liability to exist are present (which differ from one legal system to the other and depend on factual and legal circumstances).\textsuperscript{124}

It should be stressed that whether and to what extent business enterprises bear human rights duties has no impact on the duties of states. Precisely because the respective obligations of business enterprises


\textsuperscript{121} Cf. De Schutter (2010), \textit{supra} note 30, 401.


\textsuperscript{123} Cf. Reinisch, \textit{supra} note 31, 39 (enumerating the elements of a legal framework).

\textsuperscript{124} See also A. Clapham, Human Rights Obligations of Non-State Actors (Oxford University Press, 2006), 195 (defining accountability as comprising only voluntary initiatives, excluding liability).
and states are fundamentally different (for instance, ‘do not violate’ versus ‘enforce regulations that should prevent violations’), they are always complementary, as will also be discussed in the case study (infra Part III, Chapter 2). Accordingly, human rights duties on the part of business enterprises can only strengthen, and never weaken, the protection of rights holders.

2.3. Business enterprises: what’s in a name

The terms ‘business enterprise’ and ‘company’ are used here as generic and interchangeable concepts to designate any undertaking that manages a business or trade. Whilst many business and human rights scholars concentrate on the legal status of ‘transnational corporations’ or ‘multinational enterprises’, the nationality or legal incorporation of a company is not considered a relevant factor for the purposes of this dissertation. Accordingly, ‘companies’ may be entirely domestically-owned, have listings on a foreign stock exchange or even be controlled by a foreign-based parent company. Although a characteristic of transnational corporations is that no single state may be able to control them, because they can easily swift capital from one country to the other, the choice of a generic definition is believed to be justified for at least three reasons, the most evident one being that the nationality of a perpetrator does not matter for victims. Treating them differently on that basis would lack any rational basis and, hence, be discriminatory.

A second justification is that any company is capable of violating human rights. The risk of human rights violations might even be higher for domestically owned companies, as they may be treated more favourably by their government than transnational companies or may have less resources to invest in human rights due diligence – a claim that is sometimes also uttered by transnational corporations themselves. In this regard, it is noteworthy that one of the reasons why the open-ended intergovernmental working group established by Resolution 26/9 for the elaboration of a treaty on business and human rights (supra Section 1.3) is so controversial, is precisely the fact that the working group’s mandate is restricted to transnational corporations and ‘other business enterprises’. The latter

126 See also Ratner, supra note 98, 461-465.  
127 Zerk, however, advances three justifications for focussing on multinational enterprises: they are better placed to safeguard benefits for vulnerable groups; they are frequently more powerful than the state; and, the benefits and burdens of globalisation are not distributed fairly. Zerk (2006), supra note 16, 46-47.  
129 Cf. Office of the High Commissioner for Human Rights, The Corporate responsibility to respect human rights: an interpretative guide (New York: United Nations, 2012), 19 (declaring that all enterprises have the same responsibility but that size will often influence the approach to meet that responsibility).  
130 This term is explained infra in Part II, Section 1.1.2.  
131 Zerk (2006), supra note 16, 45. Cf. Report A/HRC/4/035 on mapping international standards, supra note 27, para. 3 (stating that “firms operating in only one country and state-owned companies often are worse offenders”).
term was (originally) defined as “all business enterprises that have a transnational character in their operational activities”, excluding “local businesses registered in terms of relevant domestic law”. At the first session of the working group the EU insisted that the working group would amend its mandate to include ‘all’ business enterprises. This was not accepted at first, but by the second session an agreement was reached to widen the scope of the working group to cover all business enterprises, at least for the time being.

A third reason justifying a broad definition of the term ‘business enterprise’ is that the precise meaning of ‘transnational corporations’ and ‘multinational enterprises’ is disputed. In fact, these two concepts have each emerged from a different discipline. The term ‘multinational enterprises’ comes from economical science, where it comprised any company that “owns (in whole or in part), controls and manages income generating assets in more than one country”. ‘Transnational corporations’ has its roots in international law and, in particular, in the business and human rights field, and refers to all companies operating across national borders. Given that over time the legal techniques for conducting business across borders have become increasingly diverse, the meaning of ‘multinational enterprises’ has later been extended beyond foreign direct investment. Whilst the meaning of the two terms has thus been equated, there is still no consensus about when exactly a company becomes transnational or multinational. Even in relation to the definition that was given to ‘transnational corporations and other business enterprises’ in Resolution 26/9 prior to the second session of the intergovernmental working group, there were a number of uncertainties, such as the question whether it included enterprises that are simply involved, in some way, in global production chains. A flexible approach thus seems appropriate, since the ways in which businesses may act transnationally are infinitely diverse.

132 Footnote 1 of Resolution 26/9, supra note 48.
133 Report A/HRC/31/50 on the first session of the intergovernmental working group, supra note 52, para. 13.
134 Ibid. paras 16-17.
135 That does not mean, however, that any treaty that may result from those negotiations would necessarily apply to all business enterprises, as there still exists strong opposition to that idea. Report A/HRC/34/47 on the second session of the intergovernmental working group, supra note 54, paras 14, 33 and 101.
137 ‘Enterprise’ is also believed to be more neutral, as it does not presume a particular legal structure. P. Muchlinski, Multinational Enterprises and the Law (Oxford University Press, 2007), 5-6. See also Zerk (2006), supra note 16, 49.
138 Muchlinski, supra note 137, 5-6.
139 Ibid. 6; Zerk (2006), supra note 16, 49.
140 Backer (2017), supra note 56.
2.4. ‘Strategic’ litigation for ‘change’

Langford defines a ‘strategy’ as “the autonomous space that an organisation or individual creates for itself” on the medium and long term to pursue a certain interest, and ‘tactics’ as “the initiatives undertaken on the space or terrain of the other to advance the strategy.”\footnote{Langford (2015), supra note 112, 20.} Accordingly, for the purposes of this dissertation ‘strategic litigation’\footnote{For a detailed discussion of the relevant factors influencing strategic litigation, see infra Part II, Section 2.2 and Part III, Sections 2.4 to 2.7.} is a tactic employed by victims, activists and lawyers whereby business enterprises or government actors are called to account for their conduct in court with the aim of testing, enforcing and strengthening, through litigation, the responsibility and/or accountability of business enterprises for human rights. It should immediately be stressed that strategic litigation is but one tactic that can be used for that purpose and is generally used \textit{in tandem} with alternative tactics.

Speaking of strategies and tactics in relation to litigation is not mere decorative word use: “[s]trategic thinking is as important in litigation as it is in war.”\footnote{A. Kanner and T.L. Nagy, “Legal Strategy, Storytelling and Complex Litigation,” Am. J. Trial Advocacy 30(1) (2006), 7.} For activists and lawyers to engage in such litigation, they should have a predetermined plan that is motivated by a specific mission and objectives.\footnote{Ibid. 2.} As a first crucial step, they should thoroughly evaluate their position and that of the direct victims. This requires profound knowledge of the legal system and of the specific matter’s legal context and anticipation of any relevant factor that may influence the judicial proceedings or the reception of a particular case by courts and of a particular judgment by government or by business enterprises.

After this evaluative phase, the court case should be designed having regard to all factors that may, adversely or advantageously, affect the prospect of success. In choosing the appropriate cause(s) of action, the relevant counterparty, the right legal arguments and the suitable remedies, strategic litigants should also anticipate the reactions of the counterparty and of the court.\footnote{Ibid. 8.} In strategic litigation, activists and lawyers also look for the ‘right’ case, a sympathetic victim who is willing to go through lengthy judicial proceedings, is aware of the risks, and knows that his or her own situation may not improve – at least not at short notice. As the case study will also demonstrate (\textit{infra} Part III, Section 2.4.3), in principle, strategic litigation relates to novel, uncharted legal issues, which makes them even harder to predict and even more challenging than ordinary lawsuits.
Strategic litigation for social change by its very nature entails that the parties engaging in such litigation pursue certain long-term objectives with a social impact that reaches beyond the individual case that is litigated. Moreover, in general, strategic litigation does not end with the (successful) finalisation of one case, but involves follow-up litigation as well as action to monitor the impacts. The specific type of strategic (human rights) litigation for ‘social transformation’ or ‘change’ that is examined in the context of this dissertation seeks to shift the balance of power in society by empowering vulnerable victim groups so that they are actually able to vindicate their rights vis-à-vis business enterprises and so that business enterprises are truly accountable for human rights. It should be emphasised that the dissertation does not take a position as to how such accountability should be achieved; depending on the situation and on their preferences, victims could demand (1) that the state regulates and monitors corporate conduct, (2) that the state provides redress, (3) that the company accounts for its behaviour, and/or (4) that the company provides redress. This arguably constitutes social change, because victims’ vulnerability for human rights violations and companies’ ability to commit such violations are inherently intertwined and linked to structural inequalities in society.\footnote{Cf. S. Gloppen, “Courts and Social Transformation: An Analytical Framework,” in eds. R. Gargarella, P. Domingo and T. Roux, Courts and Social Transformation in New Democracies 35 (Aldershot: Ashgate, 2006), 37-38 (defining social transformation as “the altering of structured inequalities and power relations in society in ways that reduce the weight of morally irrelevant circumstances, such as socio-economic status/class, gender, race, religion or sexual orientation”).} Or, as Backer \textit{et al.} have written about litigation specifically in the business and human rights field,\footnote{Backer \textit{et al.}, \textit{supra} note 78, 265.} Catalyzing litigation produces empowerment among the most neglected group of human right stakeholders in two ways: it serves to remedy individual wrongs, and it provides a powerful venue for participation of traditionally excluded groups who may now more vigorously participate in the international development of business and human rights standards.
3. RESEARCH QUESTIONS AND OBJECTIVES

As was mentioned before and will be explained more in detail below (infra Part II, Section 1.1), according to the UNGPs, international human rights law only binds states, which are obliged to protect human rights against possible infringements by companies. At least from the perspective of international law, business enterprises’ responsibility for human rights is a mere social expectation. All legal responsibility for human rights is passed on to states, whose domestic legal framework should safeguard human rights from interferences by business enterprises. If states comply with their duty, however, human rights will constrain business enterprises under national law. The question is thus to what extent business enterprises are constrained by human rights at the domestic level.

In view of the finding that the international legal framework stops short of imposing legally binding human rights duties on business enterprises and instead places a tremendous responsibility on states, two main research questions are tackled in this dissertation. The first question is whether business enterprises are indeed responsible for human rights under national law. This question essentially explores the domestic operationalisation and the effectiveness of the UNGPs. A number of sub-questions arise in that context, in particular whether there exists accountability for human rights violations by business enterprises and which kind of barriers victims (may) face when they try to enforce such accountability. In addressing these issues, special attention is paid to judicial remedies as a mechanism to ensure accountability. The second question concerns how international law and domestic law (should) interact in the business and human rights field. To answer this question, the dissertation first scrutinises the how and why of the current international legal framework on business and human rights and, after having explored the domestic operationalisation of the UNGPs in line with the first research question, examines how international law could strengthen the ‘domestic’ approach to business and human rights that is presently proclaimed by the UNGPs.

The two research questions assume a practice-oriented approach in which the actual needs and experiences of local stakeholders take centre stage. Therefore, in addition to a fundamental analysis of the law, the dissertation includes a case study to check the law on the books with the law in action. In the context of that case study empirical data were collected (see also infra Chapter 5). The case study is then used as a lens to reflect on the operationalisation and effectiveness of the international legal framework on business and human rights and as guidance to make propositions in order to strengthen that framework. In particular, based on the practice of local stakeholders who seek to ensure
accountability for human rights violations by business enterprises, a number of boundary conditions are identified that are imperative for such accountability to be effective.\textsuperscript{148}

In sum, the overall objective of the dissertation is to examine how the international legal framework on business and human rights functions in practice, in particular at the domestic level, whether it is effective and how its effectiveness could be improved. Accordingly, the dissertation seeks to contribute to the business and human rights field (1) by rationalizing the law on the obligation to protect and its domestic operationalisation and by addressing the conceptual and normative questions that arise in that context, (2) while reckoning with the practical experiences of local stakeholders who seek to vindicate human rights against business enterprises, and (3) by identifying any gaps in protection and reflecting on how these gaps could be addressed.

\textsuperscript{148} As also Janet Love, one of the respondents for the case study, writes, “there appears to have been little or no effort to bring pressure to bear on businesses to fulfil their obligations” with “international discourse on business and human rights [focusing] primarily on understanding the obstacles that prevent victims from securing an effective remedy, rather than on removing such obstacles.” J. Love, “Are We Depoliticising Economic Power? Wilful Business Irresponsibility and Bureaucratic Response by Human Rights Defenders Human Rights in Motion,” SUR - Int'l J. on Hum Rts. 20 (2014), 106.
4. STRUCTURE OF THE DISSERTATION

The dissertation is divided into four main Parts, including this first Part, which introduces the topic, defines some key concepts, explains the research questions and objectives, and describes the methodology.

Next, Part II consists of a fundamental analysis of the two leading themes that are tackled in this dissertation, namely ‘business and human rights’ and ‘strategic litigation’ to ensure accountability for human rights violations by business enterprises. In Chapter 1 the legal framework on business and human rights is discussed, from the perspective of both international law (Section 1.1) and national law in abstracto, and thus not specifically South African law (Section 1.2). Chapter 1 of Part II ends with a brief reflection on the peculiar relationship between human rights law and trade and investment law, because the risk of conflicts between these two branches of the law is particularly high when the rights and duties of business enterprises are at stake (Section 1.3). Chapter 2 then delves into the topic of strategic litigation. It comprises two main Sections that, respectively, introduce the analytical framework for the use of litigation to effect social change (Section 2.1) and explain the variables that influence strategic litigation as well as the decisions that have to be adopted in its course (Section 2.2).

Part III of the dissertation is devoted to the case study. Chapter 1 sketches the general framework, by discussing the state of affairs of business and human rights in South Africa (Section 1.1), the legal effect of human rights on companies under South African law (Section 1.2), the interplay between international and South African law (Section 1.3) and the elements of the general context within which strategic litigation takes place (Section 1.4). Next, in Chapter 2 of Part III the practical experiences of local stakeholders that use litigation to enforce accountability for human rights violations by business enterprises are explored. Through this analysis the different decisions that these actors have to take when they determine the strategy of their litigation are highlighted as well as the determinants underlying these decisions. The Chapter begins with a description of the factual background (Section 2.1) and of the legal framework (Section 2.2) of mining, the environment and human rights. Next, the three ‘focus matters’ are introduced, which will be used as illustrations throughout the case study (Section 2.3). Thereafter, strategic litigation to hold mining companies accountable for human rights violations due to environmental degradation is analysed in depth (Sections 2.4 to 2.6), and the Chapter ends with a review of how South African civil society actors define and measure success (Section 2.7).

Finally, the findings of Parts II and III are brought together in Part IV. Chapter 1 briefly summarises the general thread and identifies a number of lessons learnt regarding the conditions that impede or facilitate victims’ ability to vindicate their rights. Thereafter, Chapter 2 reflects on how the international legal framework could be developed to increase its effectiveness in ensuring that business enterprises are responsible for human rights and that there exists accountability for violations by business enterprises.
5. METHODOLOGICAL SETTING

The methodology applied for this dissertation was not limited to traditional legal methods but also involved the collection of empirical data. This is motivated by the research questions and objectives given that empirical data, which gives an insight into the actual experiences of stakeholders on the ground, is imperative to understand the practical implications of the UNGPs at the domestic level as well as their strengths and weaknesses. The legal theoretical analysis\textsuperscript{149} of business and human rights is thus complemented with practice-oriented research in order to test the efficacy of the legal theoretical framework and to make recommendations to improve its effectiveness.\textsuperscript{150}

Empirical data were collected in the context of a case study. The case study method entails an in-depth analysis of a small and selective, but manageable, sample, and its strategic focus facilitates intensive data generation and the combination of multiple collection techniques (triangulation). The case study examined in this dissertation is demarcated based on a geographical focus (South Africa), an industry focus (mining) and three indicators, which are all necessary but sufficient conditions for a matter to be included.\textsuperscript{151}

This Chapter first demarcates the case study; it justifies its focus on South Africa (Section 5.1.1.1) and, in particular, on the mining industry (Section 5.1.1.2) and explains that the human rights violations examined are direct violations (Section 5.1.2.1) that are associated with environmental health hazards (Section 5.1.2.2) and suffered by neighbouring communities and/or mineworkers (Section 5.1.2.3). Thereafter, the methodology for the fundamental part (Section 5.2) and the qualitative part (Section 5.3) of the dissertation is discussed more in detail.

5.1. The case of the South African mining industry

5.1.1. Mining in South Africa: the pertinence of the case

A geographically (South Africa) and thematically (interferences by the mining industry with the rights of mineworkers or neighbouring communities) demarcated case study necessarily has consequences for the generalisability of any findings, as will be discussed in Part IV. Nevertheless, it is submitted that the concrete case that was studied is particularly instructive, not in the least because of the

\textsuperscript{149} For a discussion of the three legal methodologies (legal theory, legal doctrine and legal philosophy), see e.g. A. Nollkaemper and J.E. Nijman, “Introduction,” in eds. A. Nollkaemper and J.E. Nijman, New Perspectives on the Divide between National and International Law 1 (Oxford University Press, 2007), 4-5.


\textsuperscript{151} Temporal and within-unit spatial variations were accepted. See J. Gerring, “What Is a Case Study and What Is It Good For?” Am. Pol. Sci. Rev. 98(2) (2004), 343.
awareness in South Africa about the risk of human rights abuses by business enterprises, in particular in the mining industry (see also infra Part III, Section 1.1.1) and because of the relatively high number of cases in which human rights-based approaches, including litigation, are used to resolve conflicts.

5.1.1.1. South Africa

As was said before, many human rights violations by business enterprises are committed in developing countries by companies vested in or operating from developed countries. Since developing countries are eager to attract investment in their pursuit of economic growth – while their governance systems often suffer from a lack of resources and a weak rule of law – there is a risk for them to engage in a regulatory race-to-the-bottom, rather than to tighten their laws and regulations. This also applies for African countries, where numerous human rights violations by companies have been reported, and where inadequate regulation and non-enforcement constitute a major concern for human rights protection. Nevertheless, no thorough analysis of strategic litigation to hold companies accountable for human rights has yet been carried out. Given that the economic growth of Sub-Saharan African countries also relies on their natural resource base more than in any other region in the world, the risk that laws, regulations and policies are designed and enforced in such a way as to advance the interests of the elite (extractives) industries – so-called regulatory capture – is high.

Within that region of Sub-Saharan Africa, the choice to focus on South Africa was partly motivated by some practical considerations on the part of the researcher, such as language (English being one of the eleven official languages, so that all laws and most judgments are available in English), political stability, physical accessibility (fairly good roads and local public transport to reach the respondents) and institutional links with local partners (in particular the University of Pretoria). More important, however, were the scientific considerations. First of all, the South African Bill of Rights is one of the

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152 See Hayward, supra note 79, 202 (citing Green Nature, which reports that the countries in Sub-Saharan Africa depend more on their natural resources than any other region in the world); E. Oshionebo, Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study (University of Toronto Press, 2009), 7; Tully (2012b), supra note 30, 12.

153 22% of the cases reported to the Special Representative related to the African continent, but Asia and the Pacific scored even higher with 28%. J.G. Ruggie, Just Business: Multinational Corporations and Human Rights. (New York: Norton, 2013), 24.


156 Hayward, supra note 79, 202. Mining is a major contributor to South Africa’s gross domestic product (see also infra Part III, Section 2.1.1.1).

few legal instruments that expressly stipulate that private actors are bound by human rights. This constitutional dispensation, which has to be understood in light of the country’s history and the time at which the Constitution was adopted (infra Part III, Section 1.1.1), represents a unique opportunity to assess the practical implications and actual relevance of legally binding human rights duties for companies.

Secondly, given this explicit constitutional dispensation as well as the awareness, in view of South Africa’s past, that business enterprises may abuse human rights, the use of litigation to ensure corporate accountability are not that uncommon. There is thus a sufficiently large sample of matters that can be reviewed as to whether, under what conditions and why domestic enforcement of corporate accountability for human rights is or is not effective.\(^\text{158}\) This is also explained by the fact that in the course of its history a strong civil society has emerged in South Africa (see infra Part III, Section 2.1.2). These civil society actors regularly use rights-based strategies to pursue their objectives, and they rely heavily on the human rights protections provided by the Bill of Rights.\(^\text{159}\) If need be, they litigate a matter up to the Constitutional Court. Some examples of famous, successful rights battles dealt with access to antiretroviral medicines, protection against eviction, the abolition of the death penalty and access to schoolbooks.\(^\text{160}\) Accordingly, the use of human rights arguments in court, but also out-of-court, to achieve social change is a reasonably common phenomenon in South Africa.

Third, although South Africa is an emerging economy,\(^\text{161}\) the country should not be placed on an equal footing with countries like Russia or China. The South African economy has had a few rough financial years and its economic outlook is not very optimistic either. Since mining still contributes 7.7% to the country’s gross domestic product in real terms (2015), the interests of the mining industry are also the interests of government.\(^\text{162}\) Hence, the risk of regulatory capture is not alien to South Africa. Moreover, the country’s mineral wealth does not necessarily translate in increased power towards the mining companies wishing to extract those mineral resources, since the government depends on those companies’ technologies and expertise to exploit the minerals.\(^\text{163}\) It should thus not be claimed without

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\(^\text{158}\) Gerring, supra note 151, 346.


\(^\text{160}\) See, respectively, for instance, Minister of Health and Others v. Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15 (5 July 2002); Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and Others (24/07) [2008] ZACC 1 (19 February 2008); S v. Mokwanyane and Another (CCT3/94) [1995] ZACC 3 (6 June 1995); Minister of Basic Education v. Basic Education for All (20793/2014) [2015] ZASCA 198 (2 December 2015).

\(^\text{161}\) Since 2010 South Africa participates in the meetings of the BRIC-countries (Brazil, Russia, India and China), and following its official accession to the group in 2011, it was renamed ‘BRICS’.


\(^\text{163}\) De Schutter (2010), supra note 30, 238.
more that the South African context does not share many of the features that are common to the contexts in which business enterprises violate with human rights.

5.1.1.2. The mining industry

The South African mining industry constitutes only a part of the larger extractive sector, which covers the extraction of any ‘natural resource’, namely any substance that exists naturally in the earth, *id est* comes from nature without human intervention, including “air, land, water, natural gas, coal, oil, petroleum, minerals, wood, topsoil, fauna, flora, forests and wildlife.” The case study is only concerned with the extraction of mineral resources, however, such as oil, gas, gold, platinum, platinum group metals, coal, diamonds and the three T’s (tin, tungsten and tantalum).

Human rights violations in the mining industry are a long-standing problem. Of the reported cases in a study on human rights violations by business enterprises carried out by the former UN Special Representative, John Ruggie, for instance, 28% concerned human rights violations associated with the extraction of mineral resources, which was the highest score of all the sectors examined in that study. This is hardly surprising as the extraction of minerals is an ecologically-intensive undertaking that poses high risks, amongst others, of water, air, soil or noise contamination. This will be discussed more in detail in relation to the South African mining industry in the case study (*infra* Part III, Section 2.1.1). Also the fact that states with the highest mineral wealth often have the lowest rate of economic growth and development remains striking.

5.1.2. The demarcating factors

5.1.2.1. Direct human rights violations...

The case study deals with direct human rights violations by private mining companies. This excludes three categories of human rights violations that trigger specific rules of attribution, which complicate the analysis.

Firstly, human rights violations by ‘public companies’ are not considered. These are companies that are either state-owned or that, although being privately owned, act as a public actor (see the definition

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166 Murombo, *supra* note 157, 37-38. See also Part III, Chapter II, Section 1.
167 An entire discipline is devoted to the resource curse theory, with economists and political scientists developing models to explain and solve the problem. E.G. Burton, “Reverse the Curse: Creating a Framework to Mitigate the Resource Curse and Promote Human Rights in Mineral Extraction Industries in Africa,” Emory Intl L. Rev. 28 (2014), 425.
of private actors *supra* in Section 2.2). In principle, the conduct of such companies is directly imputable to the state, as if the state itself committed the violation.\(^{168}\) The other two categories of matters that do not qualify as direct human rights violations are instances of beneficial and silent complicity by business enterprises.\(^{169}\) Beneficial complicity means that a company takes advantage of a human rights violation committed by another actor, in particular the state, while silent complicity entails that a company chooses not to denounce systematic or continuous human rights violations even though they have regular contacts with the perpetrators and have the leverage to bring the violations to an end.\(^{170}\)

Accordingly, for a business enterprise to commit a ‘direct human rights violation’ its activities should *in se* interfere with human rights. This also comprises instances where companies are directly complicit in human rights violations, meaning that they knowingly assist in them. On the other hand, the mere fact that a state is either complicit in the human rights violations or simultaneously breaches its own obligations and is thus in some way involved, does not alter their qualification as direct violations by a business enterprise.\(^{171}\)

5.1.2.2. … associated with environmental health hazards

Furthermore, the case study concentrates on those violations that are associated with environmental degradation or pollution, which is a prominent concern in the mining industry, and the consequent health hazards.\(^{172}\) The link between human rights and the environment is, arguably, straightforward, as environmental degradation or pollution may affect a whole range of rights, in particular economic, social, cultural and environmental rights, such as the rights to health, food, water and housing, but also civil and political rights, such as the rights to life and personal integrity (see also *infra* Part III, Section

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\(^{168}\) See the definition of private actors (*supra* Section 2.1). Other scholars have excluded public companies for the same reason. See e.g. Oliver and Fedtke (2007b), *supra* note 105, 13.

\(^{169}\) Note that Bilchitz identifies a fourth form of complicity, aside from beneficial, silent and direct complicity, namely indirect complicity, which consists of the provision of financial or moral support to a perpetrator of human rights violations. Bilchitz (2008), *supra* note 29, 787.


\(^{171}\) This also means that human rights violations by a joint venture of a private and a state-owned company trigger both the direct responsibility of the private business enterprise and of the state.

\(^{172}\) Research by Davis and Franks has confirmed that environmental degradation constitutes an important trigger for conflict. In a study of twenty-five cases (the results of which were confirmed in a follow-up study of fifty cases) Davis and Franks found that in 92% of the conflicts pollution was a cause (namely the proximate cause in 84% and an underlying cause in 8%). Also access to and competition over natural resources (80%) is likely to trigger conflict. R. Davis and D.M. Franks, “Costs of Company-Community Conflict in the Extractive Sector,” Corporate Social Responsibility Initiative Report No. 66 (Cambridge: Harvard Kennedy School, 2014).
2.2.1.2).\textsuperscript{173} Given that the human rights violations considered are associated with environmental degradation caused by mineral extraction, they are committed by mining companies in their core business operations. This excludes, for instance, incidents of arbitrary arrest or inhuman treatment by private security guards.

Noteworthy is that the individuals who are most likely to suffer from environmental health hazards belong to vulnerable groups. Indeed, the structural phenomenon whereby environmental risks are unequally distributed, with the harms being disproportionately borne by developing countries and, within countries, by poor and marginalised groups, is called ‘environmental injustice’.\textsuperscript{174}

Environmental injustice may even coincide with ‘environmental racism’, when the vulnerable people who bear the burden of environmental risks predominantly belong to a certain race.\textsuperscript{175}

\begin{quote}
[Environmental justice] understands that all persons have equal rights to be protected from contamination, to live in a healthy environment they can enjoy thanks to a fair distribution of environmental benefits and opportunities, and to be fully involved in decision making regarding those issues.\textsuperscript{176}
\end{quote}

5.1.2.3. … and suffered by neighbouring communities and/or mineworkers

Although exceptions are imaginable, the majority of human rights violations that are directly perpetrated by business enterprises in their core business operations affect not just one individual but generally a group of people. The three major victim groups are employees, neighbouring communities and consumers.\textsuperscript{177} The case study is only concerned with interferences with the rights of mineworkers and neighbouring communities.

The people belonging to these groups are often vulnerable, not in the least because they have significantly less resources than the mining company, which leaves them in a weaker position, but also


\textsuperscript{174} Environmental injustice tends to have a geographical dimension, since spatial planning policies locate polluting activities nearby marginalised residential areas and vice versa. The theory emerged in the US, but was picked up by advocates in other countries and at the international level. Greyl, supra note 122, 13. For an analysis of the different conceptions of environmental justice theory, see A. Nolkaemper, “Sovereignty and Environmental Justice in International Law,” in eds. J. Ebbesson and P.N. Okowa, Environmental Law and Justice in Context 253 (Cambridge University Press, 2008), 259-263.


\textsuperscript{176} Greyl, supra note 122, 12 (citing De Marzo in his book ‘Anatomy of a revolution’).

\textsuperscript{177} In a study by the former UN Special Representative, John Ruggie, 45% of the examined violations affected employees, another 45% neighbouring communities and 10% end-users. Ruggie (2013), supra note 153, 23.
because they lack the necessary leverage to be able to influence the company’s behaviour or the governmental policies affecting that behaviour. Consequently, victims of human rights violations by mining companies often (have to) join forces in order to make up for their lack of power and seek to vindicate their rights together, regardless of whether those rights are ‘individual’ rights held by ‘everyone’ or ‘collective’ rights held by ‘all peoples’.178

In this regard, it should also be noted that the term ‘neighbouring communities’ as used in this dissertation has a generic meaning and designates any group of local people who live in the immediate surroundings of a company and who share given needs or interests, in particular in view of their neighbourliness, regardless of the size, history, distinctiveness or other characteristics of the group.179

5.2. Fundamental study

As was explained in the Sections discussing the research questions and objectives and the structure of the dissertation (supra Sections 3 and 4), there is a fundamental part and an empirical research part. The fundamental part comprises an analysis of two main topics, namely the legal framework for business and human rights and the use of strategic litigation to ensure accountability for human rights violations by business enterprises. Both topics were scrutinised first in abstracto and subsequently specifically in relation to South Africa. For each topic, the research began with an exploratory study so as to establish which issues required a thorough analysis.

As regards the legal framework for business and human rights, the extensive literature study concentrated on the obligation of states under international law to protect human rights against violations by companies and on the implications of that obligation at the domestic legal level. Accordingly, an analytical framework was drafted that unravels the different options for business enterprises to be affected by human rights under national law. It is submitted that based on this framework the impact of human rights on business enterprises within any given domestic legal system can be appraised comprehensively. Thereafter, a similar literature study was carried out to assess,

178 While under the Western conception of human rights the individual is at the centre, the international community has gradually recognised a few collective or solidarity rights (so-called third generation rights) that belong to ‘all peoples’. One illustration is the right to a healthy environment – although some instruments vest this right in ‘everyone’. Moreover, human rights bodies increasingly accept that (even individual) rights can be claimed collectively. See e.g. Human Rights Committee, J.G.A. Diergaardt and Others v. Namibia, UN Doc. CCPR/C/69/D/760/1997 (6 September 2000), para. 10.3 (holding that “there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights”); Inter-American Court for Human Rights, Sawhoyamaxa Indigenous Community v. Paraguay, IACHR Series C No 146 (29 March 2006), paras. 118 and 120.

179 The term, as used in this dissertation, should thus not be related to the discussions on the meaning of ‘peoples’ and ‘(indigenous) communities’. See also Aguilar, supra note 69, 114 (defining local communities as “groups or organisations inclusive and plural, which are based at the level of a geographic community and are unified by common needs and interests as articulated in human rights terms”).
through the analytical framework that had been developed, the particular impact of human rights on business enterprises in the South African legal order.

As regards strategic litigation, existing literature on the use of litigation to achieve social change was consulted, including scholarship on the judicialisation of society. As will be explained below, the analytical frameworks that have been developed by other scholars in the past were used as a point of departure to identify the elements that are constitutive of strategic litigation and that could, at least hypothetically, be relevant for the use of litigation to ensure accountability of business enterprises for human rights as well. The abstract review was again followed by a specific analysis of the use of strategic human rights litigation in South Africa.

Although the fundamental study of the business and human rights field and of strategic litigation constituted the point of departure for the case study, throughout the research the two topics (business and human rights and strategic litigation), the two levels of analysis (in abstracto and specifically in relation to South Africa) as well as the fundamental and practice-oriented parts of the study continuously interacted with one another, which resulted in some readjustments.  

5.3. Qualitative empirical research

5.3.1. Data collection

In the context of the case study empirical data were collected and analysed so as to gain an insight into the experiences of local stakeholders in South Africa who actually seek to enforce accountability for human rights violations by business enterprises. Three collection techniques were used for that purpose: interviews, document analysis and observation. In particular, practitioners were interviewed, court papers as well as judgments consulted and interactions between or amongst lawyers, activists, victims, mining companies, government authorities and experts observed. The data were collected during two research stays in South Africa of respectively 18 weeks (November 2014 – March 2015) and 7 weeks (March – May 2016), but also through email correspondence with a number of informants. In addition, brochures, reports and other documents published by civil society actors as well as most judgments and some court papers were publicly available (namely online) and could thus be accessed through a traditional desktop study.

Interviews. The respondents belonged to either one of the following groups: lawyers (attorneys, counsels and legal researchers), ‘activists’ or experts (respectively 25, 6 and 5 respondents). They

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181 The term ‘activist’ designates a member of an advocacy organisation, as defined infra in Part III, Section 2.1.2.
are listed in Table 13 in Annex 1. The interviews with the first two groups of respondents were semi-structured interviews, based on a single topics list, but the questions were slightly adapted to the profile and expertise of the individual respondent and to the specific matters in which he or she is or was involved. One respondent was not formally interviewed, but has extensively shared information and exchanged ideas through personal contacts and e-mail correspondence. The interviews with experts, except for one, a legal scholar, were not based on the same topics list, because the questions were tailored to their knowledge and expertise. A number of respondents were interviewed a second time and/or shared information about ongoing cases through e-mail correspondence, as is also indicated in Table 13 in Annex 1. The follow-up interviews were not structured, but were driven by the respondents’ replies to questions relating to specific cases or topics on which they had worked or were working at that time.

During the interviews the respondents were probed to share factual and knowledge information about situations and processes relating to the issue of business and human rights in South Africa and, in particular, to the use of strategic litigation to denounce human rights violations associated with environmental health hazards caused by mining. The information that they accordingly shared pertained to themselves, meaning that it was first-hand information based on the respondents’ own experiences. Given that they are also experts who get involved in such situations and processes in view of their professional (or voluntary) activities, the data also qualify as ‘expert’ opinions.

Judgments and court papers. The second source from which data were extracted are judgments, including interlocutory decisions, and ‘court papers’, a term designating all papers that are submitted to a court in the context of a legal dispute by parties involved in those proceedings, such as notices of motion, summons, affidavits, heads of argument and particulars of claim.

These documents were collected for relevant court cases, which were identified based on a search of the online database of the Southern African Legal Information Institute, a case law review by third parties, references by respondents or by legal scholars and cross-references in other cases. All cases of which the researcher took note accordingly and that met the criteria to be classified as ‘directly relevant’ were included in the study, but exhaustiveness cannot be ensured. The ‘related’ and ‘legally

182 Verschuren and Doorewaard, supra note 180, 207 (distinguishing between data sources and knowledge sources).
183 These are written factual statements.
185 A study reviewing all litigation relating to mining and the environment was commissioned by the Centre for Environmental Rights and carried out by the Wits School of Law (University of the Witwatersrand). The Centre continues to watch any related litigation and regularly updates its virtual library accessible online (http://cer.org.za/virtual-library). Centre for Environmental Rights and University of the Witwatersrand School of Law, Mining and Environmental Litigation Review (June 2012).
relevant’ cases were selected based on their relevance for the case study – the categorisation of court cases as ‘directly relevant’, ‘related’, or ‘legally relevant’ is explained below (Section 5.3.2).

Most judgments are publicly available on the online database of the Southern African Legal Information Institute. Others were consulted through law reports that are accessible in South Africa, whilst some unpublished judgments were shared by lawyers or activists who were involved in the litigation. As for court papers, in turn, few such documents are available online and access to them was generally obtained with the assistance from lawyers or activists involved therein. Court papers were only consulted for ‘ongoing cases’ and for the three focus matters that were selected for in-depth discussion (*infra* Section 5.3.2).

Again the data supplied by judgments and court papers contain factual information as well as, in the case of legal arguments by litigating parties or legal reasoning by judges, knowledge information. In addition to court papers, some other relevant documents were consulted as well, such as administrative decisions or appeals, and reports or assessments prescribed by law (such as the social and labour plan that mineral rights holders have to submit to government, see *infra* Part III, Section 2.2.3). Those documents provided valuable background information for the case study.

**Observations.** Finally, the researcher observed a number of meetings between or amongst relevant stakeholders, notably activists, lawyers, government authorities, representatives from mining companies, communities, mineworkers and experts. Both factual and knowledge data were extracted from these observations, which have mainly informed the general framework of the case study and are not directly referenced in the dissertation – see also the discussion of the researcher’s experiences (*infra* Section 5.3.3). The observed meetings include conferences, seminars, workshops and client-lawyer or lawyer-counterparty meetings, and are listed in Table 14 in Annex 1.

**5.3.2. Data analysis**

The collected data were processed and analysed through MaxQDA©. The transcribed interviews, the court papers and the judgments were uploaded into this software system and coded, whereby the meaning assigned to each code was carefully jotted. Those codes were informed by the analytical framework drafted in the course of the fundamental part of the study that preceded the data collection. The coding system was adapted a few times while the data were processed and analysed, since the findings of the practice-oriented case study were continuously reviewed in light of the fundamental study and vice versa.

The court cases that informed the case study were classified into three categories: ‘directly relevant cases’, ‘related cases’, and ‘legally relevant cases’ – see Tables 15 and 16 in Annex 1. Some cases, especially amongst the directly relevant cases, are ongoing, which means that no final decision has yet been adopted. Court papers were consulted for ongoing cases as well as for the litigation in the three
focus matters that were selected for in-depth scrutiny, as explained below. For the other court cases, only judgments were examined. The data on ongoing cases and on the three focus matters are up to date until 31 March 2017.

The ‘directly relevant’ court cases (17 cases) satisfy three cumulative criteria: (1) the applicants, plaintiffs or, in a criminal case, aggrieved parties are either (members of) neighbouring communities or mineworkers; (2) the defendants, respondents or, in a criminal case, accused parties are, broadly speaking,186 government and/or mining companies; and (3) the dispute relates to the impact of mining on the environment and the consequent health hazards. Two clarifications should be made in this regard. Firstly, the parties in civil cases are called applicants versus respondents or plaintiffs versus defendants depending on whether it are application or action proceedings.187 In order to avoid confusion around the term ‘respondent’, which can thus refer either to the interviewees or to the defending party in application proceedings, ‘respondent’ will be used for interviewees, whilst the counterparty in application proceedings will be called the ‘responding party’. Secondly, a case still classifies as a directly relevant case, if it is appealed by the counterparty, following which the community members or mineworkers, who initiated the proceedings at first instance, become the responding parties or defendants on appeal.

Three matters that meet the three criteria above have been selected for in-depth scrutiny: the Carolina matter, the Tudor Shaft matter and the silicosis class action. These cases are discussed at length at the beginning of the case study (infra Part III, Section 2.3), and will be cited as illustrations throughout the case study. Litigation is ongoing in the silicosis class action, whilst in the Carolina and Tudor Shaft matters urgent applications have resulted in interim court orders. Nonetheless, the problems that triggered the applications are not yet finally resolved and are currently addressed through out-of-court engagements. If those processes do not produce the desired outcome, follow-up litigation may be considered.

The ‘related cases’ (5 cases) are disputes between mining companies, on the one hand, and mineworkers or communities, on the other – although, in case of a SLAPP suit, they are instituted by the former against the latter instead of vice versa – but they do not directly concern interferences with human rights associated with environmental degradation. Lastly, the ‘legally relevant cases’ are cases on legal issues that are covered in the dissertation. This third category comprises three sub-categories, namely cases dealing with (1) mining, environmental or company law (35 cases), (2) with the responsibilities of business enterprises for human rights (10 cases), or (3) with the general legal and

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186 Different actors may be sued on the part of either government or company. See also the discussion of the counterparty in strategic litigation infra in Part II, Section 2.2.3.
187 In principle, interdicts, declaratory orders, judicial review and the like are sought through application proceedings, whereas damages require action proceedings.
constitutional framework (32 cases). Included in the first type of cases are, for instance, matters concerning environmental degradation caused by mining or other industries, such as farming, tourism and manufacturing, in which a court interprets a legal rule that would also be relevant in a hypothetical dispute between a mining company and a community or mineworkers. Examples of the second and third types of case are, respectively, judgments in which constitutional rights are applied to a dispute between individuals and business enterprises and judgments in which the courts rule on the applicable procedural rules in public interest litigation.

5.3.3. Research ethics

The Ethical Commission of the law faculty of Ghent University approved the data collection techniques, the consent form for respondents and the general interview plan on 7 November 2014.

Respondents participated in the research on a voluntary basis, and their informed consent was secured in advance. In particular, persons and organisations whose participation was solicited immediately received a ‘research summary note’ explaining the research objectives and questions of the research project as such and of the case study in particular. A brief summary thereof was again presented orally before each interview began, and at that time respondents were asked to express their agreement that the interview would be recorded and transcribed for the researcher’s reference. The individual respondents and organisations that supported the research project are thanked in the dissertation’s acknowledgments section.

The respondents were ensured confidentiality and anonymity. Therefore, quotes from the interviews do not disclose the name of the specific respondent, but are accompanied, in principle, by an individual reference code to enable verification. Each code is composed of the letter ‘R’ (‘respondent’), followed by a number. There are thirty-six reference codes. When the identity of the respondent could be inferred from a quote’s context, which would then allow to link a particular respondent with his or her anonymised reference code and, accordingly, with all his or her statements, the reference code for such ‘contextual’ quote was replaced by ‘AS’ (‘anonymous source’).

Some respondents have requested that certain information or quotes would only be used and published upon their approval. However, it was decided to allow all respondents to read the case study before the dissertation was submitted to the council of the law faculty of Ghent University and to the jury, so as to allow them to review any information that could be linked to them. The respondents also received the full dissertation upon its finalisation.

All questions dealing with voluntary participation, informed consent, confidentiality, acknowledgement and access to the findings were also stipulated in a consent form, which was shared with the respondents before the interview so that they could read the form in advance. In principle, a hard copy of the form was signed at the time of the interview. However, this form mainly served as an
insurance for the respondents, and they were not obliged to sign. Except for three respondents who did not wish to formalise their participation, the other respondents all signed the form.

5.3.4. An account of the researcher’s experiences

Throughout the research project, I was based at the Human Rights Centre of Ghent University, where I spent most of my time, conducting desktop research. When I entered the field to collect data for the case study, I did so as an outsider. I am not trained in South African law, and had to make myself familiar with its legal system through self-study. The obvious downside was that the preparation to enter the field and to study South African law took more time than I had initially expected and definitely more than what would have been the case if I had conducted a case study on Belgium. Moreover, when I analysed the collected data, I regularly came across previously unknown, or even unheard of, legal rules, concepts and constructs, all the more because South Africa has a hybrid common law/civil law tradition. Hence, when this was necessary to understand the legal, social and political setting of the case study, I had to study those issues more in depth before I could proceed. This ranged from more ‘basic’ questions, such as the difference between attorneys and advocates, to substantial questions, such as the organisation of the judiciary.

On a practical side, coming from outside South Africa also meant that I had to create my own network in order to be able to collect the necessary data. Fortunately, my university has several contacts at the University of Pretoria, who warmly welcomed me and offered me a basis from which I could conduct my research in South Africa, for which I am very grateful. Evidently, however, I had to solicit the participation of civil society actors and their staff myself. I was pleasantly surprised to experience that most organisations and persons whom I contacted, were happy to contribute to the research project. They either participated in an interview or assisted me in other ways, for instance by sharing court papers, inviting me to seminars, conferences and community workshops, allowing me to observe confidential meetings with clients or with (the legal representatives of) counterparties and taking me on field trips to mining sites and affected communities.

Personally, I believe that the field was so receptive because this type of research, where a researcher conducts interviews with lawyers and activists regarding their litigation strategies, is quite uncommon, both in general and in South Africa. Hence, the respondents are not overburdened with such requests. One respondent spontaneously suggested another possible explanation, being precisely the fact that I come from abroad, because, allegedly, insiders are quickly labelled in a certain way.

I am very happy that you are doing this thing away from people who think that we can be biased or prejudiced, because when you come from outside South Africa, like Belgium, I do
not think you have any prejudice or any bias. So when you come here, you are neutral, and you are looking at the issues the way they are. You are not taking sides.188

Notwithstanding this enthusiasm of one respondent, the reality seems more complex. As was discussed earlier (supra Section 1.3), the business community, civil society and states are very divided on the question whether companies should bear legally binding human rights duties, as a result of which the different stakeholder groups tend to organise parallel, instead of joint, meetings and consultations on the topic. For instance, although mining companies were invited to attend a seminar on transparency in the mining industry, organised by the South African Human Rights Commission, an independent body, they did not. Members of civil society who were present at the seminar denounced that all too often mining companies ignore such opportunities for engagement.

I experienced this distrust also personally. Although I was interested to understand the challenges and opportunities that mining companies themselves identify in the debate on business and human rights, and for that reason wanted to attend a workshop where mining companies would discuss their views of and their experiences with the corporate responsibility to respect human rights, the organisers cancelled my attendance last-minute. Conveying their decision, they gave reasons like the following.

Our meeting is a business-to-business, invitation only event. (…) [I]t is important to create safe spaces for companies to share challenges and discuss what implementation of respect for human rights means in practice. (…)

(…) companies are coming based on the fact that this is a safe space for companies.

(…) company representatives will have an opportunity to engage with each other on issues of common interest (including issues related to stakeholder engagement) but in this instance without the presence of other stakeholders.

Evidently, I regretted this decision since I strongly believe in objective, independent and impartial academic research. While the perspective from which I tackle the debate on business and human rights in this dissertation, which focusses specifically on the effective enforcement of accountability for human rights violations by business enterprises, may be rather specific and perhaps perceived as ‘adversarial’, this perspective did not entail any a pre-determined value judgment on business enterprises, their conduct and their human rights policies.

In any case, the willingness amongst lawyers, activists and experts to contribute to the research project was high. I was even allowed to observe confidential meetings and to consult confidential documents. Although I could not use such data directly in the dissertation, it gave me the opportunity to become more familiar with the different aspects to the dispute between mining companies, on the one hand, and mineworkers, communities and civil society actors, on the other. In one such meeting, for

188 R22.
instance, mineworkers told about their state of health and its impact on their daily lives. I also received plenty of information that, strictly speaking, reached beyond the purposes of the dissertation, but that allowed me to get the full picture. Sometimes these were positive experiences, other times less so. For instance, I observed meetings between an affected community and representatives from a mine, facilitated by a civil society actor. At these meetings, the community was informed about the mine’s social investment projects and its representatives listened to the concerns and complaints of the community. On the other hand, I also got hold of several pamphlets, for example, that were distributed by mining companies in communities affected by mining, in which they make certain promises, disguise or simplify reality or even indirectly threaten opponents of a mining project. Two examples are provided in Figures 1 and 2 below.

![Figure 1. Two illustrations in a brochure of a to-be-constructed mine](image1)

The illustration top left depicts that a surface lease agreement (to be concluded between a mining company and the communities on whose land the company wants to mine) will determine how the lease will be divided amongst the communities depending on how much land from each community is used. The soup pot displayed the name of the mine and the municipality, whilst each soup plate represented a community. The illustration top right accompanies the statement in the brochure that community members who will lose their farming land will be assisted to acquire other land or to find another way of making a living.

![Figure 2. Excerpts from a pamphlet of a mine seeking to expand its operations](image2)

According to the pamphlet, if the mine goes ahead with its expansion plan, additional jobs will be created (42% of which would be recruited locally, as stated elsewhere on the pamphlet) and, if not, the mine will have to close and jobs will get lost.
Overall, the experience of conducting a case study in South Africa and collecting empirical data was very rewarding and has improved my understanding of what is really at stake and what matters for local actors. Definitely for a topic like business and human rights, which directly affects the daily lives of many people, I believe such field research is invaluable.
PART II.
THE FUNDAMENTALS OF ‘BUSINESS AND HUMAN RIGHTS’ AND ‘STRATEGIC LITIGATION’
Two topics are analysed in Part II, namely the international legal framework on business and human rights and its operationalisation within domestic legal orders (Chapter 1), and the use of strategic litigation to enforce accountability for human rights violations by business enterprises (Chapter 2).

Chapter 1 commences with a synopsis of the international legal framework, as it is restated by the United Nations Framework for business and human rights and its implementing Guiding Principles (Section 1.1). The three pillars of that Framework (the state obligation to protect, the corporate responsibility to respect, and access to remedies) are briefly explained. In view of the fact that states are burdened with the responsibility to regulate and monitor corporate conduct and to provide a remedy when human rights are nevertheless interfered with, the Chapter then continues with examining the different ways in which human rights can, in theory, affect business enterprises at the domestic level (Section 1.2). For that purpose, an analytical framework is proposed which reviews the horizontal effect, scope and application of human rights within the domestic legal order and the recognition and enforcement of protective duties of the state. The Chapter ends with a general discussion of the frictions between international trade and investment law, on the one hand, and human rights law, on the other, and explains how the former may prevent states from complying with their obligation to protect human rights (Section 1.3).

Thereafter, Chapter 2 delves into the issue of using strategic litigation so that victims of human rights violations by business enterprises can vindicate their rights. In order to sketch the context of the use of strategic litigation, the Chapter first briefly mentions two analytical frameworks that were developed by scholars to examine the ability of litigation to effect social change, and explains that litigation is generally used in tandem with alternative tools (Section 2.1). Following this introduction, strategic litigation in business-related human rights matters is scrutinised more in depth (Section 2.2). That analysis begins with a discussion of the factors that may affect access to justice. Thereafter, the (so-called ‘umbrella’) decisions are discussed that litigating parties must adopt when they design their litigation strategy (namely which remedies, which arguments and which counterparty). This is followed by an examination of what constitutes ‘success’, and the Chapter ends with a general overview of the contextual factors that must be borne in mind as well.
1. HUMAN RIGHTS AND BUSINESS

Part I has already indicated that although in a world of globalisation non-state actors are not rarely as, if not more, powerful than states, international human rights law continues to look at society through Westphalian spectacles. This means that (the formerly omnipotent) states remain the primary duty bearers under international human rights law, as restated by the UNGPs. This Chapter thus begins with outlining the three pillars of the UN Framework and some of the implementing guiding principles (Section 1.1). Through this discussion, it is also explained that, notwithstanding the focus of international law on the state, the construct of ‘the obligation to protect’ at least reckons that at the domestic level states should ensure that business enterprises are responsible for human rights. Hence, after setting forth the international legal framework, the Chapter proceeds with explaining how the legal effect of human rights on business enterprises in the domestic legal order should be scrutinised (Section 1.2). Finally, the Chapter returns to international law to explain that in many cases international investment law negatively affects the domestic policy space of states within which they are (believed to be) allowed to adopt national laws, regulations and policies in pursuit of their obligation to protect human rights (Section 1.3).

1.1. Business and human rights according to the UNGPs

According to the UNGPs, only states have legally binding human rights duties under international law. The UNGPs’ sole and limited concessions are, first, that states have to protect rights holders against possible human rights violations by business enterprises (Section 1.1.1) and, second, that the social expectation is that those enterprises themselves respect human rights (Section 1.1.2). In addition, the UNGPs stress the vitality of access to remedies, so as to enable victims to vindicate their rights (Section 1.1.3).

189 This is criticised in legal scholarship, see e.g. D. Augenstein and D. Kinley, “Beyond the 100 Acre Wood: in which international human rights law finds new ways to tame global corporate power,” Int’l J. Hum. Rts. 19(6) (2015), 829 (explaining how a state-centred approach results in compartmentalisation with each state having “a singular legal obligation and entitlement (to the exclusion of other states) to respect, protect and fulfil the human rights of individuals located on its own territory”, which is problematic as soon as victims and perpetrators do not reside in the same state); Mendes, supra note 10, 185 and 190; Tully (2012b), supra note 30, 11; J.R.M. Wetzel, Human Rights in Transnational Business: Translating Human Rights Obligations into Compliance Procedures (Springer International Publishing, 2016), 81.

190 The latter discussion is particularly relevant in view of the recent legal reforms in South Africa, the country where the case study is situated, through which the government tries to respond to the problem of a shrinking domestic policy space (infra Part III, Section 1.1.3).
1.1.1. First pillar: obligation to protect

1.1.1.1. The ‘obligation to protect’

Notwithstanding the emergence of numerous powerful non-state actors, the premise of international law remains one where states are the primary duty bearers. This is partly explained by the principle of territorial sovereignty under general international law, which, in theory, grants states exclusive jurisdiction over their territory and their nationals. Hence, in principle, third states are prohibited from interfering with a state’s internal affairs and international law does not determine how private actors should behave on the territory of a particular state. International human rights law as such already limits this principle of territorial sovereignty, by creating rights for private actors. The interference with state sovereignty is greater, however, when international law also starts regulating the duties of private actors.

According to Knox, legally binding international regulation of private conduct can be situated on a continuum, depending on whether international law ‘contemplates’, ‘specifies’, ‘places’ or ‘enforces’ private human rights duties. Also the degree of interference with state sovereignty varies along that continuum. First, international law merely ‘contemplates’ private human rights duties, when states are required to take the measures necessary to ensure that private actors comply with international law. In that scenario the impact on state sovereignty is minimal. If international law concretises (or ‘specifies’) the precise duties that states should impose on private actors, this limits the discretion of states to adopt those measures they prefer. Evidently, the sovereignty of states is even more constrained when international law directly prescribes the conduct of private actors, or ‘places’ human rights duties on private actors. The enforcement of such duties still occurs at the domestic level, unless international law also creates an international mechanism to ‘enforce’ private human rights duties. The latter scenario entails the greatest interference with state sovereignty. The placement of duties on private actors, let alone their international enforcement, is extremely rare, however.

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191 Transnational corporations already exist since the late 19th century, but the last few decades their growth has accelerated on account of technological innovation, liberalisation, deregulation, privatisation, global trade and global political stability. Anton and Shelton, supra note 3, 865; Ratner, supra note 98, 447-448.


193 Knox, supra note 99.

194 Three conditions must be met for this to be the case: the duty is imposed by an international rule that regulates corporate conduct directly (without mediation by domestic law), corporate conduct in breach of this duty engages the actor’s responsibility under international law and this responsibility is enforced by a domestic forum applying international law, or by an international forum – in the latter case, international law also ‘enforces’ private human rights duties, which is the next stage on Knox’ continuum. Karavias, supra note 117, 16.

195 See also Wetzel, supra note 189, 86.
States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.  

As the above-cited principle indicates, the UNGPs endorse ‘the obligation to protect’ doctrine and thus acknowledge that international law at least contemplates human rights duties for business enterprises, which should then be imposed by domestic law and enforced through domestic remedies. The degree of specification of those duties depends on the right concerned and the instrument incorporating that right. According to the UNGPs, international human rights law does not place any duties directly on non-state actors, like business enterprises.

Broadly speaking, the obligation to protect comprises the following two cumulative duties: (1) a (preventive) duty to adopt and enforce reasonable legislative, administrative, judicial and other measures that regulate business conduct and (2) a (remedial) duty to ensure redress whenever, despite the preventive measures, business enterprises do not comply with their duties. States are in principle free to decide which measures they adopt, provided that they are reasonable. Accordingly, the obligation to protect is one of due diligence; the failure to prevent and/or redress a violation does not automatically trigger the state’s international legal responsibility, unless its conduct is considered unreasonable. Hence, international law does not assume that business enterprises have no human rights duties at all, but those duties are only legally binding, if they have a basis in national law, and

196 Principle 1 of the UNGPs, annexed to Report A/HRC/17/31, supra note 33.
198 For instance, Article 9(2)(b) of the Convention on the Rights of Persons with Disabilities (adopted by the UN General Assembly on 13 December 2006, 2515 UNTS 3) specifies that states must take appropriate measures to “ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities”.
201 The reasonableness standard inter alia accounts for the unpredictability of private conduct, the state’s budgetary constraints and its obligation to respect other rights and freedoms. De Schutter (2010), supra note 30, 423.
202 This liability is ‘indirect’ or ‘vicarious’, since the state is not the actual perpetrator of the violation. Reinisch, supra note 31, 79. See also A. Popova, “Business and Human Rights after Ruggie’s Mandate: Feasible Next Steps,” in eds J. Martin and K.E. Bravo, The Business and Human Rights Landscape 106 (Cambridge University Press, 2016), 119.
can only be enforced through domestic remedies. This also means that when a company violates human rights, victims have to be content, at the international level, with calling the state to account for its failure to adequately regulate corporate conduct and/or to provide an appropriate remedy. This creates a triangular relationship between victims, the state and business enterprises, as depicted in Figure 3 below.

Following Principle 2, which stipulates that states “should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”, Principles 3 to 10 of the UNGPs and their explanatory commentaries clarify the practical implications of the obligation to protect for states’ dealings with business enterprises (‘operative principles’). They should, for instance, take additional steps to protect human rights against possible violations by state-owned companies, promote human rights in public contracts, be mindful of their human rights obligations when they enter into investment agreements (see also infra Section 1.3), and ensure that state actors that shape business practices are aware of and observe the state’s human rights obligations. These principles suggest that more is expected from states than merely regulating corporate conduct, which the discussion of national action plans next will confirm.

1.1.1.2. Implementation through national action plans

In an attempt to urge states to implement their obligation to protect by proposing concrete action measures, the Working Group on the issue of human rights and transnational corporations and other

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203 De Brabandere, supra note 95, 74 and 82; J.L. Černič, “An Elephant in a Room of Porcelain: Establishing Corporate Responsibility for Human Rights,” in eds. J.L. Černič and T. Van Ho, Human Rights and Business 131 (Oisterwijk: Wolf Legal Publishers, 2015a), 135; Mendes, supra note 10, 209; van Dam, supra note 95, 491. Deva criticises that the term ‘responsibility to respect’ might create the (wrong) impression that all human rights responsibilities of companies are without legal consequences. Deva (2013), supra note 42, 94.

204 See also Hessbruegge, supra note 62 (using the term ‘diagonal obligations’).

205 See, respectively, Principles 4, 6, 9 and 8 of the UNGPs and their commentary, annexed to Report A/HRC/17/31, supra note 33.
business enterprises has called on all states to draft a national action plan. A major added value of these plans – and the best practices for redacting and updating them that have emerged since that first call – is that they have clarified the ambit of the obligation of states to protect human rights against possible interferences by business enterprises.

After all, many states interpret(ed) their obligation to protect rather narrowly and concentrate(d) on the extent to which the responsibility of business enterprises to respect human rights is ‘hardened’ through domestic laws, regulations and policies, for instance through a stringent labour law regime. They project their obligation to protect entirely on what is expected from the other party, being business enterprises, and thereby ‘externalise’ their own responsibility. Nonetheless, the obligation to protect as it is contemplated by the UNGPs reaches beyond such narrow interpretation. Plenty of decisions that states take (or refuse to take) have the potential to affect the power and leverage of business enterprises in society and/or the protection and enforceability of human rights. As was said before, this is the case for decisions relating to state-owned companies, to the state’s own commercial transactions and to business-related policies such as trade and investment. The case study will demonstrate that also many rules of procedural law affect victims’ ability to vindicate their rights vis-à-vis business enterprises, one example being standing rights. If a state does not admit class actions, for instance, this may impede litigation against business enterprises, because individual claims may be too small to be litigated or individual victims may lack the resources to pursue such litigation. States should thus be careful not to unduly hamper access to courts and, at best, try to correct the evident power imbalance between victims and business enterprises and/or government actors.

Furthermore, not only the substance of laws, regulations and policies may affect the relationship between business and human rights, but also the procedure through which these measures are developed and implemented. An important element in that connection are the capacity and resources

206 When the Human Rights Council endorsed the UNGPs (supra Part I, Section 1.3), the mission of the Special Representative was accomplished and his mandate came to an end. Therefore, the Human Rights Council established a Working Group inter alia to promote the effective and comprehensive dissemination and implementation of the UNGPs. Resolution 17/4 of the Human Rights Council, supra note 43, para 6(a).

207 Human Rights Council, Report of the working group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/23/32 (14 March 2013), para. 71(f). States are only slowly responding to that call. For the states that have published a national action plan, see supra note 61.


210 See also ibid. 463 and 472-475 (denouncing that states rather focus on outward than on inward discipline).


212 See also J. Zerk, “Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies,” report prepared for the Office of the High Commissioner for Human Rights (2014), 87 (calling on states to address in their national action plans the practical steps that they will take “in terms of reforming legal systems, amending rules of civil procedure, providing public financial support for litigants and boosting the resources available to public prosecutors”).
that state actors have at their disposal to comply with the state’s human rights obligations.\(^{213}\) The former UN Special Representative, John Ruggie, for instance, has deplored the fact that notwithstanding their potentially huge impact on human rights (\textit{infra} Section 1.3), trade and investment agreements are generally negotiated by officials from the trade department who have little to no experience with human rights.\(^{214}\)

In sum, besides ‘hardening’ the responsibility of business enterprises for human rights through domestic law, every state should review the coherence of its entire polity and political economy and of all law and policy in order to assess whether these different elements of its architecture reckon with its obligation to protect human rights.\(^{215}\)

1.1.2. Second pillar: responsibility to respect

The foundational principle of the second pillar of the UN Framework reads that “[b]usiness enterprises should respect human rights”, which “means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”\(^{216}\) According to the UNGPs, this responsibility is not grounded in law but in social expectations.\(^{217}\) Hence, from the perspective of international law, the corporate responsibility to respect human rights is not legally binding nor (quasi-)judicially enforceable. On the other hand, perhaps precisely because it is not a legal obligation, it does extend beyond mere compliance with domestic law, which is particularly relevant for business enterprises that are active in countries where certain rights are not protected by law or where such law falls short of international human rights standards.\(^{218}\) Neither is the responsibility to respect limited to the activities proper of a particular company, but applies to all possible adverse impacts linked to its operations, products or services throughout its commercial relationships, including the supply chain.\(^{219}\)


\(^{214}\) Ruggie (2013), \textit{infra} note 153, 87.


\(^{216}\) Principle 11 of the UNGPs, annexed to Report A/HRC/17/31, \textit{infra} note 33. ‘Adverse human rights impacts’ are broadly defined as occurring whenever an action removes or reduces the ability of individuals to enjoy their human rights. OHCHR, Interpretative Guide on the Corporate Responsibility to Respect, \textit{infra} note 129, 5.


\(^{219}\) Principle 12 of the UNGPs, annexed to Report A/HRC/17/31, \textit{infra} note 33.
To provide guidance to business enterprises as to how they can identify, prevent, mitigate and account for their human rights impacts, the UNGPs incorporate a roadmap to conduct ‘human rights due diligence’.\(^{220}\) In particular, companies should (1) assess actual and potential human rights impacts, (2) integrate, and act upon, those findings, (3) track responses and (4) communicate how they address impacts.\(^{221}\) This concept of ‘due diligence’ was actually borrowed from corporate governance, which should facilitate the business community’s understanding of their responsibility to respect.\(^{222}\) Ordinarily, carrying out ‘due diligence’ means that business enterprises review their policies and operations on a continual basis and/or at the occasion of specific transactions in order to identify and manage financial risks.\(^{223}\) Thus, the UNGPs expect companies to undertake a similar exercise for their actual and potential adverse human rights impacts.

Nonetheless, ordinary due diligence is fundamentally different from human rights due diligence. The former is concerned with financial risks that are internal to the company itself and that affect its viability and its shareholders’ interests, whereas adverse human rights impacts are external to the company in the sense that they primarily affect the interests of stakeholders other than shareholders – notwithstanding that adverse human rights impacts may eventually also have financial repercussions for the company.\(^{224}\) Moreover, carrying out human rights due diligence requires meaningful engagement with those rights holders,\(^{225}\) which is alien to ordinary due diligence. As a result, human rights due diligence does not match business thinking as much as it may have been expected to do.\(^{226}\)

This dissertation submits that the association of ordinary due diligence with the financial position of companies may even partly explain why many business enterprises believe that funding social projects suffices to comply with their ‘social responsibility to respect human rights’ – so that they do not assess nor address the adverse impacts of their core business activities.\(^{227}\)

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220 Principle 17 of the UNGP, ibid.
221 These steps are concretised in Principles 18, 19, 20 and 21 of the UNGPs, ibid.
222 See also Bird, Cahoy and Dhooge, supra note 26, 623; Deva (2013), supra note 42, 99-100.
226 See also the criticism by Deva (2013), supra note 42, 99-100.
227 Others have suggested that this is due to the confusion between human rights violations and adverse effects on human rights. The former takes account of effects on people’s ability to exercise rights, whilst the latter is only concerned with their actual will or perceived interests. G.C. Brenkert, “Business, Respect, and Human Rights,” in eds. J. Martin and K.E. Bravo, The Business and Human Rights Landscape 145 (Cambridge University Press, 2016), 148-151.
Also the legal implications of human rights due diligence are not settled. Due diligence is used as a standard of conduct both in international human rights law to assess whether states have discharged certain legal duties, like their obligation to protect human rights, and in national law to establish whether a private actor has acted negligently, for instance, whilst in corporate governance due diligence is understood as a process to manage risks. Consequently, the question is whether carrying out human rights due diligence can be used as a legal defence against liability. In its Guidance on improving corporate accountability and access to judicial remedy, the Office of the UN High Commissioner for Human Rights has left this question open, so that states have the discretion to decide whether proof of having conducted human rights due diligence constitutes a partial or complete defence or has an impact on sentencing.

1.1.3. Third pillar: access to remedies

Lastly, the third pillar, namely access to remedies, is an essential component of the UN Framework. Its effectiveness would be seriously jeopardised, if victims cannot access a remedy to enforce their rights. The UNGPs discern three types of remedies, namely judicial remedies, state-based but non-judicial remedies and non-state-based remedies.

First of all, the duty of states to establish a comprehensive state-based system of remedies is inherent to their obligation to protect. Importantly, victims should not only have access to judicial remedies, but also to non-judicial remedies, since “[e]ven where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses” and “judicial remedy is not always required [and not] always the favoured approach for all claimants”. As also the UNGPs acknowledge, an important role in this regard is reserved for national human rights institutions.

In addition, the UNGPs encourage states to create and facilitate access to non-state-based remedies, petition business enterprises to provide for, or participate in, operational-level grievance mechanisms

228 J. Bonnitcha and R. McCorquodale, “Is the concept of ‘due diligence’ in the Guiding Principles coherent?” (25 January 2013); López, supra note 17, 60-61; Sanders, supra note 223, 301-302.
231 See also infra Part IV, Section 2.1.
232 See, respectively, Principles 26, 27 and 28-30 of the UNGPs, annexed to Report A/HRC/17/31, supra note 33.
233 Principle 25 of the UNGPS, ibid.
234 Commentary to Principle 27 of the UNGPs, ibid.
235 Ibid.
and call for all (non-legally binding) collaborative initiatives to be accompanied by a remedy.\textsuperscript{236} One type of non-state-based remedies are operational-level grievance mechanisms, which are “ongoing procedures through which low-level complaints about a diverse array of issues can be addressed through dialogue and flexible alternative dispute resolution processes”, which should ensure that adverse human rights impacts by business enterprises are identified and resolved at an early stage.\textsuperscript{237} Accordingly, they are assumed to be quicker and less expensive than state-based remedies, as well as a good occasion for companies to generate data and to improve their practices based thereupon.\textsuperscript{238} These mechanisms may be administered by individual business enterprises, by business enterprises acting jointly or by an external expert body.\textsuperscript{239} Aside from operational-level grievance mechanisms, non-state-based remedies comprise remedies established by industry organisations or intergovernmental organisations,\textsuperscript{240} remedies created under multi-stakeholder initiatives, as well as remedies before regional or international human rights bodies.\textsuperscript{241}

1.2. Business and human rights according to national law

The preceding discussion has demonstrated that the international legal framework on business and human rights, through the obligation to protect, places a tremendous responsibility on states. The extent to which a human rights violation actually engages the responsibility of a business enterprise depends on a state’s excellence in implementing its obligation to protect. To assess the degree to which companies are constrained by human rights in a particular state, its domestic legal system must thus be unravelled. A one-size-fits-all approach to business and human rights does not exist, however; every domestic legal system has its own way to construct the legal impact of human rights on private actors, like business enterprises,\textsuperscript{242} and neither have scholars agreed on a single approach to categorise

\textsuperscript{236} Respectively Principles 28, 29 and 30 of the UNGPs, annexed to Report A/HRC/17/31, supra note 33.


\textsuperscript{239} Commentary to Principle 29 of the UNGPs, annexed to Report A/HRC/17/31, supra note 33.

\textsuperscript{240} An example are the complaint mechanisms within the World Bank Group. For a brief discussion, see e.g. Drimmer and Laplante, supra note 238, 335.

\textsuperscript{241} Commentary to Principle 28 of the UNGPs, annexed to Report A/HRC/17/31, supra note 33.

and explain the effects of human rights in the private sphere. This dissertation proposes to carefully scrutinise the following two legal constructs in order to assess the relationship between business and human rights in a given domestic legal order: the horizontality of human rights (Section 1.2.1.) and the protective duties of (organs of) the state (Section 1.2.2).

1.2.1. The horizontality of human rights

In fact, ‘horizontality’ is a rather opaque concept, as it seems to assume a contractual relationship between parties with mutual rights and duties, whereas there is no such reciprocity when business enterprises are assumed to bear human rights duties; rights holders do not owe any duties to companies in return for holding those rights against them. On top of the conceptual discomfort, fathoming the precise meaning of horizontality is also difficult. Many different approaches in legal scholarship exist. In this dissertation, three dimensions to horizontality are discerned, which concurrently determine the horizontal impact of human rights on business enterprises, being horizontal effect (Section 1.2.1.1), horizontal scope (Section 1.2.1.2) and horizontal application (Section 1.2.1.3).

In simple terms, the three dimensions respectively entail an inquiry into whether a human rights norm binds companies, which duties companies bear under such norm and towards whom, and how the norm and its consequent duties actually affect companies. Remarkably, many scholars do not (explicitly) consider the horizontal effect and scope of human rights, but immediately jump to the question of horizontal application. Such analysis arguably stands at odds with the established principle that a rule’s applicability does not depend on its enforceability, which also relates to the

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245 See also Karavias, supra note 117, 178-179. If corporate human rights duties are not based on reciprocity, the question is whether they accrue from principles akin to the pursuit of social welfare, for instance, where also the human rights duties of the state find their origin. This discussion exceeds the purposes of the dissertation, however.

246 Price, supra note 115, 330-331 (questioning the value of such enquiry at the abstract level because at the concrete level there is “a host of different practical and theoretical issues”).


248 This is also criticised by, for instance, Davis and Klare, supra note 106, 418.
difference between primary and secondary (remedial) rights. Following a discussion of the three dimensions to horizontality, the approach under the Alien Tort Statute, which deserves special mention, is briefly explained (Section 1.2.1.4).

1.2.1.1. Horizontal effect

A specific human right has horizontal effect when it binds business enterprises. This is an all-or-nothing, black-or-white question that is unrelated to how this effect manifests itself – id est which duties flow from that right and how those duties are enforced. Whether a right has horizontal effect has to be reviewed in abstracto and in concreto. First of all, if in a given domestic legal order there exists a fundamental opposition to the idea that human rights are capable of binding anyone other than the state, no human right within that system has horizontal effect. However, even when there is no such principled objection, a concrete right must still be suitable to bind business enterprises. Examples of rights that can only ever have implications in vertical relations between the state and its citizens are the right not to be subjected to the death penalty, the right to equality before the courts and the right to participate in elections.

When a right has no horizontal effect, this implies that it can only be applied in a purely vertical way (infra Section 1.2.1.3). As will be explained, however, this does not mean that such right does not constrain business enterprises at all given the protective duties of the state. Only rights that have horizontal effect can thus be horizontally applied, whether directly or indirectly.

1.2.1.2. Horizontal scope

The second dimension of horizontality, the horizontal scope of human rights, deals with the types of duties that a right with horizontal effect creates for business enterprises (i) and the identification of the rights holders towards whom they owe those duties (ii).

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250 This dissertation employs ‘horizontal effect’ for both constitutional and international human rights. Other scholars speak of ‘third-party applicability’ in relation to international human rights norms to express the idea that a treaty, which is agreed by states, is subsequently applied to business enterprises, which are non-state actors and thus third parties to the concerned treaty – a similar reasoning could in fact be applied to constitutions when they are considered to be social contracts between the state and its citizenry. See e.g. A. Clapham, Human Rights in the Private Sphere (Oxford University Press, 1993), 111.

251 The archetypical example is the US. See e.g. Chirwa, supra note 242, 22-26.

252 See e.g. the discussion on horizontal effect in South Africa, infra Part III, Section 1.2.1.2.
(i) Types of duties

There is little disagreement that the human rights duties of business enterprises can hardly be the same as those of the state, given that the *raison d’être* of business enterprises is fundamentally different.  

Discussions about the duties of companies are generally conducted on a more abstract level, referring to the different types of duties that human rights can create. Different typologies exist in that regard, but this dissertation prefers to work with the categorisation based on whether compliance with a specific duty is a matter of respecting, protecting or fulfilling the concerned right. The obligation to respect means that the duty bearer should refrain from interfering with the right, the obligation to protect that third parties should be prevented from interfering therewith, and the obligation to fulfil that duty bearers should facilitate (assist rights holders), promote (ensure awareness) and provide human rights (to rights holders who are unable, for reasons beyond their control, to realise their rights by the means at their disposal).

Whilst it is generally accepted that business enterprises should not interfere with human rights, there is some discomfort with the idea that, under appropriate circumstances, they should also protect and fulfil human rights – note that also the UNGPs only speak about business enterprises’ responsibility to *respect* human rights. The reasons for this controversy about companies’ obligation to protect and especially their obligation to fulfil human rights lie in the perceived mismatch with the commercial,


254 Aside from the tripartite obligations to respect, protect and fulfil, and the distinction between positive versus negative duties and active versus passive duties, each of which will be mentioned in the discussion that follows, Toebes, for instance, distinguishes internal and external duties. B. Toebes, “Direct Corporate Human Rights Obligations under the Right to Health: From Mere ‘Respecting’ Towards Protecting and Fulfilling,” in J.L. Černič and T. Van Ho, Human Rights and Business 263 (Oisterwijk: Wolf Legal Publisher, 2015), 270.

255 See also Černič (2016), *supra* note 77, 196-201. This typology originates from Shue’s distinction between duties to avoid depriving, to protect from deprivation and to aid the deprived, which was subsequently developed by Eide into the tripartite obligation to ‘respect, protect, fulfil’. Shue, *supra* note 103, 52-53; Report E/CN.4/Sub.2/1987/23 on the right to adequate food, *supra* note 200, para. 66.

256 This could, for instance, comprise a duty for companies to support human rights protection through their expertise and resources and a duty to oblige partners in the supply chain to respect human rights. Černič (2015a), *supra* note 203, 152. See also Toebes, *supra* note 254, 277.

257 Companies could, for instance, have a duty to offer financial support to secure all basic needs within a certain area or one specific need across the country. Černič (2015a), *supra* note 203, 154. See also Toebes, *supra* note 254, 277.

profit-maximizing objectives of business enterprises as well as in concerns about legitimacy, which will be illustrated and discussed further in the context of the case study. There is also a fear that business enterprises would try to off-set a failure to respect a certain human right with measures taken to protect, facilitate, promote or provide other rights. In any case, a lot would depend, first, on the concrete duties that would emerge from the recognition that business enterprises must protect and fulfil human rights and, second, on the rights holders towards whom they would such those duties. That parent companies should watch their subsidiaries’ conduct, for instance, may be less controversial, which is a duty that seems to fall under an obligation to protect human rights. Another common typology to categorise human rights duties distinguishes between negative and positive duties. This terminology is avoided, however, because it may raise misunderstandings and confusion when it is equated with (passive) ‘duties to forebear from acting’ and (active) ‘duties to act’ – although not all scholars make that association and adopt a broader interpretation of negative and positive duties. First of all, rights are sometimes described as negative or positive rights, which may create the (wrong) impression that each right imposes either negative or positive duties. Nonetheless, it should go without saying that any right is capable of creating both duties to act and

259 See e.g. A.G. Scherer, G. Palazzo and D. Baumann, “Global rules and private actors: Toward a new role of the transnational corporation in global governance,” Bus. Ethics Q. 16(4) (2006), 519 (writing that “if corporations (…) assume responsibility for state functions and generate global rules, then it becomes obvious that it is necessary to control corporations just as the democratic state needs to be controlled by its citizens”). Cf. Karavias, supra note 117, 169-172 (discussing whether companies have obligations beyond the baseline obligation to protect). Cf. N. McMurry, “Privatisation and the Obligation to Fulfil Rights,” in eds. J.L. Černič and T. Van Ho, Human Rights and Business 251 (Oisterwijk: Wolf Legal Publisher, 2015), 253 (noting that privatisation can “provide a disincentive for the state to develop policies to fulfil rights if these policies impede the profits of investors”). Contra Bilchitz (2013b), supra note 217, 131-135 (arguing that companies do not lack such obligations).

260 See e.g. Part II, Sections 1.2.1.2 and 2.2.3.3.

261 See also OHCHR, Interpretative Guide on the Corporate Responsibility to Respect, supra note 129, 15.

262 According to some scholars, in a number of ways the UNGPs also assume that business enterprises have an obligation to protect. See e.g. R. Mares, “‘Respect’ human rights: Concept and convergence,” in R.C. Bird, D.R. Cahoy and J.D. Prenkert, Law, Business and Human Rights 3 (Cheltenham: Edward Elgar, 2014), 6; Wettstein (2013), supra note 258, 244.

263 See also Deva and Wettstein, who both write that the duty of parent companies triggers an obligation to protect. Deva (2013), supra note 42, 95-96; Wettstein (2013), supra note 258, 244. If the degree of control exercised by the parent is so high, however, that the subsidiary does not independently determine its own conduct and policy, the parent company’s obligation to respect is arguably rather at stake.

264 Note that several other theories have been developed by scholars to determine which rights have horizontal effect and which duties they create for business enterprises. See e.g. Hessbruege, supra note 62, 79-82; Ratner, supra note 98, 496-519.

265 See e.g. Wettstein (2013), supra note 258, 253-254; Wettstein (2016), supra note 16, 83.

duties to forebear from acting. A similar confusion may arise, when the obligation to respect is described as a negative obligation and the obligations to protect and promote as positive obligations. However, as also other scholars acknowledge, each of the three obligations to respect, protect and promote can create duties to act as well as duties to forebear from acting. It is evident, for instance, that under given circumstances the obligation to respect human rights may require certain action on the part of the duty bearer so as to prevent that human rights are harmed. Take, for instance, the right to water. To respect that right, companies have to take measures to avoid that their operations pollute the water sources of neighbouring communities. Another example is the obligation to respect the right to life of employees, which creates a duty for business enterprises to provide their employees with adequate protective equipment to avoid exposure to harmful products. In anticipation thereto Dubbink and Van Liedekerke, for instance, make a distinction between ‘genuinely positive duties’, which do not relate to any prior existing negative duty, and ‘derivative positive duties’, which are incidental to a negative duty. Arguably, however, using such terminology further complicates the legal picture.

A second reason why the ‘positive’ and ‘negative’ typology is avoided is that the differentiation between positive and negative duties and/or rights is regularly accompanied by the argument that economic, social, cultural and solidarity rights are not judicially enforceable, because contrary to civil

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267 An illustration is the right to vote, which cannot be exercised unless government establishes an electoral system and provides the necessary human, financial and technical resources to organise the ballot. Also other scholars criticise the association of negative/positive obligations with negative/positive rights. See e.g. Abramovich, supra note 267, 183-184 (writing that rights should be placed on a continuum depending on the symbolic weight of the positive and negative duties that they impose); D. Brand, “Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale,” in ed. F. Coomans, Justiciability of Economic and Social Rights 207 (Antwerpen: Intersentia, 2006), 226 (“all rights can (…) impose a range of different duties, negative and positive”); I.E. Koch, “Dichotomies, Trichotomies or Waves of Duties,” Hum. Rts. L. Rev. 5 (2005), 82-84 (challenging proponents of the positive/negative dichotomy and arguing in favour of human rights encompassing a spectrum of legal obligations going from negative to positive); Liebenberg (2010), supra note 83, 56 (arguing that “characterising particular rights as inherently negative or positive is problematic in both theory and practice”); Shue, supra note 103, 155 (writing that “no right can (…) be secured by the fulfilment of (…) only one kind of duty”).

268 See e.g. the terminology used by the South African Constitutional Court in Governing Body of the Juma Musjid Primary School and Others v. Essay N.O. and Others (CCT 29/10) [2011] ZACC 13 (11 April 2011), paras 31, 45 and 57.

269 Also other scholars agree that every right and every obligation (to respect, protect or fulfil) can create both positive and negative duties. Abramovich, supra note 267, 184; Augenstein and Kinley (2015), supra note 189, 839-840; Karavias, supra note 117, 168-169; Shue, supra note 103, 155-156.

270 See e.g. Brand (2006), supra note 267, 212-216 (identifying three types of duties to comply with the obligation to respect human rights: non-interference, non-impairment and mitigation measures); Brenkert, supra note 227, 155; Černič (2016), supra note 77, 197-198. Compare also with the statement in the interpretative guide on pillar II that “[r]especting human rights is not a passive responsibility: it requires action on the part of businesses.” OHCHR, Interpretative Guide on the Corporate Responsibility to Respect, supra note 129, 23.

271 They use this terminology to explain that under an orthodox view companies are believed to owe negative as well as positive duties “insofar as they are required to fulfil one’s negative duties”. Dubbink and Van Liedekerke, supra note 122, 529-530.
and political rights they essentially demand positive action from their duty bearers. However, as said before, this dissertation agrees that every right (regardless of its generation) and every obligation (whether to respect, protect or fulfil) can create duties to forebear from acting and duties to act, even when this requires the spending of resources.

Whatever typology is used, the concrete duties that human rights impose on business enterprises remains a highly controversial issue. Therefore, it can already be observed that one way in which the international legal framework could be advanced is through greater specification of the concrete duties that companies bear under human rights that have horizontal effect.

(ii) Identifying rights holders

The second question that arises when the horizontal scope of human rights is assessed, relates to the identification of the rights holders towards whom business enterprises owe their duties. Contrary to states, whose obligations are linked to their jurisdiction, the criteria that should trigger the responsibility of business enterprises remain highly controversial, as was also demonstrated by the uproar that the UN Norms caused for linking the human rights duties of companies to their ‘sphere of activity and influence’.

What should indeed be relevant is the “political, contractual, economic or geographic proximity” of a business enterprise to potential rights holders, which necessitates a case-by-case assessment. The precise degree of proximity that is required for a duty towards certain rights holders to come into existence is again an issue that would benefit from further clarification, for instance at the international level.

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273 See also Knox, supra note 99, 45; Ratner, supra note 98, 448 and 538.
274 Under the UN Norms business enterprises would have borne human rights duties “within their respective spheres of activity and influence”. UN Norms E/CN.4/Sub.2/2003/12/Rev.2, supra note 40, para. 1. At one side of the spectrum, the fear was that this concept would “allow corporations to assert that they are not bound in a particular instance and thus to escape liability where it should be imposed”. At the other end, the fear was rather that the responsibilities of business enterprises would be overly broad, encompassing all instances where they have some leverage. Bilchitz (2008), supra note 29, 767-768; J.L. Černíč, “United Nations and Corporate Responsibility for Human Rights,” Miskolc J. Int'l L. 8 (2011), 25; D. Kinley and R. Chambers, “The UN Human Rights Norms for Corporations: The Private Implications of Public International Law,” Hum. Rts. L. Rev. 6 (2006), 452 and 469-472.
276 Cf. Karavias, supra note 117, 173-174 (using the concept of ‘control’ to identify the beneficiaries of the obligations); Ratner, supra note 98, 496-497 (proposing to delineate duties of companies on the basis of four criteria).
Evidently, while the (predominantly territorial) exercise of jurisdiction that serves as the basis to identify the human rights duties of states, is quite uniform across those duty bearers, business enterprises are infinitely diverse. A one-size-fits-all definition thus seems illusory.

1.2.1.3. **Horizontal application**

When a business enterprise fails to comply with its duties owed to a rights holder under a human right that has horizontal effect, the remaining question is how this right is or can be applied to that duty bearer, so that aggrieved rights holders can vindicate their rights and that future violations can be prevented. Broadly, three approaches towards horizontal application exist, namely purely vertical application, indirect horizontal application and direct horizontal application – note that several forms of application may exist in parallel in one legal system, so that a different form of application may be used depending on the case.

Purely vertical (or ‘non-horizontal’) application means that the right at stake is not applicable in-between the individual and the business enterprise, but only in-between the individual and the state. This does not preclude that the concerned right affects companies, but this can only occur through the state’s protective duties, namely the obligation of (organs of) the state to protect human rights against possible interferences by companies whenever they perform their functions (infra Section 1.2.3).

Next, indirect horizontal application implies that private law is interpreted and applied in conformity with human rights. The horizontal application is ‘indirect’, because human rights are applied through the realm of private law. Different models of indirect horizontal application exist. In particular, in interpreting and applying private law, reference can be made to either the actual rights that are at stake (direct-indirect horizontal application) or to the fundamental values that underlie those rights (indirect-indirect horizontal application), and the judiciary may or may not have the competence to forge a new (private law) remedy if existing remedies are believed to be inadequate, for instance by developing the common law (strong versus weak indirect horizontal application).

Finally, direct horizontal application entails that the human right itself establishes a cause of action on the basis of which victims can proceed, and that remedies flow directly from human rights law.

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277 Kinley and Chambers, *supra* note 247, 471.
278 See also Barak, *supra* note 247, 30-31. Contra Phillipson, *supra* note 247, 830-831 (using the terminology weak and strong for what is here called indirect-indirect and direct-indirect).
279 According to Dafel, there is a general reticence to direct horizontal application across legal systems, which is due to three reasons: the state-centric wording of constitutions, the ‘non-rule-based provisions’ that do not establish absolute entitlements and the philosophical opposition to the idea of human rights duties being directly imposed on private actors. M. Dafel, “The directly enforceable constitution: political parties and the horizontal application of the bill of rights,” S. Afr. J. on Hum. Rts. 31 (2015), 62-63.
Accordingly, victims do not first have to identify a cause of action under existing private law before they can approach a court, and remedies can be created outside of private law.

1.2.1.4. The US Alien Tort Statute

A detailed discussion of the US Alien Tort Statute\(^{280}\) exceeds the purposes of this dissertation, but for the sake of completeness the peculiar approach to horizontality under this Statute should be mentioned.\(^{281}\) In brief, the Alien Tort Statute explicitly provides for horizontal (or ‘third party’\(^{282}\)) effect of a number of international legal norms, which are indirectly applied through domestic tort law, because the Statute establishes a cause of action to sue a private actor in the federal courts for damages that are due to violations of ‘the law of nations’. Although the Statute was traditionally believed to deal with only three types of international law breaches (piracy, violations of safe conducts and infringements of ambassadors’ rights) in its landmark judgment in *Sosa v. Alvarez-Machain* the US Supreme Court only held that no claims should be recognised for “violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when [the Statute] was enacted.”\(^{283}\)

In *Kiobel v. Royal Dutch Petroleum*\(^{284}\) the US Supreme Court was asked whether the Alien Tort Statute also applies to international law breaches by business enterprises. The Court did not address that question, but dismissed the claim for another reason, being the presumption against extraterritoriality.\(^{285}\) This presumption means that whenever a statute does not give a clear indication of its extraterritorial application, it has none, as US law should not be presumed to “rule the world”.\(^{286}\) Accordingly, federal courts do not have jurisdiction over ‘foreign-cubed cases’ that involve a dispute in which non-US victims seek compensation for a tort committed outside the US by a non-US perpetrator.\(^{287}\) However, even before this judgment, the relevance of the Alien Tort Statute in business-related human rights matters was limited. For one, the circuit courts were (and continue to be) divided

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\(^{282}\) See the explanation about terminology, *supra* note 250.


\(^{285}\) This argument was, for instance, raised in the submissions of the Netherlands and the UK. *Kiobel v. Royal Dutch Petroleum Co*, Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland, no. 10-1491 (13 June 2012).

\(^{286}\) *Kiobel v. Royal Dutch Petroleum*, *supra* note 284, 4.

\(^{287}\) Baughen, *supra* note 32, 98-104.
on the question whether corporate liability exists under the Statute.\textsuperscript{288} Another restriction is that the Statute only applies to rights that are sufficiently determinate to constitute rules of international customary law for the purposes of subject-matter jurisdiction, which was not found to be the case for the prohibition of intra-state pollution, for instance.\textsuperscript{289}

In sum, the Alien Tort Statute should be mentioned as a unique instrument providing for horizontality, as it creates a cause of action, based on tort law, before the US courts in case of violations of well-established, universally recognised norms of international law. However, the case law has developed in such a way that the possibilities to litigate under the Statute are restricted for victims of human rights violations by business enterprises and that transnational litigation under the Statute has been dealt a hard blow by the judgment of the Supreme Court in \textit{Kiobel v. Royal Dutch Petroleum} – although it cannot be excluded that specific cases may meet its ‘touch and concern’ criterion.\textsuperscript{290}

\subsection*{1.2.2. Protective duties}

Human rights also have an impact on business enterprises through the protective duties of the state.\textsuperscript{291} Similar to the obligation to protect under international human rights law, domestic legal systems generally require that the state not only respects, but also protects, human rights.\textsuperscript{292} The doctrine on protective duties has mainly been developed in German scholarship, where it emerged as an antipode to the ‘Mittelbare Drittwirkung’ paradigm (indirect horizontal application), because this paradigm

\begin{thebibliography}{99}
\bibitem{Baughen-2003} Baughen, \textit{supra} note 32, 248.
\bibitem{Tushnet-2003} See, more generally, the theory on the social democracy, as explained e.g. by Tushnet (2003), \textit{supra} note 110, 90-91.
\end{thebibliography}
could not explain all instances in which human rights affect private actors, which created a lot of uncertainty.\textsuperscript{293}

In accordance with its protective duties the legislature must thus consider its duty to protect and promote human rights whenever laws, regulations or policies touching upon these rights are proposed, adopted or amended. A similar obligation exists on the part of the executive in the exercise of its law-making and -enforcing competence and of the judiciary, when judges have to adjudicate ‘horizontal’ disputes amongst private actors or ‘vertical’ disputes with a radiating effect on private third parties.\textsuperscript{294}

Obviously, when the state discharges its protective duties, companies are affected by the human rights that are at stake. The intensity and explicitness of that impact depend on a right’s horizontal effect, scope and application. The protective duties of the legislature and the executive are particularly important whenever a human right has no horizontal effect, so that only the implementing laws, regulations and policies that they adopt are relevant for private relationships. The executive should also be particularly mindful of its protective duties, when it monitors the implementation of a judgment that touches upon human rights in private relationships. The judiciary, in turn, must always consider its protective duties given its pivotal role in the horizontal application of human rights, whatever form it takes, as its decisions and judgments are always capable of affecting the human rights duties of business enterprises. Indeed, judges have to apply the laws, regulations and policies adopted by government (vertical application model); they must interpret private law in accordance with human rights and, if necessary and mandated thereto, develop private common law in accordance therewith (indirect horizontal application model); and, when human rights serve as an independent cause of action, they must apply these rights directly and balance them with any rights of the defending party (direct horizontal application model).

\textbf{1.2.3. Final outlook}

In fact, ‘horizontality’ and ‘protective duties’ are inherently intertwined and they are separated only to rationalise the possible impact of human rights on business enterprises in domestic legal orders. A


\textsuperscript{294} See e.g. Biowatch Trust \textit{v. Registrar Genetic Resources and Others} (CCT 80/08) [2009] ZACC 14 (3 June 2009), paras 28 and 54. Not all authors accept that the judiciary has protective duties, because when judges exercise their judicial functions, their decisions are constitutive of the law and not subject to any form of external influence. Barak, \textit{supra} note 247, 27-28; H. Cheadle and D.M. Davis, “Application of the 1996 Constitution in the Private Sphere,” S. Afr. J. on Hum. Rts. 13 (1997), 55. In Germany, for instance, protective duties are not believed to affect adjudication. Fedtke (2007a), \textit{supra} note 293, 148-149.
given situation where human rights affect companies may be explained as triggering horizontality or protective duties.\textsuperscript{295} The standard of care that is used (quasi-)universally in domestic tort law is a good illustration – a standard which should \textit{inter alia} protect people’s right to personal integrity. This standard can be incorporated in statutory law (in accordance with the executive and/or the legislature’s protective duties, depending on who took the initiative) or it can be part of common law, in which case mainly the protective duties of the judiciary are at stake. When that standard is then applied in a particular case, also the horizontality of the right to personal integrity may be triggered, for instance when that right is used to interpret, apply and possibly even develop the standard.

Nevertheless, for analytical purposes a separate scrutiny of horizontality and protective duties remains useful. It ensures a comprehensive understanding of the interplay between business and human rights in domestic legal systems,\textsuperscript{296} given that the answer to the question whether and to what extent human rights constrain business enterprises under national law is never straightforward. In view of the obligation to protect under international law, human rights should, in principle, have some legal impact on business enterprises in every domestic legal order.\textsuperscript{297} However, states are free to decide how this impact manifests itself, and may even provide for different approaches depending on the situation at hand. The only certainty then is that, contrary to the international legal framework (see \textit{supra} Figure 3), the domestic legal framework for business and human rights does not necessarily have a triangular design, as Figure 4 below depicts.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Figure_4.png}
\caption{Multifaceted relationship victims/state/company under domestic law}
\end{figure}


\textsuperscript{296} See also A.J. Van der Walt, “Transformative Constitutionalism and the Development of South African Property Law (Part 2),” J. S. Afr. L. (2006), 26 (writing that “the duty to protect doctrine does not and should not replace horizontal application discourse”).

\textsuperscript{297} Alexy and Rivers, \textit{supra} note 243, 352; Chirwa, \textit{supra} note 242, 22; Oliver and Fedtke (2007b), \textit{supra} note 105, 14.
1.3. Business and human rights according to international investment law

Before proceeding with the second topic of Part II of the dissertation, namely strategic litigation, this Section briefly interposes to explain how international investment law, by according rights to business enterprises, may weaken human rights protection. For a long time international investment law has been regarded as a “self-contained regime that is insulated from other branches of international law” – and it may even still be regarded as such.\(^\text{298}\) Under this view, international human rights law and international investment law constitute two separate branches of the law that exist independently from each other, “hermetically sealed boxes” as it were.\(^\text{299}\) Nonetheless, investment and human rights are closely intertwined. On the one hand, investment represents a great opportunity for realizing human rights, especially economic and social rights, while, on the other hand, it also poses a risk of adverse human rights impacts.\(^\text{300}\) The problem is that this is not reflected in investment law, which is predominantly concerned with protecting investors’ interests, by creating various (internationally enforceable) rights without imposing any accompanying duties.\(^\text{301}\)

Two main sources of international investment law are investment treaties\(^\text{302}\) (concluded between two or more states) and investment contracts (concluded between host states and private investors). These agreements are first and foremost meant to protect foreign investors against political risks resulting \textit{inter alia} from changes in government or in bilateral and multilateral relationships\(^\text{303}\) – although, in theory, they should benefit the state as well, by improving its investment climate and by making foreign investment more attractive.\(^\text{304}\) The need for investment protection first came to the fore when decolonisation resulted in numerous (foreign) companies being nationalised, but later protection was extended beyond straightforward nationalisations so as to cover also arbitrary and discriminatory forms of treatment and expropriations.\(^\text{305}\) The latter term is, moreover, interpreted broadly to include

\begin{itemize}
  \item \(^\text{298}\) A. Al Faruque, “Mapping the Relationship between Investment Protection and Human Rights,” J. World Investment & Trade 11 (2010), 540.
  \item \(^\text{300}\) Al Faruque, \textit{supra} note 298, 550-554; J.L. Černič, “Corporate Human Rights Obligations under Stabilization Clauses,” German L.J. 11 (2010), 210-211 and 215.
  \item \(^\text{302}\) Also falling within this category are the investment-related provisions in free trade agreements and in regional economic integration agreements. Al Faruque, \textit{supra} note 298, 540.
  \item \(^\text{303}\) Al Faruque, \textit{supra} note 298, 541; Office of the High Commissioner for Human Rights, “Stabilization Clauses and Human Rights.” A research project conducted for the International Finance Corporation and the United Nations Special Representative of the Secretary-General on Business and Human Rights (27 May 2009), vii.
  \item \(^\text{304}\) See also Henok, \textit{supra} note 301, 158 (adding the caveat “hopefully”, however). This is disputed by Brickhill and Du Plessis, \textit{supra} note 299, 154.
  \item \(^\text{305}\) OHCHR, Report on stabilisation clauses and human rights, \textit{supra} note 303, 4.
\end{itemize}
direct as well as indirect forms of expropriation, including changes in the investment climate that seriously undermine the investment or its profitability. In particular, to protect investors against such changes, investment agreements generally contain a clause on expropriation, which provides for ‘prompt, adequate and effective compensation’ if a state nationalises or expropriates investments or subjects them to measures having an equivalent effect, or a so-called stabilisation clause, which ‘stabilises’ the investment climate either by exempting investors from amendments to the law or by compensating them.

Investment protection may raise an issue under international human rights law in two regards. Firstly, expropriation and stabilisation clauses and the risk that they are enforced through international arbitration (resulting in considerable compensation awards) may have a chilling effect on states that want to comply with their obligation to protect human rights, which they primarily do by adopting the necessary laws, regulations and policies. There is indeed a risk that the exercise of regulatory power for the protection and promotion of human rights is interpreted as in breach of investment law, if the conditions of the expropriation or stabilisation clause, as the case may be, are not complied with, which makes that the domestic regulatory space for states shrinks. That is why Principle 9 of the UNGPs now stipulates that states should maintain adequate domestic policy space, when they negotiate such agreements. In that regard, the Office of the High Commissioner has, for instance, proposed ten principles that should guide investment contract negotiations between states and investors. One of those principles stipulates that if stabilisation clauses are used, they should be drafted in such a way that they “do not interfere with the state’s bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations.” Secondly, investment agreements do not only disregard the responsibility of investors to respect human rights, but seemingly encourage them to challenge states that pursue their human

306 Ibid. 4-5.
307 There are three types of stabilisation clauses. First, freezing clauses ‘freeze’ the law as it stands when the contract is signed. As a result, the investor is exempted from any subsequent amendment to the law that affects its investment. Second, economic equilibrium clauses ensure that investors are compensated for any amendments to the law. Third, hybrid clauses establish a right for the investor to be restored to its position before the amendments, whether by way of an exemption or compensation. Depending on whether these clauses apply to all legislative changes that may affect the investment or only to certain laws and depending on whether they ensure full or reasonable restitution, the clauses are categorised as ‘full’ or ‘limited’. OHCHR, Report on stabilisation clauses and human rights, supra note 303, 5-9. See also Černič (2010), supra note 300, 213-215.
rights obligations. Nonetheless, according to the commentary to Principle 11 of the UNGPs, “business enterprises should not undermine States’ abilities to meet their own human rights obligations”.

Depending on whether the adoption by states of certain measures for the protection and promotion of human rights is assessed from the perspective of investment law or human rights law, the outcome of that assessment may thus be contradictory, namely prohibited under investment law but obligatory under human rights law. This is highly problematic as international law provides little guidance as to how courts and arbitration tribunals should deal with such clashes between different branches of the law. In practice, this seems to have created a reality in which courts and arbitration tribunals favour “the private corporate actors over sovereign debtors/host countries of foreign investment”. This is all the more problematic given that nearly two-thirds of all disputes submitted for arbitration to the International Centre for the Settlement of Investment Disputes have apparently been lodged against developing countries, which are the ones that struggle the most with business-related human rights abuses. Scholars – as well as certain states – have, therefore, called for a new type of investment law that allows to balance the different interests that are at stake.

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313 Schlemmer-Schulte, supra note 311, 416.

314 This is a permanent institution established at the World Bank Group to administer international investment disputes.

315 Henok, supra note 301, 165.

316 See e.g. Al Faruque, supra note 298, 549; Černič (2010), supra note 300, 215; de Vietri, supra note 312, 228-229. See also infra Part III, Section 1.1.3.
2. STRATEGIC HUMAN RIGHTS LITIGATION

2.1. General analytical framework

The key role of judicial remedies in the business and human rights field must be considered in light of a phenomenon that has been called ‘judicialisation’ and that captures the evolution towards a political system and a society in which law and litigation feature prominently. The judicialisation of politics, first of all, comprises two inter-related phenomena. On the one hand, the judiciary increasingly participates in law-making, in particular through judicial review, which entails that judges scrutinise the constitutionality of acts and conduct by the legislature and the executive (see infra Section 2.2.2.1). On the other hand, the legislature and the executive, as well as other organs of the state, pay more attention to legal rules and principles, in particular constitutional rights, when they exercise their functions, so as to pre-empt possible judicial intervention. Although, in principle, judicialised politics should not be equated with a strained relationship between the judiciary, on the one hand, and the legislature and the executive, on the other, it cannot be denied that it is a controversial phenomenon in view of the separation of powers doctrine, for reasons that will be discussed later (infra Section 2.2.6.4).

Not only politics has become more judicialised, but society as such. The use of legal arguments in disputes between private actors and the state as well as amongst private actors is increasingly common, and litigation is often considered a viable option to resolve a dispute. Against this background, it seems logical that also advocates for social change have appropriated rights-based tactics and strategies to pursue their objectives, as a result of which legal mobilisation is more prevalent than ever, which has not gone unnoticed. Several scholars, including Gauri and Brinks

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319 Sieder, Schjolden and Angell, supra note 318, 3.
321 Gauri and Brinks (eds.), supra note 320.
and Gloppen,\(^{322}\) have examined the use of litigation to realise human rights and have developed analytical frameworks for that purpose.\(^{323}\) This Section briefly explains the frameworks drafted by Gauri and Brinks and by Gloppen (Section 2.1.1), following which it is argued that the finding that litigation may contribute to – and perhaps even play a crucial role in – transforming society does not mean that it should substitute alternative tactics (Section 2.1.2).

2.1.1. Analytical frameworks for strategic human rights litigation

2.1.1.1. Gauri and Brinks’ theory on legalizing economic and social rights

Gauri and Brinks have theorised on ‘the legalisation of economic and social rights’, which they describe as the process whereby litigation acts as a catalyst for government to adopt laws, regulations and policies for the effective and adequate provision of economic and social goods. As a result, “courts and lawyers (…) become relevant actors, and the language and categories of law and rights become relevant concepts, in the design and implementation of public policy.”\(^{324}\) There are four stages to this process: (1) legal mobilisation, (2) judicial decision-making, (3) bureaucratic, political or private-party response and (4) follow-up litigation.\(^{325}\) This process occurs at three levels, notably in-between the state and individual consumers (‘provision’), in-between the state and private suppliers (‘regulation’) and in-between private suppliers and individual consumers (‘obligation’).\(^{326}\) According to Gauri and Brinks, whether actors resort to courts in order to realise certain rights and whether an attempt at legalisation results in economic and social interests being entrenched in the law depends on a variety of factors that influence the four stages of the process, which they categorise as demand-, supply-, and response-side variables, depending on whether they relate to the litigating parties (demand), the courts (supply) or the targets (response).\(^{327}\)

Contrary to this dissertation, which concentrates on the state obligation to protect and on corporate human rights duties, they are mainly interested in the state obligation to fulfil human rights and the


\(^{323}\) The ability of law to effect social change is not uncontentious, however. For a discussion of the different schools of thought, see e.g. C. Holzmeyer, “Human rights in an era of neoliberal globalization: The Alien Tort Claims Act and grassroots mobilization in Doe v. Unocal,” Law & Soc’y Rev. 43(2) (2009): 271-304. The approach adopted in this dissertation aligns with the school of legal mobilisation scholars, who are rather interested in the motivations and tactics of activists who resort to litigation in order to effect social change, and the impact of contextual factors, and who measure the impact of litigation by considering indirect effects as well.


\(^{325}\) Ibid.

\(^{326}\) Ibid. 10-11.

\(^{327}\) Ibid. 14-19.
accruing involvement of private actors in the ‘provision’ of economic and social goods. Nevertheless, the analytical framework of Gauri and Brinks is relevant to this dissertation as they depart from at least two equal assumptions. First, litigation is capable of playing a role in the design and implementation of law and policy aimed at protecting human rights against business enterprises and, second, the responsibility of business enterprises for human rights can be enforced not only through the vertical relations between the state and individuals, but also through the vertical relations between the state and business enterprises and the horizontal relations between business enterprises and individuals. Also interesting is their emphasis on the dialogic nature of judicial decision-making, which recognises that courts are “just one actor in the deeply strategic and iterative process of legalization.”

2.1.1.2. Gloppen’s analysis of litigation and social transformation

Another interesting analytical framework was developed by Gloppen.329 Similar to Gauri and Brinks,330 she discerns four stages in social rights litigation, notably claims formation (litigants bringing claims to the courts), adjudication (courts dealing with those claims), implementation (government responding to the litigation), and social outcome (litigation influencing the social context of the claims).331 For each of these stages she has mapped the different factors that are at play and that may influence the effectiveness of social rights litigation. Except for the social outcome stage, each stage consists of an input and an output phase. In particular, regard is had to the litigants and the claim for the claims formation stage, to the court and the judgment for the adjudication stage, and to the responsible authority and the implementation of the judgment (narrow implementation) and possible policy and systemic change (long-term implementation) for the implementation stage.332 Gloppen has also theorised on how the success of litigation should be evaluated, which will be discussed later (infra Section 2.2.5).

Contrary to this dissertation, Gloppen drafted her analytical framework specifically to examine the accountability of the state for realizing the right to health-related services, without paying (much)

330 Note, however, that Gloppen’s ‘implementation stage’ includes consecutive litigation and that ‘social outcome’ constitutes a separate stage, which Gauri and Brinks (implicitly) seem to include in their third stage.
331 In an earlier article she has discussed a framework in which only the litigation process itself is deconstructed into four stages: voice (victims’ ability to access courts), responsiveness (courts’ willingness to hear claims), capability (judges’ ability to give effect to those claims) and compliance (the authority of judgments and their actual implementation). Gloppen (2006), supra note 146, 36-37.
attention to the role and possible duties of private actors. Nevertheless, Gloppen’s research confirms that litigation may be used to effect social change, and has resulted in a comprehensive framework encompassing a plethora of factors that have an impact on litigation and on its outcome.

### 2.1.2. Alternative strategies for change and the value of litigation

Scholars recognise that litigation rarely constitutes a sufficient tool to effect change and is generally used in tandem with other tactics. In particular, judicial remedies are resorted to when all other options have failed or in case of emergency, or when they can secure the conditions that are necessary for alternative tactics to be available and effective, for instance by providing access to certain information, by correcting power imbalances or by forcing parties to negotiate. One explanation for the sparing and subsidiary use of litigation is the belief that judges are unlikely to “run faster than the societies of which they form a part” and that legal norms rather emerge from social and political norms than vice versa. This is also why the context within which litigation takes place is so important (infra Section 2.2.6) and may never be overlooked when a lawsuit’s prospect of success is assessed and when its impacts are measured and explained.

Hence, to sculpt a favourable socio-political context, civil society actors should (and generally do) deploy alternative tactics before, during and after the litigation, so as to raise the awareness of all relevant actors, including politicians and governing elites as well as the society at large, to draw their support and to mobilise them. Examples of tactics that can be used for that purpose include lobbying politicians, informing and training victims, organizing demonstrations and media campaigns, and holding politicians accountable through elections. Similar to litigation, whether these tactics are

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333 Ibid. 23-24 (admitting, however, that the state is responsible for adequately regulating the activities of private actors).
335 Gloppen (2008), supra note 122, 27.
338 J. Hancock, Environmental Human Rights: Power, Ethics and Law (Aldershot, Ashgate, 2003), 85-86 (citing other authors as well).
340 Hassan and Azfar, supra note 337, 246.
available and effective depends inter alia on the legal, historical and socio-political context (see also infra Section 2.2.6). The alternative tactics can be confrontational, but also cooperative, for instance by supporting government or the business community in creating an environment in which human rights are respected or by facilitating compliance by the state with its obligation to protect or by business enterprises with their responsibility to respect human rights. An additional upside of using alternative tactics to support and complement strategic litigation is that they ensure that the mission becomes more of a collective undertaking, instead of an individual one.

Aside from the need to secure broader support for a given objective, litigation may also not be the most obvious tactic as it has some inherent disadvantages. For one, as also the case study will demonstrate, few cases ever reach the courts’ dockets, even fewer result in a final judgment and many nuances of the dispute may get lost in its translation to legal language. Other drawbacks include the limited expertise of judges to decide on polycentric issues that raise diverse policy, budgetary and technical questions (see also infra Section 2.2.6.4) and the risk of non-enforcement of court orders. Furthermore, while left-wing critics warn that legal strategies may divert the already scarce resources of civil society actors, displace other tactics and leave less space for legitimate political activism, right-wing critics argue rather that (human) rights language is too strong, inhibits cooperation and creates a culture of dependency.

In sum, for various reasons litigation is, in principle, used as a back-up plan and is embedded in a broader social and political strategy to achieve long-term objectives. As a result, the different tactics that are used to effect change are often entangled to such an extent that assigning a concrete positive impact to a particular tactic is hard, if not impossible.

341 Cf. Gloppen (2008), supra note 122, 27 and footnotes 32 and 34; S. Gloppen, “Legal Enforcement of Social Rights: Enabling Conditions and Impact Assessment,” Erasmus L. Rev. 2 (2009), 466-467 (speaking about the opportunity structure or situation for potential litigants, who assess what tactic seems the most promising one taking account of their resources and the expected barriers).

342 Handmaker, supra note 113, 19.


347 Langford (2015), supra note 112, 16-17 (describing the criticism from both sides).

348 See supra note 334.

2.2. Variables of strategic litigation

For the purposes of the dissertation, the ultimate goal of strategic litigation is to ensure that business enterprises are accountable for human rights, regardless of whether this is achieved by the litigation resulting in tightened regulations, monitoring and enforcement by government and/or in a direct finding of liability on the part of the company combined with an order to provide appropriate relief. This Section explores the variables of such strategic litigation, in particular the factors influencing the course and outcome of litigation, the elements of the design of a strategic lawsuit and the different impacts of litigation.

First, three factors are reviewed that affect victims’ ability to access the court system, namely standing rights, the availability of free or cheap legal services and protection against intimidating lawsuits (Section 2.2.1). Thereafter, the analysis of the design of a strategic lawsuit is structured around three ‘umbrella decisions’ that litigating parties have to adopt, being which remedy (type of proceedings and form of relief) they want to pursue (Section 2.2.2), which counterparty they want to sue (Section 2.2.3) and which (legal) arguments they want to use (Section 2.2.4). Following an exploration of the meaning of success (Section 2.2.5), the Section ends with a brief discussion of some contextual factors that influence litigation as well (Section 2.2.6).

The analysis of the variables of strategic litigation in this Section is not meant to be exhaustive. Its structure and content is informed by the existing analytical frameworks and by the theoretical discussion of business and human rights in Chapter 1. Moreover, the aim of this Section is to offer a stepping stone to guide the discussion in the case study of the practical experiences of stakeholders in South Africa who use strategic litigation to enforce accountability for human rights violations by business enterprises. In turn, the objective of that case study not to make a conclusive analysis of all variables of litigation and their respective impact, but rather to assert the impressions, experiences and preferences of litigating parties when they design a lawsuit.

2.2.1. Access to justice

Access to justice has many dimensions, but three factors that affect the ability of victims and activists to vindicate human rights against business enterprises by having recourse to judicial remedies, merit particular attention: rules on *locus standi* (Section 2.2.1.1), the availability of free or cheap legal services (Section 2.2.1.2) and intimidation through vexatious litigation (Section 2.2.1.3).

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350 Where used in this dissertation, ‘litigating parties’ refers to the parties that initiate the litigation (against government and/or a company) and has a generic meaning, which comprises the alleged victims of the human rights violations, any advocacy organisation supporting them or acting on their behalf or in the public interest, and their legal representatives. See also *infra* Part III, Section 2.1.2.
2.2.1.1. Standing in court

Corporate human rights violations commonly share two features; they affect a group of people, rather than individuals, and these victims often belong to poor and marginalised groups, meaning that there is generally a huge power imbalance between the perpetrator and the victims. If those victims can join forces, however, they become significantly stronger. This is where locus standi comes in.\(^{351}\)

*Locus standi* or ‘standing rights’ determine whether a particular party has the capacity to pursue a claim in court. Given that human rights violations by companies typically affect people who belong to a vulnerable group, an important question that arises relates to who can approach the court, other than the individual victims acting in their own interest.\(^{352}\) Rules on *locus standi* may, for instance, admit representative claims, allowing that one person acts on behalf of the others or that an (informal) association is established to act on behalf of its members. There exist two even more liberal types of standing, being public interest litigation and class actions, and their advantages in business-related human rights cases are widely acknowledged.\(^{353}\)

First, in some jurisdictions litigation can be conducted in the public interest, which means that anyone (in practice mainly nongovernmental organisations) can litigate in the interest of the general public and without having to demonstrate a personal interest.\(^{354}\) In principle, a number of conditions have to be met so as to ensure that the litigation is truly in the public interest and to prevent that courts are flooded with such claims. In some jurisdictions, however, public interest litigation is only available for specific issues and/or to specific actors.\(^{355}\)

A second, very liberal approach to *locus standi* are class actions. These are representative lawsuits that are conducted by a limited number of claimants acting on behalf of a group of persons who have not specifically authorised those claimants, the so-called ‘class representatives’, to bring an action on their behalf.\(^{356}\) Class actions are in principle only available when a larger group of persons find themselves in a comparable situation and have claims that raise common questions of fact and law so that

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\(^{353}\) This is reflected in the call by the Office of the UN High Commissioner on states to “provide for the possibility of collective redress mechanisms” (see also *infra* Part IV, Section 2.2.3.2). Guidance on corporate accountability and access to remedy (A/HRC/32/19), *supra* note 213, para. 15.3.


\(^{355}\) See e.g. Zerk (2014), *supra* note 212, 75-77.

attending to them jointly is expedient.\textsuperscript{357} The class representatives play a very important role, as they are the only members of the group who are actual parties to the litigation and to whom all procedural rules apply.\textsuperscript{358} Every member of the class, however, either because they did not explicitly withdrew from the action (in the case of an opt-out class) or because they expressed a willingness to join the action (in the case of an opt-in class), is bound by its eventual outcome, meaning that a separate action can face a plea of \textit{res judicata}.\textsuperscript{359} Therefore, it is crucial that adequate notice of the class action is given, so as to inform all potential members of the class and to give them the opportunity to join or to withdraw, depending on the circumstances.\textsuperscript{360}

Class actions originate in English principles of equity, but were mainly developed in the US.\textsuperscript{361} Although they have gradually become more prevalent, they are as yet not available in all domestic legal orders and tend to be subject to limitations and strict criteria.\textsuperscript{362} Generally, those conditions relate to ‘numerosity’ (the high number of potential claimants makes a simple joinder impracticable), ‘commonality’ (there are common questions of fact and/or law), ‘typicality’ (the claims of the representatives are typical of those of the other class members) and ‘adequacy’ (the representatives fairly and adequately represent the interests of the class).\textsuperscript{363}

\textbf{2.2.1.2. Free or cheap legal services}

Given that litigation is a resource-intensive enterprise,\textsuperscript{364} the availability of free (or at least cheap) legal services is crucial in order not to put judicial remedies beyond the reach of most victims.\textsuperscript{365} Various state-based and private models for free or cheap legal services exist, so that the following paragraphs only provide a non-exhaustive overview of the commonly available sources of legal aid.

State-based legal aid systems, first of all, are incredibly diverse.\textsuperscript{366} Broadly speaking,\textsuperscript{367} however, they can be classified into two categories. The first option is that a legal aid board is established, which is

\begin{itemize}
  \item \textsuperscript{358}Therefore, “[m]uch of the success of the action depends on the competence, dedication and zeal of the representative and absent members also rely on the representative for the protection of their interests.” E. Hurter, “The Class Action in South Africa: Quo Vadis.” De Jure 41(2) (2008), 295.
  \item \textsuperscript{359}Children’s Resource Centre Trust v. Pioneer Food, supra note 356, para. 16.
  \item \textsuperscript{360}Jephson, supra note 211, 287.
  \item \textsuperscript{361}Children’s Resource Centre Trust v. Pioneer Food, supra note 356, para. 14.
  \item \textsuperscript{362}Zerk, supra note, 82-83 and 96-97.
  \item \textsuperscript{363}Hurter (2008), supra note 358, 296.
  \item \textsuperscript{364}In addition to a party’s own costs (such as lawyers’ fees, court fees, transport and evidence collection), there is the risk to be ordered to pay the costs of the counterparty if the claim is not successful. See also Zerk (2014), supra note 212, 80.
  \item \textsuperscript{365}Ibid. 79.
  \item \textsuperscript{366}Note, however, that in some countries no state-based legal aid is available. Ibid. 79.
  \item \textsuperscript{367}For more options, see e.g. Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 29.
\end{itemize}
financed by public funds and employs its own legal practitioners, who then offer legal services for free or against a heavily reduced fee. The second possibility is that of a regulatory system under which ‘regular lawyers’ (have to) offer (a certain amount of) free or cheap legal services which are then (partially) reimbursed by the state. Eligibility for state-based legal aid depends on the criteria set by law, which differ from one jurisdiction to the other, but generally include a means test. Legal aid boards sometimes also work with a strategic agenda, on the basis of which they can select, amongst those cases that meet the statutory criteria, the ones that they will effectively take on.

Sources for private legal aid, in turn, are even more diverse. First, there is always the possibility that individual legal practitioners offer their services pro bono. Second, legal clinics may be established at the university where professors, lecturers, (candidate) attorneys and legal trainees provide services for free, in particular first-line legal services. Third, pro bono services may also be offered by law firms that operate as non-governmental, not-for-profit organisations. These firms may get their funds from private donations, government subsidies and (limited) fundraising activities. As the case study will demonstrate (infra Part III, Sections 2.1.2 and 2.5.1), such ‘public interest law firms’ are, for instance, quite common in South Africa.

Another option is that lawyers (who generally work for a regular, incorporated law firm) offer legal services to certain clients for a ‘contingent’ or ‘conditional’ fee. This means that legal practitioners agree not to be paid for their legal services and not to be reimbursed any costs incurred during the proceedings until and unless the dispute is successfully resolved. The success fee may be higher than the fee that a legal representative would normally charge for his or her services, is generally set at a (small) percentage of the value of the claim and is agreed in advance and stipulated in an agreement, the ‘contingency fee agreement’. If the litigation is successful, legal practitioners receive their success fee, as agreed with the client, and the costs advanced during the litigation are reimbursed by the counterparty at the amount determined in the court’s costs order or in the settlement. Contingency fees are controversial, however, and are prohibited in some domestic legal orders.

368 Ibid. 29-30; Zerk (2014), supra note 212, 79-80.

369 For some examples, see e.g. Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 30.

370 Zerk (2014), supra note 212, 80-81.

371 Ibid.

372 Such agreements are also often challenged by the counterparty. This was, for instance, the case in the silicosis litigation, which is one of the focus matters discussed in the case study (infra Box 4), and in a lawsuit in the UK where Shell was sued for oil spills in Nigeria. Nkaiia and Others v. Harmony Gold Mining Company Limited and Others (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) (certification judgment) [2016] ZAGPJHC 97 (13 May 2016), para. 147 and further; Okpabi and Others v. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd. [2017] EWHC 89 (TCC) (Eng.), paras. 33 and 120.

373 Zerk (2014), supra note 212, 82-83. In South Africa, contingency fee agreements are admissible but subject to judicial control (see infra Part III, Section 1.4.1.2).
Unfortunately, the demand for free or cheap legal services generally exceeds their supply, as the lawyers offering such services remain few in numbers and have scarce financial, technical and human resources.\textsuperscript{374} Because they cannot take on every case, they tend to work on the basis of selective criteria and/or a strategic agenda, as will be illustrated in the case study.\textsuperscript{375} As a result, only a fragrance of all business-related human rights cases reach the courts’ dockets.

2.2.1.3. Intimidating litigation

A final factor that may negatively affect the courage of victims and activists to oppose activities that (may) interfere with human rights and their ability to vindicate those rights in court, is the risk of being slapped with a lawsuit. It is increasingly common for powerful elites, like business enterprises, to try and silence critical voices by intimidating them through litigation, a tactic that is called strategic litigation against public participation (or SLAPP) and that has supposedly spread from the US.\textsuperscript{376} SLAPP suits are frivolous, meritless lawsuits or motions that are filed with the sole purpose of intimidating opponents by imposing costs on them, by discrediting them and by prolonging the process.

Evidently, SLAPP suits can create a considerable chilling effect and deter victims, activists or their lawyers from going to court. Even if such litigation is ultimately dismissed with costs, the resources of the party who is slapped with such a suit are tied up in judicial proceedings for a lengthy period of time throughout which the outcome of the litigation remains unpredictable.

2.2.2. Remedies

In this dissertation, the term ‘remedy’ refers both to the concrete relief that litigating parties seek to obtain (\textit{id est} the form of reparation) and the proceedings through which such relief is sought.\textsuperscript{377} Before discussing, \textit{in abstracto}, the type of proceedings that may be available (Section 2.2.2.1) and the orders that litigating parties may request from the court (Section 2.2.2.2), it should be noted that the choice of a remedy frequently unmask\textsuperscript{es} the kind of justice that litigating parties desire – albeit that sometimes different forms of justice may be pursued simultaneously, even by way of one and the same remedy. Without dwelling upon the concept of justice, which oversteps the legal domain and the

\textsuperscript{374} See also Gloppen (2011), supra note 322, 20; Zerk (2014), supra note 212, 82.
\textsuperscript{375} In the case of donor-funded organisations, funds may be earmarked and available only for specific cases.
\textsuperscript{377} Also the Office of the High Commissioner uses the term ‘remedy’ to refer to both the processes through which redress is provided and their substantive outcomes. OHCHR, Interpretative Guide on the Corporate Responsibility to Respect, supra note 129, 7. See also Drimmer and Laplante, supra note 238, 320.
dissertation’s ambit, it suffices to mention at least three layers of justice, namely retributive, corrective and social justice. This is relevant to analyse human rights litigation and to explain the strategic decisions that are made in such litigation, because understanding these layers of justice will assist in evaluating the interplay between the objectives pursued through litigation, the remedies used and the assessment whether the litigation was successful.

An important distinguishing feature of litigation concerns the question which actor takes centre stage. When litigating parties are mainly concerned with punishing either the company (for having violated human rights) or government (for having failed to prevent and/or redress the violation), the litigation strategy is oriented towards the responsible actors and seems to unmask a desire for retributive justice. Other lawsuits concentrate on the victims (distributive justice). Litigating parties may then, for instance, want to secure reparation for the actual victims so as to redress the harm that they suffered and to restore their pre-existing rights (backward-looking, corrective justice), or they may want to address the structural causes of the violation having regard to similarly placed individuals, so as to ensure that such human rights violations do not happen again (social justice).

2.2.2.1. Type of judicial proceedings

In theory, human rights violations by business enterprises can be denounced in criminal, civil, administrative or constitutional proceedings. It should be noted that this is again a typology that mainly serves an academic purpose. An overlap is possible, for instance when a court is competent to rule on the civil liability of the accused party in a criminal case or when the constitutionality of a law can be challenged in the course of either civil, criminal or administrative proceedings.

Criminal and civil proceedings should be in place in every domestic legal order, albeit with some provisos, such as the fact that not all human rights violations qualify as a crime, that the criminal responsibility of business enterprises is not recognised in all jurisdictions and that government liability

378 The international concept of ‘justice’ encompasses at least a retributive, corrective and distributive dimension. However, the more the study of justice advances, the more pillars are added, such as recognition, procedural justice, capabilities and justice in groups. See e.g. D. Schlosberg, Defining Environmental Justice: Theories, Movements, and Nature (Oxford University Press, 2007), 12-31; D. Shelton, “Describing the Elephant: International Justice and Environmental Law,” in eds. J. Ebbesson and P.N. Okowa, Environmental Law and Justice in Context 55 (Cambridge University Press, 2008), 56.


380 Ferreira, supra note 118, 50.

is sometimes subject to limitations. Whether a specific human rights violation is then tackled in criminal or civil proceedings depends on several factors, such as the burden and standard of proof, the expected length of the proceedings and the desired reputational impact. For example, the requirement to establish criminal intent on the part of the accused party is subject to a higher standard of proof than what is the case for civil liability. On the other hand, a criminal case has the crucial advantage that a public prosecutor is involved, who investigates the matter with the support of the state apparatus, which significantly attenuates the burden for victims. A few domestic legal orders, especially in the common law countries, however, facilitate access to evidence through ‘discovery’, a procedural device that admits litigating parties to demand the other party or a third party to hand over information that they have in their possession and that could serve as evidence in a civil lawsuit. Another element to consider is that whilst the decision to launch civil proceedings is left to the litigating parties, the instigation of criminal proceedings generally falls within the discretion of the prosecutor – unless when private prosecution is available, although the practicality thereof is questionable in light of the burden of proof and the costs. At the same time, if the prosecutor is willing to start an investigation and, subsequently, to prosecute, victims only have to lay criminal charges, which they can do themselves, without legal representation, and the state will bear the costs of the proceedings.

Next, in the context of the dissertation, the term ‘administrative proceedings’ refers to the procedure through which interested and affected parties can apply for judicial review of administrative acts, in principle after having exhausted any available internal remedies such as appeals within the administration. Depending on the legal order, such proceedings are conducted in specialised administrative tribunals or in ordinary courts. Administrative proceedings thus offer a specific opportunity to sue administrative authorities for their actions; only they are directly involved as

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384 See e.g. Jägers (2002), supra note 83, 213.

385 Clapham (2000), supra note 383, 140.

386 van Dam, supra note 95, 488; Zerk (2014), supra note 212, 84 (observing, however, that the process is complex and time-consuming and that such applications are often treated with a lot of deference for the resisting party).

387 Note that ‘administrative regimes’ may also refer to regimes that “regulate conduct that is deemed harmful or antisocial or that is required to meet certain regulatory requirements”. Human Rights Council, “Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance,” Addendum to the Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/32/19/Add.1 (12 May 2016), Box 1. Such regimes often also apply to corporate conduct, and may even be the dominant way through which harmful corporate conduct is tackled in domestic legal orders that do not recognise institutional criminal liability.
responding parties and only their legal status is directly affected. Nevertheless, the outcome of the proceedings can have an impact on the legal status of business enterprises as well. Indeed, when an administrative decision that authorises a specific activity by a company, for instance, is cancelled following a successful application for judicial review, then the company has to discontinue its activities until it obtains a new authorisation. At the occasion of such review, courts can even incidentally scrutinise the conduct of the business enterprise itself, for example in order to assess the lawfulness of the administrative act.

Finally, the term ‘constitutional proceedings’ used here encompasses a broad category of remedies that seek some kind of constitutional relief, such as a finding of constitutional (in)validity of laws, regulations and policies (judicial review), a declaration of rights or duties, an interpretation of laws, regulations and policies in conformity with the constitution, and an award of constitutional damages. Proceedings may also be classified as ‘constitutional’ when a cause of action is directly derived from the constitution, when relief is granted outside of private law or when the constitutionality of a judgment by a lower court is challenged.

As regards judicial review, most legal orders admit, in conformity with the rule of law, that the judiciary can review acts and conduct by the legislature and the executive so as to scrutinise their compatibility with the law and with the constitution. Diverse judicial review systems are applied across domestic legal orders, and they can at least be distinguished on the basis of the following two features. First, depending on whether jurisdiction over constitutional matters is assigned to a specialised court or to several or all courts, the system of review is classified, respectively, as centralised or diffuse, although hybrid systems are common. Second, legal orders may admit concrete review (at the occasion of an actual dispute), abstract review or both. Judicial review systems may also vary in terms of standing requirements and the scope of the judiciary’s powers of review, in particular whether or not courts have the authority to scrutinise both acts and omissions, to grant mandatory orders (to act or to forebear from acting), to impose supervisory orders (compelling a party to report back to the court), and to establish expert committees that investigate and monitor compliance.

388 Smit, supra note 291, 363.
389 Ibid. 364.
391 An example of a hybrid system is when a finding of unconstitutionality by a lower court has to be confirmed by the highest court. This is the case in South Africa (see infra Part III, Section 1.4.2.1).
392 See e.g. Parmar and Wahi, supra note 336, 171-182 (discussing the remedial techniques used by the Supreme Court of India).
2.2.2.2. Relief: looking for adequate court orders

Which relief litigating parties can request is to a great extent a function of their cause of action, the type of proceedings they resort to and the identity of the party that is sued. Litigating parties should thus factor in the question of relief at the time of taking those decisions. In principle, the forms of relief that may be available in a particular legal order can be infinitely diverse. Therefore, what follows is a non-exhaustive overview.393

A particular form of relief can be classified as ‘punitive’, ‘reparative’ (sometimes also called ‘compensatory’) or ‘preventive’,394 which broadly reflect, respectively, retributive, corrective and social justice. Since ‘strategic’ litigation is presumed to have a medium or long term objective that transcends the individual interests at stake in a given case (see supra Part I, Section 2.4), strategic lawsuits generally seek to achieve some kind of social impact, which may, however, even be pursued through damages claims, as will be illustrated in the case study. Nevertheless, a consideration that strategic litigants should bear in mind is that legal scholars have reported that the more individualised the requested relief is, the higher the chance is that it will be granted, since “courts are more likely to engage in particularising the universal than in universalizing the particular.”395

Relief should at all time be adequate, effective, prompt and appropriate – id est proportional to the gravity of the violations and the resulting harm.396 Concrete examples of forms of relief include financial or non-financial compensation, restitution (restoring the original situation that existed before the violation), rehabilitation (like medical and psychological care and legal and social services), injunctions (compelling or prohibiting to act in a certain way), penalties (such as fines or prison sentences), and declaratory orders.397 The effect of one form of relief is not necessarily limited to either punishment, reparation or prevention.398 For instance, a finding of tortious liability resulting in the award of damages may have a preventive dimension in addition to its inherent reparative function, inter alia by forcing business enterprises that operate under the logic of the bottom line to factor in the

393 Interim orders and costs orders are, for instance, not included in the discussion.
394 Ferreira, supra note 118, 52-53; Explanatory notes for the guidance on corporate accountability and access to remedy (A/HRC/32/19/Add.1), supra note 387, Box 4.
395 Brinks and Gauri, supra note 328, 305.
396 Articles 2, 11(b) and 15 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, endorsed by Resolution 60/147 of the General Assembly of 16 December 2005, UN Doc. A/RES/60/147 (21 March 2006).
397 Guidance on corporate accountability and access to remedy (A/HRC/32/19), supra note 213, para. 11.1; Explanatory notes for the guidance on corporate accountability and access to remedy (A/HRC/32/19/Add.1), supra note 387, para. 40; OHCHR, Interpretative Guide on the Corporate Responsibility to Respect, supra note 129, 7; Article 18 of the UN Basic Principles and Guidelines on the Right to a Remedy (A/RES/60/147), supra note 396. The terminology used for specific orders may be different depending on the legal order, however.
398 See e.g. Ferreira, supra note 118, 50-54 and 71 (discussing inter alia the “growing presence of a punitive function in tort law”).
risk of high compensation awards. In the case of punitive damages, the relief even has a punitive function. Penalties are another example, since they obviously serve to punish perpetrators, but also to deter the commission of similar acts in the future. Prison sentences can obviously not be imposed on corporate entities, which rather get fined. The actual impact of fines is questioned, however, amongst other reasons because they are not believed to carry the same stigma as prison sentences and may simply be set off as costs.

One peculiar form of relief for human rights violations deserves special mention, namely ‘satisfaction’, which comprises any order that is aimed at offering symbolic reparation for moral damage. The UN General Assembly has recommended states to make such relief available in human rights cases. Nevertheless, until today satisfaction features most prominently in the jurisprudence of the Inter-American Court of Human Rights, which has, for instance, ordered public apologies, guarantees of non-repetition and the erection of public memorials. Other examples of satisfaction include commemorations and tributes to victims, the verification of facts and their full and public disclosure, and the inclusion of an accurate account of the violations in training and in educational material. Although orders for satisfaction are primarily case-specific and victim-oriented, a broader social impact is not inconceivable as they always involve an element of public disclosure.

Also very useful are supervisory orders, which entail that the judiciary retains jurisdiction so as to monitor the implementation of its orders. According to Roach and Budlender, the appropriateness of adopting a supervisory order against government depends on the cause underlying a party’s behaviour. In particular, if a failure to comply with certain duties is due to a lack of willingness, closer monitoring of a party’s adherence to the order is required than when a party merely did not understand or obliterated its duties.

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400 Zerk (2014), supra note 212, 39.
402 Article 22 of the UN Basic Principles and Guidelines on the Right to a Remedy (A/RES/60/147), supra note 396.
404 Article 22 of the UN Basic Principles and Guidelines on the Right to a Remedy (A/RES/60/147), supra note 396.
405 In case of companies this would amount to ‘corporate probation’ as it were. Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 20.
Domestic legal orders should leave sufficient leeway as regards the forms of relief that can be requested and granted in a particular case, especially in human rights litigation, where reparations should acknowledge the harm that victims have suffered, and even more in business-related cases, where it should be possible to tailor relief to the corporate structure of the perpetrator. Illustrations of (more innovative) forms of relief that may be available in some states for business-related human rights cases include the following: the publication of the company’s name on a list of business enterprises falling short of the minimum standards of responsible conduct; the exclusion from benefits, like foreign investment subsidies, or from public procurement procedures; the cancellation or suspension of the company’s listing; compulsory publication of the conviction and the sanctions imposed; confiscation of property; suspension or cancellation of licenses; obligation to pay money into funds; and forced dissolution.

2.2.3. The counterparty

Contrary to international human rights remedies, most of which are, to date, only concerned with the state, different actors may be held liable (possibly concurrently) at the domestic level. This Section provides an overview of some of the actors that may be called to account in abstracto, even if in certain domestic legal orders or for certain constellations of facts not all options are available. In view of their relevance for the case study, the discussion looks at state versus company liability (Section 2.2.3.1), liability of the company as such or of a responsible individual acting for that company (Section 2.2.3.2), and parent company liability (Section 2.2.3.3). Overall, it can already be observed that a victim-oriented perspective calls for as much flexibility as possible regarding which actor(s) can be called to account for human rights violations by business enterprises, which will be discussed further infra in Part IV.

2.2.3.1. Government versus corporate liability

Human rights violations by business enterprises trigger the state’s international legal responsibility for having failed to comply with its obligation to protect unless the state demonstrates that it has adopted

407 See also Explanatory notes for the guidance on corporate accountability and access to remedy (A/HRC/32/19/Add.1), supra note 387, para. 71.
408 Ratner, supra note 98, 534; Zerk (2014), supra note 212, 39; Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 19-21 and 36-37. A peculiar form of relief is “corporate community service”, for instance by performing the upkeep of public areas and making contributions to public or cultural amenities. Ibid. 20.
409 Note that this question also arises when the state is sued, as it may be possible to call either a government body as such to account, or an individual in his or her official capacity. An extensive discussion of the different government liability regimes exceeds the purposes of this dissertation, however, which is concerned with ensuring that business enterprises are responsible for human rights, either by holding them directly accountable or by making sure that government regulates and monitors corporate conduct.
410 See also Černič (2015a), supra note 203, 155-158.
all reasonably available measures to prevent the violation and to provide adequate relief (supra Section 1.1.1.1). Similarly, under national law state actors may be held accountable for not having complied with their (protective) duties (supra Section 1.2.2), which depends on the options to hold government actors civilly or criminally liable as well as the availability of judicial review of administrative acts and of legislative and executive acts (supra Section 2.2.2.1).

Evidently, however, also the responsibility of the business enterprise that actually committed the violation should be triggered, unless the state has blatantly disregarded its obligation to regulate and monitor corporate conduct. Given their distinct involvement in the human rights violation, namely a failure to regulate, monitor or enforce (on the part of government) and a failure not to interfere with human rights (on the part of the company), their respective responsibility is triggered for a different reason. Therefore, the accountability of government and of business enterprise should, in principle, exist concurrently.412

Whether litigating parties then choose to sue either government or business enterprise (or both), and their justification for that decision may elucidate their opinion about the respective responsibility for human rights of the state and of business enterprises, which remains a controversial topic in the global debate on business and human rights.413 In particular, their choice may be justified by strategic, practical or principled considerations, as will be discussed in detail in the case study (infra Part III, Section 2.6.3.1). To give an example, suing only government notwithstanding the fact that a cause of action is available against the company as well, may be motivated by a belief that the state has to protect its people, against whomever.

2.2.3.2. Institutional versus individual corporate liability

Corporate liability can take the form of institutional liability of the abstract entity, ‘the company’, or of individual liability of agents within that company who act on its behalf, such as (managing) associates, directors and senior employees.414 The three main questions that arise in this regard are whether legal entities, like companies, can be called to account ‘as such’, how conduct by individuals is attributed to the company and how institutional and individual liability relate to one another.

412 See also Černič (2015b), supra note 217, 86; Černič (2016), supra note 77, 209 and 211.
413 Bilchitz (2013b), supra note 217, 128 (writing that “in order to justify differential responsibilities, there is a need to have a clear conception of the respective roles of the corporation and the state”).
Whilst civil liability can be imposed as much on legal persons as on natural persons, holding companies criminally liable remains controversial.\textsuperscript{415} Many legal orders regard institutional criminal liability as incompatible with the foundational principles of criminal law.\textsuperscript{416} The main objection reads that legal persons cannot be ‘guilty’ of committing a crime, since they do not have a own mind and can only act through natural persons, who are believed to be the ones that should be held criminally liable.\textsuperscript{417} The number of legal systems where business enterprises do not have criminal responsibility is gradually decreasing, however, as they come into contact with the experiences of states where such responsibility does exist, albeit sometimes only for specific crimes.\textsuperscript{418}

If a company can be called to account (civilly or criminally), the question of attribution of individual conduct to the company arises given that it is an abstract entity that can only act through natural persons. Different options exist in that regard.\textsuperscript{419} In the case of ‘the identification approach’, for instance, the conduct of senior managers is automatically imputed to the company as they are believed to represent the company’s directing mind and will. Vicarious liability, on the other hand, entails that a company is liable for the acts committed by its employees within their function or by contractors within the scope of their contract. Rules on attribution are rarely perfect, however, and depending on the circumstances they have been criticised for being under-inclusive (for instance, when a company cannot be held liable if the harmful conduct is not caused by the acts of one individual but is due to a systemic problem) or over-inclusive (for instance, when the company is accountable for the fault of individuals without itself having committed any fault).\textsuperscript{420} If both the company and the responsible individual can, in principle, be called to account, the last question concerns the allocation of


\textsuperscript{417} For a discussion of other reasons why institutional liability under criminal law may not be recognised, see e.g. Saunders, \textit{supra} note 414, 647-648.

\textsuperscript{418} Černič (2015a), \textit{supra} note 203, 137. However, in its Guidance on corporate accountability and access to remedy published in May 2016 the Office of the UN High Commissioner for Human Rights leaves the door open for ‘functional equivalents’ for institutional criminal liability, Guidance on improving corporate accountability and access to remedy (A/HRC/32/19), \textit{supra} note 213, para. 1.2.

\textsuperscript{419} For an explanation of the identification approach and of vicarious liability, see Zerk (2014), \textit{supra} note 212, 33-36 and 72-74 (see also Tables 2 and 8); Explanatory notes for the guidance on corporate accountability and access to remedy (A/HRC/32/19/Add.1), \textit{supra} note 387, paras 12-15 and paras 47-50; Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, \textit{supra} note 230, 5 and 24. Aside from these two attribution theories, alternative tests may be based on corporate culture or collective fault or on secondary liability.

\textsuperscript{420} Wells and Elia, \textit{supra} note 382, 156; Explanatory notes for the guidance on corporate accountability and access to remedy (A/HRC/32/19/Add.1), \textit{supra} note 387, paras 12-13.
responsibility amongst these two actors. This raises several sub-questions, such as whether the liability of the one actor depends on a finding that the other is liable, and whether they can be held liable concurrently for the same conduct.\textsuperscript{421}

The questions on attribution and allocation of responsibility are important, because pros and cons to both institutional and individual liability have been discerned in legal scholarship.\textsuperscript{422} A first reason why institutional liability may be favoured over individual liability, for example, is the fact that companies are not “simply the sum of individuals working for them.”\textsuperscript{423} In instances where abuse by a particular individual in a company cannot be divorced from the ‘corporate culture’\textsuperscript{424} that prevails in that company and in which individuals thus have to work, imposing liability only on an individual person seems reasonless, because there is a considerable risk that business will continue as usual once the company has reprimanded (and perhaps replaced) that person. Other arguments in favour of institutional liability relate \textit{inter alia} to the recognition that companies are separate moral agents with autonomy of action,\textsuperscript{425} the potential barriers to suing individuals (such as the identification of the responsible person),\textsuperscript{426} the wish to create a standard of acceptable corporate conduct,\textsuperscript{427} the financial resources of companies to pay compensation\textsuperscript{428} and the creation of an incentive for shareholders to monitor corporate conduct.\textsuperscript{429}

There are also advantages to individual liability, however. For instance, when a business enterprise is dissolved, the risk exists that the human rights violation will never be redressed, which is all the more frustrating when the dissolution is in fact elicited in a fraudulent way by the managers, who have

\textsuperscript{421} Zerk (2014), \textit{supra} note 212, 36-39. Explanatory notes for the guidance on corporate accountability and access to remedy (A/HRC/32/19/Add.1), \textit{supra} note 387, paras 16 and 53; Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, \textit{supra} note 230, 4.

\textsuperscript{422} For an extensive analysis of the respective benefits of institutional and individual liability, in general and specifically in human rights cases, see Saunders, \textit{supra} note 414; Ratner, \textit{supra} note 98, 473-475.

\textsuperscript{423} Ratner, \textit{supra} note 98, 474. See also Saunders, \textit{supra} note 414, 634-641 (explaining the philosophical, sociological, psychological and collectivist reasons for holding the legal entity accountable); Explanatory notes for the guidance on corporate accountability and access to remedy (A/HRC/32/19/Add.1), \textit{supra} note 387, para. 4.

\textsuperscript{424} In some domestic legal systems, fault can be attributed to the company based on the existence of a ‘corporate culture’, namely if it expressly, tacitly or impliedly authorised or permitted the commission of the offence which is evidenced by “an attitude, policy, rule, course of conduct or practice within the corporate body generally or in the part of the body corporate where the offence occurred.” This theory is applied \textit{inter alia} in Canada and the US. Wells and Elia, \textit{supra} note 382, 158; Report A/HRC/4/035 on mapping international standards, \textit{supra} note 27, para. 28.

\textsuperscript{425} Saunders, \textit{supra} note 414, 634.

\textsuperscript{426} Ibid. 642-644.

\textsuperscript{427} Ratner, \textit{supra} note 98, 473.

\textsuperscript{428} Ibid. See also Clapham (2000), \textit{supra} note 383, 147 (discussing the advantages of including legal persons in the jurisdiction of the International Criminal Court during the negotiations).

\textsuperscript{429} Ratner, \textit{supra} note 98, 473.
secured their own interests and those of the shareholders.430 Moreover, when only the business enterprise is held liable, the actual wrongdoers may wash their hands unless they are disciplined by the company.431 As to which liability acts as a better deterrent, no straightforward reply seems to exist. On the one hand, individuals are believed to act more risk-averse when their personal liability is at stake, especially when they risk a prison sentence,432 whereas companies cannot be imprisoned and can easily spread the financial burden of liability – unless the penalty imposed is compulsorily dissolution. On the other hand, the regulatory impact of institutional liability is higher, when it incentivises companies to adopt codes of conduct and to invest in training and monitoring.433 Nevertheless, the finding that both institutional and individual liability have their (dis)advantages should not lead to the conclusion that the silver bullet is to hold companies and individuals always simultaneously liable. Indeed, they may see this as an opportunity to disclaim their own responsibility and to focus on the other.434 Whether the company as such, an individual within that company or both should be called to account and held liable thus depends on the circumstances of the case, the goal of the litigating parties and the preferences of the actual victims.435

2.2.3.3. Liability of parent companies

The issue of parent company liability receives most attention in legal scholarship in relation to transnational corporations. Scholars are particularly intrigued by the question whether parent companies in developed countries can be held accountable for human rights violations committed by their subsidiaries in developing countries.436 This issue, which relates to the exercise of extraterritorial

430 See e.g. Minister of Water Affairs and Forestry v. Stilfontein Gold Mining Company Limited and Others (7655/05, 7655/05) [2006] ZAGPHC 47 (15 May 2006), para. 16.2 (criticising the attempt of directors to wind up a mining company because it was not financially capable to take measures to prevent serious water contamination). The eventual order by the High Court in the latter judgment was reviewed on appeal, however. Kebble and Others v. Minister of Water Affairs and Forestry (530/06) [2007] ZASCA 111 (21 September 2007).

431 Saunders, supra note 414, 648.

432 Ibid. 649-650 and 651-653 (adding that individuals who risk to incur personal liability may put pressure on their companies to indemnify or insure them against this risk). See also R.G. Anderson, supra note 399, 379 (writing that criminal sanctions only bite if managers are sent to prison).


434 Černič (2016), supra note 77, 208; Saunders, supra note 414, 660.

435 See also Černič (2015a), supra note 203, 158. Some victims may, for instance, want to ‘personalise’ their narrative out of fear that the real culprits will get off scot-free if only the abstract entity is held liable. See also Saunders, supra note 414, 653.

jurisdiction (supra Part I, Section 1.2), falls outside the scope of this dissertation. Nevertheless, the question of parent company liability may also arise in relation to companies that are based in the same country as their subsidiary.

Suing parent companies has a number of pros and cons. On the one hand, these companies are more likely to dispose of the required knowledge and technical and financial resources to advice their subsidiaries on appropriate policies and to pay for possible damages. When parent companies are taken to court, the internal regulatory impact of such lawsuit may also be greater. On the other hand, the liability of parent companies raises difficult legal-technical questions and there may be sly attempts to circumvent liability, so that the costs and duration of the proceedings may increase. If litigating parties consider it appropriate to sue a parent company, there presently exist, in theory, two main options to establish liability on the part of that company. Whether these options are actually available in a concrete case depends on the applicable law and the circumstances of that case.

First, parent companies may be liable qualitate qua, id est based on their managerial control. Such liability is only exceptionally found, however, due to the principle of separate legal personality, which is held dear in corporate law around the world. According to this principle, the mere holding of shares is insufficient to make a parent company liable for the conduct of its subsidiary, since they constitute two separate legal entities. In most domestic legal orders, this ‘corporate veil’ can only be pierced under exceptional circumstances, such as in case of fraud or corruption. A corporate entity being established with the sole purpose of evading legal obligations and liabilities is a typical scenario in which fraud can be found to exist. Cases in which liability qualitate qua was based on a less formal criterion of economic integration, which entails that all group members are jointly and severally liable for the activities of other members because they constitute a single economic

438 Zerk (2014), supra note 212, 49.
439 Cf. Van Dam, supra note 95, 496 (referring to the group-wide policies in enterprise groups).
441 See also van Dam, supra note 95, 493. Other options, such as accessory liability, are also possible, however. See e.g. Zerk (2014), supra note 212, 37.
442 Zerk (2014), supra note 212, 37 and 65.
444 It is unlikely that this requirement will be met in human rights matters. Palombo, supra note 443, 458-459.
enterprise under common management (the ‘enterprise theory’ or ‘single economic entity’ theory), remain very rare.445

A second ground to establish parent company liability consists of arguing that the parent company violated its own legal duties and is thus a joint tortfeasor with its subsidiary.446 This is the doctrine of ‘direct’ parent liability, which is different from liability qualitate qua, where a parent company is liable in its capacity as parent and not for reason of its own conduct.447 The most interesting application of the direct parent liability doctrine is found in common law, where under certain conditions the failure of a parent company to prevent a human rights violation by its subsidiary qualifies as a breach of a specific duty of care that the parent company itself holds towards the victims, as a result of which its liability is triggered for negligence.448 There are three cumulative conditions for a specific duty of care to exist, namely the damage must be foreseeable, there must exist a relationship of proximity between the person holding the duty of care and the beneficiary thereof, and the imposition of a duty of care must be just, fair and reasonable.449

For a specific duty of care to exist on the part of a parent company, the inquiry focuses on whether the parent company has superior knowledge or expertise in relation to the harm and whether it is fair to infer therefrom that the subsidiary will rely upon its parent to avoid the harm.450 Four factors are relevant, albeit not exhaustive, to this inquiry: the parent and subsidiary are active in the same kind of business, the parent has superior or specialist knowledge, the parent is familiar with the subsidiary’s systems of work, and the parent knows that the subsidiary relies on that knowledge to avoid the harm.451 In the past, courts have used this theory to establish that a parent company holds a specific duty of care towards its subsidiary’s employees, but it is uncertain whether a similar duty may also exist vis-à-vis other stakeholders, such as the neighbouring communities of a subsidiary.452

As this discussion of liability qualitate qua and direct parent company liability shows, there are options to hold a parent company liable, but they are limited. Therefore, some scholars have called, for

445 Those cases remain highly exceptional, however, and little guidance has been provided on the precise degree of integration that is required for such liability to arise. See e.g. Baughen, supra note 32, 160; Muchlinski, supra note 137, 313 and 317-320; Palombo, supra note 443, 459; Zerk (2014), supra note 212, 46.
446 Muchlinski, supra note 137, 310.
447 Palombo, supra note 443, 457.
448 David Brian Chandler v. Cape Plc. [2011] EWHC 951 (QB), aff’d, [2012] EWCA (Civ) 525 (Eng.).
449 Ibid. paras 64-65 (referring to the standards set in Caparo Industries Plc v Dickman [1992] 2 AC 605 (Eng.)).
450 Okpabi v. Royal Dutch Shell, supra note 372, para. 79.
451 Ibid. para. 80.
instance, for a rebuttable presumption of parent company liability or, at least, for parent company liability based on complicity. This dissertation submits that tightening the responsibility of parent companies for the conduct of their subsidiaries is justifiable, because at present they reap the financial and commercial benefits of operating as a group but disclaim responsibility for negative consequences. It is also unlikely that parent companies are not aware of serious malpractices at their subsidiaries. Definitely when business enterprises operate under the same brand name, their commercial links are crystal clear. Moreover, notwithstanding a division into separate legal entities, enterprise groups generally have policies that apply across the group, including a single code of conduct. This factual relationship between the different members of an enterprise group should, arguably, receive more attention in law.

2.2.4. Human rights in legal argument

In the context of this dissertation, litigating parties use human rights arguments whenever they refer to human rights in their submissions to the court, regardless of whether such references are assigned a prescriptive effect. While it is not an entirely new phenomenon, the use of human rights language in litigation, and even in public discourse in general, has grown exponentially with the judicialisation of society (supra Section 2.1). Human rights are truly “the vocabulary of our time”. This also holds true for the ‘private’ sphere. Although private law has always been concerned with values like human dignity, integrity, autonomy and privacy, traditionally, the ‘private rights’ protecting those values were not called ‘human rights’. It is an unmistakable trend, however, that rights holders, activists, lawyers, scholars, prosecutors, judges and the like increasingly refer to human rights even in disputes amongst private actors, especially in settings where a vulnerable party faces a powerful private actor, such as a business enterprise.

453 Muchlinski, for instance, pleads for a rebuttable presumption that a parent company is jointly and severally liable for its subsidiary’s acts, unless its independence is established. Muchlinski, supra note 137, 331.
454 Different forms of complicity could exist: direct complicity (the parent actively assisted through its own acts or by supporting other actors), indirect complicity (the parent provides financial or moral support), silent complicity (the parent remains silent and inactive) and beneficial complicity (the parent benefits from the violations). Bilchitz (2008), supra note 29, 786-787. Whether such involvement by the parent company in human rights violations committed by its subsidiary also translates into actual liability depends on the conditions set by national law. In some jurisdictions strict requirements apply as to the required degree of knowledge, for instance, which may impede the finding of complicity. See also Zerk (2014), supra note 212, 38.
455 See also Van Dam, supra note 95, 496.
456 Cf. De Feyter (2011), supra note 73, 18 (defining ‘human rights claims’ based on three criteria, namely the use of human rights language, the identification of a duty-bearer and the insistence on holding this duty-bearer accountable); Langford (2015), supra note 112, 19 (discerning four features of a rights-based discourse).
458 For a discussion of the ambiguity of distinguishing the private and the public, see supra Part I, Section 2.1.
Importantly, using human rights arguments is not merely an issue of semantics, but has a symbolic significance and can have practical implications. The symbolism of human rights, first of all, is nicely expressed in the following quote of Baxi:

(…) [H]uman rights norms and standards impact upon notions of self, society, state and the world at large. It is in this sense that one grasps the gestalt of contemporary human rights as constitutive of an astonishing fact of human social life, one that marks a revolution in human sensibility to, and imagination of, freedom.

As the quote above suggests, the explicit appropriation of human rights by people can be seen as a sign of emancipation and empowerment. This applies even more when litigating parties appeal to human rights in a dispute with business enterprises given that human rights were traditionally believed to govern the relationship between the state and its citizenry and to redress the power imbalance in that relationship. The use of such discourse in disputes with business enterprises thus contests the idea that human rights are the preserve of governance. Moreover, when aggrieved parties refer to human rights, for instance in a tort case against a business enterprise, they seem to suggest that their case raises a matter of public concern and invokes a sense of urgency and seriousness above and beyond their individual case, or that they believe that human rights should rectify inequalities amongst private actors and provide equality of arms in private relationships, which are objectives that traditional private law does not aspire.

Aside from the symbolic meaning of using human rights arguments, they may also have a material impact on the litigation. They can, for instance, influence the applicable rules on locus standi, the burden and standard of proof, the available defences, the award of costs orders and access to appellate proceedings or to supreme or constitutional courts. On a more practical level, the fact that human

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460 See also the study of ‘pragmatics’, a subfield of linguistic studies which is concerned with the interplay between language, its meaning and its users.
462 Gargarella, Domingo and Roux, supra note 351, 269 and 272. Cf. De Feyter et al. (eds), The Local Relevance of Human Rights (Cambridge University Press, 2011) (examining the use of human rights claims to address the plight of vulnerable groups).
463 Friedmann and Barak-Erez, supra note 459, 1-3.
464 Baxi calls this phenomenon ‘politics for human rights’, as opposed to ‘politics of human rights’ where human rights language is used to manage power and governance. Baxi, supra note 461, 47-48.
465 Ratner, supra note 98, 395.
466 van Dam, supra note 95, 484 (writing that tort law and human rights law virtually protect the same rights, but do not share the same purport and objectives).
rights are at stake may be an incentive for activists or lawyers to get involved and support the case.⁴⁶⁸ Some concrete examples of the material impacts of using human rights arguments will be discussed in the course of the case study, at which occasion it will also be explained why these impacts may be considered burdensome as well and, hence, constitute a reason not to refer to human rights.

Whether human rights arguments are capable of producing such material effects depends on the legally binding nature and enforceability of the concerned human rights norms, which is discussed below (Section 2.2.4.2).⁴⁶⁹ First, however, the mutually beneficial interplay between international and national human rights law is explained (Section 2.2.4.1).

2.2.4.1. International and national human rights

Since its emergence after the Second World War the contemporary human rights idea, according to which all human beings have inalienable rights that guarantee a dignified life in a democratic society, has undergone two evolutions: internationalisation and universalisation.⁴⁷⁰ One the one hand, following the proclamation of the Universal Declaration for Human Rights in 1948⁴⁷¹ numerous other international human rights agreements and declarations have been adopted and an international law on human rights has accordingly emerged. On the other hand, an increasing number of states have entrenched a list of rights in a foundational document, either a constitution or an extraordinary law that cannot be amended by a simple democratic majority.

In light of these evolutions international and national human rights law generally bear a high degree of resemblance. This begs the question whether it is valuable to use international law in domestic (human rights) litigation. From a legal-fundamental perspective, the answer is affirmative, since creating a space where international and national law interact is crucial for their mutual development.⁴⁷² In particular, referring to international law in domestic litigation is beneficial for both international and national human rights law.

First of all, the value of international law lies in its ability to ensure that national human rights law is developed in pace with evolving international standards and to remove any legal uncertainties that exist in the domestic legal order, either by filling gaps or by guiding the interpretation of national

⁴⁶⁸ De Feyter (2011), supra note 73, 12.
⁴⁶⁹ If human rights are invoked against business enterprises, their effect also depends on the legal impact of human rights in the private sphere in that particular legal order (see supra Section 1.2).
⁴⁷¹ Universal Declaration of Human Rights, supra note 116. Note that one regional human rights instrument had already been adopted before, namely the American Declaration of the Rights and Duties of the Man, adopted by the Inter-American Commission on Human Rights on 2 May 1948.
⁴⁷² This definitely holds true now that international law pays greater attention to intra-state relationships and increasingly regulates the rights (and duties) of non-state actors. Allott, supra note 192, 80-82.
law. Whether in practice this added value is recognised by litigants and is eventually materialised, depends *inter alia* on the legal order within which a case is litigated and the precise issue at stake — see, for instance, the examination in the case study *infra* in Part III, Sections 1.3 and 2.6.4.1. In turn, national human rights law may also spur the development of international law. Due to the subsidiarity principle (and the requirement to exhaust domestic remedies), the dearth of international (quasi-)judicial enforcement mechanisms, as well as the practical barriers to access such mechanisms, international law is predominantly applied in domestic courts. Hence, whenever those courts are called to consider, apply and enforce international law, they contribute to its development and specialisation. Domestic judgments that engage with international law may even constitute formal sources of international law, either because they qualify as a subsidiary means to determine the law, or because they provide evidence of state practice, which is one of the criteria to establish the existence of a rule of international customary law. Furthermore, thanks to the augmented judicial dialogue amongst jurisdictions, determinations about international law may influence the application of that law in other legal orders as well.

### 2.2.4.2. Legal effect of human rights

A major variable that will determine the actual impact of human rights on litigation is their legal effect. For human rights norms to be capable of having a mandatory effect, they should be codified in a legally binding (i) and self-executing (ii) rule (of national or international law). However, even if a human rights norm is legally binding and enforceable, the litigating parties themselves and/or the court may still only assign moral or persuasive force to them, instead of prescriptive force (iii).

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475 Within the meaning of Article 38(d) of the Statute of the International Court of Justice, *supra* note 64.
477 One should be mindful, however, that national judges may slightly adapt international rules to the national context. Roberts, *supra* note 79, 74 and further. See also Rivera, *supra* note 76, 304-305 (specifically on the role of domestic courts in relation to business and human rights).
478 Note that in many states also the self-executing nature of constitutional rights was, at least initially, not an evident question. Anton and Shelton, *supra* note 3, 476-477.
(i) A legally binding norm

Whilst the legal nature of a national norm is in principle straightforward, to ascertain the legal effect of an international norm in a given domestic legal order two questions must be considered.

The first question concerns the degree of integration of international and national law, on the basis of which domestic legal systems used to be classified as ‘dualist’ or ‘monist’. A dualist approach sees international and national law as two separate, self-contained legal orders within each of which “the only existing rules are those that are part of the system”, 480 so that international law cannot as such be applied domestically. International norms only produce legal effects once they are domesticated, namely when they are enacted as part of national law (‘direct incorporation’) or when national law is amended in conformity with international norms (‘indirect reception’ or ‘transformation’). 481 A monist approach, on the other hand, considers international and national law as inherent parts of a single legal order. Accordingly, rules of international law – provided that they are self-executing as will be discussed next (ii) – are applicable in the national legal order without requiring domestic implementation. This brief account of the meaning of dualism and monism began with the caveat ‘used to be’, because hybrid systems are presently the norm. Consequently, scholars have largely relinquished the strict dichotomy of dualism and monism and prefer to speak of monist or dualist ‘tendencies’ 482 or ‘degrees’. 483 Research has, moreover, demonstrated that a monist tendency does not guarantee that practice is one where international human rights law is directly enforced by the judiciary, or even used as an interpretative guide. 484

Secondly, the effect of international norms in the domestic legal order depends on their hierarchical position. 485 Three approaches are possible: supra-constitutionalisation, constitutionalisation and quasi-constitutionalisation. 486 The first means that international law takes precedence over all national law, including constitutional law, the second that international law is equivalent to constitutional law and the third that international law is superior to ‘ordinary’ national law but inferior to the constitution. Since the Vienna Convention on the Law of Treaties explicitly stipulates that states may not rely on


482 Oliver and Fedtke (2007a), supra note 242, 497-499.


484 Viljoen, supra note 481, 520 and 558 (explaining that courts require legislative enactment in most (African) countries that formally adhere to monism).

485 Shany, supra note 479, 356-357.

486 Ibid.
national law to justify non-compliance with international legal obligations, the so-called principle of *pacta sunt servanda*, ‘supra-constitutionalisation’ should in principle be the norm.\(^{487}\) Nevertheless, in reality states rarely accept that international law takes precedence over constitutional law.\(^{488}\)

(ii) A self-executing norm

Human rights norms, whether they are codified in national\(^{489}\) or international law, have to be ‘self-executing’ in order to be capable of having a mandatory effect.\(^{490}\) A norm is self-executing, when the duties imposed by that norm are sufficiently precise, unequivocal and unconditional and when the means for duty bearers to comply with these duties are prescribed with directly binding force so that no prior implementing laws are necessary.\(^{491}\)

The requirement that human rights are self-executing is regularly linked to the debate about the justiciability and judicial enforceability of economic, social, cultural and environmental rights in particular.\(^{492}\) ‘Justiciability’ and ‘judicial enforceability’ should be distinguished, however; whilst the former is a black-or-white question concerning a right’s *suitability* for enforcement by a (quasi-) judicial body, the latter is rather matter of degree that relates to *the type of remedies* that are available if a right is violated.\(^{493}\) Whilst in most cases human rights are considered justiciable, some rights, especially economic, social, cultural and environmental rights, are either denied judicial enforceability or their enforceability is qualified, meaning that it is subject to such mitigating factors as ‘progressive


\(^{488}\) Allot, *supra* note, 80-82.

\(^{489}\) At least traditionally, also constitutional rights were often not deemed to be self-executing, especially in civil law systems, but this has changed over the years. Anton and Shelton, *supra* note 3, 476-477.


realisation’, ‘reasonable measures’, and ‘available resources’ (see also infra Part III, Section 2.2.1.1). Hence, in relation to the latter rights, fewer remedies are available and courts are more deferential towards the duty bearers.

(iii) Prescriptive, persuasive or moral force

Human rights can be used either in empirical or in rational arguments. Hence, even if they have, in theory, legal effect, they do not necessarily dictate with binding force how a particular dispute must be resolved.

When human rights are used to influence the court’s decision as a matter of fact, rather than as a legal reason justifying a concrete decision by the court, they feature as an empirical argument. In those instances, references to human rights are motivated by moral or political considerations, such as a desire to emphasise the significance of the interests at stake or to raise the awareness of the litigating parties, the counterparties, the courts and possibly even the public at large about those interests. In a ‘rational argument’, on the other hand, human rights do influence the legal resolution of an issue in dispute either because they prescribe a particular outcome (human rights as a ‘mandatory reason’, with prescriptive force) or because they support a particular decision that is primarily based on the application of another legal rule (human rights as a ‘permissive reason’, with persuasive force).

It should be noted that human rights can also simply influence the judicial decision-making process, expressly or implicitly, by creating a system of values and principles that affects the exercise of judicial scrutiny, which aligns with the protective duties of the judiciary.

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496 Price, supra note 115, 347-348.
497 Cf. Viljoen, supra note 481, 558 (observing that international human rights norms are very often invoked “merely as an afterthought not linked to the outcome of the case”).
498 Ibid. See also the difference made between ‘direct enforcement’ and reliance for ‘interpretative guidance’ as regards the application of international law in Viljoen, supra note 481, 527. According to Viljoen, international law is more likely to be used as interpretative guide. Ibid. 554 and 558.
500 See, for instance, the discussion of the protective duties of the South African judiciary at the end of Section 1.2.1.3 infra in Part III.
2.2.5. Effectiveness and success

Whether and under what conditions litigation is rightly considered a success seems to be the million dollar question,\(^{501}\) which rarely lends itself to a straightforward answer. Firstly, success is not uni-dimensional; litigation can be successful in many different ways, and a particular case may be a victory in one respect but a defeat in another. Quoting Gauri and Brinks, “the grandiose language of many decisions vastly overstates their actual impact on the ground”\(^{502}\) – fortunately, also the opposite scenario is possible. Aside from the multi-dimensional nature of success, a second difficulty concerns how success should be measured, which \textit{inter alia} raises the difficulty of establishing a causal link between litigation and an alleged impact.\(^{503}\) As Langford admits, three factors should always be kept in mind in relation to measurements of success, namely which criteria are used to identify impacts, what is the comparator and how are causes and effects untangled.\(^{504}\) Hence, to avoid that the way in which success is evaluated distorts reality, litigation should be assessed from multiple perspectives and there should be absolute transparency about how success is defined and measured.\(^{505}\) This dissertation evaluates the success of litigation based on the theories developed by Rodriguez-Garavito and Gloppen, as further inspired by the writings of Langford \textit{et al.} and Andreassen and Crawford. Crucially, these theories show that litigation does not stand upon itself and must always be assessed in context.\(^{506}\)

According to Rodriguez-Garavito,\(^{507}\) lawsuits are capable of producing four types of impact: direct material, indirect material, direct symbolic and indirect symbolic impacts. He distinguishes between direct and indirect impacts based on whether an impact is mandated by the court and affect the actors in the litigation or is a consequence that derives from the decision by the court and affects the actors in the case as well as others.\(^{508}\) The difference between material and symbolic impacts, in turn, depends on whether they imply material (tangible) changes in the conduct of groups or individuals or “consist of changes in ideas, perceptions and collective social constructs relating to the litigation’s subject

\(^{501}\) R4.
\(^{502}\) Brinks and Gauri, \textit{supra} note 328, 325.
\(^{503}\) See e.g. Gloppen (2011), \textit{supra} note 322, 18; Langford (2008), \textit{supra} note 349, 42; Moestad, Rakner and Motta Ferraz, \textit{supra} note 339, 278-279; M. Pieterse, \textit{Can Rights Cure?} The impact of human rights litigation on South Africa’s health system (Pretoria University Law Press, 2014), 83-84.
\(^{504}\) Langford (2008), \textit{supra} note 349, 40-42.
\(^{506}\) See also e.g. Rosenberg, \textit{supra} note 346, 7 (distinguishing between two types of influence depending on whether the focus lies on the judicial or extra-judicial path).
\(^{508}\) Ibid. 4.
Next, the interesting aspect of Gloppen’s theory is that she analyses success from three angles: victory (or defeat) in court, material impact on the situation of the litigating parties themselves and social impact beyond the specific case. By singling out victory in court as but one dimension of success, Gloppen warns that judgments may never be implemented or complied with or that the court order may be inadequate and thus inconsequential, or – in the opposite scenario – that even cases lost in court may have successful impacts.

This dissertation combines the insights of both scholars so that the success of a lawsuit is evaluated having regard to its direct, indirect, material and symbolic impacts (1) in court, (2) for the litigating parties (‘concrete’) and (3) for the society at large (‘social’). A somewhat different meaning is assigned to the difference between direct and indirect impacts, as the former embrace all impacts that feature directly in the litigation, whether in the parties’ claims or arguments or in the court’s judgment or order, and that their effect is not necessarily limited to the actors in the litigation. Furthermore, Gloppen’s concept of ‘material’ success is here called ‘concrete’ success so as not to confuse with ‘material impacts’. It is submitted that such detailed deconstruction is required to ensure a nuanced but truthful understanding of a lawsuit’s success. It merely serves an analytical purpose, however, as in practice the distinction between the different impacts at the different levels is frequently blurred. A straightforward example is that repeated concrete impacts may over time generate social impacts. Two important, additional observations must be made, which is, first, that indirect effects generally only become apparent over time, which makes it hard to identify them, and, second, that litigation can generate impacts even before (as well as long after) the final judgment.

The ultimate comparator to assess the ‘effectiveness of litigation’ is obviously determined by this dissertation’s focus on enforcing accountability for human rights violations by business enterprises and thereby strengthening their responsibility for human rights. Accordingly, success depends on the extent to which litigation (1) recognises and raises awareness about corporate human rights violations, (2) ensures that companies are forced to respect human rights and (3) is capable of eliminating (a number of) the symptoms and causes of the power imbalance that facilitates corporate

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509 Ibid.
510 Gloppen (2008), supra note 122, 24-25.
511 Ibid. 25. See also Cooper, supra note 411, 219-220.
512 See also N. Fraser, “Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation,” in eds. N. Fraser, A. Honneth and J. Golb, Redistribution or recognition? 7 (London: Verso, 2003) (distinguishing between affirmative and transformative strategies, while acknowledging that consecutive affirmative lawsuits may, over time, have a transformative effect); Pieterse (2014), supra note 503, 83. For an application of Fraser’s theory to human rights litigation, see S. Liebenberg, “Needs, Rights and Transformation: Adjudicating Social Rights,” Stellenbosch L. Rev. 17 (2006), 8-10.
513 Pieterse (2014), supra note 503, 83.
514 The subjective element inherent to ‘success’ entails that its meaning is influenced by the purport of the dissertation, which does not necessarily accord with the specific objectives of the litigating parties.
abuse. Litigation resulting in regulatory changes is very successful in view of its exceptionally egalitarian effect. Table 2 below displays a list of exemplary impacts.

<table>
<thead>
<tr>
<th>Table 2. Impacts of litigation</th>
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<tr>
<td><strong>Victory in court</strong></td>
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<tr>
<td>Material</td>
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<tr>
<td>- The claims are granted and the company or the government is convicted.</td>
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<tr>
<td>Symbolic</td>
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<tr>
<td>- The rights of the victims are affirmed and they feel empowered.</td>
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<tr>
<td><strong>Concrete success</strong></td>
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<tr>
<td>Material</td>
</tr>
<tr>
<td>- The company compensates the victims and redresses all damage caused, as ordered by the court.</td>
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<td>- The government reviews the company’s licence to operate and, if necessary, pulls the licence, as ordered by the court.</td>
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<tr>
<td>Symbolic</td>
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<tr>
<td>- The victims join forces to litigate and, accordingly, strengthen their negotiating position vis-à-vis the counterparty.</td>
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<td>- The litigating parties engage with the court in interpreting their rights.</td>
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<tr>
<td><strong>Social success</strong></td>
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<tr>
<td>Material</td>
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<tr>
<td>- The government amends the law on licence requirements, for instance following a finding of unconstitutionality.</td>
</tr>
<tr>
<td>Symbolic</td>
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<tr>
<td>- The judgment sets a precedent for future</td>
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</table>

**Material**
- The case is used as a precedent by similarly-situated victims.
- The company adapts its conduct or activities in order to respect the victims’ rights.
- The government takes account of the judgment in renewing the company’s licence, for instance by imposing specific conditions.
- The company adopts a code of conduct to guide all its operations.
- A culture of justification is created: government substantiates and justifies its act and conduct.
- The company establishes a grievance mechanism for human rights complaints.

**Symbolic**
- The media reports on the case, the victims and the involvement of the company, the government or both.
- The perception by the general public of the victims, who belong to a vulnerable group, improves.
- Politicians have become better aware of the plight of the victims.
- Similarly-situated people are informed.

515 See also Fraser’s discussion of the structural causes of inequality, namely misrecognition and maldistribution, so that achieving social justice requires recognition and redistribution. Fraser, *supra* note 512, 7 and further.
The litigation sends a message to the business community as to what constitutes responsible corporate conduct. The media reports on the structural causes of the case and the involvement of the industry, the government or both. The issue is borne in mind when laws, regulations and policies are drafted and enforced.

The impacts discussed above can also be analysed having regard to the type of power that they create, which further improves understanding of the different ways in which success manifests itself. Langford *et al.*, for instance, have analysed the impact of litigation in terms of whether it generates leverage (the ability to make power elites listen to concerns and act upon them), perception (the ability to legitimise claims, to appropriate a voice and to transform the way in which power elites perceive the litigating parties) or organisational power (the ability to mobilise people). These different types of political impact are aligned with the types of power discerned by Andreassen and Crawford, being ‘power to’ (transforming the external power structures, such as legislation), ‘power with’ (creating space for alternative sources of power) and ‘power within’ (building internal capacity and empowering people to engage with external actors). Examples of how these different types of power can be constituted by litigation are provided in Table 3 below.

| Power TO Leverage                          | - The company establishes a grievance mechanism accessible for individuals who allege that their human rights have been violated.  
|                                          | - Through the litigation the litigating parties obtain information which can be used for advocacy. |
| Power WITH Perception                    | - The court affirms the rights that the litigating parties hold either directly against the company or against government.  
|                                          | - By reporting on the litigation the media raise awareness about the structural causes of the human rights violations and the respective involvement of industry and government. |
| Power WITHIN organisational power        | - The victims establish an (informal) association to become a more formidable opponent and to improve their negotiating position.  
|                                          | - During the litigation the lawyers and activists supporting the victims organise trainings and workshops to inform all members of the group of their rights. |

A final observation that should be made relates to the dilemma whether litigating parties should agree to settle their case. This is one of the hardest decisions that can arise in the context of strategic human

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517 Langford *et al.*, *supra* note 159, 434-436.  
While the decision to accept a settlement offer should be based on the content of the proposal and an assessment of the expected risks and benefits of continued litigation, which includes a consideration of different interests and factors, the clients’ interests should ultimately prevail. Whether a settlement is successful depends on a similar assessment as discussed above. In that regard, not only the impacts of the settlement itself (which is often confidential) should be considered but also any impacts that the litigation may already have produced before the parties decided to settle. Although it is not impossible for the settlement and the preceding litigation to generate indirect social impacts, the compromise reached will likely be limited to the specific parties involved – which, at least as far as strategic litigation is concerned, is not considered very successful. The dilemma of settling cases is reviewed more thoroughly in the context of the case study (infra Part III, Section 2.4.4).

### 2.2.6. Contextual factors

Litigation is subject to a multiplicity of input and output factors, which, moreover, do not stand by themselves but interact, making the course and outcome of litigation inherently unpredictable. Hence, designing a lawsuit is not a matter of mathematical science, and untangling the different factors so as to measure their concrete effect and their contribution to the eventual success of a lawsuit, is arduous if not impossible. For instance, lawsuits are conducted in a particular legal order and relate to a particular issue, and thus take place in a unique historical, socio-political, legal and institutional setting. The discussion below briefly describes the meaning and limiting effect of some of these contextual factors that together determine the window of opportunity for strategic human rights litigation – without ambitioning exhaustiveness.

The fact that cases are litigated in a unique setting is an important caveat whenever strategic lawsuits are compared, whether within one domestic legal order (but at different times or relating to different

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519 See also Zerk (2014), supra note 212, 94.
520 Ibid.
521 See, for instance, the very detailed frameworks depicted in Figure 1 in Gloppen (2008), supra note 122, 26 and Figures 2.1 to 2.6 in Gloppen (2006), supra note 146, 42-54.
522 See also Rosenberg, supra note 346, 7.
523 See e.g. Gloppen (2008), supra note 122; Pieterse (2014), supra note 503, 80 and 86-87; Yamin, supra note 505, 335. See also Langford (2008), supra note 349, 9-11 (enumerating the factors that determine the prominence and authority of social rights).
524 Examples of other influential factors include the degree of rights awareness, language and geographical barriers, the practicality of collecting evidence, and distrust for state institutions. See e.g. D. Cote and J. Van Garderen, “Challenges to Public Interest Litigation in South Africa: External and Internal Challenges to Determining the Public Interest Current Developments,” S. Afr. J. on Hum. Rts. 27 (2011), 167; Gloppen (2006), supra note 146, 47; Pieterse (2014), supra note 503, 80; van Dam, supra note 95, 486-496.
issues) or across legal orders (even if relating to the same issues). The findings from the case study can thus not be generalised without more (see also infra Part IV, Section 1.2.2.1).

2.2.6.1. History

A first group of contextual factors relate to the history of a country and its legal order. Many national bills of rights, for instance, were elaborated and adopted following a specific historical (r)evolution. Generally, the causes of such happening have influenced, and may still influence, not only the content and style of a state’s constitutional law, such as the organisation of the state apparatus and its fundamental values, but also the legal culture and society as such. Understanding history may thus assist in explaining why litigation is more or less common, whether a constitution has authoritative power and why (not), and how separation of powers amongst the judiciary, the legislature and the executive is conceived and implemented. As regards South Africa, for instance, its past of Apartheid is crucial, especially for the debate on business and human rights, as will be explained later (infra Part III, Section 1.1.1).

2.2.6.2. Socio-political context

As was said before (supra Section 2.1.3), litigation is generally used in tandem with other strategies, precisely because it is not immune from socio-political interests. Indeed, notwithstanding safeguards for their independence and impartiality, judges are members of the society in which they perform their functions and tend to share the values and ideas that also determine the policies of popular representatives. Hence, few judges are completely insensitive to the social and political interests that are at stake in a particular case, and they are not likely to adopt a reasoning or decision that has no

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525 See also Berger, supra note 381, 86-91 (describing some elements that influence the success of rights litigation in South Africa); Gloppen (2006), supra note 146, 467 (writing about two cases that “their (relative) success (…) was born out of an unusual and unlikely combination of social and political conditions”).

526 Jayawickrama, supra note 70, 128; B. Oomen, “Soul of a nation? The inception, interpretation and influence of South Africa’s 1996 Constitution,” in M. Frishman and S. Muller, The Dynamics of Constitutionalism in the Age of Globalisation 57 (The Hague Academic Press, 2010), 57 (calling such constitutions adopted at the occasion of large-scale political transitions ‘symbols of hope’).

527 See also e.g. Langford (2008), supra note 349, 11.


529 Hancock, supra note 338, 87; Gauri and Brinks, supra note 324, 17. See also Hassan and Azfar, supra note 337, 246 (noting the influence of sympathetic media, which may in turn influence judges’ mind-set). Cf. Du Bois (1996), supra note 467, 162-163 (opposing the view by Ligeti that politics are less at play in environmental litigation which “transcends political ideology”).
popular support at all. This is also due to the fact that they depend on government and on society as such for their judgments to be implemented and effective.

Pieterse distinguishes an ‘internal’ political environment (where policy is conceptualised and implemented) and an ‘external’ political environment (where policy is received). Factors within the political context that may influence the effectiveness of litigation include the willingness and capacity of government (especially to implement or enforce court orders), the political culture, the interaction between the judiciary and the parties involved (government, civil society, business community), and judges’ sensitivity to lobbying campaigns. Also the transnational political environment may be relevant, which comprises factors such as the occurrence of similar challenges in other countries and the consequent transnational diffusion of experiences related thereto, or the intervention by transnational actors.

2.2.6.3. Legal context

A third category of factors concern the legal context within which litigation takes place and comprise, for instance, the legal culture (which is influenced by factors relating to history and socio-political interests as well), the legal system as such (in particular the applicable rules of procedural and substantive law), as well as the frequency, significance and nature of similar cases and their outcome, and factors that are directly linked with the court system (such as the degree of bureaucratisation and formalism, and even the geographical distance to the courts) or with the way in which the case proceeds (such as the behaviour of the parties involved in the litigation). As regards legal culture, in particular, this is “the cluster of attitudes, ideas, expectations, and values that...”

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530 See e.g. Friedman, supra note, 322-325; Langford (2008), supra note 349, 43; A. Nolan (2011), supra note 334, 95.
531 Pieterse (2014), supra note 503, 86; Rosenberg, supra note 346, 16. R25 noted that “the court does not have an army, it is not able to implement its own orders.”
532 Pieterse (2014), supra note 503, 86.
533 Gauri and Brinks, supra note 324, 17-19; Gloppen (2006), supra note 146, 43 and 54; Gloppen (2008), supra note 122, 30; Pieterse (2014), supra note 503, 86-87.
534 For an analysis of the transnational context, see e.g. Roseman and Gloppen, supra note 114.
535 Gauri and Brinks, supra note 324, 17; Gloppen (2006), supra note 146, 50; Gloppen (2008), supra note 122, 30; B. Friedman, supra note 528, 271-280.
536 Gauri and Brinks, supra note 324, 16-17; Gloppen (2006), supra note 146, 49-52; Gloppen (2008), supra note 122, 28-29.
537 Note that in common law nations, the rationes decidendi of final judgments become part of the legal landscape and acts as a binding precedent for future cases that have a similar constellation of facts, unless they are distinguished from the case leading to the precedent. This binding force does not apply to obiter dicta, which are considerations that are not essential to decide a matter and only have persuasive force in future matters. Hassan and Azfar, supra note 337, 216.
538 Gloppen (2006), supra note 146, 50.
539 Gargarella, Domingo and Roux, supra note 351, 265-268; Gauri and Brinks, supra note 324, 16; Gloppen (2006), supra note 146, 45-51.
people hold with regard to their legal system, legal institutions, and legal rules\textsuperscript{541} that prevail in a certain geographical and temporal space.\textsuperscript{542} This culture affects everyone, namely judges\textsuperscript{543} and lawyers (internal legal culture) as well as politicians and society as such (external legal culture),\textsuperscript{544} and is not rigid but evolves.\textsuperscript{545}

2.2.6.4. Institutional setting

Finally, also a lawsuit’s institutional setting must definitely be considered, which encompasses factors relating to the judiciary’s organisation (internal dimension) and its relationship with other actors (external dimension).\textsuperscript{546} Relevant factors in the internal institutional context include the appointment procedure for judges, the bench’s composition, jurisprudential resources (such as judges’ training and curriculum, the financial, human and technical resources of courts, and the existence of professional organisations protecting the interests of judges), and the interaction between courts at different levels of jurisdiction, in particular in common law countries that adhere to \textit{stare decisis}.\textsuperscript{547} It should be noted that even within one state the internal institutional context may slightly differ depending on the space where a dispute manifests itself and/or is resolved, for instance a rural \textit{versus} an urban setting and a national \textit{versus} a regional or local setting.\textsuperscript{548}

The independence of the judiciary is one important factor of the external institutional setting,\textsuperscript{549} but most discussions have focussed on the relationship between the judiciary, on the one hand, and the executive and the legislature, on the other. The main question is how far the competence of the judiciary reaches to scrutinise legislative and executive acts without violating the separation of powers doctrine. For the purpose of this dissertation, it is sufficient to briefly explain the two objections that lie at the heart of this controversy, namely the concern that non-elected judges should not substitute decisions adopted by the democratically elected representatives of the people (the counter-majoritarian difficulty) and the uncertainty whether judges have access to the required resources and information to

\begin{itemize}
\item \textsuperscript{542} Davis and Klare, \textit{supra} note 106, 406.
\item \textsuperscript{543} The socio-political and legal context influences the ideology of judges, which, in turn, defines their view about the function, interpretation and application of the law and the appropriate role of the judiciary and, accordingly, influences their decision-making. B. Friedman, \textit{supra} note 528, 271-280.
\item \textsuperscript{544} Pérez-Perdomo and Friedman, \textit{supra} note 541; Sieder, Schjolden and Angell, \textit{supra} note 318, 12-13.
\item \textsuperscript{545} Gloppen (2006), \textit{supra} note 146, 49-50.
\item \textsuperscript{546} Compare with the distinction between internal and external political environment made by Pieterse (2014), \textit{supra} note 503, 86-87.
\item \textsuperscript{547} Brinks and Gauri, \textit{supra} note 328, 314-316; B. Friedman, \textit{supra} note 528, 263 and 270-329; Gargarella, Roux and Domingo, \textit{supra} note, 267-268; Gloppen (2006), \textit{supra} note 146, 49-51.
\item \textsuperscript{548} See also Langford et al., \textit{supra} note 159, 441-448.
\item \textsuperscript{549} Brinks and Gauri, \textit{supra} note 328, 320-323; Gloppen (2006), \textit{supra} note 146, 54-55.
\end{itemize}
adopt well-founded decisions in polycentric matters (the issue of comparative institutional competence).

Although there is some truth in both objections, rather than prompting a finding that transformative human rights litigation is inherently anti-democratic and forces judges to perform a role for which they are ill-equipped, it is agreed that these concerns should rather encourage activists and lawyers, first, to integrate strategic litigation into a broader political and social strategy that secures popular support and, second, to ensure that all necessary information to adopt a reasoned decision is provided to the court. Furthermore, the counter-majoritarian difficulty and the principle of comparative institutional competence imply a particular understanding of ‘democracy’ and ‘separation of powers’ that should, arguably, not be taken for granted at least for the following four reasons.

First, the objections are based on an artificial distinction between what is legal and what is political, which is unpersuasive because, as Courtis for instance explains, law results from politics and, in turn, politicians use the law to convey political values. Second, they seem to presume that judges simply disregard the will of the people and the political deliberations that preceded the act that is challenged, while research has demonstrated that judges rarely rule completely against the executive and the legislature. Third, the concerns express a belief that judicial review of legislative and executive acts pre-empts rather than provokes inter-branch dialogue. In many cases, however, judges only apply a weak form of judicial review and leave sufficient room for discretion to government. Hence, the litigation presents an opportunity for genuine dialogue on constitutional matters, amongst the judiciary, the legislature, the executive and the citizenry, and thereby deepens democracy instead of weakening it. Fourth and finally, the criticism seems to ignore the birth-right of constitutions, as the very idea underlying them is precisely to prevent that human rights can ever be undermined by the

550 See e.g. Brand (2006), supra note 267, 225.
553 Courtis (2008), supra note 493, 74-77 (explaining also that “judicial decision are both ‘legal’ and ‘political’”).
554 See e.g. Gauri and Brinks, supra note 324, 17; Langford (2008), supra note 349, 43; A. Nolan (2011), supra note 334, 95; Brinks and Gauri, supra note 328, 315.
555 Abramovich, supra note 267, 197-198; Courtis (2008), supra note 493, 84-86; Brinks and Gauri, supra note 328, 344. For a discussion of the relationship between strong-form (foreclosing the discussion) and weak-form judicial review, see Tushnet (2008), supra note 291.
tyranny of the majority.\textsuperscript{557} Indeed, as Tushnet has found, most constitutional states place limits on democratic governance to prevent that the legislature and the executive act against the constitution.\textsuperscript{558}

In sum, many scholars\textsuperscript{559} argue that transformative human rights litigation, even when it leads to courts reviewing acts by the legislature or the executive, does not carve out but deepens democracy, because it demonstrates the checks and balances between the three branches, complements other accountability mechanisms, such as elections,\textsuperscript{560} and enhances deliberation and popular participation, for several reasons, including that courts constitute a public forum, that judges are less likely to be tainted by political interests, and that government can be held accountable more immediately and directly.\textsuperscript{561} This definitely holds true for public interest litigation and class actions, which are not limited to only a few aggrieved parties (\textit{supra} Section 2.2.1.1.).\textsuperscript{562}

\textsuperscript{557} Courtis (2008), \textit{supra} note 493, 82-83; Shany, \textit{supra} note 479, 386; Taylor, \textit{supra} note 243, 194; Tushnet, (2008), \textit{supra} note, 85.
\textsuperscript{558} Tushnet (2008), \textit{supra} note 291, 20.
\textsuperscript{560} Other formal vertical accountability mechanisms are, for instance, national human rights institutions and ombudspersons. Examples of informal vertical accountability mechanisms are demonstrations and media campaigns. Horizontal accountability mechanisms, on the other hand, relate to checks and balances within the state architecture. See also Gloppen (2008), \textit{supra} note 122, 22-23.
\textsuperscript{561} The latter reason refers to two advantages of litigation over elections, being that litigation can be initiated at any time, whilst elections are organised at specific times, and that litigation can target the concrete authority that is responsible.
\textsuperscript{562} Gill, \textit{supra} note 354, 202-203. Cf. Pieterse (2014), \textit{supra} note 503, 80 (writing that the transformative potential of litigation depends on the ability of vulnerable people to access the justice system and on the responsiveness of courts to their claims).
PART III.
A REALITY CHECK: MINEWORKERS AND NEIGHBOURING COMMUNITIES' (UN)HEALTHY WORKING AND LIVING ENVIRONMENT IN SOUTH AFRICA
As the discussion of the international legal framework on business and human rights in Part II has
demonstrated, international law does not assume that business enterprises have no human rights duties
at all, but that such duties should be implemented under domestic law and enforced at the domestic
level. The UNGPs urge states to ensure that business enterprises are legally responsible for human
rights *inter alia* by adopting the necessary preventive and remedial (legislative, regulatory,
administrative, judicial or other) measures.

Hence, whether business enterprises are effectively accountable for human rights ultimately depends
on the extent to which states excel in complying with their obligation to protect. To assess this issue,
regard should be had to the legal impact of human rights on business enterprises under national law
and to the ability of victims or activists acting in the public interest to access judicial remedies. In Part
III, these questions are considered in relation to a particular domestic legal order (South Africa) and a
specific type of human rights violations (associated with environmental degradation) committed by
business enterprises that are active in a given industry (the extractives).

Chapter 1 of Part III deals with the features of the South African domestic legal order that are, based
on the analysis in Part II, considered relevant for ascertaining the responsibility of business for human
rights. Thereafter, in Chapter 2, the practical experiences of activists and lawyers that have used
litigation to enforce accountability for human rights by business enterprises (namely mining
companies) are scrutinised so as to shed light on the different decisions that these stakeholders have to
take when they determine the strategy of their litigation. The purpose of the latter analysis is to
identify any common factors that assist (or hamper) victims in enforcing accountability for business-
related human rights abuse through judicial remedies and that (could) strengthen the effectiveness of
such litigation.
1. SETTING THE SCENE: BUSINESS, HUMAN RIGHTS AND ACCESS TO REMEDIES IN SOUTH AFRICA

Before delving into the specific issue of using strategic litigation to ensure accountability for human rights violations by mining companies due to environmental degradation, a number of general features of the South African legal order are discussed, which together constitute the framework within which business-related human rights matters are litigated. One such feature concerns the legal impact of human rights on business enterprises in the South African legal order (1.2), namely the horizontality of human rights and the protective duties of state organs. Thereafter, the Chapter continues with an assessment of the relationship between international and South African law (1.3) and ends with a discussion of different factors that relate to the enforcement of accountability for human rights violations (1.4), videlicet the rules on locus standi, access to free or cheap legal aid, the threat of intimidating lawsuits, the different judicial, non-judicial and non-state-based remedies, and the available forms of relief.

By way of introduction, however, the Chapter commences with explaining why the very idea of business enterprises having human rights obligations is not considered all that strange in South Africa (1.1), how this country positions itself in the international debate (1.2) and how the government tries to maintain its domestic regulatory space under international investment law (1.3).

1.1. Business and human rights: a state of affairs in South Africa

1.1.1. A history of business and human rights

Earlier it was claimed that the idea of human rights duties for business enterprises entails a paradigm shift, because, at least traditionally, human rights were classified as belonging to the public sphere.\(^{563}\) This does not hold true as much in South Africa, where, as Gwanyana says, “[t]he belief that placing duties on companies is unprecedented and not allowed was never part of [the] law.”\(^{564}\) The country’s history of Apartheid, a time during which companies maliciously conspired with the regime in order to preserve and even tighten discriminatory practices,\(^{565}\) has made everyone aware of the power of

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\(^{563}\) See e.g. supra Part I, Section 2.1 and the introduction to Chapter 1 of Part II.


\(^{565}\) In its final report, the Truth and Reconciliation Commission found, for instance that “the mining industry harnessed the services of the state to shape labour supply to their advantage[, and] bears a great deal of moral responsibility for the migrant labour system and its associated hardships” and that “[c]ertain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies.” Truth and Reconciliation Commission, Final Report (29 October 1998), Volume 4, Chapter 2, paras 63 and 161.
business and of its ability to commit human rights abuses.\footnote{According to Wettstein, the complicity of business in the Apartheid regime constituted the first catalyst for a global debate on business and human rights. Wettstein (2016), supra note 16, 78. See also Resolution 2307 (XXII) of the General Assembly of 13 December 1967 on the policies of apartheid of the Government of the Republic of South Africa (condemning companies that collaborated with the Apartheid regime and requesting states to disengage).} As the Truth and Reconciliation Commission wrote in its final report, “[b]usiness was central to the economy that sustained the South African state during the apartheid years.”\footnote{Truth and Reconciliation Commission, supra note 565, para. 161.} When the country made its transition to a democratic, constitutional state based on the rule of law, the drafters of the Constitution were mindful of the past and dedicated to a future where all private and public conduct would be subjected to constitutional scrutiny.\footnote{S. Liebenberg, “The Application of Socio-Economic Rights to Private Law,” J. S. Afr. L. (2008b), 465.} Moreover, by that time, the question of human rights affecting business enterprises had been theorised in other jurisdictions, the experience of which was considered when the new Constitution was drafted.\footnote{Dafel, supra note 279, 59.} The result was that ever since the birth of the new state, business enterprises have been assumed to be responsible for human rights (see the analysis of the constitutional dispensation for business and human rights\footnote{See e.g. Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance (69/2014) [2014] ZASCA 184 (26 November 2014), paras 1 and 78.} in Section 1.2.1).

common law base inherited from the past and indelibly stained by apartheid.574 This quote bespeaks an awareness that private power is actually constituted by the law and thus by public power, which makes the distinction between the private and public sphere for the protection of human rights rather artificial.575 Also the Constitutional Court has pondered that “over emphasis on the differences between the exercise of private and public power often sheltered private power used for public purposes.”576

In sum, the debate on business and human rights has a somewhat different dimension in South Africa in the sense that there is no paradigmatic reticence to the idea of business enterprises being bound by human rights. This allows for a more progressive approach to the issue of business and human rights, which, as will be demonstrated in Chapter 2, indeed finds expression in the discourse used by lawyers and activists and sometimes even in bold statements by judges. A nice illustration is the following holding by the Supreme Court of Appeal in a case concerning industrial pollution.

Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.577

1.1.2. South Africa’s position in the international debate

Before discussing the extent to which human rights constrain business enterprises within the South African legal order and reviewing the actual experiences of local stakeholders who seek to vindicate human rights against business enterprises, it is interesting to reflect on South Africa’s position in the debate on business and human rights at the level of the United Nations. The following quote from one of the respondents is already revealing.

It is a shocking surprise to me that (…) there is this disconnect between progress at that level and actually what is happening all over the country. I am not sure how to explain it, but maybe the state is not one thing (…) It is a complex arrangement (…) I would not look at the

574 Davis and Klare, supra note 106, 409-412. Cf. Bhana, supra note 571, 353 (writing that “[t]he law cannot tolerate a perpetuation of the apartheid legacy by virtue of continuing pre-constitutional socio-economic power relations in the private arena”); D. Cornell and N. Friedman, “In Defence of the Constitutional Court: Human Rights and the South African Common Law,” Malawi L.J. 5 (2011), 2 (writing that “the Constitution has had and will continue to have a rightly extensive and transformative impact on the law governing relations between private persons”).


577 ArcelorMittal v. VEJA, supra note 570, para. 82.
behaviour of the state within its own boundaries, and say this is characteristic of its diplomacy.\textsuperscript{578}

In June 2014 South Africa was amongst the twenty states that voted in favour of Resolution 26/9 on the elaboration of an international legally binding instrument on business and human rights, which created an open-ended intergovernmental working group (\textit{supra} Part I, Section 1.3).\textsuperscript{579} The concerned resolution was even drafted by South Africa, together with Ecuador – the latter country not being a member of the Human Rights Council at that time.\textsuperscript{580} Since its establishment two sessions of the open-ended working group have been organised, each of which were attended by representatives from the South African government.

While the state is one of the main supporters of a binding treaty, South Africa has not yet taken any step towards adopting a national action plan regarding the concrete measures it will take to implement its obligation to protect in accordance with the UNGPs. This illustrates why the fear that Resolution 26/9 may distract from the real work, \textit{id est} the effective enforcement of domestic laws and regulations governing corporate conduct so as to prevent and redress abuse, may be founded.\textsuperscript{581} After numerous unanswered calls from civil society on the South African government to issue a national action plan, in April 2016 the Centre for Human Rights at the University of Pretoria eventually published a shadow baseline assessment with the support of the International Roundtable for Corporate Accountability.\textsuperscript{582} In the executive summary of the shadow report, they write that “the South African government is currently prioritizing the process around a treaty on business and human rights at the UN level”.\textsuperscript{583} As the government has not yet even committed to drafting a national action plan, the shadow report is meant to lay the foundations for such a process in the future, but also to support advocacy around business and human rights in South Africa.\textsuperscript{584}

In relation to South Africa’s international position about business and human rights it is also interesting to observe that the government has not (yet) ratified the Protocol on the Statute of the

\textsuperscript{578} R10.
\textsuperscript{579} Resolution 26/9 of the Human Rights Council, \textit{supra} note 48, para. 1.
\textsuperscript{580} Resolution 26/9 was also backed by Bolivia, Cuba and Venezuela.
\textsuperscript{581} Contra e.g. Blackwell and Vander Meulen, \textit{supra} note 59, 52-53 (arguing that the two processes could and should complement each other). See the discussion \textit{supra} in Part I, Section 1.3.
\textsuperscript{582} This is a coalition of human rights organisations (including e.g. Amnesty International, EarthRights International, Global Witness and Human Rights Watch) committed to ensuring that “governments create, implement, and enforce laws and policies to protect against business-related human rights abuse”. \textit{Inter alia} the Roundtable provides advice to states on drafting a national action plan. J. Loots, “Shadow” National Baseline Assessment of Current Implementation of Business and Human Rights Frameworks: South Africa (Centre for Human Rights at the University of Pretoria and International Corporate Accountability Roundtable, April 2016).
\textsuperscript{583} Ibid. 2. They acknowledge, however, that at least the South African Human Rights Commission, which is an independent body (\textit{infra} Section 1.4.2.2), has already taken some measures to educate on, and build capacity for, business and human rights.
\textsuperscript{584} Ibid. 6.
African Court of Justice and Human Rights and, hence, neither the Protocol on the Amendments thereto. This is noteworthy precisely because the latter amendments will extend the Court’s jurisdiction to legal persons. In other words, if the Protocol on the Amendments enters into force, the African Court will be competent to hear claims seeking to hold companies accountable for infringements upon international criminal law, including the most egregious human rights violations.

1.1.3. The domestic regulatory space and international investment law

When the new South African state emerged after decades of discriminatory policies administered by the Apartheid regime, equality was far from within reach and the desired social transformation would never be achieved without affirmative action, for which the Constitution explicitly catered. When the South African government began implementing this constitutional mandate, it soon realised, however, that its laws, regulations and policies providing for affirmative action could be challenged under international investment law. Indeed, in November 2006, for instance, investors from Italy and Luxembourg launched arbitration proceedings claiming that the Mineral and Petroleum Resources Development Act (see also infra Section 2.2.2) amounted to expropriation.

This Act introduced several changes to South African mining law. First of all, since its entry into force the state is the custodian of all minerals, but can grant, for the benefit of all South African people, ‘limited real rights’ to prospect for or extract these minerals to applicants that meet the requirements set by law. Moreover, rights holders are no longer allowed to ‘sterilise’ – id est not exercise – their rights, meaning that they have to start prospecting or extracting within a time period set by law. Another fundamental change is that the Mining Charter adopted in terms of the MPRDA provides that all mineral rights have to be held for at least 26% by previously disadvantages groups – a measure...

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586 Shadow National Baseline Assessment, supra note 582, 12 and 40.
587 The basic provision, Section 9(2) of the Constitution, stipulates that “[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.” Other relevant provisions include Sections 25(6) and (7) (on property rights) and 29(2) (on language in education) of the Constitution.
589 Piero Foresti and Others v. the Republic of South Africa, ICSID Case No. ARB(AF)/07/1 (4 August 2010).
591 Prospecting activities should, for instance, start within 120 days from the date on which the right becomes effective and mining operations within one year. Sections 19(2)(b) and 25(2)(b) MRPDA.
592 A gradual approach was agreed, however, whereby within 5 years (by 2009) the target of 15% would be obtained, and within ten years (by 2014) the target of 26%. The Amendment of the Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (the Mining Charter), Government Gazette No. 33573, adopted in terms of Section 100(2)(a) MPRDA. Note that a new Mining Charter was in the course of being adopted at the time of writing.
that is part of the ‘broad-based black economic empowerment’ policy that applies across the South African economy. The Act also applies to mineral rights that were acquired before its entry into force, and the holders of such rights were obliged to convert their ‘old order’ rights into ‘new order’ rights within the transitional period set by the law.

The Italian and Luxembourghish investors complained that these changes amounted to direct or indirect expropriation and, hence, filed a request for the institution of arbitration proceedings pursuant to the two bilateral investment treaties that South Africa had concluded with, respectively, Italy and the Belgo-Luxembourg Economic Union – the case of Piero Foresti and Others v. South Africa. Those treaties included the following clause protecting against expropriation.

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the real value of the investment expropriated (…), shall include interest at a normal commercial rate until the date of payment, (…) The investors affected shall have the right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of their case and of the valuation of their investments (…)

Peculiar to this arbitration case is that four nongovernmental organisations applied to intervene as non-disputing parties, which was accepted by the Tribunal. According to those interveners, the investors sought to challenge the international legality of constitutionally mandated measures and to question the South African government’s ability to implement certain legislative and policy decisions to redress the devastating socio-economic legacy of Apartheid, which could have serious domestic repercussions. Therefore, the non-disputing parties pleaded for “[a]n interconnected approach to international law” and wanted to assist the Tribunal in placing the bilateral investment treaties in context so as to avoid an “interpretable approach that would create an irreconcilable conflict between the relevant bilateral investment treaties and the human rights obligations” and “to promote a more

593 See also the framework law, Broad-Based Black Economic Empowerment Act 53 of 2003, Government Gazette No. 25899 [BBBEE].
594 Piero Foresti and Others v. South Africa, supra note 589.
595 Article 5(1) of the Agreement between the Belgo-Luxembourg Economic Union and the Republic of South Africa on the Reciprocal Promotion and Protection of Investments, adopted at Pretoria on 14 August 1998, 2218 UNTS 40. See also the general discussion supra in Part II, Section 1.3.
596 Petition for limited participation as non-disputing parties in terms of Articles 41(3), 27, 39, and 35 of the Additional Facility Rules of the International Centre for Settlement of Investment Disputes, in re: Piero Foresti and Others v. the Republic of South Africa, Case No. ARB(AF)/07/1 (17 July 2009). For a discussion of that intervention by two of the lawyers involved, see Brickhill and Du Plessis, supra note 299.
coherent international legal framework.” In the end, however, the dispute got settled, so that the arbitration Tribunal never ruled on its merits, and thus did not respond to the fundamental concerns raised by the non-disputing parties regarding the relationship between investment law and human rights, which is unfortunate given the uncertainties that exist in that regard (supra Part II, Section 1.3).

As South Africa feared that the Foresti case would only be the first in a series of challenges to its transformative policies, the government ordered a screening of its foreign investment policy framework. That process ended in 2009 with the publication of a report holding that South African negotiators were insufficiently experienced and lacked knowledge about investment law so that the country had entered into agreements that were not in its long term interests. More generally, the report also found that investment agreements are predominantly concerned with protecting the interests of investors from developed countries and insufficiently address the interests of developing countries in sustainable development.

The balance of power in North–South negotiations is tipped heavily in favour of developed countries and large, politically influential corporations. (...) the current BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for development. New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance development. (...) 

The report concluded with a number of recommendations for the South African government to review its current investment policy “to do damage control”. In accordance with those recommendations, in July 2010 the Cabinet adopted a decision (1) to draft a new investment act codifying and clarifying standard provisions for bilateral investment, (2) to terminate first-generation treaties while offering partners a possibility to renegotiate, (3) to refrain from entering into new treaties except for compelling economic and political reasons, and (4) to develop a new model treaty as a basis for (re-)negotiation. That decision is being implemented since 2012. In particular, several bilateral investment treaties have been terminated, including those with the Belgo-Luxembourg Economic Union, Spain, Germany, Switzerland, the Netherlands and Denmark. Furthermore, in 2015 the

598 Ibid. paras 4.14-4.15.
599 The Tribunal only issued an order on costs. Piero Foresti and Others v. South Africa, supra note 589.
601 Ibid. 11.
602 Ibid. 54. ‘BITs’ is the abbreviation of bilateral investment treaties.
603 Ibid. 55.
Protection of Investment Act\textsuperscript{605} was adopted. This Act is aimed at protecting investment in a manner that balances the public interest and the rights and obligations of investors, affirming South Africa’s sovereign right to regulate investment and confirming the Bill of Rights and the laws that apply to all investors in the country.\textsuperscript{606}

In accordance with those objectives the Protection of Investment Act contains a number of innovative elements. Section 10, for instance, acknowledges that investors have a right to property, but in line with the South African Constitution.\textsuperscript{607} The latter caveat is important as the right to property as protected by Section 25 of the Constitution\textsuperscript{608} not only provides for additional legitimate restriction grounds, but also makes a distinction between expropriation, which must be compensated to be legitimate, and deprivation, which does not require compensation – provided that the deprivation occurs in terms of a law of general application and is not arbitrary.\textsuperscript{609} The protection of the right to property in the South African domestic legal order is thus less strong than investors would like it to be.

In Agri South Africa v. Minister for Minerals\textsuperscript{610} which is a case concerning a mining company’s claim for compensation based on the argument that the changes to mining law introduced by the MPRDA amounted to expropriation,\textsuperscript{611} for instance, the Constitutional Court held that in casu the MPRDA had not expropriated the claimant but deprived it of its mineral rights in a legitimate way, namely through a general, non-arbitrary law that seeks to facilitate broader and equitable access to mineral resources.\textsuperscript{612} In that judgment, the Court also emphasised the peculiar, historically-motivated interpretation of property rights under the Constitution.\textsuperscript{613} The following holding is particularly revealing.

This brings to the fore the obligation imposed by section 25 not to over-emphasise private property rights at the expense of the state’s social responsibilities. It must always be remembered that our history does not permit a near-absolute status to be given to individual property rights to the detriment of the equally important duty of the state to ensure that all South Africans partake of the benefits flowing from our mineral and petroleum resources.\textsuperscript{614}

\textsuperscript{605} Protection of Investment Act 22 of 2015, Government Gazette No. 39514 [PIA].
\textsuperscript{606} Section 4 PIA (cited in Annex 2).
\textsuperscript{607} Section 10 PIA is cited in Annex 2.
\textsuperscript{608} Section 25 of the Constitution is cited, in part, in Annex 2.
\textsuperscript{609} Agri South Africa v. Minister for Minerals and Energy (CCT 51/12) [2013] ZACC 9 (18 April 2013), para. 48. For the requirements to prove expropriation, see ibid. paras 58 and 67.
\textsuperscript{610} Ibid.
\textsuperscript{611} The claimant had to convert an old order right into a new order right within the statutory time period, but this entailed not only that a certain percentage of the right had to be sold to a previously disadvantaged person, but also that sufficient funds had to be available to execute the right as the MPRDA no longer allows to sterilise mineral rights.
\textsuperscript{612} Agri South Africa v. Minister for Minerals, supra note 609, para. 68.
\textsuperscript{613} Ibid. para. 60.
\textsuperscript{614} Ibid. para. 62.
Another striking provision of the Protection of Investment Act is Section 12, which explicitly recognises the right of the South African government to regulate and, in particular, its authority to adopt measures for purposes such as redressing historical, social and economic inequalities and injustices, upholding the rights guaranteed in the Constitution and achieving the progressive realisation of socio-economic rights. Finally, although the Act provides for a possibility to request international arbitration, the South African government can only agree to have an investment dispute referred to arbitration when all domestic remedies have been exhausted.

The adoption of the Act in December 2015 has meant a major step for South Africa towards maintaining its domestic regulatory space so as to be able to comply with its obligations under international human rights law – as well as other international obligations, for instance in terms of environmental law. The initiative has, therefore, been commended by civil society for formalizing “in investment terrain, the supremacy of the Constitution and the Bill of Rights” and for ensuring “that foreign investors remain committed to the South Africa’s development agenda [sic].”

1.2. Business and human rights according to South African law

1.2.1. Constitutional dispensation for business and human rights

1.2.1.1. A quick overview

The extent to which human rights affect business enterprises in South Africa depends on the horizontal effect, scope and application of human rights and the protective duties of organs of the state (see supra Part II, Section 1.2). The following five constitutional provisions are particularly relevant to this analysis.

7. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

615 Section 12 PIA is cited, in part, in Annex 2.
617 Centre for Applied Legal Studies, Submission to the Portfolio Committee on Trade and Industry regarding the Promotion and Protection of Investment Bill, B18 of 2015 (August 2015), para. 6.
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). (…)

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. (…)\(^618\)

39. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

172. (1) When deciding a constitutional matter within its power, a court— (…) (b) may make any order that is just and equitable, (…)

While the meaning and effect of these provisions will be discussed more in detail in the following Sections on horizontality (Section 1.2.1.2) and protective duties (Section 1.2.1.3) as well as later in the Sections dealing with standing rights (infra Section 1.4.1.1) and remedial powers (infra Section 1.4.3.1), this introductory Section already provides a general overview.

Section 8(2) determines the horizontal effect and scope of the rights in the Bill of Rights, whilst Section 8(3) governs their (possible) indirect horizontal application. More specifically, the latter provision admits strong, direct-indirect horizontal application by mandating judges to develop the common law in order to give effect to concrete rights. In turn, Section 39(2) is \textit{inter alia}\(^619\) concerned with – if need be strong – indirect-indirect horizontal application in conformity with constitutional values, as opposed to concrete rights (indirect-indirect horizontal application).

Next, Section 38 provides an independent cause of action for the direct horizontal application of constitutional rights, in conjunction with the concrete right that is (allegedly) violated. This provision is also relevant for other forms of (non-)horizontal application, as well as for the state’s protective duties, because it determines standing rights and stipulates that courts should grant appropriate relief.

In relation to relief, Section 172(1)(b), lastly, confers wide discretion to the judiciary as well, which includes the possibility of granting constitutional relief (in the case of direct horizontal application) and of strong remedies (in the case of indirect horizontal application).

The provisions of Sections 8(3), 39(2) and 172(1)(b) also trigger the protective duties of the judiciary, since judges are responsible for applying human rights horizontally, whether directly or indirectly. The

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\(^{618}\) The full provision is cited \textit{infra} in Section 1.4.1.1.

\(^{619}\) Section 39(2) applies whenever the courts engage with either statutory law or common law (\textit{id est} interpret, apply or, in case of common law, develop) in whichever type of dispute (amongst private actors, between private and state actors or amongst state actors). It is aimed at involving judges “in a process of development of a normative order in terms of which the entire South African legal system can be located.” D.M. Davis, “How Many Positivist Legal Philosophers Can Be Made to Dance on the Head of a Pin? A Reply to Professor Fagan,” S. Afr. L.J. 129 (2012), 68. See also Davis and Klare, \textit{supra} note 106, 423; N. Friedman, \textit{supra} note 571, 74-75.
key constitutional provisions dealing with protective duties are Sections 7(2) and 8(1), however. The latter provisions relate to the vertical application and the indirect horizontal application of human rights as well, because protective duties affect the way in which the legislature, the executive and the judiciary perform their functions, and thus influence laws, regulations, policies and judgments.

It should be noted that, similar to legal scholarship on the horizontality question in abstracto, South African legal scholars have not agreed on one normative theory. Hence, there are different approaches to categorise and explain the effects of human rights in the private sphere. Nolan, for instance, uses the term ‘direct-mediated horizontal application’ to explain that human rights bind private actors, but in principle take effect through private law, which is here called indirect horizontal application. In turn, Bhana distinguishes “two legs of the horizontality debate”: the ‘scope’ and the ‘form’ of horizontal ‘application’, with the former relating to the content and the latter to the method of application. Her understanding of the ‘scope of horizontal application’ then seems to embrace both ‘scope’ and ‘effect’ as used here, while the term ‘application’ in this dissertation is only used to discuss ‘the form’ of such application as Bhana calls it. When Friedman, on the other hand, writes about the ‘ambit’ of human rights, that term again combines ‘effect’ and ‘scope’. A last illustration are the writings by Van der Walt, who theorises about the influence of human rights on the development of the common law, which he calls the horizontal ‘radiation’ or ‘seepage’ of human rights in the private sphere, while in this dissertation this is designated as indirect horizontal application. His theory combines the judiciary’s protective duties (in particular to develop the common law in conformity with human rights) and the (direct or indirect) horizontal application of human rights.

1.2.1.2. Horizontality

(i) Horizontal effect

Whether the Bill of Rights has horizontal effect seems quite straightforward, as Section 8(2) explicitly stipulates that companies are bound by constitutional rights. There is thus no principled objection against horizontal effect, nor against the idea that the exercise of private power is not immune from

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620 See also Dafel, supra note 279, 58-60. Some scholars, for instance, use the terminology of ‘direct’ and ‘indirect’ application depending on whether rights or values have an impact on private actors, whilst in this dissertation a distinction is made first depending on whether rights affect either private conduct or private law (direct versus indirect horizontal application) and only then depending on whether private law is influenced by rights or by values (direct-indirect versus indirect-indirect horizontal application).

621 A. Nolan (2014), supra note 571, 79.

622 Bhana, supra note 571, 358.

623 N. Friedman, supra note 571, 69.

constitutional scrutiny. This acceptance has to be understood in light of South Africa’s history, as was explained earlier (supra Section 1.1.1).

Section 8(2) suggests that both the nature of the right and the nature of the duty are relevant to determine whether a concrete right has horizontal effect. For the purposes of this dissertation, however, the nature of the duty rather assists in establishing the horizontal scope of a right that has, in principle, horizontal effect. At present, a clear normative theory on how to assess whether a right lends itself, by its nature, to horizontal effect does not (yet) exist. In Khumalo v. Holomisa, a case concerning defamation, the Constitutional Court has provided some limited guidance with its holding that “the right to freedom of expression is of direct horizontal application” “given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state.” Arguably, the Court’s use of the term ‘application’ here was premature, because at that point the real issue was whether the right had horizontal effect and all the more because in this case the Court eventually did not apply the right directly, but indirectly by interpreting and applying the common law in conformity with the concerned right.

Thus, according to the Constitutional Court, regard should be had to (1) the intensity of a right – which seems to be equated with the right’s importance – and (2) its susceptibility to invasion by private actors. In other paragraphs of the same judgment, the Court also takes into account the role of the private party whose right is at stake (in casu freedom of expression of the media) and the countervailing interests of the other private party (in casu privacy and dignity). Through the latter criterion the Court suggests that conflicting private interests must be balanced already at the time of determining the horizontal effect and scope of a particular right, and thus prior to the determination of how that should eventually be applied to private actors, which again blurs the different dimensions of horizontality.

In view of this limited guidance, some legal scholars have developed their own method to determine whether a given right has horizontal effect. According to Bilchitz, for instance, two factors are particularly important to determine whether a right takes effect against a business

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625 Bilchitz (2008), supra note 29, 775-779.
627 As was already said, however, the typology of ‘three dimensions to horizontality’ only serves an academic purpose (see also supra Part I, Chapter 2). In practice the horizontality assessment may not be linear, in particular the sequence may not be fixed and the different dimensions even blended.
628 See Khumalo and Others v. Holomisa, supra note 628, para 35.
629 See also the discussion of Khumalo v. Holomisa by Bilchitz (2008), supra note 29, 775-779.
630 Note, however, the observation made supra in note 627. The need to balance conflicting rights is also discussed infra in the section dealing with horizontal scope (ii).
enterprise: (1) the (potential) impact of business enterprises on the rights at stake and (2) the capacities, capabilities and functions of those companies within society.  

In any case, in practice the question whether a right has horizontal effect may be somewhat moot for two reasons. First, many provisions in the Bill of Rights explicitly confirm that they affect state actors as well as private actors. Examples are Section 9 on the right to equality (“[n]o person may unfairly discriminate (…) against anyone”), Section 12(1)(c) on the right to freedom and security of the person (“[e]veryone has the right (…) to be free from all forms of violence from either public or private sources”), and Section 32(1)(b) on the right to information (“[e]veryone has the right of access to (…) any information that is held by another person and that is required for the exercise or protection of any rights”). Second, the South African judiciary has by now recognised the horizontal effect of those rights that are codified in a provision that does not include an express statement on their horizontal effect, but that logically seem relevant in private relationships. Examples thereof include the right to education, to freedom of expression, to an environment not harmful to health, and to have access to housing.

(ii) Horizontal scope

Not all human rights duties owed by the South African state towards everyone within its jurisdiction should automatically be imposed on business enterprises. This is implied by the caveat in Section 8(2) making the binding effect of human rights vis-à-vis private actors conditional upon the nature of the specific duty imposed by the concerned right. According to Cheadle and Davis, whether a private actor bears a certain duty under a given right thus depends on whether the imposition of such a duty is ‘suitable’.

Again only limited guidance has been given regarding the types of duties that business enterprises can bear. Before discussing the two legs of the scope question, id est the type of duties and the identification of rights holders, a brief observation should be made on the terminology used by the judiciary. In particular, courts often speak of the obligation to respect as an inherently negative obligation, even if it results, in the specific circumstances of a case, in a duty to take positive action to

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631 Bilchitz (2008), supra note 29, 779.
632 As expressly confirmed by the Constitutional Court in Mankayi v. AngloGold Ashanti Ltd (CCT 40/10) [2011] ZACC 3 (3 March 2011), paras 13 and 15.
633 Juma Musjid Primary School v. Essay, supra note 268.
634 Khumalo v. Holomisa, supra note 626.
635 ArcelorMittal v. VEJA, supra note 570.
637 See also Boycott, Divestment And Sanctions South Africa and Another v. Continental Outdoor Media (Pty) Ltd and Others (2013/19700) [2014] ZAGPJHC 200 (11 September 2014), para. 79.
638 Cheadle and Davis, supra note 294, 57-58.
avoid an invasion with human rights, whereas the obligations to protect and fulfil are considered inherently positive. As was explained earlier (supra Part II, Section 1.2.2.2), this dissertation avoids that terminology, because ‘negative’ and ‘positive’ duties are too often conflated with passive and active duties, whilst each of the tripartite obligations to respect, protect and fulfil is capable of encompassing both passive and active duties.

First, as regards the types of duties that may be owed by business enterprises, it is settled case law of the Court that “at the very minimum” business enterprises may not improperly encroach on human rights, whether civil and political rights or economic, social and cultural rights. 639 This obligation to respect may result in the imposition of a positive duty on private actors if action is needed to prevent interference with the existing enjoyment of certain rights. 640 In a case concerning the eviction of a school from private property, for instance, the Constitutional Court set aside a judgment of the High Court in which it had denied that a private actor, in casu a trust, owed a constitutional obligation under the right to education and had found that rather this trust’s constitutional right to property was at stake. 641 According to the Constitutional Court, socio-economic rights should be “negatively protected from improper invasion,” so that private parties can be required “not to interfere with or diminish the enjoyment of a right.” 642 The Court thus concluded that “the Trust’s constitutional obligation, once it had allowed the school to be conducted on its property, was to minimise the potential impairment of the learners’ right to a basic education”, from which flew a positive duty to engage meaningfully with government so as to find an agreement and take steps to secure alternative placement. 643

In another case, the High Court decided in accordance with the above judgment that an advertising company has to respect the right to freedom of expression. In casu, this entailed that once an advertising contract had been concluded, the company was prohibited from taking down billboards merely because of the content of the advertising campaign. According to the High Court, the company had a “duty not to interfere with the platform provided to the applicants to freely express certain facts and/or views (...) and ‘to respect’ the existing protection of the applicants’ constitutional right in this respect.” 644 In the end, the High Court issued an order of specific performance directing the company to reinstate the advertisement. 645

640 Juma Musjid Primary School v. Essay, supra note 268, para. 58 (holding that a private actor may not indirectly breach the right to education either, for instance by failing to prevent a direct infringement by another or by failing to respect the existing protection of the right).
641 Ibid. paras 66, 68 and 71-72.
642 Ibid. para. 58.
643 Ibid. paras 62 and 74.
644 BDS South Africa v. Continental Outdoor, supra note 637, para. 80.
645 Ibid. para. 116.
The judiciary is reticent to accept, however, that private actors, like business enterprises, also bear an obligation to protect and fulfil human rights. For instance, the Constitutional Court has expressly held that “[i]t is clear that there is no primary positive obligation on the Trust to provide basic education to the learners”, since that obligation rests on government. Similarly the High Court has found that “a private entity does not have the positive duty or obligation to ‘promote, protect and fulfill’ [sic] the constitutional rights of another private entity in the same way as the State”, but does have the negative duty not to interfere with human rights.

In sum, the South African judiciary acknowledges that business enterprises must respect human rights – which may entail that they must act in a given way – but not that they must protect and fulfil human rights. Such obligations may, however, arise when laws or regulations expressly provide for such a role on the part of companies or when companies enter into a contractual commitment under which they assume specific tasks in protecting or providing socio-economic goods. In a judgment concerning the privatisation of the payment of social grants, for instance, the Constitutional Court has held that because the concerned private company exercised a public power and performed an essentially public function, it should for the purpose of that activity be considered an organ of state, which is endowed with constitutional obligations and accountable to the public. Moreover, these constitutional obligations continue to exist even after the dissolution of the contract. This meant that in casu the private company bore a constitutional obligation to ensure that a workable system for the payment of social grants would remain in place until a new one was operational.

In this regard, it should also be noted that South African courts adopt a lenient interpretation of the term ‘organ of state’, as a result of which the state’s constitutional obligations have been extended to all private actors that exercise traditional government functions. As the Constitutional Court has explicitly acknowledged, “government cannot be released from its human rights and rule of law obligations by outsourcing core public functions to private providers.”

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646 Liebenberg (2015), supra note 106, 70 (referring to the Constitutional Court’s holding that socio-economic rights “at the very least” impose a negative duty). See also Pieterse (2014), supra note 503, 146 (writing that “almost all commentators agree that private entities should be bound at least by the obligation to respect”).

647 Juma Musjid Primary School v. Essay, supra note 268, para. 57.

648 BDS South Africa v. Continental Outdoor, supra note 637, paras 79-80 and 84.

649 Section 239 of the Constitution defines ‘an organ of state’ as “(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution—(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer”.

650 AllPay Consolidated Investment Holdings (Pty) Ltd and Others v. Chief Executive Officer of the South African Social Security Agency and Others (No. 2) (CCT 38/13) [2014] ZACC 12 (17 April 2014), paras. 52, 54, 56 and 64.

651 Ibid. paras 64 and 66.

652 Ibid. para. 66.

653 Dafel, supra note 279, 79. See also the definition in the Constitution cited supra in note.
obligations simply because it employs the strategy of delegating its functions to another entity." In the case study, another example of a situation in which duties to provide and to fulfil have been imposed on private actors (albeit this time by legislation) will be explained, at which occasion also the opposition against such involvement of companies in the protection and fulfilment of human rights will be discussed (infra Section 2.2.3).

Importantly, when human rights take effect in the relationship between private actors, an important consideration to bear in mind is the fact that private duty bearers are at the same time also rights holders. Accordingly, where the imposition of particular duty on a business enterprise interferes with a right held by that same actor, a balancing exercise has to be conducted – after all, private actors, like companies, are simultaneously duty bearers and rights holders. South African courts are wary thereof, as is evident from their reasoning in specific instances of horizontality. For instance, in the case of the school eviction, the Constitutional Court held that the private party’s obligation was secondary in nature and that the trust had not given up its property rights so that the obligation that it owed to the learners was, at most, to minimise the impact of the exercise of its rights on the right to education. Another example relates to defamation cases, where the freedom of expression of one party has to be balanced with the other party’s interests, like human dignity and reputation.

As regards the second leg of the horizontal scope issue, namely towards whom business enterprises owe their duties, there is again no single standard or normative theory. Nevertheless, the facts generally speak for themselves. Since business enterprises only have an obligation to protect and promote human rights when such duties are explicitly imposed on them by implementing laws or regulations or have been accepted in terms of a contract, those laws, regulations or contracts ordinarily

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655 Section 8(4) of the Constitution provides that “[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.”
657 Another example is a case concerning flood victims who had established an informal settlement on the land of a farm, in which the Constitutional Court balanced private property rights with the right to have access to housing. Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others (CCT 55/00) [2001] ZACC 19 (29 May 2001), paras 102 and 107. See also e.g. Barkhuizen v. Napier (CCT72/05) [2007] ZACC 5 (4 April 2007), para. 57; Van Rensburg and Another v. Cloete and Another (8270/09) [2010] ZAWCHC 6 (28 January 2010), paras 10-12. For an example relating specifically to mining and environmental rights, see Vhembe Mineral Resources Stakeholders Forum and Others v. MEC, Department of Economic Development, Environment and Tourism (Limpopo Provincial Government) and Others (78690/14) [2015] ZAGPPHC 1043 (8 December 2015), para. 21.
also identify the rights holders. The obligation to respect, on the other hand, binds business enterprises when they exercise control over the enjoyment of a right by its holder. To establish whether a company is responsible for an interference with a human rights ordinary rules of causation can, for instance, be applied (see also infra Section 2.5.4). In certain cases this obligation to respect may involve positive duties to maintain the existing enjoyment of rights, but then companies have first facilitated that enjoyment, following which they cannot simply interrupt a previous commitment. 660

A final observation is that some scholars and civil society actors have argued that the more vulnerable the individual rights holder is, the stronger the obligations of the business enterprise should be. 661 This is an interesting argument, which combines the two legs of the horizontal scope issue, as it links the types of duties owed by companies to the identity of the rights holder.

(iii) Horizontal application

When a legal dispute amongst private actors has a bearing on human rights, it triggers the question of horizontal application. In theory, when such dispute arises in the South African legal order, all three models of application of human rights are available. Consequently, it is important to stress that the explicit provision for horizontal effect in Section 8(2) of the Constitution does not entail that human rights are necessarily applied horizontally; 662 they may merely affect the conduct of business enterprises by influencing the laws, regulations, policies, judgments and other measures that govern corporate conduct. This was acknowledged by the Constitutional Court, holding that “even when only the state is bound, rights conferred upon individuals will justifiably be limited in order to recognise the rights of others in certain circumstances.” 663

Nevertheless, if a legal dispute amongst private actors touches upon human rights, mostly those rights will affect the resolution of that dispute by being (directly or indirectly) horizontally applied to it. Whether such application is direct or indirect makes little, if any, difference in terms of practical outcome, 664 but the interplay between those two modes of application and the choice for either of them does lead to some interesting findings.

A first finding is that when South African courts apply human rights horizontally to private parties, including business enterprises, such horizontal application is rarely ‘direct’. An important reason

660 Liebenberg (2008b), supra note 568, 469 (mentioning two specific examples, namely when a special relationship exists between the parties or when the private entity has significant power to control access to the particular social goods or services).
661 See e.g. Liebenberg (2008b), supra note 568, 470; Section 27, Submission to the Panel of the Market Inquiry into the Private Health Sector (31 October 2014), 21.
662 Du Plessis and Ford, supra note 242, 291.
663 Certification of the Constitution, supra note 639, para. 56.
664 See also Davis and Klare, supra note 106, 429.
therefor is the well-established principle of subsidiarity, underscored by the Constitutional Court, 665 according to which litigating parties may only invoke their fundamental rights directly – whether against a state actor or a private actor – if those rights are not implemented in any rule of statutory or common law or if they challenge the constitutionality of such implementing rule. The subsidiarity principle is meant to prevent the occurrence of parallel systems of jurisprudence, one under the Constitution and one under private law. 666 Hence, in principle courts apply existing statutory or common law, which they interpret in conformity with the Constitution.

The judiciary’s predilection for such indirect horizontal application should not come as a surprise. The Constitution arguably dictates a hierarchy preferring indirect over direct horizontal application, given that Section 8(2), stipulating that the Bill of Rights has horizontal effect, is immediately followed by a subsection (3), explaining how the Bill of Rights should be applied to private actors. 667 A four-step analysis is prescribed, which judges cautiously follow: 668 (1) they should first apply any legislative act in force that gives effect to that right; (2) where no such act exists, they must apply the common law; (3) if the common law does not adequately protect the constitutional right at stake, they have to develop the common law; (4) and, if the common law limits the right at stake, they have to scrutinise that limitation in light of Section 36. 669 Moreover, throughout this four-step analysis judges should promote the spirit, purport and objects of the Bill of Rights, in conformity with Section 39(2). Underlying this four-step analysis – as well as the subsidiarity principle – is the consideration that, in conformity with the separation of powers doctrine, “judges should be mindful that the major engine for law reform is the Legislature, not the Judiciary.” 670

Also noteworthy is that while South African courts regularly resort to concrete rights in the Bill of Rights so as to interpret and apply existing laws and regulations (direct-indirect horizontal application), their interpretation and application of the common law (indirect-indirect horizontal

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666 Ibid. (Ngcobo, J., concurring), para. 436.
668 In Hichange v. Cape, for instance, a litigating party unsuccessfully sought ‘constitutional relief’ against a neighbour causing air pollution, without arguing that the common law was inadequate to protect the constitutional rights at stake. Hichange Investments v. Cape Produce Co (Pty) Ltd v/a Pels Products (1050/2001) [2004] 2 SA 393 (E) (20 November 2001), p. 409-410. See also, more generally, Khumalo v. Holomisa, supra note 626, para. 31.
669 See e.g. Khumalo v. Holomisa, supra note 626, paras 33-34. Section 36 of the Constitution is cited in Annex 2.
670 Hichange v. Cape, supra note 668, p. 410.
application) is rather guided by constitutional values in accordance with Section 39(2) of the Constitution.\textsuperscript{671} This different effect of human rights on private law depending on whether the law at stake is statutory or common law is relevant, because a value-analysis tends to be less rigorous; the exact content of the concerned rights may go unnoticed or be compromised more easily in favour of factors other than those that are recognised by Section 36 as legitimate restriction grounds.\textsuperscript{672}

Yet another finding is that judges use their mandate for strong indirect horizontal application only sparingly. A rare exception are cases where contractual provisions were found contrary to public policy as interpreted in conformity with the Bill of Rights and were invalidated.\textsuperscript{673} Courts also seem reluctant to develop new remedies in order to give effect to concrete constitutional rights, unless existing private law remedies are completely absent or blatantly inappropriate and the legislature is not expected to act upon a judgment within reasonable time.\textsuperscript{674} Rather than developing a new remedy, the Constitutional Court has found, for instance, that damages at common law based on negligence constitute an effective remedy under Section 38 of the Constitution to vindicate the right to personal security.\textsuperscript{675} It is also striking how to date only at very few occasions the common law has been developed to give effect to the rights protected by the Bill of Rights.\textsuperscript{676}

As was already said, even more exceptional are cases between private parties in which constitutional rights were directly applied, for instance in which a remedy was granted outside the common law (a constitutional remedy) or which were based solely on the Constitution. Examples of the former situation are constitutional damages\textsuperscript{677} and declarations that private conduct or private contracts are

\textsuperscript{671}See e.g. Barkhuizen v. Napier, supra note 657, para. 30.


\textsuperscript{673}See e.g. Barkhuizen v. Napier, supra note 657, paras 28-30. A similar situation is when speech is assessed in light of public policy as determined by the constitutional values. See e.g. Van Rensburg v. Cloete, supra note 657, para 8.

\textsuperscript{674}In one case, the Supreme Court of Appeal decided to grant a remedy based on the Constitution, instead of developing the existing common law remedy, as the litigating parties had requested, to their own surprise. AS; Tswelopele Non-Profit Organisation and Others v. City of Tshwane Metropolitan Municipality (303/2006) [2007] ZASCA 70 (30 May 2007), paras. 20, 25-28. See also Liebenberg (2008b), supra note 568, 478-479.

\textsuperscript{675}Mankayi v. AngloGold Ashanti, supra note 623, paras 15 and 17. See also Fose v. Minister of Safety and Security, supra note 107, para. 58 (holding that “[i]n many cases the common law will be broad enough to provide all the relief that would be ‘appropriate’ for a breach of constitutional rights”). Cf. Van der Walt (2005), supra note 624, 667-668 (identifying the question of new remedies as an outstanding issue in the debate on horizontality).

\textsuperscript{676}In Khumalo, for instance, after having analysed the common law of delict concerning defamation inter alia in light of freedom of expression and human dignity, including respect for privacy, the development of the common law was not considered necessary. Khumalo v. Holomisa, supra note 626, para. 45.

\textsuperscript{677}Although it is well established that constitutional damages are in principle available, they have only been so in extremely rare cases. R27 (identifying the availability of constitutional damages, as such or in conjunction with other damages, as an area of law that needs to be developed). For an example of a case where they were granted, see e.g. President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty) Ltd (CCT20/04) [2005] ZACC 5 (13 May 2005).
unconstitutional and, hence, invalid.\textsuperscript{678} As for the second situation, cases rarely proceed on a constitutional cause of action, which is largely explained by the subsidiarity principle. The remarkable consequence is that the Constitutional Court only in December 2012 for the first time adjudicated a matter between private parties based on a constitutional cause of action – the case dealt with the compatibility of the constitutions and rules of political parties with the right of everyone to participate in the activities of such parties (Section 19(1)(b) of the Constitution).\textsuperscript{679}

Some legal scholars have criticised the judiciary’s cautious attitude and, in particular, its disregard of Section 8(3), claiming that this is why the transformative objective of the Constitution has yet to be realised in relation to private law.\textsuperscript{680} One fundamental point of criticism is that the courts have not (yet) developed a normative theory about the precise relationship between human rights and the common law. Such theory would definitely be welcomed, because the literature about the impact of human rights on the common law is divided.\textsuperscript{681} Moreover, many legal practitioners still seem to believe, rightly or wrongly, that the common law is a self-contained legal regime that is subject only to its own logic and rationality and that any external influence would endanger legal certainty and coherence.\textsuperscript{682} An illustration is the claim by du Plessis and Ford claim that “the milk has been spilt and there has been a degree of constitutional colonisation of the common law.”\textsuperscript{683} Nonetheless, Justice Chaskalson has once written the following holding for an unanimous Constitutional Court.

I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. (…) There is only one system of law. It is shaped by the

\textsuperscript{678} Dafel, \textit{supra} note 279, 82.
\textsuperscript{679} \textit{Ramakatsa and Others v. Magashule and Others} (CCT 109/12) [2012] ZACC 31 (18 December 2012). For a discussion of this case, see Dafel, \textit{supra} note 278 (claiming that this was the first case to proceed on a constitutional cause of action reaching the Constitutional Court). Note, however, that a High Court judge had already earlier noted, \textit{obiter dictum}, that a contractual clause restricting the right to have a dispute resolved in court is no general law and can thus not justifiably limit Section 34 of the Constitution. \textit{Jacobs and Another v. Transand (Pry) Ltd} (11554/2014) [2014] ZAWCHC 172 (14 November 2014), para. 65. Cf. Barkhuizen \textit{v. Napier}, \textit{supra} note 657, paras 23 and 30-33 (pondering on the question of testing contractual provisions directly against the Constitution, but \textit{in casu} preferring to interpret ‘public policy’ as embracing constitutional values). Section 34 of the Constitution is cited \textit{infra} in Section 1.4.2.1.
\textsuperscript{680} Brand (2006), \textit{supra} note 267, 218; Davis and Klare, \textit{supra} note 106, 410, 413, 461-462 and 509; Liebenberg (2008b), \textit{supra} note 568, 471-478; Liebenberg (2010), \textit{supra} note 83, 62; Van der Walt (2005), \textit{supra} note 624, 667-668.
\textsuperscript{682} E.g. R12 (saying that “to me there is very little room for the Constitution in delict”) and R13 (saying that “most advocates in this country would rather deal with the common law and leave the constitutional stuff”). R12 later changed this position, see \textit{infra} note 1507.
\textsuperscript{683} Du Plessis and Ford, \textit{supra} note 242, 300.
Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.  

1.2.1.3. Protective duties

According to Sections 7(2) and 8(1) of the Constitution, the legislature, executive, judiciary and all organs of state are bound by the Bill of Rights and must protect the rights contained therein. The Constitutional Court has interpreted the obligation to protect as imposing “a positive constitutional duty (...) to act in protection of the rights in the Bill of Rights” so that, where necessary, courts may direct state actors to take the necessary steps. Accordingly, regardless of the horizontality of human rights, they necessarily influence the private sphere through the constitutional obligation to protect, which constrains all state organs. The Constitutional Court already reckoned with this determination in its certification judgment, holding that “[a]s long as a bill of rights binds a legislature, legislation which regulates the relationships between private individuals will be subject to constitutional scrutiny.”

Hence, the executive and the legislature have to regulate and monitor the conduct of private actors, including business enterprises, so as to prevent them from violating the rights of others and to offer redress when a violation does occur. Also other organs of state bear duties so as to protect the rights in the Bill of Rights. These protective duties apply both to the substance of their acts or conduct and the procedures followed. Moreover, compliance therewith is subject to judicial scrutiny, and although South African courts are mindful of separation of powers, they have not shied away from specifying the concrete duties of government in accordance with the constitutional principle that remedies must be effective even if they have policy or budgetary implications (infra Section 1.4.3.2).

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684 Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1 (25 February 2000), para. 44.
686 AllPay v. South African Social Security Agency, supra note 650, para. 58 (holding that “[o]rgans of state, even if not state departments or part of the administration of the national, provincial or local spheres of government, must thus — respect, protect, promote and fulfil the rights in the Bill of Rights”).
687 Certification of the Constitution, supra note 639, para. 56.
688 Cf. ibid. paras 54 and 56 (holding that given that the Constitution binds the legislature, all legislation regulating the relationships between private actors is subject to review). See e.g. AllPay v. South African Social Security Agency, supra note 650, para. 58 (holding that the governmental body under whose competence social grants fall remains accountable for the performance of the services by the private actor to whom it delegated that task).
689 The police must, for instance, investigate allegations of torture. National Commissioner SAPS v. SALC, supra note 30, para. 55.
690 Certification of the Constitution, supra note 639, 56.
According to Van der Walt, there is a noticeable trend that judges who are called upon to analyse the impact of human rights on private law opt for the protective duties discourse instead of the horizontality discourse.\textsuperscript{691} The discourse on protective duties appeared for the first time in a judgment by the Constitutional Court dealing with the protection of physical integrity, \textit{Carmichele v. Minister of Safety}.\textsuperscript{692} In that case, the Court held that the duty of the state and its organs not to interfere with constitutional rights may include “a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.”\textsuperscript{693} Given that “constitutional obligations are now placed on the state to respect, promote and fulfil the rights in the Bill of Rights,” the Court developed the common law of delict by expanding the requirement of unlawfulness, as a result of which state authorities can more easily be held liable in delict.\textsuperscript{694} Although \textit{Carmichele v. Minister of Safety} was the first case in which protective duties were considered, in fact that judgment and later jurisprudence confirming it,\textsuperscript{695} deal with the duty of the state to protect the physical integrity of its citizens, comparable to the European Court of Human Right’s line of case law following \textit{Osman v. UK}\textsuperscript{696} – the Constitutional Court even explicitly referred to that judgment.\textsuperscript{697} Van der Walt distinguishes such ‘duty-of-care’ cases from real ‘protective-duties’ cases.\textsuperscript{698} ‘Real’ protective duties are akin to the much broader obligation to protect recognised in international law and, hence, extend beyond a mere duty of care.\textsuperscript{699} Not only do they apply to all the rights recognised in the Bill of Rights, but they are also more radical in demanding from the state to adopt laws and to provide remedies that interfere with the private sphere.\textsuperscript{700}

An example of a real ‘protective-duties’ case is the judgment of the Supreme Court of Appeal in \textit{Modder East Squatters v. Modderklip},\textsuperscript{701} where the Court found that the state had failed to comply with its constitutional duty to protect the property rights of a farm, as it had not provided the occupiers

\textsuperscript{691} Van der Walt (2005), \textit{supra} note 624, 679-686.
\textsuperscript{692} The case concerned a woman who was assaulted by a man released on bail. Although he was convicted to a prison sentence, the victim also sued two ministers in negligence because several law enforcement and judicial officers had failed to comply with their duty to protect her. \textit{Carmichele v Minister of Safety and Security} (CCT 48/00) [2001] ZACC 22 (16 August 2001).
\textsuperscript{693} \textit{Ibid.}, para. 44.
\textsuperscript{694} \textit{Ibid.}, para. 57.
\textsuperscript{695} See e.g. \textit{K v Minister of Safety and Security} (CCT52/04) [2005] ZACC 8 (13 June 2005).
\textsuperscript{697} \textit{Carmichele v Minister of Safety and Security}, \textit{supra} note 692, paras. 45 and 47.
\textsuperscript{698} Van der Walt (2005), \textit{supra} note 624, 685-689.
\textsuperscript{699} Van der Walt (2006), \textit{supra} note 296, 17.
\textsuperscript{700} \textit{Ibid.} 16.
\textsuperscript{701} \textit{Modder East Squatters and Another v. Modderklip Boerdery} (Pty) Ltd; \textit{President of the Republic of South Africa and Others v. Modderklip Boerdery} (Pty) Ltd (187/03; 213/03) [2004] ZASCA 47 (27 May 2004).
of that farm with alternative land which would have enabled the farm to enforce their eviction.\textsuperscript{702} This judgment was confirmed by the Constitutional Court, albeit based on a different reasoning.\textsuperscript{703} The Constitutional Court found that the rule of law obliges the state to provide citizens with mechanisms to have disputes between them resolved, as protected by the right of everyone to have access to courts under Section 34 of the Constitution.\textsuperscript{704} Accordingly, the state should create an infrastructure that facilitates the execution of court orders and “take reasonable steps (…) to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders”.\textsuperscript{705} In \textit{casu}, this obligation had not been complied with as the state had failed to provide the farm with effective relief.\textsuperscript{706}

Also judges have protective duties. For instance, “there can be no question that the obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights is an obligation which falls on all of our courts”.\textsuperscript{707} According to Davis and Klare, courts should also adopt a ‘transformative methodology’, whereby the values and aspirations of the Bill of Rights inform every legal reasoning.\textsuperscript{708} Hence, if a legal dispute amongst private actors reaches the courts’ dockets, judges must acquit their adjudicative function in conformity with their own obligation to protect human rights, which may require them to balance the different interests at stake.\textsuperscript{709} A judgment or an order that does not take into consideration the obligation of one private party to respect the rights of the other is subject to review.\textsuperscript{710} In the case discussed earlier concerning the eviction, for example, the Constitutional Court found that the High Court had granted an eviction order to the owner of the property where the school was located without adequately considering the right to education.\textsuperscript{711}

\begin{footnotes}
\item[702] Ibid. para 30. Note that the Supreme Court of Appeal expressly refused to assess the case applying a horizontality perspective. Ibid. para 31. See also the discussion in Van der Walt (2005), \textit{supra} note 624, and Van der Walt (2006), \textit{supra} note 296, and the critique by Davis and Klare, \textit{supra} note 106, 482 and further.
\item[703] \textit{President v. Modderklip (CC), supra note 677.}
\item[704] Ibid. para. 39. Section 34 of the Constitution is cited \textit{infra} in Section 1.4.2.1.
\item[705] \textit{President v. Modderklip (CC), supra note 677, paras 41 and 43.}
\item[706] Ibid. para. 51.
\item[707] \textit{Carmichele v Minister of Safety and Security, supra note 692, para. 34. Similarly so, they must prefer an interpretation of an act that that promotes the Bill of Rights. Escarpment Environment Protection Group and Another v. Department of Water Affairs and Others (A666/11, 4333/12, 4334/12) [2013] ZAGPPHC 505 (20 November 2013), para. 34.}
\item[708] Davis and Klare, \textit{supra} note 106, 412.
\item[709] \textit{Certification of the Constitution, supra note 639, para. 55; MEC: Department of Agriculture, Conservation and Environment and Another v. HTF Developers (Pty) Limited (CCT 32/07) [2007] ZACC 25 (6 December 2007), paras 26-28; N. Friedman, \textit{supra} note 571, 69.}
\item[710] See e.g. \textit{Carmichele v Minister of Safety and Security, supra} note 692, para. 37 (finding that the High Court and the Supreme Court of Appeal overlooked their development mandate under Section 39(2) of the Constitution).
\item[711] \textit{Juma Musjid Primary School v. Essay, supra} note 268, paras 3 and 68-71.
\end{footnotes}
1.2.2. Company law and corporate governance

Section 7(a) of the Companies Act of 2008 clearly brings corporate law under the realm of the Constitution by stipulating that the promotion of compliance with the Bill of Rights in applying company law is one of the purposes of the Act. Whether this provision suffices to harmonise corporate law and constitutional law is questioned, however. According to Bilchitz, for instance, what is still lacking is, first, a legal requirement for companies to acknowledge that they are bound by human rights and, second, specific legal duties imposed on directors to ensure compliance by companies with their human rights duties. Katzew has even argued that the foundational principles of South African corporate law should be re-evaluated, including the paradigm of shareholder supremacy and the principle of separate legal personality.

Aside from the Companies Act, regard should also be had to common law. Under common law, the doctrine of the enlightened shareholder is recognised, for instance, which means that directors may consider the interests of stakeholders – like consumers, employees, communities and the environment – provided that they act in the best interests of the company which are equivalent to its shareholders’ interests. They are only required to consider those external interests if the interests of the company demand so, because their duty to exercise their powers in the best interests of the company is absolute.

As to corporate governance, a number of principles are stipulated in the King Report. The first King Report was adopted in 1994 by the King Committee established by the Institute of Directors of Southern Africa, and the latest King Report (IV) was issued in 2016. All companies operating in South Africa may, on a voluntary basis, commit themselves to the King Report, the only exception being companies listed on the Johannesburg Securities Exchange, which are obliged under the listing requirements to disclose their measure of compliance with the King Report. Adherence is on an ‘apply or explain’ basis, meaning that companies do not have to apply the governance principles, but if they do not, they should explain the reasons for that decision. Principle 3 of the King Report stipulates, for instance, that the governing body should ensure that the organisation is and is seen to be a...
responsible corporate citizen, including by complying with the Constitution. In addition, it should be noted that the Johannesburg Securities Exchange manages a social responsibility index based on the triple bottom line, *id est* good governance for economic, social and environmental sustainability (profit, people, planet).\(^{719}\)

Interestingly, judges sometimes consider voluntary commitments when they assess the behaviour of companies. In *VEJA v. ArcelorMittal*, for instance, the Supreme Court of Appeal found that it was “not without importance” that ArcelorMittal had publicly committed (in its annual reports) to engage with environmental activists but subsequently refused to share information regarding the pollution caused by its activities.\(^{720}\)

### 1.3. The liaison between international human rights and the Bill of Rights

When South Africa emerged out of Apartheid, the aim was to found a new state on a “constitutional order premised upon open and democratic government and the universal enjoyment of fundamental human rights.”\(^{721}\) This entailed a historic transformation from a “past of a deeply divided society characterised by strife, conflict, untold suffering and injustice” to a “future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”\(^{722}\) As is evident from these wordings and from the pledge in the Interim Constitution that every South African would “enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions,”\(^{723}\) international human rights featured prominently in South Africa’s transition.\(^{724}\) Eventually, this commitment to universal human rights resulted in a Constitution that establishes a peculiar relationship between the South African state and international law.

First and foremost, South Africa is a prime example of the now dominant hybrid dualist-monist approach. Dualism is the starting position, with the first sentence of Section 231(4) of the Constitution providing that an international agreement only becomes law when it is enacted by national...

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\(^{720}\) *ArcelorMittal v. VEJA*, supra note 570, para. 53.

\(^{721}\) *Certification of the Constitution*, supra note 639, para. 10; Schedule 4 to the Act 200 of 1993 to introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto [the Interim Constitution].

\(^{722}\) Postscript “National Unity and Reconciliation” to the Interim Constitution.

\(^{723}\) [emphasis added] Second Constitutional Principle, Schedule 4 to the Interim Constitution.

\(^{724}\) International experts were, for instance, invited at the conference on the establishment of the Constitutional Court organised in 1991. Oomen, *supra* note 526, 60-61. See also J. Dugard, “International Law and the South African Constitution,” Eur. J. Int'l L. 1 (1997), 77 (writing that where international law used to be considered a threat to the state, it is now viewed as one of the pillars of democracy).
legislation.\textsuperscript{725} According to the Constitutional Court, there are three main methods to incorporate treaties into domestic law, namely enacting its provisions in a specific act, including the treaty as a schedule to an act or adopting a law authorizing the executive to bring the treaty into effect by way of a proclamation or notice in the Government Gazette.\textsuperscript{726} Nevertheless, self-executing provisions of an international agreement that is not (yet) enacted, as well as rules of international customary law, are immediately applicable provided that they are not inconsistent with the Constitution or any act in force.\textsuperscript{727} In practice, however, the Constitutional Court has struggled with distinguishing self-executing treaties from treaties that require incorporation.\textsuperscript{728}

What is peculiar to the South African Constitution, however, is the fact that the analysis of the relationship between international and national law does not end here.\textsuperscript{729} Two additional factors should be considered that further attenuate South Africa’s tendency towards dualism, in particular where human rights are concerned. Firstly, the Bill of Rights has clearly been inspired by the Universal Declaration of Human Rights,\textsuperscript{730} with some of its provisions clearly being the twins of those of the Universal Declaration. International human rights law accordingly also forms part of the ‘spirit’ of the Bill of Rights, which is relevant in light of the courts’ mandate under Section 39(2) of the Constitution to promote the spirit, purport and object of the Bill of Rights whenever they interpret legislation and develop the common law.\textsuperscript{731} Secondly, the Constitution incorporates two additional interpretative mandates, that is Section 233,\textsuperscript{732} which demands judges to prefer a reasonable interpretation of the law that is consistent with international law, and Section 39(1), which is the extraordinary provision that compels judges to consider international law – and allows them to consider foreign law – whenever they interpret the Bill of Rights.\textsuperscript{733}

\textsuperscript{725} Section 231(4) of the Constitution is cited in Annex 2.
\textsuperscript{727} Sections 231(4), second sentence and 232 of the Constitution (cited in Annex 2).
\textsuperscript{729} See also National Commissioner SAPS v. SALC, supra note 30, para 24. Cf. the minority opinion by Justice Ngcobo in Glenister v. President, stating that the interpretative provisions “demonstrate that international law has a special place which is carefully defined by the Constitution.” Glenister v. President (Ngcobo, C.J., separate opinion), supra note 726, para. 97.
\textsuperscript{730} Oomen, supra note 526, 64; Dugard, supra note 724, 84.
\textsuperscript{731} Woolaver, supra note 728, 16; Written submissions of the first to fourth amici curiae in re: National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another (CCT 02/14) (30 October 2014), para. 17. Section 39(2) of the Constitution is cited supra in Section 1.2.1.1.
\textsuperscript{732} Woolaver, supra note 728, 4-5 and 13-16. Literally, Section 39(1) of the Constitution provides that “When interpreting the Bill of Rights, a court, tribunal or forum—.(b) must consider international law; and (c) may consider foreign law.”
Section 233 applies to all legislation, and its general reference to ‘international law’ includes all international law that is binding on South Africa, even if the concerned treaties are not incorporated into domestic law.\(^{734}\) Section 39(1) only applies to the interpretation of constitutional rights, but is not limited to binding and/or self-executing rules of international law,\(^{735}\) so that even soft law\(^{736}\) and regional law from other regions\(^{737}\) may be considered.\(^{738}\) The interpretative mandate of Section 39(1) does not oblige judges to agree with those rules of international law and with their interpretation and application by the relevant monitoring bodies; they only have to consider international law.\(^{739}\) After all, the Constitution is the supreme law of the country.\(^{740}\) The relevance of this formal hierarchy should again be nuanced, however, given that international human rights law inspires the Bill of Rights and in light of its indirect integration through the interpretative mandates of Sections 39(1) and 233.\(^{741}\)

Finally, it should be noted that notwithstanding the solid alliance, on paper, between international human rights law and South African law, the record in practice is more mixed.\(^{742}\) First of all, it depends on the issues at stake. The case study will demonstrate that litigating parties do not have the habit of referring to international law in all matters and that international law does not always feature in the reasoning of judges.\(^{743}\) Secondly, it is true that judges were more enthusiastic to consider

\(^{734}\) Progress Office Machines CC v South African Revenue Services and Others (532/06) [2007] ZASCA 118 (25 September 2007) (interpreting national anti-dumping law in conformity with the General Agreement on Tariffs and Trade 1994, even though the latter agreement had not been enacted into domestic law); Woolaver, supra note 728, 13; Written submissions in re: National Commissioner SAPS v. SAHRLC, supra note 731, para. 19.

\(^{735}\) Only binding rules are assigned prescriptive authority, however. See e.g. National Commissioner SAPS v. SALC, supra note 30 (on the application of the law implementing the Rome Statute).

\(^{736}\) See e.g. the references to the Brundtland Report of the World Commission on Environment and Development in Fuel Retailers Association of Southern Africa v. Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others (CCT67/06) [2007] ZACC 13 (7 June 2007), para. 44.

\(^{737}\) See, for instance, the references to the jurisprudence of the European Court of Human Rights on the principle of equality of arms in legal proceedings in Magidiwana and Another v President of the Republic of South Africa and Others (37904/2013) [2013] ZAGPPHC 292 (14 October 2013), para. 48.

\(^{738}\) According to Woolaver, the consideration of non-binding international law raises less concerns than the consideration of binding but non-incorporated international agreements, Woolaver, supra note 728, 16 and 28.

\(^{739}\) See e.g. Government v. Grootboom, supra note 493, para. 33 (rejecting the minimum core obligations).

\(^{740}\) Sections 1(c) of the Constitution stipulates that “[t]he Republic of South Africa is one, sovereign, democratic state founded on (…) supremacy of the constitution and the rule of law”, and Section 2 that “[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”


\(^{742}\) See also du Plessis, supra note 479, 311 (writing that “legal international law friendliness does not automatically translate into optimal reliance on or use of international law in specific cases”).

\(^{743}\) Handmaker came to a different conclusion in relation to refugee law, writing that as the case law developed, “international law became ever more important to the argumentation put forward by lawyers” and that “[a]s judges gradually accepted this reasoning, international law formed a basis for progressive judgments on refugee rights”. Handmaker, supra note 113, 164. See also the discussion of international law regarding the right to education, for instance, in Juma Musjid Primary School v. Essay, supra note 268, paras 40-41.
international and foreign law during the first few years of the new democracy, but that the gradual development of South African law has detracted from this initial enthusiasm.²⁴⁴

1.4. Remedies to enforce corporate accountability for human rights

Although scholars may claim that rights can exist without a remedy,²⁴⁵ few rights holders will be satisfied if they hold a right that they cannot enforce. Hence, enforceability is crucial for a right to be effective. This is also why ‘access to remedies’ is one of the three pillars of the UN Framework on business and human rights (see supra Part II, Section 1.1.3). The UNGPs identify three main types of remedies: judicial, non-judicial state-based and non-state-based remedies. While the use of judicial remedies is analysed more in-depth in the case study in Chapter 2, this Section briefly explains some practicalities of gaining access to judicial remedies (Section 1.4.1), describes the remedies that are in principle available to victims of human rights violations and which are not limited to judicial remedies (Section 1.4.2), and discusses the forms of relief that can be obtained (Section 1.4.3).

1.4.1. Practicalities of accessing justice through the court system

Access to remedies, in general, and to courts, in particular, is crucial for human rights to be practical and effective. The South African Constitutional Court has phrased this concern as follows.

Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the state.²⁴⁶

Notwithstanding the idea of transformative constitutionalism (supra Section 1.1.1), which stands for an objective to transform society through and on the basis of a constitutional project and, hence,

assumes that law can effect social change, also in South Africa some scholars are sceptic. Although the focus of this dissertation is precisely on the use of judicial remedies to make business enterprises more responsible for human rights, which is not only a rights-based strategy but a courts-based strategy, it is admitted and the case study will also demonstrate that there are many practical barriers for poor and vulnerable people to access the justice system, which is a fact that should always be borne in mind. The people who are most in need, are the ones who are the least aware of their rights and the least likely to approach the courts to enforce their rights. Judges in South Africa acknowledge that they have to perform their functions "in a country where so few have the means to enforce their rights through the courts." Below, three potential practical barriers are discussed, namely standing rights (Section 1.4.1.1), access to legal services (Section 1.4.1.2) and intimidation by counterparties using the law to scare off opponents (Section 1.4.1.3).

1.4.1.1. Standing in court

Under traditional common law the authority to sue is only vested in persons who have a sufficient personal interest in the subject-matter of the litigation – over and above any possible interest of the general public – or who have a special legal right. In other words, to have locus standi in iudicio litigating parties must have a direct interest in the matter. Section 38 of the South African Constitution has introduced a “radical departure” from the traditional common law approach to standing, however, by stipulating the following broad standing rules.

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

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749 Fose v. Minister of Safety and Security, supra note 107, para. 69.

750 Ibid. See also Jephson, supra note 211, 288.

751 Hurter (2006), supra note 748, 492.

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

According to the Constitutional Court, for these standing rights to apply it is necessary but sufficient that litigating parties make a clear allegation that a right recognised in the Bill of Rights is either violated or threatened. Consequently, Section 38 is triggered as soon as there is a constitutional claim, which has been leniently interpreted to include even claims based on ordinary statutory or common law, provided that the law is to be applied, interpreted and developed in conformity with the Constitution. The only limitation is that abstract questions of constitutionality cannot be litigated; there must be an interest in pursuing the matter in court.

Section 38(a) and (e) admit collective claims, respectively by several parties acting together or by an association created to conduct the litigation on behalf of all its members, whilst representative claims by a person acting on behalf of another person who cannot act in his or her own name are permissible under Section 38(b). In addition, Sections 38(c) and (d) cater for, respectively, class actions and public interest litigation. Given that the South African legislature has never adopted a law regulating class actions and public interest litigation, the courts have been left with the task of developing the law on these types of standing. Whilst civil society actors frequently litigate in the public interest, class actions remain exceptional.

In relation to public interest litigation, Justice O’Regan first wrote in a minority opinion in *Ferreira v. Levin* that whether a claim is in the public interest should be assessed having regard to a number of criteria, including the existence of an alternative, reasonable and effective way to bring the claim, the nature of the relief sought (and whether it is of general and prospective application), and the range of

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755 *Ferreira v. Levin*, supra note 753, paras 35-36. Abstract questions of constitutionality can only be referred to the Constitutional Court by certain government officials, see *infra* Section 1.4.2.1.
756 Section 38(c) of the Constitution is duplicated in Section 32 of the National Environmental Management Act 107 of 1998 (Government Gazette No. 19519 [NEMA]), Section 4 of the Consumer Protection Act 68 of 2008 (Government Gazette No. 32186) and Section 157 CA. See also Jephson, *supra* note 211, 289.
757 They do so in accordance with Section 173 of the Constitution, which provides that “the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”
758 Jephson, *supra* note 211, 289.
persons who may be (in)directly affected by the order sought. Later, in *Lawyers for Human Rights v. Minister of Home Affairs*, a majority of Constitutional Court justices found that these three elements identified by Justice O’Regan are indeed relevant, but not exhaustive. Key is whether a person or organisation acts ‘genuinely’ in the public interest, which asks the question whether bringing the proceedings is objectively considered in the public interest. Other pertinent criteria for that assessment include the degree of vulnerability of the affected people, the nature of the right at stake and the consequences of the infringement.

It should be noted that the National Environmental Management Act even provides for a specific type of public interest litigation. Section 32(1) of that Act is quasi-identical to Section 38 of the Constitution, except for the additional subsection (e) which grants standing to any person or group of persons seeking relief so as to protect the environment. The advantage of this provision is that the protection of the environment is automatically deemed to be a public interest, so that no specific argument has to be submitted for that purpose. In previous cases dealing with environmental protection, the South African judiciary has also referred to the Aarhus Convention, which is considered exemplary of the principle of public participation in the field of environmental protection.

Despite the express provision of Section 38(c) of the Constitution and notwithstanding calls for implementing legislation from actors like the South African Law Commission, no statute has ever been adopted to regulate class actions, in particular the requirements for resorting to such actions, the procedure for dealing with them and any necessary adjustments to ordinary rules (such as regarding the prescription of claims). For a long time, it was uncertain, for instance, whether class actions are also available in non-constitutional litigation and/or in litigation against actors other than the state. Some of those questions were addressed by the Supreme Court of Appeal in *CRCT v. Pioneer Food*

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759 *Ferreira v. Levin* (O’Regan, J., separate opinion), *supra* note 753, para. 234.
761 Ibid. para. 18.
762 Ibid.
763 Section 32(1) of NEMA is cited in Annex 2.
764 The High Court has called such litigation ‘environmentally concerned watchdog litigation’. *Lionswatch Action Group v. MEC: Local Government, Environmental Affairs And Development Planning and Others (5278/2013) [2015] ZAWCHC 21 (2 March 2015), para. 23.
766 See e.g. *ArcelorMittal v. VEJA, supra* note 570, para. 71.
768 Ibid.
and by the Constitutional Court in *Mukaddam v. Pioneer Foods*.

Many outstanding questions remain, however, such as the interaction between certification proceedings and limitation periods, and the impact of a certification application on the rights of persons that are potentially covered by the class. The courts are wary, however, not “to trespass upon the domain of the legislature” by resolving all those issues merely through the development of the common law.

The Supreme Court of Appeal began its judgment in *CRCT v. Pioneer Foods* with pondering on the risk that individual members of a vulnerable group of people may be unable to lodge separate, individual claims, which would raise a serious concern under the Constitution, as Section 34 ensures to everyone a right to have access to a competent court to have disputes resolved. Hence, the Court found that it would be irrational to allow class actions only in cases where constitutional rights are invoked, and to deny them in equally appropriate circumstances, merely because the parties cannot argue that any particular constitutional right has been infringed.

Next, the Supreme Court of Appeal held that class actions should be certified before they can proceed on the merits, because this allows courts to define the class and to examine whether the procedural conditions for a class action are met. In relation to the class definition, the Court found that it is unnecessary to identify all the members of the class at the time of the certification, as the ability to do so would raise the question whether a class action is truly necessary and whether individual cases cannot simply be joined. Hence, it suffices for the class to be defined in a sufficiently precise manner so that it is possible to examine, objectively, whether a particular individual belongs to the class – in other words, the class has to be ascertainable. This is not only important for the responding parties, who want to know the breadth of the claims against them, but also for potential class members, who must be able to determine whether they belong to the class and, hence, should opt in or out of the proceedings as they desire.

The Supreme Court of Appeal then identified the following requirements for class actions to be certified, in addition to the ascertainability of the class: the cause of action must raise a triable issue;

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770 In principle, summons must be issued to interrupt prescription. A class action first needs to be certified, however, so that by that time the action may be statute-barred. Jephson, *supra* note 211, 297-298 (mentioning other outstanding issues as well).

771 See e.g. *Mahaene v. AngloGold Ashanti*, which is discussed *infra* in Section 2.3.3.4.

772 *Children's Resource Centre Trust v. Pioneer Food*, *supra* note 356, para. 22.

773 Ibid. para. 19. Section 34 of the Constitution is cited *infra* in Section 1.4.2.1.


775 Ibid. para. 23.

776 Ibid. para. 29.

777 Ibid.

778 Ibid. See also Jephson, *supra* note 211, 287-288. For a definition of opt-in and opt-out class actions, see *supra* Part II, Section 2.2.1.1.
the relief should depend on the determination of common issues of fact and/or law; the relief sought must flow from the cause of action, be ascertainable and capable of determination; there should be an appropriate procedure for allocating damages to individual class members; the class representative has to be suitable to represent the class; and, a class action must be the most appropriate means to determine the claims given the composition of the class and the nature of the proposed action.\textsuperscript{779} In relation to the suitability of the class representatives, who have a prominent role in the proceedings, the Supreme Court of Appeal held that courts must check whether there is no conflict of interest between the class representatives and the members of the class and whether they are capable to conduct the litigation properly on behalf of the class.\textsuperscript{780} In particular, the litigation should not be aimed at enriching the representatives or at serving interests other than those of the class, and the representatives should \textit{inter alia} dispose of the necessary financial resources, have the time, inclination and means to procure the necessary evidence and have access to legal representatives.\textsuperscript{781} Following a further appeal on the question of class actions in \textit{Mukaddam v. Pioneer Foods}, the Constitutional Court ruled, authoritatively, that the only \textit{real} precondition for a class to be certified is whether it is in the interests of justice to do so.\textsuperscript{782} According to the Constitutional Court, the specific requirements laid down by the Supreme Court of Appeal are relevant but not exhaustive, and should thus only serve as factors to be considered when a court has to determine whether certification is in the interests of justice, and not as conditions precedent or as jurisdictional facts that must be met.\textsuperscript{783} None of the factors is thus decisive of the ‘interests of justice’ question.\textsuperscript{784} Indeed, a rigid assessment would even be suspicious in light of the right of access to courts under Section 34 of the Constitution read in conjunction with Section 38.\textsuperscript{785} In that judgment, the Constitutional Court also clarified that the requirement of certification does not apply to class actions for the enforcement of a constitutional right against the state, as such proceedings assume a public character that automatically extends the reach of any order that is eventually issued.\textsuperscript{786} This statement is \textit{obiter}, however, as the question concerning the certification of constitutional claims against the state was not before the Court.\textsuperscript{787} In turn, the question whether certification is required to lodge a class action based on the Bill of Rights against a private actor was

\textsuperscript{780} Ibid. para. 47.
\textsuperscript{781} Ibid. para. 48.
\textsuperscript{782} \textit{Mukaddam v. Pioneer Foods}, supra note 746, paras 35-37 and 47.
\textsuperscript{783} Ibid. paras 35-37 and 47; Jephson, supra note 211, 293 (welcoming this ruling).
\textsuperscript{784} \textit{Mukaddam v. Pioneer Foods}, supra note 746, para. 36.
\textsuperscript{785} Ibid. para. 37. Section 34 of the Constitution is cited \textit{infra} in Section 1.4.2.1.
\textsuperscript{786} \textit{Mukaddam v. Pioneer Foods}, supra note 746, para. 40.
\textsuperscript{787} \textit{Obiter dicta} are only persuasive and do not act as binding precedent. Jephson, supra note 211, 295.
expressly left open by the Court. In a separate opinion, Mhlantla disagreed with this part of the majority’s judgment in *Mukaddam v. Pioneer Foods*, arguing that the Court should have clarified that certification is required for all class actions, regardless of their basis and the identity of the responding party.

### 1.4.1.2. Free or cheap legal aid

Victims of human rights violations in South Africa who do not have the means to obtain access to the justice system without free or cheap legal aid, usually rely on one of the following three sources of free or cheap legal aid: they seek legal assistance from either Legal Aid South Africa or from a public interest law firm, or they conclude a contingency fee agreement with a legal practitioner – another option is that they are assisted by a regular law firm in the context of a pro bono programme. This will be discussed *in concreto* in Chapter 2 (in particular *infra* Sections 2.1.2 and 2.5.1), but some general observations on Legal Aid South Africa and on the regulation of contingency fees should already be made.

First of all, Legal Aid is an autonomous statutory body, established by law, which renders legal aid and provides legal representation at state expense. The legal services are supplied either by its own staff or by legal practitioners whose services are procured by Legal Aid. The Legal Aid Guide determines which matters and which persons qualify for legal aid, but the general criterion reads that individuals are entitled to aid if otherwise substantial injustice will result. To determine whether such injustice would exist, regard is had to factors like the affordability of legal representation (a means test), the severity of possible penal sanctions (in criminal matters) and the prospects of success on a balance of probabilities (in civil matters). In practice, Legal Aid does not often get involved in strategic litigation relating to business and human rights. The body mostly intervenes in criminal (88%) as opposed to civil (12%) cases, and those generally concern individual matters, with ‘impact litigation’ not even amounting to a percentage of Legal Aid’s caseload.

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788 *Mukaddam v. Pioneer Foods*, *supra* note 746, para. 41. According to Jephson, the nature of the claim should be irrelevant in classifying class actions, and regard should rather be had to the nature of the relief sought, such as damages versus declaratory orders. Jephson, *supra* note 211, 294.


791 Section 4(1)(a) LASAA (cited in Annex 2).

792 Legal Aid South Africa, Legal Aid Guide (2014), 35-36. See also e.g. Section 35(2)(c) of the Constitution.


794 According to Legal Aid’s own policy, ‘impact litigation’ comprises class action lawsuits as well as individual matters that resolve a large number of disputes and help other communities.

It should be noted, however, that the High Court has held that although there is no absolute right to legal representation, in exercising its power to decide whether or not to grant legal aid to litigating parties, Legal Aid should respect the Constitution and, in particular, comply with Sections 9 and 34, meaning that it may not distinguish unfairly nor discriminate amongst different groups of people who want to have their participation to the same proceedings funded. This judgment was appealed first to the Supreme Court of Appeal and later to the Constitutional Court. The latter Court found that the matter had become moot, but emphasised that the High Court’s judgment had been based on a case-specific analysis and that no obligation is imposed on Legal Aid to fund legal representation and that “[t]he decision and the discretion remain with Legal Aid.”

Aside from relying on pro bono services, persons who want to approach the courts can also conclude a contingency fee agreement. As was explained before (supra Part II, Section 2.2.1.2), legal practitioners who work for a contingent fee agree not to be paid for their legal services and not to be compensated for any costs until and unless the dispute is successfully resolved. Contingency fee agreements are permissible in South Africa, subject to the rules of the Contingency Fees Act and its implementing regulations and provided that, according to the assessment of the legal practitioner with whom such an agreement is concluded, there is a reasonable prospect that his or her client will be successful. The Act admits to ask for a success fee in excess of the normal fee, but this is capped at 100% of the normal fee and 25% of the amount obtained by the client through the proceedings after deduction of any costs. Before entering into such an agreement, the legal practitioner must also advise the clients on alternative methods to have their case funded. Another safeguard is that clients have a right to withdraw from the contingency fee agreement within 14 days and, if they feel aggrieved by it, they may apply for review to a professional controlling body. Finally, if the matter is ultimately settled out-of-court, such settlement agreement only gets legal effect upon its endorsement by the court, which will review inter alia the equitableness of the contingent fee.

1.4.1.3. SLAPP suits

Another potential burden for victims seeking access to justice are the intimidating tactics that counterparties may employ (supra Part II, Section 2.2.1.3). Also in South Africa, companies

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796 Magidiwana v. President (HC), supra note 737, paras 87-98. See also the discussion infra in note.
799 Section 2(1)(b) and (2) CFA (cited in Annex 2).
800 Section 3(3)(b)(i) CFA (cited in Annex 2).
801 Section 3(3)(h) CFA (cited in Annex 2).
802 Section 5 CFA (cited in Annex 2).
803 Section 4 CFA (cited, in part, in Annex 2).
increasingly use litigation to silence persons who threaten their reputational and/or financial interests. There are two main options for persons who face a SLAPP suit; either they expose the malicious purpose of the suit or they defend themselves against the substance of those claims.

First of all, victims can have recourse to the Vexatious Proceedings Act, which applies to all legal proceedings that are instituted persistently and without reasonable ground, for whatever reason. The Act allows persons facing such vexatious, meritless proceedings to apply for an order that the person(s) instituting them may only launch new proceedings with specific leave by the court. Before granting such leave, the court must be satisfied that those proceedings do not constitute an abuse of the process of the court and that there is prima facie ground for them.

Another option for people facing intimidating lawsuits is to argue why the requirements for the claim or exception to be granted are not met. A good example is Petro Props v. Barlow concerning a company that wanted to operate a fuel service station in a wetland area and sought an interdict against an environmental activist for reason of her ongoing campaign mobilizing public opinion, as a result of which the fuel service station feared that the petrol company with which it had concluded a contract would withdraw. In its judgment the High Court balanced the applicant’s property rights (which were allegedly threatened by the campaign) against the responding party’s right to freedom of expression. For this balancing exercise, the Court inter alia considered the fact that the campaign was conducted peacefully and in good faith and was geared towards public engagement, that she did not spread any falsehoods to harm the applicant, and that her interest and motivation was selfless and aimed at environmental protection. Considering that “the Constitution does not only afford a shield, to be resorted to passively and defensively”, but that “[ i]t also provides a sword which groups like the respondent can and should draw to empower their initiatives and interests,” the Court concluded that the applicant had not discharged its burden to demonstrate that the campaign constituted an unlawful infringement of its rights. In another case where an environmental activist organisation was asked to give security of costs to ensure that it would be able to pay for adverse costs if its opposition against the grant of an authorisation was unsuccessful, the High Court called for a cautious approach as “bona

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804 Vexatious Proceedings Act 3 of 1956, Government Gazette No. 5632 [VPA].
805 Section 2(1)(b) VPA (cited in Annex 2).
806 See also Van Rensburg v. Cloete, in which the High Court confirmed that the Act does not take away the right to litigate but places the institution of the litigation under the supervision of the court. Van Rensburg v. Cloete, supra note 657, para. 21.
808 Ibid. para. 50.
809 Ibid. para. 55.
810 Ibid. para 55.
811 Ibid. para. 75.
litigation by public interest bodies should not be discouraged through the risk of adverse costs orders.”

Nevertheless, the judgment in African Nickel v. Van As, calls for carefulness, especially when activists are unsure about the veracity of their speech. In that case, the High Court granted a request for an order interdicting and restraining a person from supplying or furnishing false facts and/or information concerning the applicant’s business (a mining company) to representatives of the printed media. After confirming that trading companies have the right to protect their reputation from injurious falsehoods, the Court found that freedom of speech does not allow for unlawfulness, such as spreading lies in the media, and that there is no right in law (not even the right to freedom of expression) that would shift the onus on the victims of the unlawful actions to attempt to eradicate such lies. According to the Court, this was not a SLAPP suit because the order did not gag the responding party from having true statements about the applicant published.

Another illustration of a successful defence against a SLAPP suit is Platreef Resources v. Kgobudi Traditional Community. The case concerned a mining company, Platreef, that had obtained a rule nisi interdicting a ‘community’ from entering its area of operation. What was striking was that this rule had been sought and obtained against an entire community, while the acts that had motivated the order had been perpetrated by only a few of its members and while no such entity as ‘the Kgobudi Traditional Community’ exists. Fortunately, the Court agreed with the defence by the community’s legal representatives, finding that each member of the community is an individual in his or her own right and an independent holder of rights and responsibilities. Under those circumstances granting an order against the community as such would “not only fly in the face of the rules of this Court but would impact on the dignity of the community as a whole (…) [and] would be the most flagrant form of collective punishment undermining the very architecture of our Constitution and the values of justice and fairness.”

814 Ibid. para. 9
815 Ibid. paras 11
816 Ibid. para. 12.
817 Platreef Resources (Pty) Ltd v. The Kgobudi Traditional Community (29218/10) unpublished (HC) (16 October 2012).
818 A rule nisi is an order to show cause, meaning that the prohibition imposed by a court order is absolute unless the other party advances a legal ground why it should not apply.
819 Platreef v. Kgobudi Traditional Community, supra note 817.
1.4.2. Type of remedies available

1.4.2.1. Judicial remedies

The right to have access to the courts is protected under the South African Bill of Rights, which includes the following provision.

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.\(^820\)

In a particular case, civil, criminal, administrative and/or constitutional proceedings may be available. This Section briefly discusses the peculiarities of the latter three types of judicial proceedings.

(i) Criminal proceedings

Two elements of criminal law are particularly relevant for the business and human rights debate, being that the law provides for both individual and corporate liability and for both private and public prosecution.

First of all, there is no principled objection to holding companies criminally responsible.\(^821\) They can be held liable for any offence that exists under statutory or common law, unless where a statute establishes criminal liability on the part of natural persons only. In particular, a company is deemed to have performed an act (or an omission) that was (or ought to have been) performed by, on the instructions of, or with the (express or implied) permission of a director or servant of the company, provided that this act or omission was committed in the exercise of his or her powers or in the performance of his or her duties as director or servant.\(^822\) If particular intent is required for the act or omission to be considered an offence, such intent must have existed on the part of the director or servant, which is then attributed to the company. Moreover, any director or servant of a company that is liable to prosecution is also personally deemed guilty of that offence unless it is proven that he or she did not take part in the commission of the offence and could not have prevented it.\(^823\) The prosecutor is free to decide whether to prosecute only the responsible natural person, only the company or both, and the company and individual directors or servants can be convicted and punished separately for the same offence.

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\(^{820}\) Section 34 of the Constitution.
\(^{821}\) For a discussion of corporate criminal liability in South Africa, see Bowman Gilfillan, “Criminal liability of companies survey: South Africa” (Lex Mundi, 2008). See also some references by Zerk (2014), supra note 212, at 32, 34 and 38.
\(^{823}\) Section 332(5) CPA. See also e.g. Section 34(7) NEMA (cited in Annex 2).
Also in South Africa criminal liability has its critics, who question the effectiveness of such remedy if criminal legislation is not successful in deterring the offences. After all, criminal penalties do not remedy the consequences of an offence, are useless if the perpetrator is no longer there and ultimately depend on the willingness, competence and ability of the state to prosecute.\textsuperscript{824} As also a High Court has held in a case concerning a complaint by an association of residents about environmental degradation caused by a manufactory, criminal sanctions only apply to past events, are “woefully inadequate” and “of little use in respect of anticipated future transgressions”.\textsuperscript{825} This limitation should all the more be borne in mind in the case of institutional criminal liability of a company as such, which is generally only convicted to a fine and/or a forfeiture of assets.

In principle, the authority to prosecute is entrusted with the public prosecutor. Private persons should thus lay a criminal complaint when they believe an offence has been committed, following which the public prosecutor investigates the matter and decides whether or not to prosecute. Nevertheless, in two scenarios private persons may themselves launch criminal prosecutions. First, a number of acts explicitly establish a right to conduct a private prosecution where non-compliance with one or more of its provisions amounts to an offence.\textsuperscript{826} Second, even if no such mandate is established by a specific act, certain persons – including private persons who prove some substantial and peculiar interest in the issue of the trial arising out of some individually suffered injury – are nevertheless competent to initiate a private prosecution, if the public prosecutor declines to prosecute.\textsuperscript{827}

Private prosecution is strictly regulated under the Criminal Procedure Act\textsuperscript{828} and is extremely rare due to numerous practical barriers. Private prosecutors do not only bear the onus of proof, but also the (high) financial burden, for which they have to deposit a security of costs. In particular, they must pay for all costs related to the prosecution (including the costs for the service and execution of the criminal case before the court) and they risk to incur a negative costs order directing them to pay for all costs of the accused party, if their prosecution is (partially) unsuccessful.

A final observation should be made relating to contempt of court, which is a legal construct peculiar to common law systems. Parties that do not comply with an order made by the court against them (in non-criminal cases) may be held in contempt of court upon application by the parties who sought the original court order.\textsuperscript{829} A party guilty of contempt of court is criminally liable. For an application of contempt to succeed, the applicant(s) must establish the original order, knowledge thereof on the part

\begin{itemize}
\item \textsuperscript{825} Tergniët and Toekoms v. Outeniqua, supra note 754, para. 47.
\item \textsuperscript{826} Section 8 CPA (cited, in part, in Annex 2). See e.g. Section 33 NEMA [NEMA] (cited in Annex 2).
\item \textsuperscript{827} Section 7(1) CPA (cited in part in Annex 2).
\item \textsuperscript{828} Sections 7–17 CPA.
\item \textsuperscript{829} Such orders may be adopted against state officials. Berger, supra note 381, 73.
\end{itemize}
of the responding party, non-compliance therewith and willfulness and \textit{mala fides} beyond reasonable doubt.\textsuperscript{830} The burden of proof of the first three elements falls on the applicants, following which the responding party must show that there exists reasonable doubt as to willfulness and \textit{mala fides}.\textsuperscript{831} For a court order to be enforceable through contempt of court proceedings, the order must be sufficiently clear and capable of implementation, however.\textsuperscript{832}

\begin{itemize}
\item[(ii)] \textit{Administrative proceedings}
\end{itemize}

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must—
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.

Section 33 of the Constitution provides that everyone has the right to just administrative action. In accordance with subsection (c), the government has enacted a statute that regulates administrative justice and provides for internal administrative review and external judicial review, the Promotion of Administrative Justice Act (PAJA).\textsuperscript{833} This Act is the framework law for administrative proceedings and \textit{inter alia} determines the criteria which administrative decisions should meet in order to be considered just and procedurally fair. Administrative justice requirements may also be stipulated in specific acts.\textsuperscript{834}

Although procedural fairness depends on the circumstances of a case, some general criteria are that persons affected by administrative action should be given adequate notice, have a reasonable opportunity to make representations, be provided with a clear statement of the administrative act, be informed about their right to request reasons and receive adequate notice of any available internal appeal.\textsuperscript{835} At the administrator’s discretion, the person affected by the decision may also be provided the opportunity to obtain assistance, if necessary legal representation, to be heard and to appear in

\begin{itemize}
\item[831] Ibid.
\item[832] \textit{Kebble v. Minister of Water Affairs, supra} note 430, para. 23.
\item[833] Promotion of Administrative Justice Act 3 of 2000, Government Gazette No. 20853 [PAJA].
\item[834] See, for instance, Section 6 MPRDA, which refers to PAJA and stipulates that all decisions must be in writing and accompanied by written reasons, and Section 47(2) MPRDA, which imposes a number of procedural justice requirements if the minister wants to cancel or suspend rights. These provisions are cited in Annex 2.
\item[835] Section 3(2) PAJA (cited in Annex 2).
\end{itemize}
person.\textsuperscript{836} Where administrative action affects the public, a public inquiry should be held, a notice and comment procedure followed, or both.\textsuperscript{837} In this regard, it should also be emphasised that public participation in the administration is valued greatly in South Africa. Therefore, in 1997 the government (under the Mandela administration) introduced an initiative to transform the public service so as to ensure that the interests of the people come first. The initiative is known as Batho Pele, which is Sesotho for ‘People First.’\textsuperscript{838} In particular, public servants should perform their tasks bearing in mind the following broad principles: they should consult with citizens; standards for service delivery should be set; redress should be ensured where standards are not met; equal access to services must be safeguarded; citizens have to be treated courteously; full, accurate information must be provided; openness and transparency should be ensured; and, there should be value for money in service delivery.

When interested parties feel aggrieved by an administrative decision, they can lodge an internal, administrative appeal.\textsuperscript{839} Such appeal is in principle decided by the authority that is hierarchically superior to the one adopting the original decision. One exception that is relevant for the case study on mining and environmental degradation (infra Chapter 2) are appeals against authorisations for water usage, which are decided by the especially created Water Tribunal.\textsuperscript{840} In general, the act in terms of which the disputed administrative decision is issued, determines the authority that is competent to decide on administrative appeals and the procedures that have to be followed.\textsuperscript{841}

After exhausting all internal remedies,\textsuperscript{842} parties who feel adversely affected by an administrative act may submit an application for judicial review to the competent court or tribunal. The circumstances under which the judiciary may review an administrative decision are enumerated in the Promotion of Administrative Justice Act.\textsuperscript{843} A court or tribunal may award such orders as directing the competent authority to act in a specific manner, prohibiting it from acting in a specific manner, directing it to pay compensation and setting aside the administrative action.\textsuperscript{844} In the latter scenario, courts normally remit the matter for reconsideration to the competent authority (with or without directions), because they should “treat administrative decisions (…) with the appropriate deference which flows from the

\textsuperscript{836} Section 3(3) PAJA (cited in Annex 2).
\textsuperscript{837} Section 4(1) PAJA (cited in Annex 2).
\textsuperscript{839} Section 6(1) PAJA (cited in Annex 2).
\textsuperscript{840} Section 148 of the National Water Act 36 of 1998, Government Gazette No. 19182 [NWA].
\textsuperscript{841} See e.g. Section 43 NEMA and Section 96 MPRDA (the procedure is regulated further in implementing regulations). These two provisions are cited in part in Annex 2.
\textsuperscript{842} Section 7(2) PAJA (cited, in part, in Annex 2).
\textsuperscript{843} Section 6(2) PAJA (cited, in part, in Annex 2).
\textsuperscript{844} Section 8 PAJA (cited in Annex 2).
constitutional principle of separation of powers” and administrative authorities are considered better placed to take such decisions given their composition, experience, expertise and resources. Hence, only rarely do courts substitute the administrative decision with their own, vary the decision or correct a defect resulting from it. Such exceptional situation arises “when, on a proper consideration of the relevant facts, a court is persuaded that a decision to exercise the power in question should not be left to the designated functionary.” In the past, this has happened, for instance when the authority adopting the original decision exhibited bias or incompetence or when the competent authority had been disbanded for an indefinite period of time.

(iii) Constitutional proceedings

This Section briefly explains the procedure of direct access to the Constitutional Court and the system of judicial review applicable in South Africa.

According to Section 167(6) of the Constitution, persons should be able to bring a matter directly to the Constitutional Court or to appeal directly to that Court, when it is in the interest of justice and provided that the Court has granted leave thereto. This provision has been implemented in Rules 18 and 19 of the Constitutional Court.

An application for direct access, first of all, has to brought on notice of motion, supported by an affidavit that describes the nature of the relief sought and the grounds upon which it is based. In addition, the applicants must indicate the grounds on the basis of which they contend that direct access is in the interests of justice, whether the matter is triable without a hearing of oral evidence and, if not, how such evidence should be adduced and conflicts of fact resolved. In turn, direct appeals to the Constitutional Court have to be lodged within 15 days of the order against which the appeal is

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847 PAJA also explicitly stipulates that such relief should only be granted in exceptional cases. Section 8(1)(c)(ii) of PAJA (cited in Annex 2).
848 Makhanya v. Goede Wellington, supra note 846, para. 43.
850 Section 167(6) of the Constitution provides that “[n]ational legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—(a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court.”
851 Rules of the Constitutional Court, Government Gazette No. 25726.
852 When parties want to appeal a judgment, they must first apply for leave to appeal from the court a quo, whose decision depends on the prospect of success of an appeal.
directed. The application must contain the order from the lower court and the grounds upon which it is disputed, a statement clarifying the constitutional matter at stake and a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to another court. If leave is granted, the Constitutional Court may deal with applications for direct access or direct appeal summarily, without considering oral or written argument other than what is contained in the application itself, or may set it down for argument and direct on which issues parties should submit their written argument.

In practice, direct access is extremely rare, while direct appeals are somewhat more common but still exceptional.\textsuperscript{853} The Court requires proof that the time delay of ordinary procedures would cause serious prejudice to the public interest or to justice and good government,\textsuperscript{854} a requirement that is not met by the mere fact that the public interest is at stake. Even public interest litigants “cannot simply ignore those procedural rules which are designed to regulate the fair and orderly dispatch of court business and the protection of the rights of all”,\textsuperscript{855} and this accelerated procedure is only designed for “cases where the circumstances are so exceptional and the public interest (...) are of such overriding importance.”\textsuperscript{856}

As far as judicial review is concerned, the South African legal order, which has both civil and common law roots, provides for a hybrid system (see supra Part II, Section 2.2.2.1). In principle, any court is competent to interpret and apply the Constitution.\textsuperscript{857} Although in doing so they may even declare conduct or acts unconstitutional, such findings have to be confirmed by the Constitutional Court when they concern a national or provincial statute or presidential conduct.\textsuperscript{858} Parliamentary and provincial ‘bills’ – \textit{id est} before they are adopted – can also be reviewed \textit{in abstracto} by the Constitutional Court upon application by, respectively, the President or the provincial Premier, whilst

\begin{itemize}
  \item \textsuperscript{854} \textit{Transvaal Agricultural Union v. Minister of Land Affairs and Another} (CCT21/96) [1996] ZACC 22 (18 November 1996), paras 16 and 18.
  \item \textsuperscript{855} \textit{Hekpoort Environmental Preservation Society and Another v. Minister of Land Affairs and Others} (CCT21/97) [1997] ZACC 13 (8 October 1997), para. 8.
  \item \textsuperscript{856} Ibid. para. 10.
  \item \textsuperscript{857} Sections 38, 168(3), 169(a) and 172(1) and 2(a) of the Constitution. For the cited provisions, see infra Section 1.4.1.1 (Section 38), Section 1.4.3.1 (Section 172(1)) and Annex 2 (Sections 168(3), 169(a) and 172(2)(a)).
  \item \textsuperscript{858} Sections 167(5) and 172(2)(a) of the Constitution. For the cited provision, see Annex 2. Note that as far as the interpretation, application and development of the common law in conformity with the Constitution is concerned, the Constitutional Court assumes that the Supreme Court of Appeal is better suited for that task. See \textit{e.g.} \textit{Carmichele v Minister of Safety and Security}, supra note 692, para. 55.
\end{itemize}
parliamentary and provincial ‘acts’ may be referred to that Court by members of, respectively, the National Assembly or the provincial legislature.859

1.4.2.2. Non-judicial state-based remedies

In a country where poverty is omnipresent, litigation can be “prohibitively expensive”860 and, hence, inaccessible for the average citizen, making non-judicial state-based remedies crucial. The Constitutional Court has, for instance, voiced the following lyrical thought about the Public Protector.

(…) the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are. (…)861

This Section discusses four state-based non-judicial remedies in South Africa, namely the Public Protector, the Human Rights Commission, alternative dispute resolution mechanisms and special commissions of inquiry – although the latter very much look like quasi-judicial remedies.

(i) Public Protector

The Public Protector is one of the so-called ‘state institutions supporting constitutional democracy’, which are independent institutions subject only to the Constitution and the law – commonly called the ‘Chapter Nine Institutions’, because they are established under the ninth Chapter of the Constitution.862 Whereas many states have a national human rights institute, the Public Protector is a body peculiar to the South African constitutional order, which is tasked with monitoring the proper conduct of state affairs, including safeguarding state resources against corruption.863 The Constitutional Court has called the Public Protector “one of the most invaluable constitutional gifts” to the new state.864

The specific responsibilities of the Public Protector are enumerated in the Public Protector Act865 and in a number of other specific acts.866 He or she has investigative powers in relation to such matters as

859 Sections 79(4), 80(1), 84(2)(c), 121(2), 122(1), 127(2)(c) and 167(4)(b)-(c) of the Constitution (cited in Annex 2).
860 Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11 (31 March 2016), para. 52.
861 Ibid. para. 52.
863 Section 182(1) of the Constitution (cited in Annex 2).
864 Economic Freedom Fighters v. Speaker of the National Assembly, supra note 860, para. 52.
865 Public Protector Act 23 of 1994, Government Gazette No. 16107 [PPA].
maladministration of government affairs, abuse of power, improper or unlawful enrichment, and improper or unlawful prejudice caused by an act or omission by an authority or a person performing a public function.\textsuperscript{867}

Investigations by the Public Protector into improper state conduct can be initiated either at his or her own initiative or following a complaint, which any person can submit online, by e-mail, in print version or even orally to a staff member\textsuperscript{868} – which keeps the practical barriers as low as possible. The powers of the Public Protector include directing persons to submit an affidavit or to appear so as to give evidence, and administering oaths.\textsuperscript{869} The reports of the Public Protector are publicised on the institution’s website.\textsuperscript{870} After – or, where preferred, instead of – an investigation, the Public Protector may endeavour mediation, conciliation or negotiation in order to resolve a dispute, may advice a complainant on appropriate remedies or may refer a matter to another public body or authority for investigation.\textsuperscript{871}

As the Constitutional Court has recently confirmed, when the Public Protector orders remedial action, such orders are not ineffectual, and compliance therewith is not a matter of choice.\textsuperscript{872} In practical terms this entails that government authorities that fail to comply with orders of the Public Protector – or of other Chapter Nine Institutions – will be considered to act unconstitutionally, which may be ascertained by the courts,\textsuperscript{873} following which continued non-compliance may trigger criminal liability for contempt of court.

\textit{(ii) South African Human Rights Commission}

The South African Human Rights Commission is another one of the Chapter Nine Institutions, albeit with the very broad competence to promote respect for, and a culture, of human rights, to promote the protection, development and attainment of human rights and to monitor and assess the observance of human rights in South Africa.\textsuperscript{874} For those purposes, the Commission has the power to carry out

\textsuperscript{866} Examples are the Executive Members’ Ethics Act (power to investigate breaches of the code of ethics by cabinet members, deputy ministers and members of an executive council) and the Housing Protection Measures Act (power to review decisions on housing protection measures). Executive Members’ Ethics Act 82 of 1998, Government Gazette No. 19406; Housing Protection Measures Act 95 of 1998, Government Gazette No. G 19976.

\textsuperscript{867} Section 6(4)(a) PPA.

\textsuperscript{868} Section 6(1) PPA.

\textsuperscript{869} Sections 7-7A PPA.

\textsuperscript{870} Section 8 PPA.

\textsuperscript{871} Section 6(4)(b) PPA.

\textsuperscript{872} Economic Freedom Fighters v. Speaker of the National Assembly, supra note 860, paras 56 and 73-75.

\textsuperscript{873} Ibid. paras 103-104.

\textsuperscript{874} Section 184(1) of the Constitution (cited in Annex 2); Section 2 of the South African Human Rights Commission Act 40 of 2013, Government Gazette No. 37253 [SAHRCA].

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investigations and write reports, to conduct research, to educate and to take steps to secure appropriate redress where human rights have been violated.\textsuperscript{875} The Commission also monitors legislative or executive measures relating to human rights, liaises with other institutions and organisations with similar objectives, reviews government policies and makes recommendations to government, and monitors compliance with international human rights instruments.\textsuperscript{876} In addition, the relevant organs of states should report, on an annual basis, to the Commission on the measures that they have adopted towards the realisation of the rights in the Bill of Rights.\textsuperscript{877} In practice, the latter power is largely ineffective, as departments repeatedly fail to comply with their duty to report, or submit a half-hearted report, which Fredman imputes to those departments’ lack of capacity to collect, store and process information.\textsuperscript{878}

The investigative powers of the Human Rights Commission are extensive and include demanding information, requiring personal appearances, administering oaths, searching persons, and entering and searching premises.\textsuperscript{879} Where the Commission launches a formal inquiry, it can even decide to organise an inquisitorial hearing.\textsuperscript{880} In such scenario, a panel is erected, composed of commissioners and external experts, and terms of reference adopted. This panel can then receive submissions by different stakeholders, analyse evidence, adopt findings and issue recommendations. Reports on investigations have to be submitted to the National Assembly,\textsuperscript{881} and after investigations the Commission should assist complainants and other affected persons so that they are assured of redress, where necessary by bringing judicial proceedings.\textsuperscript{882} Alternatively, the Commission may also initiate mediation, conciliation or negotiation proceedings.\textsuperscript{883}

Finally, it should be observed that the UNGPs recognise the “important role” of national human rights institutions that comply with the Paris Principles,\textsuperscript{884} which the South African Human Rights Commission does.\textsuperscript{885} According to the UNGPs, they should provide appropriate guidance to business

\begin{thebibliography}{888}
\bibitem{footnote1} Section 184(2) of the Constitution (cited in Annex 2).
\bibitem{footnote2} Section 13 SAHRCA.
\bibitem{footnote3} Section 184(3) of the Constitution (cited in Annex 2).
\bibitem{footnote4} Fredman, \textit{supra} note 295, 167-168.
\bibitem{footnote5} Sections 15 and 16 SAHRCA, \textit{supra} note.
\bibitem{footnote7} Section 18 SAHRCA.
\bibitem{footnote8} Section 13(3) SAHRCA.
\bibitem{footnote9} Section 14 SAHRCA.
\bibitem{footnote11} Commentary to Principle 3 of the UNGPs, annexed to Report A/HRC/17/31, \textit{supra} note 33.
\end{thebibliography}
enterprises, and have a “particularly important role” as non-judicial state-based remedies. In that regard, the South African Human Rights Commission has, for instance, published a country guide, which maps the potential and actual impacts of business enterprises in South Africa, and led “several capacity building initiatives that include a focus on the UNGPs”, with a focus on agriculture and mining.

(iii) Alternative dispute resolution mechanisms

Acts that implement the rights in the Bill of Rights generally also expressly provide for the option to resolve disputes through alternative dispute resolution mechanisms, such as mediation, conciliation and/or arbitration. Conflicts in the labour context can be resolved with the assistance of the special Commission for Conciliation, Mediation and Arbitration. As was already mentioned, also the Public Protector and the Human Rights Commission are mandated to endeavour alternative dispute resolution mechanisms to resolve conflicts, where they see fit.

Importantly, alternative dispute resolution mechanisms can never be imposed upon parties, whose right to approach the courts is protected under the Constitution.

(iv) Special commissions of inquiry

Finally, Section 84 of the Constitution, which stipulates the powers and functions of the President, mandates the President in subsection 2(f) to appoint commissions of inquiry. A few of those commissions have been established to investigate serious human rights violations, but they remain quite exceptional.

An example is the commission of inquiry that was established “to investigate matters of public, national and international concern” arising out of the Marikana massacre (see also infra Box 2), which are the tragic incidents that took place at Lonmin’s mine in Marikana in August 2012 and that

886 Ibid.
889 Shadow National Baseline Assessment, supra note 582, 2 and 14.
890 See e.g. Sections 18 and 19 NEMA (conciliation and arbitration), Section 150 NWA (mediation and negotiation) and Sections 50(2)(c) and 54(4) MPRDA (arbitration). Arbitration is regulated in the Arbitration Act 42 of 1965, Government Gazette No. 1084.
892 Section 6(4)(b) PPA (supra note) and Section 14 SAHRCA (supra note).
893 Exxaro Coal (Mpumalanga) (Pty) Ltd and Another v. Minister of Water Affairs and Another (63939/2012) [2012] ZAGPPHC 354 (7 December 2012), paras 21-27. Section 34 of the Constitution is cited supra in Section 1.4.2.1.
894 After such appointment, the terms of reference of the commission of inquiry have to be gazetted.
895 Proclamation 50 of the President of the Republic of South Africa on the Establishment of a Commission of Inquiry into the Tragic Incident at or near the Area Commonly Known as the Marikana Mine in Rustenburg, North West Province, South Africa, Government Gazette No. 35680 (12 September 2012).
resulted in the death of forty-four people, the injury of more than seventy, and the arrest of around two hundred fifty. This Commission had the specific mandate to inquire into, make findings, report on, and issue recommendations concerning the conduct of a number of actors in the course of the events leading up to the massacre, namely Lonmin, the South African Police Service, two labour unions – the Association of Mineworkers and Construction Union and the National Union of Mineworkers – as well as their members and officials, the Department of Mineral Resources, and other government departments and agencies, and any individuals and loose groupings during the events.

Depending on the circumstances special commissions of enquiry may fall under the scope of Section 34 of the Constitution (the right to have access to the courts), which entails that participants in those proceedings have a right to a fair public hearing and to equality of arms, which may include a right to legal representation.

1.4.2.3. Non-state-based remedies

Victims of human rights violations by companies can also have recourse to any available non-state-based remedy. For instance, certain companies and enterprise groups have created operational level grievance mechanisms for the early detection and resolution of complaints, allowing aggrieved persons to submit a complaint to the company or to an enterprise group through an easily accessible procedure. In addition, victims may seek recourse to other non-state-based remedies, such as the Compliance Advisor Ombudsman for the International Finance Corporation, in case the latter organisation funds the project in the course of which human rights were violated.

1.4.3. Relief sought in court

1.4.3.1. Wide remedial powers of the judiciary

Relief is crucial for remedies to be effective, as also the Constitutional Court has acknowledged.

896 The Commission is also known as the Farlam Commission, after its president, Judge Ian Gordon Farlam, a retired judge from the Supreme Court of Appeal.

897 Section 34 of the Constitution is cited supra at the beginning of Section 1.4.2.1.

898 Magidiwana v President (HC), supra note 737, paras 37-38 and 65-67. The following (non-exhaustive) factors were considered as relevant: the applicants’ substantial and direct interest in the outcome of the proceedings; their vulnerability as participants in those proceedings; the complexity of the proceedings and the applicants’ capacity to represent themselves; the procedures adopted by the commission; equality of arms; and the potential consequences of the outcome for the applicants. An appeal by Legal Aid was eventually dismissed by the Supreme Court of Appeal for having become moot, which was confirmed by the Constitutional Court. At that occasion the latter Court inter alia held that “whether the right to representation arises will depend on the context of each commission and would only be granted in exceptional and rare circumstances.” Legal Aid South Africa v Magidiwana, supra note 797, paras 21-22.

899 Following the final report of the Marikana Commission of Inquiry a complaint was submitted to the Compliance Advisor Ombudsman by one group of stakeholders (infra Box 2). The World Bank Group has other grievance mechanisms as well, such as the Grievance Redress Service and the Inspection Panel.
Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal.\(^900\)

According to Section 38 of the Constitution, when a right protected in the Bill of Rights is violated, courts should grant ‘appropriate relief’, for which Section 172(1) vests the courts with wide remedial powers.

172.(1) When deciding a constitutional matter within its power, a court—
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including—
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. (…)

The Constitutional Court has defined ‘appropriate relief’ as such relief that is required to protect and enforce the Constitution, which depends on the circumstances of each case and may be a declaration of rights, an (interim or final) interdict, a mandamus or other relief, including damages.\(^901\) To be appropriate, the relief must, however, fit the injury, be fair to those affected by it and at the same time vindicate the right that was violated.\(^902\) This means that not only the victims’ interests are relevant, but also those of the counterparties and of the general public.\(^903\)

Moreover, courts are not bound by the way in which litigating parties formulate the relief that they request, nor by the manner in which relief was presented or argued,\(^904\) and they may even forge new remedies where necessary.\(^905\) Nonetheless, in many cases the common law as it stands is broad enough

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\(^900\) *Fose v. Minister of Safety and Security*, supra note 107, para. 69.
\(^901\) Ibid. paras 19 and 60. Different conditions must be met for these remedies to be granted. A declaratory order, for instance, is only awarded if the litigating party has a direct interest in an existing, future or contingent right or obligation and if the court is satisfied that it should exercise its discretion in favour of the applicant having regard to all the circumstances. For a final interdict, litigating parties must prove the existence of a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by means of any other ordinary remedy. *Tergniet and Toekoms v. Oudtshoorn*, supra note 754, paras 31 and 36.
\(^904\) *President v. Modderklip* (SCA), supra note 701, para. 18, confirmed in *President v. Modderklip* (CC), supra note 677, para. 53.
\(^905\) *Fose v. Minister of Safety and Security*, supra note 107, para. 19.
to provide appropriate relief, which could even consist of a damage award.\(^{906}\) In *Mankayi v. AngloGold Ashanti*, for instance, the Constitutional Court found that “[d]elictual remedies protecting constitutional rights may (…) constitute appropriate relief”\(^{907}\) – note that where such remedies are granted to vindicate human rights violations by private actors, this amounts to indirect horizontal application (*supra* Section 1.2.1.2).

When relief is granted to vindicate a right protected in the Bill of Rights, such relief is called ‘constitutional relief’.\(^{908}\) Although attempting to categorise such relief as either public or private seems superfluous,\(^{909}\) the Constitutional Court believes that public law remedies may be better suited than private law remedies, as the purpose of the former is to benefit the public rather than only or predominantly the individual litigant.\(^{910}\)

In any case, South African Courts have used their broad mandate to make “any order that is just and equitable” to grant and even develop diverse forms of relief, some of which are quite innovative and unique.\(^{911}\) A good illustration thereof are constitutional damages, *id est* a financial compensation for the breach of a right protected in the Bill of Rights\(^{912}\) – in litigation amongst private parties this amounts to direct horizontal application (*supra* Section 1.2.1.2). Courts have also, for instance, read words into acts, read acts down,\(^{913}\) or severed provisions in order to make certain acts constitutional.\(^{914}\) In addition, at various occasions prohibitory or mandatory interdicts have been issued, which respectively seek to prevent harm to a legal right or to make good harm already suffered.\(^{915}\) A peculiar type of mandatory interdicts are orders compelling the responding parties to engage meaningfully (being in good faith and reasonably) with other parties.\(^{916}\)

A major development, however, has been the emergence of structural interdicts, where courts have accompanied mandatory orders with further ancillary orders or directions so as to ensure the proper

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\(^{906}\) Ibid. paras 58 and 60.
\(^{908}\) *Fose v. Minister of Safety and Security*, *supra* note 107, para. 57.
\(^{909}\) Ibid.
\(^{910}\) *Steenkamp v. Provincial Tender Board (Eastern Cape)*, *supra* note 902, para. 29.
\(^{913}\) ‘Reading down’ is also known as reading in conformity with the Constitution and entails that when a statute bears two interpretations, the interpretation that does not offend the Constitution is preferred. See also Klaaren, *supra* note 912, 9-5.
\(^{914}\) See e.g. *Minister of Health v. New Clicks*, *supra* note 665, para. 13.
\(^{916}\) Liebenberg has argued that orders for meaningful engagement could bridge the gap between “the ideals of universal human rights and the particularity and determinate character of needs and identities of persons in various contexts.” Liebenberg (2012), *supra* note 522, 3 and 16.
execution of the main order (‘supervisory orders’).\footnote{For a discussion of structural interdicts, see Ken ton on Sea Ratepayers Association v. Ndlambe Local Municipality, supra note 830, paras 96 and 98; Klaaren, supra note 912, 9-15 – 9-16A.} The first structural order was issued by the High Court in \textit{Grootboom v. Oostenberg}, directing government to report within three months on the implementation of an order declaring that government is obliged to provide shelter to children who were homeless and to extend such shelter to their parents.\footnote{Grootboom and Others v. Oostenberg Municipality and Others (6826/99) [1999] ZAWCHC 1 (17 December 1999), order 3. Note that this was in fact an atypical order, as the High Court had not instructed government to do anything, but only declared the applicants’ rights and the resulting obligations. Roach and Budlender, supra note 406, 329.} Since that judgment structural orders have been adopted in various other cases.\footnote{In AllPay v South African Social Security Agency, for example, the Constitutional Court declared a tender process for the management of the payment of social grants invalid, ordered the agency to organise a new process, suspended the declaration of invalidity pending that new process and ordered the Agency to report back to the Court at each of the crucial stages of the new process. The Court granted the structural order in view of the ‘obstructionist stance’ of the agency. AllPay v. South African Social Security Agency, supra note 650, paras 71 and 75. According to Liebenberg, however, the judiciary is still reluctant to grant supervisory orders. S. Liebenberg, “South Africa,” in ed. M. Langford, Social Rights Jurisprudence 75 (Cambridge University Press, 2008a), 100. According to Roach and Budlender, at least in the following four situations a structural order is just and equitable, namely when it is necessary to secure compliance, when even a good-faith failure to comply would have too serious consequences, when the mandatory order is very general, and when an order of invalidity is suspended for a given period of time. Roach and Budlender, supra note 406, 333-335.} Notwithstanding their wide remedial powers, courts are reluctant to issue punitive orders, namely punitive damages and punitive costs, in non-criminal cases. Such orders entail that the convicted party has to pay damages or costs over and above the actual damages suffered or costs incurred by the other party, by way of penalty.\footnote{Fose v. Minister of Safety and Security, supra note 107, para. 62.} Two concerns militate against such punitive orders, being overcompensation and, in case government is the counterparty, the already great demand on scarce resources, which causes courts to question the appropriateness of using those resources to pay a party that has been fully compensated.\footnote{Ibid. para. 72. See also Federation for Sustainable Environment and Others v. Minister of Water Affairs and Others (35672/12) [2012] ZAGPPHC 170 (15 August 2012), para. 22.} Punitive costs have, nevertheless, been awarded in exceptional cases, having regard to the circumstances underlying the proceedings and/or the conduct of the losing party.\footnote{See e.g. Kloof Conservancy v. Government of the Republic of South Africa and Others (12667/2012) [2014] ZAKZDHC 60 (22 October 2014), para. 138; Louisvale Irrigation Board v. Minister of Minerals and Energy and Others (2090/2010) [2011] ZANCHC 40 (19 December 2011), paras 16-17.}

1.4.3.2. Limit: separation of powers

Some of the forms of relief mentioned above, when are granted against the legislature or the executive, may raise concerns about separation of powers. Even amongst judges structural interdicts, for instance, are controversial,. As the Supreme Court of Appeal once held, they “have a tendency to blur the
distinction between the executive and the judiciary.”923 Nevertheless, the separation of powers doctrine in the South African legal order is one that caters for appropriate checks and balances between the legislature, the executive and the judiciary in order to ensure accountability, responsiveness and openness.924 As the Constitutional Court already held in its judgment certifying the Constitution, there cannot be an absolute separation of powers, because the checks and balances in a democratic state necessarily entail that restraints are imposed by one branch on the other.925 Hence, courts have acknowledged regularly that they are constitutionally mandated to provide effective relief for the infringements of constitutional rights, which is a responsibility catered for by the separation of powers doctrine as it is entrenched in the South African Constitution.926

The Constitutional Court has, for instance, explicitly found that the judiciary’s power to declare laws unconstitutional does not breach separation of powers, because judges can only determine whether acts are constitutional, and do not have the power to alter the law as they desire.927 Also the codification in the Constitution of judicially enforceable economic, social and cultural rights cannot as such be seen as problematic for separation of powers, since the judicial enforcement of such rights does not differ much from the courts’ ordinary tasks under a bill of rights as the enforcement of any right may have budgetary consequences.928

Nevertheless, in some cases South African courts have been reluctant to grant particular remedies, because they fear to intrude upon the tasks of the legislature or the executive, or simply because they believe they lack the institutional competence to decide on polycentric issues.929 In Mazibuko v. Johannesburg, a case dealing with access to water, for instance, the Constitutional Court found that the Constitution does not “require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government” and, hence, concluded that government can be called

923 President v. Modderklip (SCA), supra note 677, para. 39.
925 Certification of the Constitution, supra note 639, para. 108; Department of Justice and Constitutional Development, “The transformation of the judicial system and the role of the judiciary in the developmental South African State,” Discussion document (February 2012), 11-12. See also the discussion in Davis and Klare, supra note 106, 499-509.
926 See e.g. AllPay v. South African Social Security Agency, supra note 650, para. 42. See also S. Ngcobo, “South Africa’s Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers,” Stellenbosch L. Rev. 22 (2011), 38 (writing that “the Constitution does not require an absolute, categorical division of institutions, powers and functions”, but “contemplates that there will be some encroachment upon one branch by another branch or branches, resulting in the lines between the branches being blurred at times”).
927 Certification of the Constitution, supra note 639, 54. See e.g. Exxaro v. Minister of Water Affairs, supra note 893, paras 26 and 33 (holding that the exercise of public power must comply with the Constitution, if not the Minister acts ultra vires and such acts should be declared unconstitutional).
928 Certification of the Constitution, supra note 639, 77.
929 See Minister of Health v. Treatment Action Campaign (No 2), supra note 160, paras 37-38.
to account for its decisions, at which occasion government should explain why its policy is reasonable, but that the judiciary should not determine the substance of such policy. An interesting application in a more recent case is the decision of the Supreme Court of Appeal in *Minister of Water v. Kloof Conservancy* to set aside an order by the High Court directing the Minister to appoint and mandate a certain number of environmental management inspectors. The Supreme Court justified its decision with reference to the separation of powers doctrine and, in particular, the argument based on comparative institutional competence (*supra* Part II, Section 2.2.6.4).

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930 *Mazibuko v. Johannesburg*, *supra* note 685, paras 159-165.
2. MINING AND THE RIGHT OF MINEWORKERS AND COMMUNITIES TO A HEALTHY ENVIRONMENT

With the general framework of business and human rights and judicial remedies in South Africa having been sketched, the crux of the case study can be explored, namely the actual legal impact of human rights on mining companies and the ability of mineworkers and neighbouring communities who experience adverse impacts on their human rights due to environmental degradation caused by mining, to call either the companies themselves or government to account. In order to give a comprehensive answer to questions such as to what extent mining companies are responsible for human rights, how accountability for human rights violations by mining companies can be enforced and why a particular strategy is preferred over another, this Chapter was written based on a two-pronged strategy, ensuring breadth and depth.933

First, the analysis is informed by the general practice of South African lawyers and activists who are regularly involved in disputes relating to mining, environmental degradation and human rights, as well as by the knowledge of experts who are directly familiar with the issue. Data was gathered through interviews with these different stakeholders. Second, particular attention is paid to three ‘focus matters’, namely specific cases relating to human rights violations associated with environmental health hazards caused by mining in which litigation was resorted to (amongst other strategies). Data about the focus matters was collected from court papers, judgments and interviews with the respondents involved therein. The focus matters return throughout this Chapter to illustrate specific findings. They were selected because they are notorious amongst local stakeholders and because their factual setting and the litigation strategy used differ, so that they paint a more diverse picture.

Since the three focus matters are referred to throughout this Chapter, they are discussed more in detail in a separate section (Section 2.3). Thereafter, the main issue, that is strategic litigation to ensure accountability for human rights violations associated with environmental degradation caused by mining companies, is scrutinised. This analysis is divided into four sections dealing respectively with litigation as a tool to ensure accountability (Section 2.4), the practicalities of gaining access to judicial remedies (Section 2.5), the design of a strategic lawsuit (Section 2.6) and the assessment of the success and failure (Section 2.7). The Chapter begins, however, with a general introduction to the factual background and the civil society landscape in South Africa (Section 2.1) and with a discussion of the legal framework, in particular the human rights at stake and the implementing laws and regulations (Section 2.2).

933 For a detailed explanation of the methodology, see supra Part I, Chapter 5.
2.1. The factual background

2.1.1. Mining in South Africa

2.1.1.1. The mining industry and its impact on human rights

Since the discovery of gold in the late nineteenth century, mineral extraction has been a major economic sector in South Africa. Although the industry has been in decline, in 2015 the direct contribution of mining to the country’s gross domestic product still amounted to 7.7% (14.7% in 1994), while the industry also maintained approximately 426,000 jobs and generated 11.3 billion Rand for the Treasury in terms of direct taxes and royalties. Moreover, given that South Africa holds the largest reserves of gold, platinum, chrome and manganese in the world, and the second-largest reserves of zirconium, vanadium and titanium, the importance of the mining industry is unlikely to decrease significantly in the nearby future.

Regardless where it takes place, mineral extraction tends to be a large-scale, resource-intensive and export-oriented undertaking, which – notwithstanding its inherently temporary nature due to its dependence on the available deposits – displaces alternative industries like agriculture and ecotourism. Because the extraction of minerals is such an intrusive, complex and dangerous activity, the risk of adverse environmental and human rights impacts is high. Such negative impacts are experienced, foremost, by the people working in the mines and by the communities living in their vicinity. The mine itself is not directly affected by those impacts and neither is it inclined to accept responsibility for the costs associated therewith, meaning that the costs are ‘externalised’. Given that the costs are not borne by the mining company, the actual and potential negative impacts of mining on human rights and on the environment do not enter the balance when companies calculate the profitability of a project, nor are they considered by the authorities approving mining projects. The costs are thus borne by the people directly affected and, ultimately, by the South Africa people. Water,

934 If indirect and induced effects are included, mining’s contribution to the gross domestic product amounts to 17%. The contribution per mining sector is as follows: coal (23%), gold (11%), platinum group metals (22%), other metal ores (31%) and other mining and quarrying (13%). Chamber of Mines of South Africa, Integrated Annual Review 2015, 23 and 25.


936 Bench Marks Foundation, “Corporate Social Responsibility and the Mining Sector in Southern Africa: A Focus On Mining In Malawi, South Africa And Zambia,” The Policy Gap Series (June 2008), 4. The Centre for Environmental Rights reports that in 2014 61.3% of the surface of Mpumalanga (one of the nine provinces of South Africa) was covered by a mining or prospecting right. Centre for Environmental Rights, Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga (May 2016), vii and x.

937 See also e.g. Sepha Ku Tin v. Kranskoppie Boerdery, supra note 845, para. 10; Coal of Africa Limited and Another v. Akkerland Boerdery (Pty) Ltd (38528/2012) [2014] ZAGPPHC 195 (5 March 2014), para. 39.

938 Bench Marks Foundation, supra note 936, 18-19.
for instance, is a very scarce commodity in South Africa. To extract mineral resources mining companies need a lot of water, and they regularly contaminate water sources – the Carolina matter is an illustration thereof (infra Section 2.3.2). Accordingly, mining increases the water stress and for many communities access to potable water is a daily concern and uncertainty. People who voice such concerns risk intimidation, however, sometimes even physical.

Civil society in South Africa feels that, for many years, the mining industry has gotten away with human rights violations. Fortunately, awareness about the risk of human rights abuses in the context of mineral extraction has increased over the years, both domestically and globally. The movement to improve the human rights record of mining companies, which at least initially seemed to concentrate on civil and political rights, has produced some tangible outcomes over the years. Two illustrations are the campaign against conflict minerals and the exposure of violence used by private security agents, which, respectively, resulted in the creation of the Kimberley Certification Process and the proclamation of the Voluntary Principles on Security and Human Rights. The impact of mineral extraction on economic, social, cultural and environmental rights, in turn, has arguably received less attention, although this seems to be changing. This change is pushed in part by the environmental justice movement that calls attention to the interconnectedness of the environment and access to basic needs, such as water, food, health care and adequate housing. Nevertheless, whilst civil society actors and scholars in South Africa plead for the integration of environmental protection and socio-economic rights like access to housing, sanitation and water, this awareness has yet to trickle down to the actual right holders.


940 R16, R26, R29. See also the discussion of SLAPP suits supra in Section 1.4.1.3 and of intimidation in general at the end of Section 2.5.2.

941 R12, R15, R18, R30.


943 Davis and Franks were the first to systematically investigate the costs of conflicts between communities and mining companies (see the discussion supra in note). An important finding is that most companies do not identify and aggregate the full range of costs associated with such conflicts, while those costs can be high given as they may have to shut down or delay their operations or lose opportunities in terms of future projects or expansion plans. Most overlooked are the indirect costs due to the diversion of staff time. Davis and Franks, supra note 172.

944 R4, R14, R28, R34. See also Section 2(4)(c) of NEMA (cited in Annex 2); Centre for Applied Legal Studies, The Mapungubwe Story: A Campaign for Change (February 2015), 45 and 86-93. Cf. Humby (2013), supra note 175 (discussing, through a case study, that the relationship between environmental and socio-economic rights is complex and that although they should be integrated, they are not always easily reconcilable).

945 See also Humby (2013), supra note 175, 108-109.
People [do not] see these things as human rights violations. Polluting water, destroying wetland, killing people’s cattle or destroying their crops, they do not think of that as human rights violations, they think of it as progress and development. That is a massive problem. The actual language of human rights violations is poo-pooed by the corporate sector. People say: ‘Oh, whatever, we are not torturing you, we are not cutting off your children’s hands, how hard can it be?’

Adverse impacts on economic, social, cultural and environmental rights are again also linked with civil and political rights, for instance because neglect for such impacts may create a hotbed for violent conflict. This is illustrated by the outburst of strikes in the South African mining industry in 2012, which met with excessive violence in the course of which over thirty mineworkers got killed and many more injured. One of the underlying causes of the strikes were the deplorable living conditions of the mineworkers, as will be discussed below (infra Box 2).

2.1.1.2. The susceptibility of the South African mining industry for human rights abuses

Several factors make the mining industry in South Africa particularly prone to human rights abuses. Firstly, as the Constitutional Court has acknowledged at several occasions, the mining industry is still gripped by the Apartheid legacy, with mining rights remaining predominantly under the control of the white minority and with the black majority, living nearby or working in the mines, having to bear the greater share of the externalised costs. Also the precarious rights of communities to the land on which they live is a vestige of Apartheid, and mining companies can exploit this to their benefit. A second factor is that the country struggles with government capture; not only does the mining industry have huge leverage on account of its size and its importance for the country’s economy, but many officials even hold direct interests in mining companies, as shareholders, board members or executive directors. Thirdly, and related to the previous point, is the lack of monitoring and enforcement by government. The main risk factor for human rights abuses by the mining industry, in particular for those associated with environmental degradation, is not the lack of legislation but its inadequate implementation. As

946 R7.
947 During Apartheid the mining industry was even directly involved in the design and implementation of apartheid policies. Truth and Reconciliation Commission, supra note 565, paras 63 and 161.
948 See e.g. Agri South Africa v. Minister for Minerals, supra note 609, para. 1; Bengwenyama-Ya-Maswazi Community and Others v. Minister for Mineral Resources, supra note 849, para. 35.
949 Humby (2013), supra note 175, 71-72; R9, R24.
950 They are evicted, for instance, or their land is sold by a chief without individual community members knowing thereof, let alone reaping any of the benefits. An example is found in a case that is currently in arbitration, see Plaintiff’s statement of the case, in re: The Mooifontein Community v. Optimum Coal Mining (Pty) Ltd, in the arbitration before Advocate A. Dodson SC (29 March 2017).
951 Bench Marks Foundation, supra note 936, 14; R2, R4, R10, R12, R13, R14, R17, R20, R23, R26, R30, R31, R32.
952 R1, R2, R7, R11, R12, R20, R25, R27, R28, R30, R31, R33, R34, R35.
the discussion of the legal framework below will demonstrate, a plethora of laws and regulations govern the mining industry, and these laws and regulations seem, at least on paper, rather strong and comprehensive. The problem lies, however, in their enforcement, which is deficient due to an interplay of factors that range from unwillingness on the part of government, over incompetence (lack of knowledge and of financial, technical and human resources) to simple inattentiveness.

A fourth risk factor for human rights abuses peculiar to the South African mining industry relates to its impact on demographics.\textsuperscript{953} A distinctive feature of the industry is that it operates on the basis of a migratory labour system; the mines rely predominantly on not-locally employed workers. Consequently, when a new mine is erected or the operations of an existing mine expanded, this causes an influx of people into the region, not only of mineworkers, but also of other unemployed people who hope to find a job in one of the parallel industries. If these people and their families are not provided with housing,\textsuperscript{954} they construct their own dwellings on or next to the mine’s premises, which results in the emergence of informal settlements.\textsuperscript{955} Another way in which mining affects demographics is by (gradually) pushing communities off their lands, without formally relocating them. Also this may result in the creation of informal settlements.

In general, living conditions in such settlements are dire. There is no access to water, sanitation and electricity, except perhaps for a few bore holes or water tanks, some pit latrines and streetlights, and the quality of the dwellings is more than below standard. Further, because of their location right next to the mine, residents of the informal settlements are continuously exposed to the pollution and environmental degradation caused by mining. The infrastructure for public services that previously existed in the area, such as schools, hospitals and roads, can frequently also not cater for the sudden, massive increase in the number of inhabitants, as a result of which the availability and quality of those services becomes precarious for everyone. One respondent aptly described these adverse demographical impacts of mining as follows.

People do not always articulate it, because it is slow, but one of the biggest impacts are social impacts, which are associated with, for want of a better word, the industrialisation of the particular environment where these people lived. So that industrialisation includes not only the loss of land, and these environmental things we have spoken about, but an influx of outsiders, pressure on local resources, such as clinics and schools, (…) the breaking down of traditional governments and

\textsuperscript{953} R1, R2; See also the Tudor Shaft focus matter, infra Section 2.3.1.

\textsuperscript{954} In principle, they should be supported in their search for housing by the mine itself in accordance with its social and labour plan, see infra Section 2.2.3.2.

\textsuperscript{955} See e.g. Marikana Commission of Inquiry, Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province (Pretoria, 31 March 2015), 527 and 530.
authority structures, an increase in crime, an increase in alcohol and drug abuse and an increase in crimes against women.\textsuperscript{956}

Fifth, and finally, notwithstanding the prominence of the South African Constitution, which is renowned for its progressive Bill of Rights, it has as yet to achieve its transformative objective of ameliorating the plight of the poorest and most vulnerable people in society, most of whom are illiterate. Communities living nearby mines and mineworkers generally belong to this subordinated group in South African society, which is a legacy of Apartheid. As socio-legal research amongst poor, black communities affected by mining, for instance, has confirmed, these people are little aware of their rights and the environment does not feature on top of their list of concerns, which are rather devoted to housing, basic services such as water, sanitation and electricity, and jobs.\textsuperscript{957} They know they have rights, but cannot identify the precise rights at stake or their content. In that same socio-legal study, a respondent is quoted who nihilistically declared that he has “the right to complain to the government about my situation, so that they can promise me everything and do nothing.”\textsuperscript{958}

2.1.2. A brief outline of the civil society landscape

To understand the context of the case study better, it is appropriate to sketch the landscape of civil society in South Africa, which is extremely diverse.\textsuperscript{959} This Section is not exhaustive but limited to a description of the civil society actors and members that regularly act on the fore in relation to mining, environmental degradation and human rights.

The term ‘civil society actors’, first of all, was previously defined as (formal or informal) organisations or associations that are private actors (\textit{id est} actors other than organs of the state) who have specialised knowledge about issues relating to business and human rights and/or practical experience with trying to safeguard human rights against possible violations by business enterprises, without themselves being the direct victims of such conduct.\textsuperscript{960} For the purposes of the case study, a distinction is made between civil society actors that advocate for particular issues, such as the environment, sustainable development and/or human rights, and those that offer legal services. The generic terms that are used to designate these two categories of civil society actors are, respectively, advocacy organisations and law firms.

\textsuperscript{956} R29.
\textsuperscript{957} Dugard, MacLeod and Alcaro, \textit{supra} note 748. One of the four communities included in that study was a middle-income, predominantly white residential area, which was more awareness about the environmental risks, but not much about their rights,\textsuperscript{958} Ibid. 948.
\textsuperscript{959} Langford (2015), \textit{supra} note 112, 14.
\textsuperscript{960} See \textit{supra} Part I, Section 2.1.
Four types of advocacy organisations can be discerned, namely faith-based organisations, community-based organisations, other nongovernmental organisations and trade unions. They are non-profit organisations. Examples of advocacy organisations that regularly advocate on issues related to mining, environmental degradation and human rights are the following: the Bench Marks Foundation and the Southern African Faith Communities’ Environment Institute (faith-based organisations); Mining Affected Communities United in Action, the Mining and Environmental Justice Community Network of South Africa, Women Affected by Mining United in Action and the Land Access Movement of South Africa (community-based organisations); the Federation for a Sustainable Environment, ActionAid South Africa, the Escarpment Environment Protection Group, GroundWork, Earthlife Africa and the International Alliance on Natural Resources in Africa (other nongovernmental organisations); and, the National Union of Mineworkers, the Association of Mineworkers and Construction Union, and Solidarity (trade unions961). Depending on the precise issue that is at stake in a given case, other organisations may also come into the picture, such as Treatment Action Campaign (focusing on access to health) and Sonke Gender Justice (focusing on gender equality).

As for law firms, a distinction is made between non-profit public interest law firms and incorporated law firms. The latter are for-profit firms that regularly offer legal services pursuant to a contingency fee agreement (supra Section 1.4.1.2 and infra section 2.5.1) to poor clients who otherwise cannot afford legal representation. Examples include Richard Spoor Attorneys Inc., Abrahams Kiewitz Attorneys Inc. and Mbuyisa Neale Attorneys Inc. The latter law firm often cooperates with Leigh Day, a UK-based law firm specialised in international tort claims. The involvement of the first two law firms in the silicosis class action, in turn, is funded by two US-based law firms, namely Motley Rice LLP and Hausfield LLP (see also infra Section 2.3.3).

Public interest law firms carry out a range of activities in the legal field, like conducting legal research and providing first-line legal advice. Their attorneys may also act as attorneys of record assisting clients in legal disputes, and if a case in court is launched, these firms may appoint an in-house counsel or recruit an external advocate.962 Public interest law firms operate as non-profit organisations and receive their funds inter alia from grants and donations. Firms that have ample experience with cases relating to mining, environmental degradation and human rights are the Legal Resources Centre, Lawyers for Human Rights, the Centre for Environmental Rights and the Centre for Applied Legal Studies. Depending on the precise issue at stake, however, other firms may get involved, such as

961 The position of trade unions is often ambiguous, however. In the silicosis class action, for instance, they adopt more of a wait-and-see attitude, partly because they are scared that the lawsuit may cripple the industry financially and because they have strong links with the reigning political party. R12, R35.
962 In South Africa a distinction is made between attorneys and advocates (or counsels). Attorneys cannot appear in court but represent the client. Only advocates can plead a case in court.
Section 27 (specialised in health-related matters) and the Socio-Economic Rights Institute (specialised in housing-related matters).

Generally, these public interest law firms have a number of specific programmes that centre on concrete rights or issues. Lawyers for Human Rights, for example, has nine programmes, amongst which an environmental rights programme, a land and housing unit and a strategic litigation unit. Each programme is guided by a strategic agenda with specific targets, which tend to be informed by what is going on in the field. One respondent explained this as follows.

With strategic litigation, you find that different attorneys within our organisation deal with different subject matters. And within each subject matter, for example like with extractives, that is one of it, I happen to be in the extractives team, (...) you discuss (...) what is the mission and vision of the group that you are in.

Three further terminological clarifications should be made. Firstly, when this dissertation speaks about individual members of civil society (natural persons), those persons are designated depending on their specific position, such as (human rights or environmental) activist, researcher, attorney, counsel, (medical or scientific) expert or scholar. These people do not necessarily belong to an organisation or association that qualifies as a civil society actor.

Secondly, throughout the case study, the term ‘litigants’ or ‘litigating parties’ is used to designate the parties that instigated the litigation comprising both the legal representatives (attorneys and counsels) and their clients (direct victims or advocacy organisations), whereas the party against whom the litigation is directed is called the ‘counterparty’, whether it is government or a mining company and regardless of the precise actors that is sued.

Thirdly, ‘public interest litigants’ refers to litigants that act in the public interest, relying *inter alia* on standing in terms of Section 38(d) of the Constitution. The (non-exhaustive) criteria that are considered relevant to ascertain whether parties genuinely act in the public interest were explained earlier (supra Section 1.4.1.1). In essence, however, public interest litigation is litigation that raises a constitutional matter, such as the protection of the rights in the Bill of Rights, and that (potentially) affects a range of vulnerable people. The term ‘public interest litigants’ is used when findings

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964 R23. Also R5, R7, R28.
965 The difference between applicants, plaintiffs and aggrieved parties and between respondents (in this dissertation called ‘responding parties’ to avoid confusion with the persons who were interviewed), defendants and accused parties was explained earlier, see supra Part I, Section 5.3.2.
966 The provision is cited supra in Section 1.4.1.1.
967 Even the mere interpretation of a law in conformity with the Constitution raises a constitutional issue. *MEC Agriculture v. HTF Developers*, supra note 709, paras 19 and 22.
specifically apply to such litigants, for instance when a certain procedural rule is applicable only in public interest litigation.

2.2. The legal framework

2.2.1. Mining and environmental degradation: the human rights at stake

Environmental degradation caused by mining may interfere with a number of rights held by mineworkers and neighbouring communities under the Bill of Rights, including the rights to human dignity, life, freedom and security of the person, an environment not harmful to health and well-being, adequate housing, health care services, sufficient food and water, information and just administrative action. These are the rights that were mentioned most in the interviews with respondents and in the court papers for, and/or judgments in, directly relevant cases – see also Table 17a in Annex 1. Nonetheless, it should be stressed that this list is not exhaustive and that depending on the circumstances other rights may be involved as well. An example is the right to freedom of expression, which is at stake when victims, their lawyers or activists are intimidated or harassed because they denounce the impact of mining activities on the environment.

The above-listed rights are not only codified in the Bill of Rights but also in international human rights instruments, the most obvious ones being the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter for Human and Peoples’ Rights (the African Charter). Therefore, the discussion below of the relevant rights under the Bill of Rights also refers to their twin rights in the ICCPR, the ICESCR and the African Charter. Before introducing each of the human rights that are most at risk where mining degrades the environment (Section 2.1.2), the judicial enforceability of these different rights should be explained first (Section 2.1.1).

968 International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966, 999 UNTS 171.
969 International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly on 16 December 1966, 993 UNTS 3. South Africa acceded to the ICESCR in 1994, but only ratified the Covenant in January 2015. This has never withheld lawyers and activists from referring to the ICESCR in high-level cases, however, which is not surprising given that references to non-binding international law are common (supra Section 1.3). See e.g. Government v. Grootboom, supra note 493, para. 27.
2.2.1.1. Categories of rights and their judicial enforcement

The economic, social, cultural and environmental rights protected under the South African Bill of Rights can be divided into three categories: qualified, unqualified and prohibitive rights.\textsuperscript{971} Qualified rights are characterised by the use of mitigating concepts like ‘access to’, ‘reasonable’, ‘available resources’ and ‘progressive realisation’, that qualify the duties created by those rights. In turn, unqualified rights do not include such qualifying concepts, while prohibitive rights are expressed in negative terms and, hence, definitely not qualified. Most socio-economic rights are qualified. Nevertheless, an example of an unqualified right is the right of children to basic nutrition (Section 28(1)(c)) and, of a prohibitive right, the right of everyone not to “be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances” (Section 26(3)).

The practical difference between qualified rights, on the one hand, and prohibitive and unqualified rights, on the other, lies in the degree of deference that courts award to the legislature and the executive when a claim is made that those rights have been violated. Because prohibitive and unqualified rights impose clear and unconditional duties, those duties are immediately enforceable, like civil and political rights. Accordingly, non-compliance will promptly trigger the application of the stringent limitations clause of Section 36 of the Constitution.\textsuperscript{972} Under this provision, restrictions are impermissible unless they are imposed in terms of a law of general application and are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. For the latter condition, regard is had to all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.

When a qualified right is at stake, which includes most economic, social and cultural rights, courts are more deferential to the legislature and the executive, as they only review whether they have acted


\textsuperscript{972} The provision is cited in Annex 2.
‘reasonably’. An important difference with the limitation clause is that the reasonableness standard of review does not allow courts to enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. Moreover, since the Constitutional Court applied this standard of review for the first time in *Grootboom v. South Africa*, the standard seems to have been attenuated. In the latter judgment, a number of substantive criteria were advanced to evaluate the reasonableness of government conduct, such as the requirements to consider the social, economic and historical context of the basic need at stake, to have special regard to the poorest and most vulnerable people, to treat everyone with care and concern, and to lower legal, administrative, operational and financial hurdles to the enjoyment of the concerned right, and the prohibition to exclude a significant segment of society. Subsequent judgments, however, have been criticised by scholars for watering down the reasonableness standard to an “over-flexible, abstract, and decontextualised standard of governance” that emphasises the process leading to a given act or certain conduct over its substance.

Two other points of criticism that are voiced against the case law applying the reasonableness standard relate to the burden of proof and the type of relief. First, courts are believed to place a too onerous burden of proof on complaining parties who seek to establish unreasonableness. Scholars have, therefore, called for a stricter standard of scrutiny *vis-à-vis* the party allegedly infringing the right and for a more rigorous proportionality analysis. Secondly, when it has been established that an act or

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973 Some of the criteria advanced by the Constitutional Court included the following: comprehensiveness, based on consultation amongst the different spheres of government and establishing a clear allocation of responsibilities and tasks (while ensuring that the necessary financial and human resources are available); coherence, with all measures being directed towards the progressive realisation of the right; flexibility, allowing the state to choose amongst a range of possible measures; and, provision for implementation. On a more substantive level, the Court held that the programme should consider the needs having regard to their social, economic and historical context, should account for short, medium and long term needs, should not exclude a significant segment of society and should cater for those whose needs are the most urgent and whose ability to enjoy all rights is most in peril. *Government v. Grootboom*, supra note 493, paras 39-44.

974 Ibid. para. 41.

975 Ibid. paras 39-44.


977 Wilson and Dugard, *supra* note 976, 56.

978 Liebenberg (2005), *supra* note 976, 22.

979 Ibid. 24-28.
conduct falls short of the reasonableness standard, courts are careful not to issue too strong orders against the legislature or the executive, which was explained as follows by the Constitutional Court.

If government takes no steps to realise the rights, the courts will require government to take steps. If government’s adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. (...) If government adopts a policy with unreasonable limitations or exclusions (...), the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.980

Finally, the main critique rings that the judiciary is reluctant to recognise the independent content of the first limb of provisions codifying qualified socio-economic rights. The first limb of the housing right, for instance, simply reads that “everyone has the right to have access to adequate housing”. Nevertheless, that limb is consistently read in conjunction with the second limb, stipulating that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” This means that whenever someone claims that his or her right is violated, courts immediately move on to examine whether the measures adopted by government in pursuing the realisation of the right are reasonable, without first considering the entitlement of the complainant under the right in principle.981

In sum, whether the failure to comply with a duty under a given right amounts to a unjustifiable violation of that right that can immediately be vindicated depends on whether the concerned act or conduct satisfies the strict requirements of the limitation clause (in the case of unqualified and prohibitive rights) or the more flexible standard of reasonableness (in the case of qualified rights). It should be noted, however, that South African courts are less deferential where the obligation to respect (the existing enjoyment of) qualified rights is at stake, as opposed to the obligation to protect or provide those rights.982 Since time immemorial the Constitutional Court has held that “[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion.”983

2.2.1.2. The specific rights at stake

(i) The right to an environment not harmful to health and well-being

The right that is threatened first and foremost when mineral extraction causes environmental degradation and pollution, is the right to an environment that is not harmful to health and wellbeing. This right is protected by Section 24 of the Constitution, which states the following:

980 Mazibuko v. Johannesburg, supra note 685, para. 67.
981 See e.g. ibid. para. 50.
982 Wilson and Dugard, supra note 976, 59.
983 Certification of the Constitution, supra note 639, para. 78.
24. Everyone has the right—

(a) to an environment that is not harmful to their health or wellbeing; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

However, notwithstanding its obvious relevance, litigating parties have, at least in the past, often overlooked Section 24 of the Constitution in cases concerning the impact of environmental degradation caused by mining on basic needs of people, such as water, food and housing.\(^984\) The explanation by a respondent who had not cited this provision in a particular case in which they could have, ran like this:

On reflection, it ought also to have been characterised as an environmental rights case, and we ought to have pleaded section 24. (…) Public interest firms, have tended not to rely on Section 24. Not for any reasons to do with its content, but because there is more jurisprudence on [the other rights].

There is very little case law on section 24 that has been brought as public interest litigation.\(^985\)

In any case, the environmental rights provision of Section 24 actually creates two rights that are independent from each other given that they are stipulated in two separate subsections without any cross-reference.\(^986\) Section 24(a), first of all, codifies an individual right (‘everyone’) that is negatively framed (‘not harmful’), unqualified and, hence, immediately enforceable.\(^987\) The nature of the right, which is aimed at preventing pollution and environmental degradation, and of its corresponding duty (not to cause such pollution or degradation), combined with the fact that private actors are as, if not more, likely to pollute or degrade the environment make that Section 24(a) is capable of having horizontal effect in conformity with Section 8(2).\(^988\) Although the right under Section 24(b) is also vested in ‘everyone’, this subsection rather provides for a collective right given its allusion to inter- and intra-generational equity (‘for the benefit of present and future generations’), and is clearly

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\(^984\) Feris, *supra* note 924, 38 (denouncing that there is a “a marked dearth in cases”). The environmental justice movement is gaining force, however. See *supra* Part I, Section 5.1.2.2 and Part III, Section 2.1.1.1.

\(^985\) R3.

\(^986\) Cooper, *supra* note 411, 215-216. See also Christiansen, *supra* note 902, 243-244 (discerning a “natural division” between the two subsections).


directed against government. Moreover, while Section 24(b) is justiciable, its judicial enforcement in concreto is qualified by the demand for ‘reasonable legislative and other measures’. In sum, Section 24 stipulates that neither private actors, including the mining industry, nor the state may degrade the environment in violation of subsection (a) and that the state must take reasonable steps in line with subsection (b) to prevent environmental degradation and to secure that mineral resources are extracted in a sustainable manner.

Interestingly, Section 24(b) refers to economic and social development, which is peculiar given that the provision is in essence concerned with the environment. By doing so, the Constitution expressly contemplates the integration of environmental protection and socio-economic development, as causing a certain amount of pollution and degradation in the course of development is unavoidable. According to the Constitutional Court, government actors should thus balance environmental considerations with socio-economic considerations, whenever they have to decide whether or not to authorise commercial or industrial activities. Section 24(b) also more generally affects the way in which administrative decisions that may have an impact on the environment should be adopted. An example thereof is the applicability of the audi et alteram partem rule, which entitles interested parties to be notified about mineral rights applications and to be given an opportunity at that time to raise objections, at least in writing.

The African Charter codifies a right to a generally satisfactory environment favourable to development as well (Article 24) – interestingly, the right is stipulated as a collective right, vested in ‘all peoples’. According to the African Commission, states are obliged under this provision to take reasonable steps to prevent pollution and ecological degradation and to promote conservation, an obligation which includes such specific duties as requiring and publicising impact studies on development projects, conducting appropriate scientific monitoring, informing communities and ensuring meaningful

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989 Fuel Retailers v. Director-General Environmental Management, supra note 736, paras 41, 44-45 and 61; Sepha Ku Tin v. Kranskoppie Boerdery, supra note 845, para. 11. Consequently, the acceptable amount of pollution is foremost a political decision, albeit constrained by human rights considerations as well as environmental principles such as the precautionary principle, the preventive principle and the polluter pays principle. See also Boyle, supra note, 631-632; Hayward, supra note 79, 149-153. For an explanation of the meaning of these three principles, see e.g. S. Tully, “International Environmental Law and Sustainable Development,” in ed. S. Tully, International Corporate Legal Responsibility 299 (Alpen aan de Rijn: Kluwer, 2012a), 338-349.

990 As the Supreme Court of Appeal has noted, “environmental considerations [should] be accorded appropriate recognition and respect in the administrative processes” and “[t]ogether with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.” Director: Mineral Development, Gauteng Region and Another v. Save the Vaal Environment and Others (133/98) [1999] ZASCA 9 (12 March 1999), para. 20.

991 Ibid. paras. 15 and 20.

992 See also the discussion of rights being vested in peoples or in individuals, supra Part I, Section 5.1.2.3 and, in particular, note 178.
opportunities for affected parties to be heard and to participate in the decision-making.\textsuperscript{993} Moreover, as the greater part of the duties of states in respect of the right to a satisfactory environment assume non-interventionist conduct, states should immediately observe those duties.\textsuperscript{994}

Aside from the environmental right \textit{pur sang}, the African Charter also vests a right in all peoples to freely dispose of their wealth and natural resources (Article 21), as well as a right to development (Article 22). The ICESCR, in turn, does not explicitly provide for a right to a healthy environment, although the Committee on Economic, Social and Cultural Rights has found that pollution and environmental degradation interfere with the preconditions that are necessary to enjoy the rights to an adequate standard of living and to health (Articles 11 and 12 of the ICESCR) and, hence, violate the Covenant.\textsuperscript{995}

(ii) \textit{The rights to life, human dignity and security of the person}

Environmental degradation can also affect several other rights than the right to an environment that is not harmful to health and well-being, including civil and political rights such as the rights to life, to human dignity and to security of the person (respectively Sections 10, 11 and 12(1)(c) of the Constitution). The respective provisions in the Constitution read as follows:

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

11. Everyone has the right to life.

12. (1) Everyone has the right to freedom and security of the person, which includes the right— …

(c) to be free from all forms of violence from either public or private sources;

The right to life, first of all, is at stake whenever the pollution or environmental degradation is so serious that the life of mineworkers and/or of people living nearby is effectively at risk.\textsuperscript{996} Also the right to human dignity is affected when mining results in environmental degradation and creates health hazards, as the High Court has recently confirmed.\textsuperscript{997} After all, dignity cuts across all the rights protected by the Bill of Rights.\textsuperscript{998} This approach to dignity must be understood against South Africa’s history, since under Apartheid the majority of the population was in fact dehumanised. That also the right to security of the person comes into play has, in turn, been acknowledged by the Constitutional

\begin{itemize}
  \item A\textsuperscript{993}frican Commission on Human and Peoples’ Rights, \textit{Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria Case No. 155/96 (27 October 2001), paras 52-53.}
  \item Ibid. para. 52.
  \item See e.g. the causes of action in the silicosis class action, discussed \textit{infra} in Section 2.3.3.5.
  \item \textit{Nkala v. Harmony Gold} (certification judgment), supra note 372, para. 66.
  \item R14.
\end{itemize}
Court in *Mankayi v. AngloGold Ashanti*, where the Court held that exposure to high levels of dust caused by mining activities implicates the right to security of the person.999

(iii) The rights to housing, water, food and health

Next, since a few years lawyers, activists and experts who denounce the pollution and environmental degradation caused by mining in South Africa have given more attention to the unequivocal link between the environment and socio-economic rights, such as the rights to housing, water, food and health.1000 One respondent eloquently said that “divorcing socio-economic and environmental rights is tricky territory.”1001 Indeed, that pollution or degradation of the environment is capable of affecting the health of people, their food security and their access to water, in breach of their right to healthcare services and to sufficient food and water is rather self-evident.1002 Their right to adequate housing may likewise be affected, however, for instance when blasting (a form of noise pollution) causes houses to crack or simply to collapse. The relevant provisions in the Constitution are Sections 26 and 27, which respectively stipulate the following:

26. (1) Everyone has the right to have access to adequate housing.  
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (…)

27. (1) Everyone has the right to have access to—  
(a) health care services, including reproductive health care;  
(b) sufficient food and water; and (…)  
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Sections 26 and 27 are both qualified rights, the enforcement of which is subject to the standard of reasonableness explained previously (*supra* Section 2.2.1.1). Furthermore, they are composite rights, meaning that they consist of several components which respectively relate to the quantity and quality of the concerned basic good and to its physical and economic accessibility.1003

Also the ICESCR stipulates a right to adequate housing, which includes a right to adequate food, and a right to the enjoyment of the highest attainable standard of health (Articles 11 and 12). These

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1000 For a discussion see e.g. Humby (2013) 175, *supra* note.
1001 R28.
1002 See e.g. *Federation for Sustainable Environment and Others v. Minister of Water Affairs and Others* (35672/12) [2012] ZAGPPHC 128 (10 July 2012), para. 13.
provisions have, moreover, been interpreted as implying a right to water.\textsuperscript{1004} With respect to the African Charter, only the right to health is explicitly recognised (Article 16). Nevertheless, according to the African Commission, the rights to housing, food and water are implied by other rights that are stipulated in the Charter.\textsuperscript{1005}

An important distinction between the rights as they are protected by the South African Constitution, on the one hand, and by the African Charter and the ICESCR, on the other, is the fact that under the latter instruments a number of minimum core obligations have been recognised that should immediately be observed, whilst the Constitutional Court has expressly rejected this theory of ‘minimum core obligations’ and applies the reasonableness doctrine discussed earlier instead.\textsuperscript{1006} The advantage of the minimum core obligations, however, is that they provide each right with substantive content as regards the basic needs to which every individual right holder is entitled at any time. The minimum core obligations under the right to water, for instance, encompass a duty to ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic use, and to ensure safe physical access to water facilities within a reasonable distance from the household.\textsuperscript{1007}

\textit{(iv) The rights to information and just administrative action}

Finally, although their relevance may be less straightforward, also the procedural rights to information and to just administrative action are frequently directly at stake when mineral extraction creates an environment that is harmful to health and well-being. These rights are stipulated, respectively, in Sections 32 and 33 of the Constitution, which read as follows.

32. (1) Everyone has the right of access to—
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.
(2) National legislation must be enacted to give effect to this right, …

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

\textsuperscript{1006} Government v. Grootboom, supra note 493, paras 32-33.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—
   
   (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
   
   (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
   
   (c) promote an efficient administration.

Information is crucially important for mineworkers and neighbouring communities, first, to be aware of the health hazards to which they are exposed and, second, to be able to hold the responsible actors effectively accountable and, hence, to vindicate their rights. Because of its central role in claiming other rights, the right to information has been called a ‘power’ or ‘leverage’ rather than a ‘liberty’. Interestingly, Section 32 explicitly provides that it binds private bodies as well as public bodies. The threshold for exercising this right against private actors is higher, however, as requesters have to demonstrate that they need to information for the exercise or protection of a right. The importance of having access to information in order to be able to ensure accountability in business-related matters was recently emphasised by the Supreme Court of Appeal, finding that “citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations.”

The right to just administrative action, in turn, comes into play because mining is a regulated activity that is subject to different types of authorisations. If, despite the strict regulations, a mine causes pollution or environmental degradation and creates health hazards for mineworkers and neighbouring communities, the question arises whether the authorities have adopted the necessary administrative decisions and issued the required authorisations in a lawful, reasonable and procedurally fair manner and whether affected persons can challenge those authorisations.

The right to information is protected by the African Charter (Article 9(1)) and is included in the right to freedom of expression under the ICCPR (Article 19(2)). Moreover, the African Commission has held that even the rights to health and to a satisfactory environment (Articles 16 and 24 of the African Charter) impose a specific duty on the state to inform communities that are exposed to environmental degradation and to give them meaningful opportunities to be heard and to participate in decisions.

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1009 Bentley and Calland, supra note 1008, 344; Wynberg and Fig (2015), supra note 175, 325.

1010 ArcelorMittal v. VEJA, supra note 570, para. 1.
affecting them.\textsuperscript{1011} Similarly, the right to development (Article 22) has been interpreted by the African Commission as imposing an obligation on states to consult with people who are affected by a development project, and to ensure that they are fully informed about the project and able to participate in the decision-making process.\textsuperscript{1012}

2.2.2. Implementing legislation

The different constitutional rights discussed above have also been implemented in national laws, many of which apply to the mining industry. The most directly relevant acts are the Mineral and Petroleum Resources Development Act, the National Environmental Management Act, the National Water Act, the Mine Health and Safety Act, the Occupational Diseases in Mines and Works Act, the Promotion of Access to Information Act and the Promotion of Administrative Justice Act. Their main objects are briefly explained below, while specific provisions will be discussed in the course of the case study, where it is necessary to understand concrete cases and/or elements in the design of a lawsuit.

The Mineral and Petroleum Resources Development Act (MPRDA),\textsuperscript{1013} which was also mentioned in the context of South Africa’s struggle with international investment law (\textit{supra} Section 1.1.3), regulates the process of extracting mineral resources and petroleum, from beginning to end (reconnaissance, exploration, prospecting and mining), including the application for, and compliance with, the necessary permits and rights, and the application for a closure certificate when a mining operation ceases. The Act implements Sections 25(4)-(7) (equitable access to natural resources and land) and 24 (environmental rights) of the Constitution.\textsuperscript{1014} Amongst its purposes are giving effect to the principle of the state’s custodianship of the nation’s mineral and petroleum resources, promoting equitable access to those resources, expanding the opportunities for historically disadvantaged persons to benefit from their exploitation, promoting economic growth, and ensuring sustainable ecological, social and economic development of the mineral resources.\textsuperscript{1015} The MPRDA must be read in conjunction with its Regulations, which elaborate on the specific conditions and procedures for the different applications.\textsuperscript{1016}

\begin{itemize}
\item \textsuperscript{1011} African Commission, \textit{SERAC and CESCR v. Nigeria, supra} note 993, para. 53.
\item \textsuperscript{1012} \textit{Ibid}, paras 281-282. According to the African Commission, communities should not merely be consulted but their free, prior and informed consent should be obtained. African Commission on Human and Peoples’ Rights, African Commission, \textit{Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya}, Case No. 276/03 (25 November 2009), para. 290.
\item \textsuperscript{1013} MPRDA, \textit{supra} note 588.
\item \textsuperscript{1014} Section 2(c) and (h) MPRDA (cited in Annex 2). See also \textit{Bengwenyama Minerals v. Genorah Resources, supra} note 590, paras 3, 34, 42, 72 and 75.
\item \textsuperscript{1015} Section 2 MPRDA (cited, in part, in Annex 2).
\item \textsuperscript{1016} Regulations Mineral and Petroleum Resources Development 28 of 2002, GNR 527, Government Gazette No. 26275 [MPRDA Regulations].
\end{itemize}
In accordance with the MPRDA, the Minister has issued ‘Codes of Good Practice for the South African Minerals Industry’ as well as a ‘Broad-Based Socio-Economic Empowerment Charter’. These documents are meant to further the transformation of the mining industry and deal with issues such as employment equity, housing and living conditions, preferential procurement and mine community and rural development. The legally binding status of the Mining Charter is challenged, however, in a pending court case, in which the Centre for Applied Legal Studies has applied to intervene.

The National Environmental Management Act (NEMA) is the primary piece of legislation implementing Section 24 of the Constitution, which should ensure that the integration of environmental protection and sustainable social and economic development is realised. Section 2 of the Act stipulates a list of principles, which apply to all environmental decision-making and which should govern the Act’s interpretation. Amongst those principles feature the ideas of people-based and integrated environmental management, sustainable development, environmental justice, equitable access to environmental resources, participatory environmental governance and polluter-pays. Several regulations that further implement the NEMA have been adopted, setting, for instance, the requirements for environmental impact assessments. Moreover, whilst the NEMA is the framework legislation for environmental protection and conservation, several other Acts have been proclaimed, which deal with particular subareas of environmental law, such as air quality, biodiversity, protected areas and waste.

Section 32 of the NEMA, which deals with standing (supra Section 1.4.1.1) and costs, deserves special mention. In particular, Section 32(2) explicitly mandates courts not to award costs against litigants who are unsuccessful in securing relief for a breach of any of the provisions of the Act. Moreover, in case of a successful application, Section 32(3) allows courts to decide to order costs against the other party so as to compensate, in part, the legal representatives who assisted the litigants.

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1017 Section 100 MPRDA (cited in Annex 2).
1018 The Codes of Good Practice for the Minerals Industry, Government Gazette No. 32167.
1019 Mining Charter, supra note 592 (see also the explanation in that note and in the main text).
1020 Affidavit of the Amicus Curiae, in re: Scholes and Another v. Minister of Mineral Resources (50642/15) (12 February 2016).
1021 NEMA, supra note 756.
1023 Section 2(1) NEMA (cited in Annex 2); Fuel Retailers v. Director-General Environmental Management, supra note 736, para. 67.
1024 Note that the burden to conduct such impact assessment lies with the person seeking to carry out activities that may affect the environment, as opposed to the state.
1025 Section 32(2) NEMA is cited in Annex 2. See also Landev. v. Black Eagle Project, supra note 812, para. 25.
for free and to reimburse any costs that the litigants incurred to investigate the matter and prepare the litigation.\textsuperscript{1026}

The National Water Act (NWA)\textsuperscript{1027} is environmental legislation implementing Section 24 of the Constitution albeit specifically concerned with the protection of South Africa’s water resources.\textsuperscript{1028} The Act \textit{inter alia} establishes the state as the public trustee of the nation’s water resources, regulates entitlements to use water (including by stipulating which forms of water usage require an authorisation and under what conditions such authorisation is granted), and organises the management of the water resources. The purpose of the Act is “to ensure that the nation’s water resources are protected, used, developed, conserved, managed and controlled” in ways that take a number of factors into account, such as intra- and inter-generational equality, equitable access to water, redressing the results of past discrimination, efficient, sustainable and beneficial use of water and facilitating social and economic development.\textsuperscript{1029}

The Mine Health and Safety Act (MHSA)\textsuperscript{1030} deals with labour conditions at mines. The Act’s objects include requiring employers and employees to identify hazards and to eliminate, control and minimise such risks, providing for participation by employees in matters of health and safety, for effective monitoring of the conditions at mines and for investigations and inquiries to improve those conditions, and promoting a culture of health and safety as well as training in health and safety.\textsuperscript{1031} In that regard, the Act also establishes committees at the mines and a general inspectorate to guard the health and safety conditions in the mining industry.

The Occupational Diseases in Mines and Works Act (ODIMWA)\textsuperscript{1032} governs the compensation of ‘compensatable diseases’\textsuperscript{1033} contracted by mineworkers due to their work at the mines and establishes the Medical Bureau for Occupational Diseases, which manages the system. Where a mineworker is suspected to have contracted a compensatable disease, such claim is examined by the Medical Certification Committee based on the reports of the medical practitioner who examined the mineworker. If the disease is compensatable, compensation is paid from the Mines and Works Compensation Fund, which is funded by levies charged on the controlled mines. Except for a person

\textsuperscript{1026} Section 32(3) NEMA (cited in Annex 2).
\textsuperscript{1027} NWA, \textit{supra} note.
\textsuperscript{1028} See e.g. \textit{Harmony Gold Mining Company Ltd v. Regional Director: Free State Department of Water Affairs and Others} (971/12) [2013] ZASCA 206 (4 December 2013), paras 19 and 25.
\textsuperscript{1029} Section 2 NWA (cited, in part, in Annex 2). For a (historical) discussion of the applicable legislation, see Feris and Gibson, \textit{supra} note 939.
\textsuperscript{1030} Mine Health and Safety Act 29 of 1996, Government Gazette No. 17242 [MHSA].
\textsuperscript{1031} Section 1 MHSA (cited, in part, in Annex 2).
\textsuperscript{1032} Occupational Diseases in Mines and Works Act 208 of 1993, Government Gazette No. 15449 [ODIMWA].
\textsuperscript{1033} This term is defined in Section 1 of ODIMWA and includes, \textit{inter alia}, pneumoconiosis, tuberculosis, permanent obstruction of the airways and progressive systemic sclerosis.
suffering from tuberculosis who is entitled to 75% of his monthly wage, mineworkers with a compensatable disease only receive a lump sum which amounts to approximately one plus one third of their annual salary (in case of a first degree disease) or three times their annual salary (in case of a second degree disease). If a mineworker dies, no funeral expenses are paid, nor do their dependants receive any compensation in the form of a lump sum or pension.\textsuperscript{1034} The Constitutional Court\textsuperscript{1035} has acknowledged that compensation awards under ODIMWA are rather low – “pittance” according to one respondent\textsuperscript{1036} – compared to the awards paid out under the Compensation for Occupational Diseases and Injuries Act (COIDA)\textsuperscript{1037} which applies to employers who do not work in the mining industry or who contract a disease that is not compensatable under ODIMWA.

The Promotion of Access to Information Act (PAIA)\textsuperscript{1038} implements the right to have access to information under Section 32 of the Constitution. The Act consists of two main parts, which deal with access to records held by public bodies and by private bodies, and regulates, for instance, how access should be requested and under what conditions a refusal is justified. Aside from giving effect to the right to information by enabling access as swiftly, inexpensively and effortlessly as possible, the objects of the Act are to promote a human rights culture and social justice, to bolster transparency, accountability and effective governance of both public and private bodies and to educate and empower people so that they understand their rights and can effectively scrutinise, as well as participate in, decision-making by public bodies affecting their rights.\textsuperscript{1039}

Lastly, the contents of the Promotion of Administrative Justice Act (PAJA),\textsuperscript{1040} which is concerned with the right to just administrative action under Section 33 of the Constitution,\textsuperscript{1041} were discussed earlier in the Section dealing with administrative proceedings (\textit{supra} Section 1.4.2.1).

On a general note, it is important to highlight the exceptional position of the mining industry in South Africa’s legal landscape. Not only in the context of labour is the mining industry governed by a different law than the one applying to all other industries (ODIMWA \textit{versus} COIDA), but a similar phenomenon is visible in environmental law. Prior to 2014, the special status of mining meant that the MPRDA regulated a greater part of the environmental aspects to mining, which was exempted from the NEMA – although for water usage mining was subjected to the NWA. Then, in 2014, the government introduced the ‘one environmental system’, which has brought mining under the NEMA.

\textsuperscript{1034} Mankayi \textit{v.} AngloGold Ashanti, \textit{supra} note 623, para. 87.
\textsuperscript{1035} Ibid. para. 88.
\textsuperscript{1036} R6.
\textsuperscript{1037} Compensation for Occupational Injuries and Diseases Act 130 of 1993, Government Gazette No. 15158 [COIDA].
\textsuperscript{1038} Promotion of Access to Information Act 2 of 2002, Government Gazette No. 20852 [PAIA].
\textsuperscript{1039} Section 9 PAIA (cited, in part, in Annex 2).
\textsuperscript{1040} PAJA, \textit{supra} note.
\textsuperscript{1041} Landev. \textit{v.} Black Eagle Project, \textit{supra} note 812, para. 24.
Nevertheless, the body competent for applying and enforcing the NEMA in relation to the mining industry is the Department of Mineral Resources, and not the Department of Environmental Affairs.\textsuperscript{1042} Only when an original administrative action adopted by the Department of Mineral Resources under the NEMA is challenged, does the matter return to the Department of Environmental Affairs, which has to decide on internal appeals. The ‘one environmental system’ has been heavily criticised for leaving the competence to adopt environment-related decisions with the Department of Mineral Resources, which amounts to allowing the wolf to guard the sheep.\textsuperscript{1043} Although the Constitutional Court, in a judgment dealing with the compensation of mineworkers for occupational diseases, has found that the distinct treatment of the mining industry is in principle justifiable in light of the country’s “singular history of mining, with the massive contribution of this sector to the country’s wealth”,\textsuperscript{1044} some respondents openly questioned this state of affairs,\textsuperscript{1045} as also the following quote demonstrates.

A regard that insulates [the extractive industry] from the sort of principles we would attach to any other industry and makes it something (…) having a very separate and special set of rules and so on, purely because it is the extractive industry, I think is quite problematic.\textsuperscript{1046}

2.2.3. Social and labour plans and the question of horizontal scope

One particular aspect of the legal framework that deserves some digression concerns the requirement of mineral rights holders to submit a social and labour plan when they apply for a mining right. The commitments that mining companies make in terms of such plans should be linked with the question regarding the scope of their human rights obligations.\textsuperscript{1047} As the discussion below will demonstrate, the outsourcing of traditional government functions entails many risks, which has brought lawyers and activists to doubt whether mining companies should be involved in the protection and fulfilment (promotion, facilitation and provision) of human rights. Before explaining the applicable law on social and labour plans, some history is sketched, which partially explains the concerns of civil society.

2.2.3.1. A history of mining villages

Since mining began in South Africa, the country has witnessed the emergence of so-called ‘mining villages’, which are villages run by the mining company that operates the nearby mine and inhabited, at least initially, by mineworkers and their families. In those villages mining companies effectively

\textsuperscript{1042} Section 38A MPRDA (cited in Annex 2).
\textsuperscript{1043} R11, R15, R26, R32.
\textsuperscript{1044} Mankayi v. AngloGold Ashanti, supra note 623, para. 109. See also ibid. paras 110-111.
\textsuperscript{1045} R11, R15, R26, R32.
\textsuperscript{1046} R15.
\textsuperscript{1047} See supra Section 1.2.1.2, where it was written that another example of a situation in which additional (human rights) duties have been imposed on companies by the law would be discussed in the case study.
assume responsibility for public service delivery: they build and maintain infrastructure for the supply of electricity, water and sanitation; they construct roads, houses, clinics and schools; they ensure waste collection; and they provide security through the recruitment of private security agents. A mining village may function rather well for many years – although this is not certain – but given that mineral extraction is by its very nature a temporary activity, at some point in time, the mine will close down. At that time, the people living in the mining village risk to be abandoned to their fate. Not only do they lose their job, the delivery of public services is suddenly interrupted. A good illustration thereof is the case of the Blyvooruitzicht mine, which for many South Africans is a seminal case that demonstrates the inherent danger in allowing a mining company to operate as a quasi-state.

Box 1. Blyvooruitzicht: from mining village to anarchy

The Blyvooruitzicht mine was incorporated in 1937 and started operating in 1942. Its name – which translates literally as ‘happy prospect’ – predicted a prosperous future and, for many years, the mine met, and even exceeded, those expectations. A thriving community emerged on its premises. The mine “built and maintained community meeting halls, sports fields, a golf course and other recreational facilities.” Schools, a clinic and churches were established, private security agents guarded the area and water and electricity were supplied and rubbish collected in return for a nominal fee that was deducted from the paycheck of the mineworkers.

In 2009, the tide turned. The mining company owning and operating the Blyvooruitzicht mine, DRD Gold, was struck by the financial crisis and started looking for a buyer of its assets. What followed was a complex process fraught with irregularities and untruthful deals. In any case, in July 2013 no one assumed any responsibility anymore over the mine nor for the Blyvooruitzicht community. The mine was placed in provisional liquidation and approximately 1,500 mineworkers were retrenched. The liquidators sought buyers for the mine’s assets so as to pay its creditors, allegedly without giving much attention to the interests of the community. In an attempt to protect their interests, residents have applied to the High Court.

1049 Ibid. 11.
1050 For an account of the events, see ibid. 10-15; T.L. Humby, “Facilitating dereliction? How the South African legal regulatory framework enables mining companies to circumvent closure duties,” Academia (2014), April 7, 2017. Meanwhile, the Office of the Prosecutor has decided to prosecute two mining companies that used to own and operate the mine, DRD Gold and Village Main Reef and some of their former directors. 

1051 The liquidators sought buyers for the mine’s assets so as to pay its creditors, allegedly without giving much attention to the interests of the community. In an attempt to protect their interests, residents have applied to the High Court.

1052 Ibid. para. 5.2.
in February 2017 for an order discharging the provisional liquidation of the mine and to place the company into business rescue operations.\(^{1053}\)

In any case, since 2013 the Blyvooruitzicht community has been abandoned to its fate, by the mine but also by government. Lawyers for Human Rights has reported that “[t]he municipality said it had no duty to intervene (...) because, inter alia, the village is located on ‘private property’, which is not incorporated as a formal township within its jurisdiction.”\(^{1054}\) The resulting situation in the Blyvooruitzicht community is aptly described as follows by Lawyers for Human Rights.

“(…) The Mine’s free hospital closed in late 2013. Organized groups of informal miners (...) invaded the unsecured Mine’s premises to access the remaining gold, and clashes with the residents erupted. Local news reports described the area as having descended into chaos and a ‘war zone’. (...) Rubbish collection halted and garbage has piled up (...) Local infrastructure, including the sewage system, is breaking down for lack of maintenance. The Village’s access to basic services such as water and electricity has been repeatedly threatened. The question of whether residents will be able to remain in their homes, which are the technical property of the [Mine], hangs in the balance.”\(^{1055}\)

Community members have literally begged government to step in, claiming that “government cannot be permitted to abandon us at our most desperate hour.”\(^{1056}\) When the supply of water was suddenly terminated in May 2015, AfriForum and a local church applied to the High Court for an urgent interdict to have the supply restored.\(^{1057}\) By the time of that application, the community had been disconnected for twelve consecutive days. The application was dismissed, but through mediation by other parties, including Lawyers for Human Rights, the supply of water was nevertheless restored. A few months’ later, in October 2015, however, it became apparent that the Blyvooruitzicht Community’s water supply would be permanently under the threat of being terminated, at least as long as the Blyvooruitzicht mine is in provisional liquidation. This time the residents themselves, represented by Lawyers for Human Rights, applied to the High Court for an interdict.\(^{1058}\)

\(^{1053}\) Applicants’ Notice of Motion in re: *Thamae and Others v. Roering and Others* (2013/46072) (13 February 2017). This application was pending at the time of writing.

\(^{1054}\) Lawyers for Human Rights, Blyvooruitzicht report, supra note 1048, 26.

\(^{1055}\) Ibid. 14-15.

\(^{1056}\) First Applicant’s Founding Affidavit, in re: *Molefe v. Merafong Local Municipality* (85928/15) (22 October 2015), para 73.


\(^{1058}\) Applicants’ Notice of Motion, in re: *Molefe v. Merafong Local Municipality* (85928/15) (22 October 2015).
On 16 October 2016, the Court issued an order without comment. The local municipality was interdicted from disconnecting the water supply and directed to supply water at a minimum flow of 60%, at all times from 6am till 10am and from 5pm till 9pm and twenty-four hours in the schools, clinics and other public facilities. The residents were asked, in return, to pay a small fee per household per month as a contribution to the costs of the water supply. In addition, the local municipality was ordered to consult with the residents in developing its water service plan, which had to be produced within 120 days from the date of the order.

Although in present-day South Africa new mines may no longer build and run entire villages, there is a legacy and, as the discussion of social and labour plans next will show, the law now explicitly provides for a role of mining companies in what are traditionally believed to be government functions.

2.2.3.2. The legal framework

Since the entry into force of the MPRDA, an application for a mining right must be accompanied by a social and labour plan, in which the mineral rights holders undertakes certain commitments. Whilst this situation may not amount to mining companies running entire villages, in many instances the commitments made in those plans mean in practice that mining companies assume all kinds of responsibilities that are traditionally located with government. This ‘legalisation’ of an albeit mitigated form of the practice of mining villages was described as follows by a respondent.

One of the most interesting components of that regulatory system is that it is basically a very effective and pretty covert form of outsourcing and privatisation. It is astounding to me that government has managed to outsource some core government functions.

The obligation of mineral rights holders to submit a social and labour plan is elaborated in the MPRDA Regulations, which prescribe its mandatory contents. In particular, a social and labour plan consists of six parts, beginning with a preamble that contains general information on the mine in question and ending with an undertaking that the holder of the mining right will adhere to its plan and inform the employees about its contents. In-between the preamble and the undertaking there are four main parts. First, the plan must cater for a human resources development programme which includes a skills development plan (concerning \textit{inter alia} the number and education levels of the employees and the number of vacancies), a career progression plan, a mentorship plan, an internship and bursary plan.  

\footnotesize{1059 \textit{Molefe and Others v. Merafong Local Municipality and Others} (85928/2015) unpublished (HC) (18 October 2016).
1060 Notwithstanding that this deadline had elapsed, at the time of writing the “Water Service Plan” was “still being completed”. AS.
1061 Section 23(1)(e) MPRDA (cited in Annex 2).
1062 R4.
1063 Section 46 MPRDA Regulations (cited, in part, in Annex 2).}
and the employment equity statistics. Second, the plan has to incorporate a local development programme, which describes the socio-economic context of the operation area, its key economic activities and the expected impact of the mine thereupon. This part of the plan must also elaborate on the infrastructure and poverty eradication projects that the mine will support and on the measures that it will take to address the housing and living conditions and the nutrition of the mineworkers. Thirdly, the plan has to stipulate the applicable procedures in case of downscaling and retrenchment, and, fourthly, it must also contain a financial provision that allocates the necessary budget for its implementation.

According to the MPRDA Regulations, social and labour plans should bolster employment, boost the social and economic welfare of all South Africans and ensure that the holder of the mining right contributes towards the socio-economic development of the area of operation. The extent to which the plan has been implemented must be reported, annually, to the Regional Manager, who is responsible for monitoring compliance by the holder of the mining right with its social and labour plan.

Through these social and labour plans (in particular the part on a local development programme), mining companies commit themselves to offering certain services that are traditionally performed by government. As the Blyvooruitzicht case demonstrates (albeit on a bigger scale), this risks to create problems once the mine ceases its operations. Problems may even arise earlier due to the lack of accountability. A first major problem is that the MPRDA Regulations only stipulate that the mine should inform its employees about the contents of the plan, but not the communities living in its immediate surroundings, who should also benefit from the local development programme and possibly from the skills development programme. Community members often only get hold of the plan after a protracted process. In particular, if the mine does not, in an informal way, agrees to hand over the social and labour, they have to submit an official request under the Promotion of Access to Information Act, and if that request is refused, which happens regularly, they are forced to go to court to obtain access. Nonetheless, information is essential for accountability to exist, because without knowing the commitments of mining companies, communities cannot begin to monitor compliance. Given that the information obligation is already so restricted, mining companies are

1064 Section 41 MPRDA Regulations (cited in Annex 2).
1065 Section 45 MPRDA Regulations (cited in Annex 2). One Regional Manager is appointed by the Director-General of the Department of Mineral Resources for each Province.
1066 Section 46(f) MPRDA Regulations (cited in Annex 2).
1067 Research by the Centre for Applied Legal Studies has demonstrated that getting access to social and labour plans is very cumbersome. Centre for Applied Legal Studies, The Social and Labour Plan Series: Trends Analysis Report (March 2016), 19-20.
1068 Civil society actors are pushing to have not only the social and labour plans made publically available, but also the implementation plans and the monitoring reports by government. R14.
even less likely to consult (in good faith) on the contents of the plans with the people who should benefit from them.\textsuperscript{1069}

A second problem is that where mining companies have failed to comply with their commitments under their social and labour plan, it has proved to be very hard to hold them accountable and to enforce compliance.\textsuperscript{1070} An important reason therefor is that commitments under such plans commonly lack finality and specificity, and the vaguer an obligation is formulated, the greater the opportunity is for companies to avoid their commitments.\textsuperscript{1071} The happenings at Marikana are a tragic example thereof.

### Box 2. The Marikana massacre: unfulfilled promises\textsuperscript{1072}

On 10 August 2012 a wildcat strike (not supported by the National Union of Mineworkers) broke out at Lonmin’s platinum mine at Nkaneng near Rustenburg, the Marikana mine.\textsuperscript{1073} Instead of showing up for work, a group of mineworkers marched to Lonmin’s offices. When the protestors were dispersed, the atmosphere became grim. Security officers of Lonmin shot rubber bounds at strikers who intimidated other employees. On 11 August two strikers were shot death by union members, which increased tensions in the area with nine more people being killed, unaccounted for, between 12 and 14 August, some of whom were allegedly police officers. When the South African Police Service wanted to break the strike on 16 August and opened fire on a group of strikers, thirty-four miners got killed and over seventy injured. The incident represents the single most lethal use of force since the end of Apartheid. The strike continued for several more weeks.

In September 2012, the President established a Commission of Inquiry to investigate the massacre and the events leading up to the incidents.\textsuperscript{1074} The terms of reference also mandated the Commission to examine whether Lonmin had generated an environment that was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct. In this context, the Commission investigated Lonmin’s failure to adhere to its housing commitments in terms of its social and labour plan. Although Lonmin had undertaken to build

\textsuperscript{1069} Cf. CALS, Trends Analysis Report, \textit{supra} note 1067, 68-70 (discussing the degree to which the plans mention consultation processes with local stakeholders and their influence on the contents of the such plans).

\textsuperscript{1070} R32; CALS, Trends Analysis Report, \textit{supra} note 1067, 80-88 (discussing \textit{inter alia} the lack of clear benchmarks, of internal accountability and of clear division of roles and responsibilities).

\textsuperscript{1071} CALS, Trends Analysis Report, \textit{supra} note 1067, 6-7.

\textsuperscript{1072} See the Final Report of the Marikana Commission of Inquiry, \textit{supra} note 955.

\textsuperscript{1073} Trade unions in South Africa are experiencing some turmoil recently, especially in the mining industry, where there are two rivalry unions, the National Union of Mineworkers (°1982) and the Association of Mineworkers and Construction Union (°1998).

\textsuperscript{1074} Proclamation 50 of the President, \textit{supra} note 895.
5,500 houses for its employees in response to the critical housing shortage in the area and the dire living conditions at Nkaneng, only three of those houses had been built by August 2012.

During the hearings of the Commission, a director gave the following declaration about Lonmin’s commitments in terms of its social and labour plan (SLP).

“(…) we have to start off with what the actual obligation in the SLP says and (…) the SLP commitment is, Lonmin will facilitate the building of houses and it will do so by talking to the relevant institutions and in fact (…) in the SLP it mentions that it’s in discussions with Rand Merchant Bank. So one’s understanding is, houses were going to be built with the assistance of relevant financial institutions, not necessarily being put on Lonmin’s balance sheet in terms of assets and liabilities. So whether Lonmin had made the commitment to spend its own money building those 5,500 houses I think is debatable.”

In its final report, delivered on 31 March 2015, the Commission of Inquiry rejected this account and concluded that Lonmin’s failure to comply with its housing obligations had indeed created an explosive situation. In its recommendations the Commission called upon the Department of Mineral Resources to take the necessary steps to enforce the housing obligations of Lonmin, and requested an investigation into the apparent failure by that Department to monitor compliance by Lonmin with its social and labour plan.

After the Commission of Inquiry’s final report was published, a group of women living nearby the Marikana mine submitted a complaint to the Compliance Advisor at the World Bank Group given that the International Finance Corporation has invested in Lonmin’s mine. Their complaint serves two goals. First, they hope to urge Lonmin to consult with the people living in Marikana as to how it will address its negative impacts on the community and implement its commitments under its social and labour plan. Second, they seek a finding that the International Finance Corporation has failed to monitor its investment, to ensure adherence to its sustainability policies and standards and adequately to protect the communities affected by the Marikana mine.

2.2.3.3. An assessment by civil society

Overall, lawyers, activists and experts consider the involvement of mining companies in service delivery through social and labour plans (and the legalisation of social investment by business enterprises in general) a negative evolution. They feel that by giving mining companies more

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1076 Office of the Ombudsman, South Africa / Lonmin – 02 / Marikana, “Complaint by affected community members in relation to the social and environmental impacts of Lonmin Plc’s operation in Marikana” (16 June 2015).
responsibilities, they are allocated even more power, whilst in fact power should be taken away from them.\footnote{R14.} Their basic tenet is that mining companies should have as little to do with government functions as possible.\footnote{R14, R32.} The reasons are manifold but essentially bear upon the risk of trade-offs, the lack of accountability and the legitimacy gap.

Firstly, a strong perception exists that mining companies tend to try to hide their adverse human rights impacts behind philanthropic projects and nice discourse.\footnote{R1, R16, R20, R32.} Or, as one respondent said, “companies (...) start providing services as a means of compensation.”\footnote{R32.} Related to this fear for trade-offs is the concern that government may be less inclined to enforce certain obligations against mining companies that perform functions that should normally be carried out, and paid for, by government.\footnote{R5, R14, R15, R34.}

That discourse is not always followed by action is a second concern.\footnote{R5. Cf. R15.} As past experiences – such as the events leading to the Marikana massacre – show, there is always a risk that when it comes down to it, mining companies deny being responsible for the provision of services that traditionally fall upon government and it proves hard to call them to account.\footnote{R25, R32. Cf. R5, R14, R15, R34.} Adding thereto is a feeling that the more actors are responsible, the less accountability there is; obligations should be clearly allocated to create real accountability.\footnote{R14 (arguing that the state should be made more accountable towards its citizens and more powerful towards mining companies).}

Thirdly, the fact that government outsources a great part of its core functions through social and labour plans raises serious concerns about democratic legitimacy. Unlike government, mining companies are not democratically elected, and their presence is inherently temporary. Accordingly, they have little incentives to draft comprehensive programmes in favour of the collective good.\footnote{R14.} Moreover, when government is no longer responsible for basic service delivery, it cannot be held accountable for its performance through elections either. The finding that government itself does not develop the capacity to supply those services is likewise problematic, because when the mine ceases to operate, government is suddenly expected to take over those services but is incapable to do so, as the Blyvooruitzicht matter demonstrates.\footnote{R5. Cf. R15.}

Therefore, instead of having them taking on government tasks, one respondent suggested that mining companies should simply pay more taxes so as to capacitate the government and...
that those taxes could be earmarked in order to ensure they benefit mineworkers and neighbouring communities.\textsuperscript{1087}

The accountability and legitimacy gaps are magnified by the previously mentioned fact that one group of people, namely the neighbouring communities, who should benefit from social and labour plans are in principle not informed, let alone consulted, about their content, meaning that they have no voice in the design of the service delivery system that concerns their basic needs.\textsuperscript{1088} One respondent also said that people have gotten confused about the different roles and responsibilities of government and of mining companies.\textsuperscript{1089} As a result, they often have unrealistic expectations as to the benefits that a mine will bring to them, expectations that are nurtured by a general feeling of unfairness that the country’s mineral wealth has benefited a small, inner circle but not the majority of the population.

Civil society actors are thus not keen on mining companies taking over traditional government services, because mining is an inherently temporary activity, because mining companies have little interest in planning on the long term for the greater good, and because social investment projects only pay lip service to mineworkers and communities for the adverse impacts of mining, which are many times higher. The following quote fittingly summarises these concerns.

\begin{quote}
[Mining] creates a totally artificial but very destructive presence for the period of its operation and then it leaves a level of anger and destitution and conflict.\textsuperscript{1090}
\end{quote}

2.3. The focus matters: three cases in the spotlight

Before delving into the issue of using strategic litigation to enforce accountability for human rights violations by business enterprises, this Section introduces the three focus matters, which will be used to illustrate findings in the sections that follow. They are directly relevant cases that meet the criteria that were explained earlier (\textit{supra} Part I, Section 5.3.2): the victims are mineworkers or neighbouring communities, who sue government, mining company or both because they suffer the consequences from environmental degradation caused by mining. For each case, the factual background is described, the relevant legal rules are explained,\textsuperscript{1091} the progress of the legal proceedings is discussed and any parallel strategies or follow-up litigation is briefly commented on. The discussion of each focus matter concludes with a case file that summarises the key elements. The cut-off date for the focus matters is

\begin{footnotesize}
\begin{itemize}
  \item[1087] R14. The respondent did not clarify whether this should also apply for royalties and for all taxes, regardless of the level of government (local, provincial or national). In 2015-2016 (over a period of one year), the mining industry paid 3.7 billion South African Rand in royalties and 12.5 billion in taxes to the South African government. Chamber of Mines of South Africa, Facts and Figures 2016, 6.
  \item[1088] R14, R15, R32. Cf. R29 (declaring that they are “about politics and political interests” and have “nothing to do with communities”), R7 (describing them as “the most patronizing, patriarchal [and] arrogant attitude”).
  \item[1089] R32.
  \item[1090] R15.
  \item[1091] The relevant legislative provisions are cited in Annex 2.
\end{itemize}
\end{footnotesize}
31 March 2017. All significant developments that took place on or before that date are included in the discussion, those thereafter not.

2.3.1. Tudor Shaft: informal settlement exposed to radiation

2.3.1.1. Factual background

Tudor Shaft is an old mining shaft located in the West Rand, a minerals-wealthy region northwest of Johannesburg. The mine is no longer operative, but its remains were never removed and the area never rehabilitated. Moreover, in the course of 1996-1997, an informal settlement emerged at the site, right beside and even on top of the unrehabilitated, radioactive tailings dam. The dam contains uranium waste produced when gold was extracted from the former mine. Aside from extremely high levels of uranium, a soil sample test has showed high traces of aluminium, arsenic, cadmium, cobalt, copper, mercury, manganese, nickel and zinc. Residents at the informal settlement get into contact with those contaminants by inhaling and even ingesting the dust of the tailings that is blown about by the wind, by consuming crops grown in contaminated soil, by playing barefoot on the soil, by using the soil for the production of traditional medicines, and by bathing in contaminated water. Moreover, several other uraniferous tailings dams which are still managed by mining companies, are located in the immediate surroundings of Tudor Shaft. The actual impact on animal and human health is under-researched, however.

By 2012 the Tudor Shaft informal settlement comprised around 450 dwellings (constructed out of corrugated iron, wood and other materials) that were inhabited by approximately 1,800 people. The residents were poor people, living on very low incomes. The living conditions at the settlement were dire. People had no electricity, and there were only three communal water standpipes and seven chemical toilets, which were serviced twice a week. Most residents were keen on being relocated to a safer environment. Since the 1990s civil society actors, the Federation for a Sustainable Environment in particular, has called on government to resettle the informal ‘Tudor Shaft community’ and to rehabilitate the site. A sustained advocacy campaign was embarked on, which included taking people

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1092 The informal settlement has apparently been founded by people who were relocated with the promise to be assigned, within short term, government-subsidised housing in terms of the reconstruction and development programme. Humby (2013), supra note 175, 94.
1093 A tailings dam is a pile composed of waste from the mining activities.
1094 See e.g. Second and further Applicants’ Founding Affidavit of Intervention Application, in re: Federation for Sustainable Environment v. National Nuclear Regulator (24611/12) (27 July 2012), para. 16.1; Humby (2013), supra note 175, 91.
to the site, organizing community workshops, lobbying government, presenting at conferences and seminars, and making submissions to the media.

A reaction from the responsible government actors was bound to ensue. Indeed, in 2009, a plan was drafted jointly by the Department of Water Affairs and the National Nuclear Regulator, but little concrete action followed. Later also the local municipality, Mogale City, came on board, as the owner of the land on which the Tudor Shaft is located. Early 2011, the municipality (allegedly forcibly) relocated some seventeen families living closest to (or even on top of) the tailings dam, which met with resistance, however. Together with the National Nuclear Regulator, the municipality then approached Mintails, the mining company that owns Mogale Gold and that holds a mining right to reclaim the tailings dam (which means that it is entitled to extract any remaining minerals) and to conduct gold recovery activities in the area. They did so, apparently because Mintails has the expertise, manpower, infrastructure and systems that are necessary to rehabilitate the area. The mining company supposedly agreed to cooperate with them in order “to resolve the challenges in relation to the Tudor Shaft community” as part of its social and labour plan – this document is not publicly available, as was explained earlier (supra Section 2.2.3). In particular, while the municipality would relocate about sixty living structures of families living in the immediate vicinity of the dam, Mintails would work on the dam.

When in June 2012 Powerstar (the transport firm contracted by Mintails) started to remove one particular hill of mining waste, the Federation for a Sustainable Environment was concerned that no precautionary measures had been adopted to prevent that radioactive dust would be released during this attempt at rehabilitation, and the residents claimed that they had not been informed, let alone consulted, in advance. Within 24 hours the Federation for a Sustainable Environment was in court.

2.3.1.2. Legal framework

The Tudor Shaft matter is an extremely complex case that implicates many different actors, both government and private. As far as government is concerned, the matter revolves around numerous issues, such as radiation, non-rehabilitated, polluting tailings dams, informal settlements, and the lack of basic service delivery. These issues trigger the competence of different government spheres and departments, each of which sees an opportunity in that complexity to point the finger to the other(s).
First, given that the land on which the Tudor Shaft is located is owned by the local municipality, Mogale City, it has a duty under Section 28(1)-(2) of the National Environmental Management Act (NEMA) to take reasonable measures in order to prevent or to minimise and rectify significant pollution or degradation of the environment. Section 28(4) of the NEMA enumerates the possible measures that the municipality could adopt for that purpose, such as remediation or an investigation into and an assessment of the environmental impacts. The municipality’s responsibility is also triggered by Section 152(d) of the Constitution, which stipulates that “the objects of local government are (...) to promote a safe and healthy environment,” an objective that falls under the legislative and executive mandate of the local council.

Second, where mining causes ecological degradation, pollution or environmental damage, contravenes the conditions of any authorisation granted, or is harmful to health, safety or well-being of people and requires urgent remedial measures, the Minister of Mineral Resources is mandated by Section 45(1) of the Mineral and Petroleum Resources Development Act (MPRDA) to direct the holder of the relevant right or permit to investigate, evaluate, assess and report on the impact of such incident, to take remedial measures and to complete such measures before a specified date. If the holder fails to comply with such directive, the Minister may take the necessary measures him- or herself and subsequently recover the costs from the rights holder. If, however, the rights holder has ceased to exist, has been liquidated or cannot be traced, the Minister may direct the regional manager to take those measures, which in that case have to be funded from the financial provision.

Third, the National Nuclear Regulator is the statutory body established by the National Nuclear Regulator Act, which has the mandate to protect persons, property and the environment against nuclear damage. All organs of state, however, that bear some kind of responsibility for monitoring and controlling radioactive material, must co-operate to ensure effectiveness and to minimise duplication of such functions and procedures. For that purpose, the National Nuclear Regulator should conclude a cooperative agreement with those organs of state. The responsibility for coordination thus falls upon the National Nuclear Regulator, which should also ensure that no person

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1101 The Municipality does not accept ownership of the Tudor dump, however.
1102 This provision is cited, in part, in Annex 2.
1103 This constitutional provision is also implemented in Section 11(3)(l) of the Local Government Municipal Systems Act 32 of 2000 (Government Gazette No. 21776).
1104 Section 45(2) MPRDA (cited in Annex 2).
1105 Ibid. Section 46(1)-(2) MPRDA (cited in Annex 2). Note that this financial provision is different from the one that has to be provided by mineral rights holders in terms of their Social and Labour Plan. In this case, the financial provision is the insurance, bank guarantee, trust fund or cash that applicants for mineral rights need to provide which ensures that sufficient funds are available inter alia for rehabilitation.
1107 Section 6(1) NNRA (cited in Annex 2).
1108 Section 6(2) NNRA (cited in Annex 2).
constructs, operates, decontaminates or decommissions a nuclear installation without a license. In casu, no such license was obtained for the removal operations in June 2012.

Fourthly, Section 28(4) of the NEMA authorises the Director-General of the Department of Environmental Affairs to enforce compliance with subsection (1) and, in particular, to direct the owner of the land and/or the polluter – in casu the mineral rights holder or the local municipality – to take the necessary measures to prevent or to minimise and rectify the pollution or degradation of the environment. An investigation into, and evaluation and assessment of, the environmental impact of the activities is one of the measures that could be ordered accordingly. In September 2011, the Department of Environmental Affairs had already issued such a directive against the municipality, ordering it to take reasonable measures to rectify the environmental degradation, in particular to resettle the residents of the informal settlement and to submit a report containing a detailed radiological assessment to determine the extent of the contamination in the area. The municipality disputed its responsibility, however.

The fact that the different government actors involved seek to abandon their respective responsibilities by passing the buck on to the other(s), does not accord with the principle of cooperative government codified in Section 41(1)(h) of the Constitution. Under this principle organs of state are expected to cooperate with one another in mutual trust and good faith. Instead of blaming each other, the responding government actors should assist, support, inform and consult with one another about the problem, coordinate their actions and, in any case, avoid legal proceedings against one another.

Finally, not only government’s responsibility is at stake, but also that of the holder of any relevant right or permit. According to Section 43(1) of the MRPDA the holder of the mining right remains responsible for any environmental liability, pollution and ecological degradation until a closure certificate has been issued, which in casu never happened. While it is unclear who conducted the

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1109 Sections 5(b) and 20(1) NNRA (cited in Annex 2).
1110 This fact has been acknowledged. First Respondent’s Replying Affidavit, in re: Federation for a Sustainable Environment v. National Nuclear Regulator (24611/12) (31 October 2012), para. 3.20.
1112 Section 41(1)(h) of the Constitution stipulates that “all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by—(i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another.”
mining operations that generated the tailings dam, the mining company in the picture is Mintails, which currently holds a mining right over the area. Although the mining company has allegedly committed itself to conducting the removal operations in terms of its social and labour plan, it is not clear whether Mintails accepts to bear any legal obligations in that regard.

2.3.1.3. The litigation

As was said, when on 28 June 2012 Powerstar began to remove the dump in an attempt to rehabilitate part of the Tudor Shaft site, the Federation for a Sustainable Environment, represented by the Legal Resources Centre, was in court the next day. They applied for an urgent interdict declaring the mine residue removal operations unlawful and hazardous to public health and directing the responding parties to cease the operations immediately, pending the supply of a risk assessment report which shows that public health would not be adversely affected by the removal operations.

The Federation for a Sustainable Environment complained that the removal operations of the uraniumiferous tailings were not carried out adequately; they caused dust liberation and heavy dust fallout, water was only intermittently sprayed to prevent such dust and the spraying water mobilised and solubilised the heavy metals, which could then be absorbed in the soil, while children were also playing in and drinking the water. The urgent application was directed against the National Nuclear Regulator, the local municipality, the Minister of Energy, and the Minister of Environmental Affairs, with the company conducting the removal operations being cited as an interested party, without direct relief being sought from it, to ensure that it would not continue the operations out of ignorance. No mining company was cited – although Mintails is involved in the out-of-court mediation process as will be discussed infra in Section 2.3.1.4.

1114 The Federation for a Sustainable Environment believes that the owner of the mine residue is DRD Gold, which had transferred its mining right to another company which subsequently sold it to Mintails, but the change of ownership flowing from the first transferal has allegedly not been registered. First Applicant’s Replying Affidavit, in re: Federation for a Sustainable Environment v. National Nuclear Regulator (24611/12) (date unknown), para. 27.3.
1115 Mintails denies having acquired the Tudor dump, however.
1116 First Respondent’s Replying Affidavit, in re: Federation for a Sustainable Environment v. National Nuclear Regulator (24611/12) (31 October 2012), para. 3.18 and 3.23. This is opposed by the Federation for a Sustainable Environment because Mintails will reprocess the tailings dam and thus gain therefrom. First Applicant’s Replying Affidavit, in re: Federation for a Sustainable Environment v. National Nuclear Regulator (24611/12) (date unknown), paras 32 and 36.
1119 The Minister was originally cited as ‘Minister of Energy’, but the co-applicants later joined the Minister of Mineral Resources. Second and further Applicants’ Supplementary Affidavit, in re: Federation for a Sustainable Environment v. National Nuclear Regulator (24611/12) (31 October 2013), paras 17-19.
At the hearing, that same day on 29 June, undertakings were given by Mogale City not to continue with removal operations and the court immediately drafted an interim order by agreement, suspending those operations pending the hearings that would take place on 10 July 2012.\(^{1120}\) The matter was eventually postponed, but the responding parties agreed not to restart the removal operations.\(^{1121}\)

After the urgent order of 29 June 2012 the residents of the Tudor Shaft informal settlement, represented by the Socio-Economic Rights Initiative, applied for leave to intervene in the matter, in particular because they were concerned about the health impacts of the unrehabilitated site and because they feared that their eviction would come up as the solution for the hazardous situation. Hence, through their intervention they mainly sought to ensure that proper consideration would be given to their interests and that they would be consulted with regard to any future step taken by either government or company.\(^{1122}\) The application to intervene was granted by the High Court in September 2012. Notwithstanding their intervention, however, the residents of the informal settlement have mainly been “conspicuous by their absence”.\(^{1123}\) Like many poor communities, they are largely unaware of their rights and the environment is far from their top concern.\(^{1124}\) Nevertheless, the fact that the residents are somewhat more conscious about the health risks posed by their living environment, which was established in a socio-legal study,\(^{1125}\) is the result of the sustained advocacy work by the Federation for a Sustainable Environment on site.

In the months following the urgent order and the intervention by the residents, court papers were exchanged amongst the different parties. In those papers, by and large, the applicants argued that all the different government actors bear a responsibility and should cooperate to resolve the problem, whereas the responding parties each denied having competence in the matter and pointed the finger to

\(^{1120}\) *Federation for a Sustainable Environment and Others v. National Nuclear Regulator and Others* (24611/12) unpublished (HC) (29 June 2012).

\(^{1121}\) Electronic mail dated 9 July 2012 from the attorneys of the first respondent to the attorney of the first applicant.


\(^{1123}\) Humby (2013), *supra* note 175, 101 (describing them as “passive receptors of scientific, media, civil society and government scrutiny and action”).

\(^{1124}\) Dugard, MacLeod and Alcaro, *supra* note 748.

\(^{1125}\) Ibid. 946.
the others, to the company that used to mine the site and to Mintails that reclaims the site. Eventually, the parties agreed to attempt to resolve their dispute out-of-court, as discussed next.

2.3.1.4. Follow-up, out-of-court processes

The urgent application and the exchange of court papers triggered the start of an out-of-court mediation process. In particular, the responding parties undertook to negotiate and consult with the Federation for a Sustainable Environment, the residents of the Tudor Shaft informal settlement and their respective legal representatives in relation to the rehabilitation of the site, the health impact assessment and the resettlement of the community.

With respect to resettlement, the municipality soon agreed to relocate the residents to an area designated for government-subsidised housing in terms of the reconstruction and development programme. Nevertheless, the relocation was postponed several times, allegedly because the municipality lacked budget. Dissatisfied with this state of affairs, protests broke out in the settlement in early 2016, in the course of which one person died. By the end of 2016, however, most residents were finally relocated, except for about one hundred persons who are not entitled to such housing, namely foreigners and persons whose monthly income exceeds a certain amount.

As regards the rehabilitation of the area, the mediation process is ongoing and also the South African Human Rights Commission participates in the meetings. Although they agreed that all parties would endeavour to reach consensus regarding the lawful removal of the uraniferous tailings dam so that no new court application would be necessary, agreement on a final solution has yet to be reached. In the course of 2015, the Federation for a Sustainable Environment also lodged a complaint with the Public Protector. Some issues in dispute include the terms of reference of an impact study, the expert that should be appointed and whether the final report and its recommendations would be adopted in a court order, making it enforceable, for instance, through contempt of court proceedings. At some point, however, the Department of Environmental Affairs commissioned an environmental and health risk assessment study, but notwithstanding its findings and recommendations, the radioactive and toxic tailings dam has yet to be removed and the area has still not been rehabilitated.

1127 This policy was introduced in 1994 by former president Mandela’s cabinet.
1129 R36.
1130 AS.
1131 R36.
confirmed, the mediation process moves slowly, as it has proved to be difficult to convene meetings and as Mintails has refused to disclose certain records.\textsuperscript{1132}

2.3.1.5. Case file

<table>
<thead>
<tr>
<th>Table 4. The Tudor Shaft matter: case file</th>
</tr>
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| **Litigating parties** | Federation for a Sustainable Environment  
| *Their legal representatives* | Legal Resources Centre |
| **Counterparties** | **Government** | National Nuclear Regulator, Mogale City, Minister of Environmental Affairs and Minister of Mineral Resources |
| | **Company** | Powerstar, the transport company contracted for the removal operations (joined as an interested party in the urgent application)  
| | Mintails, the mining company holding reclamation rights (not involved in the urgent application) |
| **Co-litigating parties** | Residents of the Tudor Shaft informal settlement  
| *Their legal representatives* | Socio-Economic Rights Institute |
| **Funding of the litigation** | Own funds of the public interest law firms |
| **Issue** | Pollution by radioactive contaminants |
| **Cause of action** | Statutory law, interpreted in light of the Constitution, in particular Sections 24 (environment) and 41 (co-operative government) |
| **Direct relief sought** | - Declaratory order finding the mine residue removal operations unlawful and hazardous to public health  
| | - Interdict to cease the operations immediately pending the supply by the respondents of the risk assessment report or other satisfactory measures showing that public health will not be adversely affected by such removal operations  
| | - Costs |
| **Broader objectives** | - A health and environmental impact study  
| | - Adequate rehabilitation of the area and removal of the dam  
| | - Relocation of the informal settlement |
| **Litigation stage** | Draft order by agreement  
| | ✓ No removal operations pending the hearing of the matter |
| **Out-of-court processes** | - Mediation process  
| | - Involvement of the South African Human Rights Commission  
| | - Complaint with the Public Protector |
| **Timeline** | 28 Jun. 2012  
| | Removal operations start |

\textsuperscript{1132} AA.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>29 Jun. 2012</td>
<td>Application by the Federation for a Sustainable Environment for an urgent interdict and urgent order by the Court</td>
</tr>
<tr>
<td>27 Jul. 2012</td>
<td>Application by the residents of the informal settlement to intervene as co-applicants</td>
</tr>
<tr>
<td>12 Sep. 2012</td>
<td>Order by the Court accepting the intervention</td>
</tr>
<tr>
<td>Oct.– Nov. 2012</td>
<td>Replying affidavits</td>
</tr>
<tr>
<td>2012-present</td>
<td>Mediation out-of-court</td>
</tr>
<tr>
<td>End of 2016</td>
<td>Relocation of the residents</td>
</tr>
</tbody>
</table>

### 2.3.2. Carolina: contaminated water for disadvantaged communities

#### 2.3.2.1. Factual background

Acid mine drainage (which is the outflow of polluted water that contains excessive concentrations of toxic metals\(^{1133}\)) is one of the greatest environmental challenges confronting South Africa. Due to the high number of abandoned and derelict mines in the country, there is a constant risk of acidic water spreading underground and flowing into streams and rivers. Acute emergencies are particularly common after heavy rainfalls during the rainy season. In addition to being an environmental disaster, the pollution of water resources by acid mine drainage has far-reaching consequences for public health.\(^{1134}\) It affects people who depend on natural resources for their water supply as well as people who are connected to the water supply services, because the infrastructure is frequently antiquated and incapable of treating the water adequately. Moreover, people are often not aware that the water is toxic or do not understand the long-term impacts, especially when they only use the water for bathing, growing crops and feeding cattle. Even if they know, however, alternatives do not exist or are scarce.

The town of Carolina and its nearby townships, Silobela and Caropark, are located in one of several regions where there is a constant threat of acid mine drainage. Although the residents are connected to the water network, the antiquated infrastructure does not protect against contamination from external sources.\(^{1135}\) When in January 2012 a heavy storm caused the run-off ponds of nearby coal mines to overflow, acid mine drainage flew straight into the dam that is the source of the resident’s water.\(^{1133}\)

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\(^{1133}\) When pyrite (a sulphide mineral regularly hosting gold) comes into contact with water and oxygen, this causes a chain of chemic reactions producing sulfuric acid, ferrous sulphates and ferric hydroxide. As a result, the pH level in the water drops and the resulting highly acidic substance can dissolve other heavy metals. When acid mine drainage joins other sources of surface water, for instance due to overflow from underground mines, those water sources become unfit for consumption. Dugard, MacLeod and Alcaro, *supra* note 748, 937; Humby (2013), *supra* note 175, 90 and fn. 95.

\(^{1134}\) The precise long-term impacts on health are under-researched, however. Dugard, MacLeod and Alcaro, *supra* note 748, 938.

\(^{1135}\) R2.
supply. As the treatment plant lacked the capacity to purify the water, it became unfit for consumption. The pH level dropped to 3.7, while the presence of iron, aluminium, manganese and sulphate far exceeded acceptable levels – as set by South African regulations and by the World Health Organization.

Warnings were given to the residents of Carolina that their water was unfit for human and animal consumption, but those did not reach the poorer residents in the townships. Although the municipality supplied water in tanks, those supplies were intermittent and insufficient; they were refilled ad hoc, their volume fell short of the prescribed standards and for many residents the tanks were not located within 200 metres. Accordingly, some people – especially in the Silobela township – were forced to continue to drink the contaminated water. When they went to hospital having become sick and suffering from vomiting, diarrhoea and skin rashes, they were advised under no circumstances to drink tap water anymore. The water crisis lasted for seven months and affected about 17,000 people. In May 2012 protests broke out during which some tanks got burnt, but they were not replaced.

2.3.2.2. Legal framework

The situation in Carolina raises two concerns: access to potable water and acid mine drainage degrading the environment. As will be evident from the discussion below, to date only the former concern has been tackled through litigation. Nevertheless, the legal framework in relation to both questions is discussed.

The Water Services Act is adopted by the state to achieve the right of everyone to have access to sufficient water in accordance with Section 27(1)(b) of the Constitution. Section 3 of this Act reiterates, first of all, that everyone is entitled to basic water supply at any time.

According to the applicable regulations, the minimum standard of basic water supply is 25 litres per person per day or 5 kilolitres per household per month, water must be accessible within 200 metres of a household.

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1136 The optimum pH level for drinking water ranging between 6.5 and 8.5 according to the World Health Organization.
1138 Ibid. paras 40 and 43.
1139 Ibid. paras 45- 51.
1140 Ibid. para. 44.
1141 Fuo, supra note 1003, 29.
1144 Section 3 WSA (cited in Annex 2).
and the supply should never be interrupted for more than seven full days in a year.\textsuperscript{1146} Each time that the supply is interrupted for more than 24 hours, steps must be taken to ensure that a consumer has access to alternative water services of at least 10 litres per person per day.\textsuperscript{1147} The authority responsible for basic water supply is the municipality, which may appoint a water services provider for the actual activity of supplying water.

Although government bears the overall responsibility to ensure that basic water is supplied, in the case of Carolina the water supply was actually interrupted due to contamination by acid mine drainage. The legal framework in this connection is similar to the one sketched in the context of the Tudor Shaft matter.

Firstly, Section 19 of the National Water Act (NWA) is the twin-provision of Section 28 of NEMA and stipulates in subsection (1) that the coal mines must take all reasonable measures to prevent water contamination from occurring, continuing or recurring.\textsuperscript{1148} Reasonable measures could consist of ceasing, modifying or controlling the act or process that causes the pollution, eliminating its source, containing or preventing the movement of acid mine drainage and remedying the effects of the pollution.\textsuperscript{1149} These companies could be directed to take such measures by the catchment management agency, which is a government agency.\textsuperscript{1150} If the directive is not complied with, the agency may itself take the necessary measures and recover the costs jointly and severally from the mines that were responsible for the acid mine drainage.\textsuperscript{1151}

Secondly, also Section 45 of the MPRDA\textsuperscript{1152} is again relevant given that acid mine drainage is a form of pollution caused by mining. The Minister of Mineral Resources is thus mandated to direct the coal mines to investigate, evaluate, assess and report on the impact of acid mine drainage, to take remedial measures and to complete such measures before a specified date. If the coal mines do not comply with the directive, the required measures may be taken by the Minister who can recover the costs from the mining companies.

\begin{itemize}
\item Section 3 Water Services Regulations.
\item Section 4 Water Services Regulations.
\item Section 19(1) is cited in Annex 2. In another case dealing with acid mine drainage, the Supreme Court of Appeal has interpreted this provision as applying not only to landowners, but to everyone who owns, controls, occupies or uses the land. \textit{Harmony Gold v. Regional Director (Free State)}, \textit{supra} note 1028, para. 26.
\item Section 19(2) NWA (cited in Annex 2).
\item Section 19(3) NWA (cited in Annex 2).
\item Section 19(4)-(6) NWA (cited in Annex 2).
\item This provision is cited in Annex 2.
\end{itemize}
2.3.2.3. The litigation

After an (unsuccessful) attempt to agree a negotiated solution for the dire situation in Carolina, the Legal Resources Centre and Lawyers for Human Rights launched on behalf of, respectively, the Federation for a Sustainable Environment and the Slobela community an application for an urgent interdict against the responsible authorities within the different spheres of government, being national, provincial and local government. The goal of the urgent application was the provision of water within the shortest period of time possible. In particular, they sought an order (1) declaring the failure by the responding parties to provide access to water unlawful, (2) directing them to provide temporary potable water within 24 hours, (3) directing them to engage actively and meaningfully with the applicants regarding the steps taken to ensure that water would once again be supplied through the water services, as well as regarding where, when, at what volume and how regularly temporary water would be made available in the interim, and (4) directing them to report to the court within one month as to the measures taken to ensure that water would once again be supplied through the water services.

The High Court judge was responsive to the applicants’ case, except for their wish to obtain an order against national and provincial government. According to the judge, those levels of government only have a general duty to regulate the supply of water and to support local government so that it is capable of supplying water (including by providing funds). If courts actually ordered national and provincial government to intervene in local government, this would negate the separation of spheres established by the Constitution and would amount to an interference by the courts in political matters. The eventual court order was only directed against the mayor and the municipal manager of the district municipality (and not of the local municipality), and included all relief requested by the applicants with the small difference that the municipality was given 72 hours to provide temporary potable water instead of 24. Costs were awarded jointly and severally against the mayors and municipal managers of both municipalities – even though no relief was awarded against the local municipality.

The district municipality appealed the decision by the High Court on technical grounds – including, notably, the argument that the order was not directed against the right municipality, which is the water services authority for the affected area. Leave to appeal was granted, but upon a counter-application by the applicants’ legal representatives the judge accepted that the appeal did not suspend the original

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1153 Applicants’ Founding Affidavit, in re: Federation for a Sustainable Environment v. Minister of Water Affairs (35672/12) (21 June 2012), paras 61-67 (mentioning the exchange of numerous letters between the applicants’ legal representatives and the responding parties over a period of two months).
1154 FSE v. Minister of Water Affairs (10 July 2012), supra note 1002, para. 13.
1155 Ibid. para. 20.
1156 The local municipality also appealed the negative costs order.
The municipalities appealed this interim execution order, which was rejected by the judge, who provided arguments for that decision in a separate judgment, dated some three weeks later. Also the applicants applied for leave to appeal, but their application was dismissed for having been lodged out of time – for a discussion, see infra Box 21. Even though the appeal had no suspensive effect and was eventually even abandoned, the municipalities never complied with the original order. In the meantime, however, the different parties involved had started to engage out-of-court, as will be discussed next (infra Section 2.3.2.4).

The original application was only concerned with the urgent provision of water to the affected community and did not address the causes of the pollution (namely the acid mine drainage). Therefore, the mines were not cited in the urgent application (see also infra Box 10). Nevertheless, as the discussion of the legal framework above shows, the mines could be demanded to take certain measures to minimise and rectify the pollution caused by acid mine drainage. Whilst it is the responsibility of government to enforce the polluter pays principle in accordance with Section 19 of the NWA, interested parties could apply to the court for an order directing the responsible government agency to exercise its mandate. The litigating parties that were involved in the 2012 urgent application are conscious of the fact that everything (the supply of water in tanks and the investments in infrastructure) was eventually paid for by government, a cost which is then ultimately borne by the South African people. However, they do not see much prospect in going “to court to force government to get the money back from the mine”, because they believe “that was never going to happen.”

2.3.2.4. Out-of-court processes and related litigation

Similar to the Tudor shaft matter, the applicants first filed for (and obtained) an urgent order against government and, thereafter, tried to engage, out-of-court, with both government and the responsible mining companies to find a solution on the longer term. In the Carolina matter the main concerns were that the quality of the water would be monitored, the water infrastructure (and in particular the treatment plant) repaired and acid mine drainage from nearby mines prevented in the future.

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1157 *Federation for Sustainable Environment and Another v. Minister of Water Affairs and Others* (35672/12) [2012] ZAGPPHC 140 (26 July 2012).
1158 *FSE and Silobela v. Minister of Water Affairs* (15 August 2012), *supra* note 921.
1159 There seems to have been some disagreement as to whether the applicants should have adopted a more robust approach in the litigation and tried harder to enforce the court order. As the court order was rather vague and directed against the wrong authorities, however, contempt of court may not have been possible. See *Kebble v. Minister of Water Affairs*, *supra* note 430, para. 23 (holding that “an order that a person is in contempt of court (...) should be made only where the court order allegedly flouted is clear and capable of enforcement”).
1160 For a discussion, see e.g. Fuo, *supra* note 1003, 36-37.
1161 Section 19 NWA is cited in Annex 2.
1162 AS.
Following the urgent application, the Department of Water Affairs eventually agreed to engage with the community and the Federation for a Sustainable Environment regarding the water crisis in Carolina, even though it had strongly opposed the urgent application in which, they believe, they should not have been joined (see also infra Box 10). In particular, the Department established a task team that is composed of officials from its national and provincial offices, local public servants, community leaders and the community’s legal representatives.1163 Accordingly, regular meetings are organised in which the different stakeholders engage with one another. The task team is also informed about and monitors the test results of water samples, so that the community is informed on a regular basis about the water quality. The Department has also promised to improve the water infrastructure, which is estimated at a high cost (200 million South African Rand).1164

Against a background of court proceedings and community mobilisation the mines began to take measures to reduce the risk of acid mine drainage as well. Nevertheless, they deny being responsible for any water contamination after January 2012 and have not paid for the infrastructure investments by government.1165 Some informal talks between the mines and the applicants’ legal representatives have taken place in the Komati Catchment Forum,1166 but the usefulness of attending this forum is questioned, because no information disclosed there can be used and because it, allegedly, functions as a talk-shop where the mines use the right discourse without significantly changing their behaviour on the ground.1167

Lawyers for Human Rights has also brought the case to the attention of the South African Human Rights Commission. Whether this submission has had practical implications is not clear. From public documents it is only apparent that the Commission has discussed the situation in Carolina in a committee, which found that government must “protect people against mining companies (…) who pollute the water” and must “ensure transparency and accountability”.1168

1164 This would amount to roughly 14 million euros, although converting the amount is difficult due to volatile exchange rates. Sue Blaine, “Carolina’s polluted water highlights growing problem in SA” (Business Day, 12 March 2012).
1165 Everything was paid for by government. R9, R24.
1166 This forum should not be confused with the catchment management agency, which is a government agency. Catchment forums are voluntary meetings of concerned groups of people where they discuss the sustainable management of the water resources in that catchment area.
1167 R20.
Finally, the successful outcome of the urgent application in the Carolina matter has sparked other litigation relating to access to water. The High Court’s order in *FSE v. Minister of Water Affairs* meant a huge victory for lawyers, activists and scholars. Indeed, only a few years’ earlier, the Constitutional Court had found in *Mazibuko v. Johannesburg* that “it is clear that the right [to have access to water] does not require the state upon demand to provide every person with sufficient water without more”\(^{1169}\) and, hence, the Court had refused to “adopt a quantified standard determining the content of the right.”\(^{1170}\) The order in the Carolina matter demonstrates that at the very least citizens can claim to be immediately provided with the basic water supply that the government itself has set by law.\(^{1171}\) The judge also explicitly acknowledged that under certain circumstances courts should order government to act in a given way.

(...) many a times in the Country, when communities register their dissatisfaction over service delivery, they resort to a chaotic and uncontrolled destructive frenzy. Good governance requires that such possibilities should be averted and the Courts should not refrain in ordering those structures of governance in taking positive steps aimed at achieving this, *inter alia*, and the progressive realization of the ethos enshrined in the Constitution;\(^{1172}\)

Moreover, in his judgment motivating the urgent order the High Court judge considered the historical, economic and social context of access to water, noting that Silobela is one of those communities that “still bears the brunt of the legacy of apartheid, under developed, under resourced [sic],”\(^{1173}\) and called upon the state to “take measures that are progressively geared towards eradicating the incongruity in living areas of communities, structured on racial divide by the hitherto apartheid regime.”\(^{1174}\) This is significant, as scholars\(^{1175}\) have called upon the judiciary to consider the vulnerable position of litigating parties in cases relating to access to basic needs, instead of resorting to a merely procedural scrutiny under the reasonableness standard of review (see *supra* Section 2.2.1.1). Since that court

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\(^{1169}\) *Mazibuko v. Johannesburg*, *supra* note 685, para. 50. Cf. ibid. para 57 (holding that “that obligation requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources[, but] does not confer a right to claim ‘sufficient water’ from the state immediately).

\(^{1170}\) Ibid. para. 56.

\(^{1171}\) This accords with what other scholars have written, namely that courts are more intrusive when they are asked to enforce rights implemented in laws, regulations and policies. Brand (2006), *supra* note 267, 233.

\(^{1172}\) *FSE and Silobela v. Minister of Water Affairs* (15 August 2012), *supra* note 921, para. 19.

\(^{1173}\) *FSE and Silobela v. Minister of Water Affairs* (10 July 2012), *supra* note 1002, para. 9.

\(^{1174}\) Ibid. para. 17.

\(^{1175}\) See e.g. Liebenberg (2006), *supra* note 512, 32 (calling on courts to have regard to the position of a claimant in society, the history and nature of the deprivation and its impact on the claimants and on similarly placed people).
order several other applications have been filed, demanding the immediate supply of water to communities that are deprived thereof (see infra Box 32). \(^{1176}\)

2.3.2.5. Case file

<table>
<thead>
<tr>
<th>Table 5. The Carolina matter: case file</th>
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</thead>
<tbody>
<tr>
<td><strong>Litigating parties</strong></td>
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<tr>
<td><strong>Their legal representatives</strong></td>
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<tr>
<td><strong>Counterparties</strong></td>
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\(^{1176}\) In those cases acid mine drainage was not the cause of the deprivation. See e.g. Kuhne and AfriForum v. Vhembe District Municipality, which resulted first in an order by agreement and later in another order seeking to ensure compliance with the former. Applicants’ Notice of Motion and Founding Affidavit, in re: Kuhne v. the Vhembe District Municipality (51887/2012) (5 September 2012); Kuhne and Another v. the Vhembe District Municipality and Another (51887/2012) unpublished (HC) (2 October 2012); Kuhne and Another v. the Vhembe District Municipality and Another (21886/2013) unpublished (HC) (17 May 2013).
to the measures taken to ensure water supply
- Permission for any party to re-enrol the application for hearing on the same papers
- Costs, jointly and severally, by whoever opposes the application

### Broader objectives
- Prevention of acid mine drainage
- Reparation of the water infrastructure
- Monitoring of the quality of the water
- Consultation with the affected community

### Litigation stage
<table>
<thead>
<tr>
<th>Court order (10 July 2012)</th>
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</thead>
<tbody>
<tr>
<td>✓ Declaratory order</td>
</tr>
<tr>
<td>✓ Interdict to provide water (but within 72 hours)</td>
</tr>
<tr>
<td>✓ Interdict to engage meaningfully</td>
</tr>
<tr>
<td>✓ Structural interdict to report to the court</td>
</tr>
</tbody>
</table>

Leave to appeal was granted (but abandoned in 2014), without suspensive effect

### Out-of-court processes
- Engagement and monitoring through the task team
- Informal talks in the catchment forum with the mining companies
- Involvement of the South African Human Rights Commission

### Related litigation
- *Kuhne v. Vhembe* (successful)
- *AfriForum v. Merafong* (unsuccessful)
- *Molefe v. Merafong* (successful)

### Timeline
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan. 2012</td>
<td>Acid mine drainage flows from coal mines into the dam supplying Carolina</td>
</tr>
<tr>
<td>11 Jan. 2012</td>
<td>Water quality survey shows that the water is unfit for consumption</td>
</tr>
<tr>
<td>Feb. 2012</td>
<td>Water is supplied in tanks</td>
</tr>
<tr>
<td>16 May 2012</td>
<td>Service-delivery protests break out</td>
</tr>
<tr>
<td>22 Jun. 2012</td>
<td>Application for an urgent interdict</td>
</tr>
<tr>
<td>10 Jul. 2012</td>
<td>Urgent order by the Court</td>
</tr>
<tr>
<td>26 Jul. 2012</td>
<td>Leave to appeal against the urgent order granted but without suspensive effect</td>
</tr>
<tr>
<td>15 Aug. 2012</td>
<td>Judgment providing reasons for rejecting appeal against the interim execution order</td>
</tr>
<tr>
<td>9 Jun. 2014</td>
<td>Application for condonation and leave to</td>
</tr>
</tbody>
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One respondent gave the following explanation as to why this urgent application (which also concerned the Blyvooruitzicht community) was unsuccessful: “With AfriForum, my feeling and my view is that they did not do enough groundwork. They rushed to court, and did not have the community buy in. The community did not even know that AfriForum was in court. They had just spoken to some church leaders. So they did not have the facts.”

R20.
2.3.3. Silicosis class action: thousands of mineworkers suffering from silicosis

2.3.3.1. Factual background

Blasting, drilling, transportation and other processes associated with the extraction of gold generate crystalline silica dust. This dust is raised into the air, although mitigating measures can be taken, and can be inhaled by mineworkers, in particular when they are not adequately protected against exposure to such dust. Upon inhalation the smallest silica particles are deposited in the alveolus region of the lung and cause scarring or ‘fibrosis’ of the lung tissue, which impairs the normal functioning of the lung. This condition, called silicosis, is caused exclusively by the inhalation of crystalline silica dust and is irreversible, incurable and painful. It is also a latent and progressive disease, with the first symptoms manifesting after several (on average 10 to 15) years and worsening over time. It is thus possible that a patient is only diagnosed long after having worked in the mines. The symptoms of silicosis include chest pains, a persistent cough and shortness of breath. Medical research has also established that silicosis patients are at a significantly higher risk to contract chronic pulmonary disease, tuberculosis and lung cancer.

Hence, current and former underground mineworkers should be monitored continuously and, when diagnosed with silicosis, they have to be treated in order to manage the (incurable) disease, its symptoms and complications. Nevertheless, the migratory labour system, which draws mineworkers from remote areas and neighbouring countries (supra Section 2.1.1.2), thwarts the required ongoing medical monitoring and treatment. As sick mineworkers either lose their job or quit before being diagnosed with silicosis (or before hearing such diagnosis), their former employers are able to withdraw from their responsibility, whilst access to health services in the labour sending areas is severely restricted. The result is that sick mineworkers become a burden for their already-impoverished families and communities.

After gold mining had begun in 1886, a first Commission of Inquiry into the causes and prevalence of silicosis was already appointed in 1902. Both the industry and government are thus aware of the risk for mineworkers to contract this condition since time immemorial. How many mineworkers are

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1178 The facts described in this section are derived from the judgment by the High Court certifying the class action (Nkala v. Harmony Gold (certification judgment), supra note 372), the submissions of the applicants (Applicants’ Submissions, in re: Nkala v. Harmony Gold (48226/12) (9 June 2015)) and J. McCulloch, South Africa’s Gold Mines and the Politics of Silicosis (Johannesburg: Jacana, 2013).

1179 R16.

1180 Nkala v. Harmony Gold (certification judgment), supra note 372, paras 1 and 3.
currently affected by silicosis is unknown, but estimates vary from 17,000 up to 500,000.\textsuperscript{1181} The incidence of silicosis amongst South African mineworkers is at an unusually high level, which has several causes. Originally, the country’s laws on health and safety in the mines were too lax as government wanted to attract investment and stimulate the mining industry. However, a tighter statutory standard for the exposure to dust and more stringent labour conditions in general had little impact, since monitoring by government was poor, measurements were susceptible to manipulation and individual protective equipment was absent or deficient. The fact that most mineworkers came from isolated areas where health services are non-existent or substandard, is another factor. As a result, since gold mining began in the late 19\textsuperscript{th} century thousands of (predominantly black) mineworkers have contracted silicosis, because they got exposed to too high doses of dust,\textsuperscript{1182} and were not provided with (adequate) personal protective equipment, which in some instances still happens today.

It is important to stress that although a zero rate exposure to silica dust is impossible, several readily-available measures to mitigate the risks are known to the industry and to governments world-wide. Examples of preventive measures include informing mineworkers about the risk and educating them on the means to mitigate that risk, preventing or minimizing dust generation by spraying water, evacuating contaminated air through proper ventilation, diluting dust with clean air and providing suitable respiratory protection equipment.

2.3.3.2. Legal framework

In terms of the common law (at least as it is argued by the mineworkers’ legal representatives), the mines (or their parent mining companies, see infra Box 11) owe a duty of care to the mineworkers, to take reasonable measures to provide a safe and healthy work environment that is not injurious to their health and/or to take reasonable care for the safety of the persons who enter the mines. Aside from any duty under common law, the employers of mines also have to comply with the Mine Health and Safety Act and the regulations in force under that Act.\textsuperscript{1183} In particular, Chapter 2 of the Act, which stipulates their duties concerning health and safety, includes such duties as ensuring that the mine is designed,
constructed and equipped to provide conditions for safe operation and a healthy working environment, providing and maintaining a working environment that is safe and without risk to the health of employees, supplying the necessary health and safety equipment and facilities to its employees, and ensuring that employees comply with health and safety requirements.\(^{1184}\) Furthermore, Chapter 9 of the Regulations, dealing with environmental engineering and occupational hygiene, stipulates \textit{inter alia} that employers must ensure that their employees are not exposed to airborne pollutants above the limit set by those regulations.\(^{1185}\)

As was already mentioned in the discussion of the applicable laws (\textit{supra} Section 2.2.2), South African employees who contract an occupational disease or get involved in a work-related accident, are entitled to statutory compensation, which is paid out without intervention by the employer, who contributes to the system by paying compulsory levies, however. Two statutory compensation schemes exist, one applicable to mineworkers who contract a compensatable disease from working in the mines (the Occupational Diseases in Mine Works Act, ODIMWA) and one applicable to all other occupational diseases (the Compensation for Occupational Injuries and Diseases Act, COIDA). The COIDA explicitly provides that employees who are entitled to statutory compensation, cannot sue their employer for damages, on whatever legal basis.\(^{1186}\) For a long time this provision was believed to apply with equal force to mineworkers who have contracted a compensatable disease, until the Constitutional Court found in \textit{Mankayi v. AngloGold Ashanti} (see also \textit{infra} Box 3) that mineworkers’ right to claim common law damages has not extinguished under ODIMWA. This judgment meant a huge victory for sick mineworkers, not only because of the low compensation awards under ODIMWA, but also because the entire system had proven to be a complete failure due to additional problems, such as the excessively bureaucratised process and the tremendous backlog in disbursements. Hence, in reality for a very long time mineworkers with silicosis simply lost their job, were not compensated, had to pay for the treatment themselves, could no longer act as breadwinners and became a burden for their already-impoverished families and communities. Accordingly, the Constitutional Court’s judgment in \textit{Mankayi v. AngloGold Ashanti} opened the door for follow-up litigation for damages.

2.3.3.3. The litigation

Local advocates (including medical practitioners), community-based organisations and lawyers have joined forces to denounce the unjust plight of mineworkers with silicosis. Over the years several lawsuits were brought against specific mining companies by individual mineworkers (albeit often

\(^{1184}\) Sections 2(1)(a), 5, 6 and 7 MHSA (cited, in part, in Annex 2).
\(^{1186}\) Section 35(1) COIDA (cited in Annex 2).
Nevertheless, many thousands of victims remained in the lurch, especially the most vulnerable ones who belong to the poorest and most marginalised communities. Since they lack the required resources and are frequently not even aware of their rights, they do not travel to town to hire a lawyer – let alone that they can pay for legal services – and are reluctant to get involved in protracted litigation against an extremely powerful counterparty (see also *infra* Section 2.5.3).

Therefore, three law firms decided to combine their efforts and to launch a class action, which they believe to be the only vehicle through which they can secure compensation for every mineworker who has contracted silicosis from working in the gold mines, even if he is not a party to the litigation, or for his dependants. In fact, the class action actually deals with two classes, one covering the mineworkers with silicosis and one covering the mineworkers with pulmonary tuberculosis. Where both conditions are combined, the disease is called silico-tuberculosis, and those patients are included in the silicosis class.

The interests at stake in the silicosis class action are by far the greatest of the three focus matters – and of any lawsuit that has been or is conducted in South Africa for that matter. The action was launched by some sixty class representatives on behalf of all sick mineworkers (possibly totalling up to 500,000 individuals), against the gold mining industry, namely thirty parent mining companies that throughout the years covered by the class action (1965 till present) have owned, controlled or operated one or more of the over eighty goldmines cited, which are spread across the country. If successful, damages will be due to all mineworkers who are effectively diagnosed with silicosis or pulmonary tuberculosis. Irrespective of its final resolution, whether it is an actual judgment, an arbitration decision or an out-of-court settlement, the silicosis class action is a landmark case of significant importance for the duties of the South African mining industry, and potentially for business and human rights in general.

The lawsuit will be a long-winded case with several intermediate stages (in particular certification, establishment of liability, and determination of damages) and possibly many more interlocutory claims and exceptions, delaying the main case. Even during the certification proceedings two major interlocutory issues were pleaded. The first one was the application by two nongovernmental organisations, namely Sonke Gender Justice and Treatment Action Campaign, both represented by Section27, to intervene as third parties so as to adduce additional argument regarding the need for the High Court to certify the silicosis and tuberculosis classes. The Court admitted the *amici*, but dismissed two of the three affidavits that they wanted to submit as additional evidence. This intervention and the Court’s decision is discussed below (*infra* Box 14).

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1187 The inhalation of silica dust significantly increases the risk of contracting pulmonary tuberculosis even if the patient never develops silicosis.
The second interlocutory matter concerned an application by one of the mining companies, Gold Fields, to join the US-based law firm funding one of the South African law firms’ involvement in the class action to make it liable for an adverse costs order if the certification application is unsuccessful. This joinder application failed. Under common law, a party funding a lawsuit may be held liable for its costs by being joined as a co-litigant to the funded litigation. The High Court considered, however, that litigation funding agreements have an inherently positive element, because they promote access to justice for litigants who due to poverty and lack of resources would otherwise not be able to enforce their rights. Therefore, to decide whether a litigation funder should be joined so as to become liable for the costs a distinction should be made between pure litigation funders and ‘controlling funders’ or ‘funders-for-own-interest’. According to the Court, Motley Rice acted as a pure litigation funder, as it did not stand to gain from the certification proceedings as a matter of business and did not act as the mineworkers’ attorney. This decision by the High Court does not preclude another attempt by the mining companies to join Motley Rice in the next stage of the proceedings, however.

Then, on 13 May 2016 the High Court delivered its judgment certifying the two classes as they were proposed by the claimants. According to the Court, its decision to certify the class was demanded by the interests of justice, because otherwise “the vast majority of them who cannot sue individually would have to live with the fact that the law, with all its promises, affords them no remedy for the pain and suffering endured while battling the growth of fibrotic forests in their ever depleting lungs.” As this fragment already indicates, the language used in the certification judgment is rather bold. The judges did not hide their abhorrence for the facts of the case and their moral condemnation of the mining companies, which also the following paragraph eloquently shows.

With remarkable consistency their evidence reveals that the mining companies stripped them of their dignity, and concomitantly compromised their health and safety, with such intensity and ferocity that they were effectively dehumanised.

The judges also condemned the obstructionist attitude of the mining companies during the certification proceedings, denouncing that they had not refrained from “deliberately undermining the interests of justice”, and urged them to change their attitude for the remainder of the litigation. One of the defence tactics employed by the mining companies was to discredit the commitment of the mineworkers’ legal representatives. Although they are all well-known, respected lawyers, a smear...
campaign was launched in which mining companies tried to disavow them by making public statements questioning the equitability of the contingency fee agreements and claiming that the lawyers were money-grubbers who litigated “for their own gain rather than in the genuine interests of class members”. In the hearings on the class certification they even explicitly impugned the lawyers’ competence and professionalism. All these accusations were summarily dismissed by the High Court, however.

Six mining companies sought leave to appeal the certification judgment by the High Court, which includes the certification order as well as the order pertaining to the transmissibility of general damages – in its judgment the High Court developed the common law in relation to the latter issue, as will be explained below (infra Box 25). The High Court originally only granted leave to appeal in relation to the latter order, and not for the certification itself, as the judges believed that such appeal does not have a reasonable prospect of success, amongst other reasons because the mining companies “are unable to show that there is any real alternative to the matter being adjudicated on a class-wide basis.” Nevertheless, the Supreme Court of Appeal has decided to hear all issues, and that appeal is pending.

If also the Supreme Court of Appeal certifies the class action, the main case will then continue in two stages, a ‘bifurcated process’. In a first set of proceedings the liability of the mining companies for the diseases contracted by their (former) employees will be established. The relief sought during that first stage is thus declaratory in nature, and those proceedings will be conducted on an opt-out basis – all mineworkers that meet the class definition are thus automatically bound by the action unless they express their wish not to be included. The damages to which individual mineworkers are entitled will be determined in the second stage, and those proceedings will be conducted on an opt-in basis. In order to be included and, if the action is successful, to receive damages, mineworkers thus not only need to meet the class definition but also to confirm in writing that they want to be included.

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1195 In the sense of *Children’s Resource Centre Trust v. Pioneer Food*, supra note 356, para. 48. See e.g. “Silicosis: the battle begins” (City Press, 8 June 2014).
1197 *Nkala and Others v. Harmony Gold Mining Company Limited and Others* (31324/12, 31326/12, 31327/12, 48226/12, 08108/13) (leave to appeal) unpublished (HC) (24 June 2016), paras 10-11.
1199 For that purpose a notice will be published (in various newspapers in the different languages, on notice boards, and through a radio announcement) to inform the potential class members and give them the opportunity to opt out if they wish so.
1200 Again a notice will be published so as to allow mineworkers to opt into the class action.
2.3.3.4. Preceding, parallel and follow-up litigation and out-of-court processes

The silicosis class action is not the first lawsuit in South Africa that deals with the plight of mineworkers who have contracted silicosis from working underground. Aside from the test case of *Mankayi v. AngloGold Ashanti*, which was mentioned several times before, there are at least two famous other cases that preceded that litigation, both of which were settled – one only shortly before the High Court certified the class action, which confused many mineworkers, thinking that it was their case that had been settled and that they would be compensated soon. One case was conducted, jointly, by the Legal Resources Centre and Mbuyisa Neale Attorneys Inc. in South Africa and Leigh Day in the UK and concerned twenty-three mineworkers with silicosis. The case is popularly known as the President Steyn litigation, called after the gold mine where the plaintiffs had allegedly contracted silicosis. After the President Steyn litigation got settled in September 2013, the Legal Resources Centre decided to pursue a class action in South Africa together with Richard Spoor Attorneys Inc. and Abrahams Kiewitz Attorneys Inc., because contrary to what they had hoped the case had not resulted in a broader, industry-wide settlement.

Even before the President Steyn litigation got settled, Leigh Day and Mbuyisa Neale Attorneys started pursuing another case before the UK courts, where the High Court eventually rejected jurisdiction, forcing the lawyers to start afresh in South Africa, where they filed summons in the High Courts in Pretoria and Johannesburg against two mining companies, Anglo American and AngloGold Ashanti. They purposefully decided not to join the silicosis class action and to pursue individual claims instead, as they felt this was in their clients’ best interests given that individual (but joined) cases would take less time to reach a finality (see also infra Section 2.4.4). The litigation initially concerned thirty-one mineworkers, but in the end covered 4,365 mineworkers. In March 2016 a settlement was agreed and a trust fund created to compensate those plaintiffs who are effectively diagnosed with silicosis.

While the class action is ongoing, several other silicosis-related lawsuits are pending as well. Twenty-two coal mineworkers have, for instance, launched an action for damages against Sasol for having

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1201 AS (explaining how the week when the case of Richard Meeran had been settled, with many clients calling to ask what had happened, whether they had settled).

1202 In fact, the case was going to proceed through arbitration.

1203 R3.

1204 In the original lawsuit in the UK only Anglo American South Africa was cited, as a few years earlier Anglo American had moved its headquarters to this country. The mineworkers’ legal representatives claimed that the UK courts had jurisdiction because the central administration of the subsidiary of Anglo American, namely Anglo American South Africa, was based at the headquarters of its parent company. In July 2013, the High Court rejected that argument. *Flatela Vava and Others v. Anglo American South Africa Ltd.* [2013] EWHC (QB) 2131 (Eng.), affirmed by *Young v. Anglo American South Africa Limited and Others* [2014] EWCA Civ 1130 (Eng.).

1205 AS.
contracted pneumoconiosis\textsuperscript{1206} in its underground coal mines. In addition, some cases by (former) gold miners with silicosis have been launched in parallel with the class action. Most of these cases seek to flesh out concrete legal questions, such as whether the mining companies’ duties amount to strict liability or whether negligence must be established, whether parent companies überhaupt bear any duties as ‘employers’, which defences mining companies try to bring, and whether such defences might result in an apportionment of damages.\textsuperscript{1207}

One interesting application, for instance, concerns the request by two former gold miners to obtain access to records held by their former employer, AngloGold Ashanti, concerning their own employment experiences as well as general safety and health practices at the responding party’s subsidiary mines.\textsuperscript{1208} In principle, the Promotion of Access to Information Act (\textit{supra} Section 2.2.2) establishes a procedure through which records can be requested from private actors when access to such information is necessary for the exercise by the requester of a right.\textsuperscript{1209} AngloGold Ashanti refused the request, however, arguing that the two applicants are prospective members of the class action (which was not yet certified at the time of the refusal) so that they can no longer request access to information outside of the court proceedings. In other words, the mining company’s argument read that from the launch of the certification proceedings onwards mineworkers who are in principle covered by the class definition even though they may still decide to opt out of the class, can only request information through discovery.\textsuperscript{1210}

This argument was challenged by the applicant-mineworkers and their legal representatives, who argued that they needed the information to assess the merits of a possible legal strategy (such as opting out of the class action and, perhaps, launching a separate individual claim or accepting to be bound by the class action). The High Court agreed with AngloGold Ashanti, however, holding that “an application to certify a class action, albeit such proceedings seeks no final relief, and has as yet no true plaintiffs because no summons has yet been issued or served (…) constitutes ‘proceedings’ which

\begin{itemize}
\item \textsuperscript{1206} This condition is similarly to silicosis caused by the inhalation of coal dust, which is deposited in the lungs where it forms coal macules causing fibrous the lung tissue.
\item \textsuperscript{1207} See e.g. Summons and Amended Particulars of Claim, in re: \textit{Strömbeck v. Harmony Gold Mining Company Limited and Others} (1449/13) (23 April 2013 and 27 June 2014). In that case the defendant mining companies argue that any damages which the plaintiff suffered as a result of being exposed to harmful quantities of dust was caused by his own conduct. In an interlocutory judgment the High Court has already clarified that the argumentation by the mineworkers’ legal representatives has to be “specific” and should not simply “plead from the enabling statute verbatim.” They should, for instance, state exactly which equipment was defective or not maintained or even supplied. \textit{Stromberg v. Harmony Gold Mining Company and Others} (14499/13) unpublished (HC) (19 October 2016), paras 19 and 30.
\item \textsuperscript{1208} Applicants’ Notice of Motion and Founding Affidavit, in re: \textit{Mahaeeane v. AngloGold Ashanti Limited} (85/2016) (28 March 2014 and 26 March 2014).
\item \textsuperscript{1209} Section 50 PAIA (cited in Annex 2).
\item \textsuperscript{1210} After all, Section 7 PAIA (cited, in part, in Annex 2) stipulates that the Act does not apply to records requested for the purpose of criminal or civil proceedings, after their commencement when access to those records is provided by another law – in particular Rule 35 of the Rules of the Court, dealing with discovery.
\end{itemize}

222
have commenced”¹²¹¹ and that “[p]ersons who are members of a class sought to be certified (…) are not distinguishable (…) from the representative proto-plaintiffs cited as applicants in a certification application.”¹²¹² Given that the applicants’ attorneys (from Richard Spoor Attorneys Inc.) had advised many other mineworkers on their litigation perspectives – the class representatives in particular for the institution of the certification proceedings – the High Court also believed that, on the facts, the applicants do not reasonably require the requested information for the purpose of obtaining advice.¹²¹³ Leave to appeal this judgment was granted, however, and that appeal is pending.¹²¹⁴

Lastly, two processes have been initiated out-of-court and independent from (albeit possibly triggered by) the silicosis class action: an industry-led initiative to eliminate silicosis and a government-led process of law reform. Although there is no evidence of any causal link between the launch of the silicosis class action and these two initiatives, it seems safe to assume that they were triggered by the litigation.¹²¹⁵

In November 2014 five mining companies – later joined by a sixth one, together the largest mining companies cited in the silicosis class action – announced their initiative to establish an industry-working group that would be tasked with advancing proposals for preventive measures to eliminate silicosis and for the detection and treatment of current incidences of silicosis.¹²¹⁶ This working group has already agreed on a number of measures to manage silica dust, measures which should be implemented throughout the industry in South Africa. The working group also provides a forum where the industry, together with the trade unions and the class action lawyers, can explore common ground for accommodating the claims of the members of the class action.

Possibly even more significant is the initiation by government in 2015 of a process to reform the law on occupational diseases and accidents. In particular, the compensation schemes under ODIMWA and COIDA would be amended to ensure that sick and injured employers are entitled to adequate compensation that is swiftly disbursed – the most likely scenario at present being the integration of ODIMWA into COIDA.¹²¹⁷ The mining industry has communicated that it is actively engaging with

¹²¹² Ibid. para. 42.4.
¹²¹³ Ibid. paras 38 and 42.6.
¹²¹⁴ Mahaeane and Another v. AngloGold Ashanti Limited (2014/112111) (leave to appeal) unpublished (HC) (7 December 2015). The court granted leave for two reasons: legal certainty and the importance of the matter for class members, in particular “the implications [of class actions] for persons who, by reason of the definition of the scope of the classes, become implicated, (…) and what freedom of action they may have to paddle their own canoes in the water of litigation.”
¹²¹⁵ R12, R29.
¹²¹⁶ See the initiative’s website at www.oldcollab.co.za.
¹²¹⁷ R23. Lawyers question whether this is the right solution given that COIDA has its own deficits, operates as an insurance scheme rather than a fund and expressly prohibits employees to sue their employer. R12.
the government regarding this law reform process.\textsuperscript{1218} Rumours have it that the law reform process was in fact prompted by the mining industry, who has put pressure on government as they want to bring the continual threat of lawsuits by former employees claiming damages to an end. Initially, the class action lawyers were not invited, but as they found out they were allowed to participate in the discussions.

Moreover, in the meantime, the mining industry has deployed financial and human resources to assist the Medical Bureau for Occupational Diseases, which manages ODIMWA, in making up the backlog in processing and disbursing compensation claims. This support is readily admitted by the industry itself,\textsuperscript{1219} even though lawyers have expressed their concerns about the appropriateness of the mining industry being involved in deciding claims to compensate harm which they themselves have caused. One respondent expressed this concern as follows.

So the industry pumped all this money in (…) They have now since the convert a senior guy from [X] to be the acting COO of the MBOD. They have sent a bunch of doctors there to certify. I mean this is all questionable, in our mind, because they are mine doctors, they do not want to find disease. This guy is being paid by [X].\textsuperscript{1220}

2.3.3.5. Case file

<table>
<thead>
<tr>
<th>Table 6. The silicosis class action: case file</th>
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</thead>
<tbody>
<tr>
<td><strong>Litigating parties</strong></td>
</tr>
<tr>
<td><em>Their legal representatives</em></td>
</tr>
<tr>
<td>Gold mineworkers</td>
</tr>
<tr>
<td><em>The Legal Resources Centre, Richard Spoor Attorneys Inc. and Abrahams Kiewitz Attorneys Inc.</em></td>
</tr>
<tr>
<td><strong>Counterparties</strong></td>
</tr>
<tr>
<td><strong>Company</strong></td>
</tr>
<tr>
<td>Thirty parent mining companies</td>
</tr>
<tr>
<td><strong>Intervening parties</strong></td>
</tr>
<tr>
<td><em>Their legal representatives</em></td>
</tr>
<tr>
<td>Sonke Gender Justice and Treatment Action Campaign\textsuperscript{1221}</td>
</tr>
<tr>
<td><em>Section27</em></td>
</tr>
<tr>
<td><strong>Funding of the litigation</strong></td>
</tr>
<tr>
<td>The Legal Resources Centre is funded by Legal Aid South Africa Richard Spoor Attorneys and Abrahams Kiewitz Attorneys offer their services pursuant to a contingency fee agreement, but their investment in the litigation is pre-funded by two US-based law</td>
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</tbody>
</table>

\textsuperscript{1218} M. Schmidt (CEO African Rainbow Minerals), A. Sangqu (CEO Anglo American SA), S. Venkatakrishnan (CEO AngloGold Ashanti), N. Holland (CEO Gold Fields), P. Steenkamp (CEO Harmony), and N. Froneman (CEO Sibanye), “Op-Ed: How to make gold mining silicosis-free” (City Press 20 March 2016). This is watched with some suspicion by civil society. AS.

\textsuperscript{1219} AS. ‘COO’ stands for chief operating officer and ‘MBOD’ for Medical Bureau for Occupational Diseases. [X] was inserted to replace the name of the specific mining company that was named by the respondent.

\textsuperscript{1220} They intervened in the certification proceedings, which are separated from the trial proceedings.
**Issue**  
Mineworkers’ exposure to hazardous dust

**Cause of action**  
- Statutory law  
- Common law of tort  
- The Constitution, in particular Sections 10 (human dignity), 11 (life), 12(1)(c) (bodily integrity), 23 (fair labour practices), 24 (environment) and 27 (healthcare services)

**Direct relief sought**  
- Certification of the classes  
- *(If certified: damages with interest & costs)*

**Broader objectives**  
- Reform of the compensation system for mineworkers  
- Preventive measures by the mining industry

**Litigation stage**  
- Certification of the class  
- Leave to appeal the certification order dismissed by the High Court but granted by the Supreme Court of Appeal  
- Leave to appeal the declaratory order on the transmissibility of damages granted

**Out-of-court processes**  
- The mining industry working group on Occupational Lung Disease (‘Old Collab’)  
- Law reform process  
- Financial and human assistance by the mining companies to the Medical Bureau for Occupational Diseases

**Preceding/parallel/follow-up litigation**  
- *Mankayi v. AngloGold Ashanti* (Constitutional Court)  
- *Qubeka v. AngloGold Ashanti* (settled)  
- *Makoti v. Sasol Mining* (ongoing)  
- *Strombeck v. Harmony Gold & Others* (ongoing)  
- *Mahaeeane v. AngloGold Ashanti* (on appeal)

**Timeline**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 Dec. 2012</td>
<td>Application by Richard Spoor for the certification of a class action</td>
</tr>
<tr>
<td>17 Oct. 2013</td>
<td>Order by the Court consolidating the applications by Spoor and Abrahams¹²²</td>
</tr>
<tr>
<td>11 Dec. 2014</td>
<td>Application for an intervention as <em>amici</em></td>
</tr>
<tr>
<td>28 Aug. 2015</td>
<td>Order by the Court admitting the <em>amici</em></td>
</tr>
<tr>
<td>13 May 2016</td>
<td>Order by the Court certifying the class</td>
</tr>
<tr>
<td>24 Jun. 2016</td>
<td>Leave to appeal partially granted by the High Court</td>
</tr>
<tr>
<td>13 Sep. 2016</td>
<td>Leave to appeal granted by the Supreme Court of Appeal</td>
</tr>
</tbody>
</table>

¹²² They had first initiated separate actions. *Nkala and Others v. Harmony Gold Mining Company Limited and Others* (31324/12, 31326/12, 31327/12, 48226/12, 08108/13) (consolidation order) unpublished (HC) (17 October 2013).
2.4. The use of strategic litigation

This is the first of three Sections dealing with strategic litigation to enforce accountability for human rights violations by business enterprises, in particular when mining companies cause environmental degradation and thereby create health hazards to which mineworkers and neighbouring communities are exposed. Four issues are covered in this Section. First, the determinants are reviewed that influence the decision of lawyers and activists to litigate (Section 2.4.1), following which the option to go to a forum outside South Africa is briefly considered (Section 2.4.2). Thereafter, it is explained how strategic litigation frequently tackles uncharted legal terrain, which calls for the careful use of test cases (Section 2.4.3), and the Section ends with a discussion of the difficult decision that often confronts litigating parties, namely whether they should accept a settlement proposal (Section 2.4.4).

2.4.1. Determinants to use litigation as a strategy

2.4.1.1. General rule: engagement first

A priori it should be noted that an important reason why litigation is in principle not the first way-to-go if there is a dispute between mineworkers or communities, on the one hand, and government or mining companies, on the other, is the fact that parties are expected to exhaust other, less adversarial strategies before going to court. The success rate of such prior engagement largely depends on the amenability of the parties involved.\(^\text{1223}\) Two observations should be made in this connection, which is, first, that the approach of lawyers and activists towards such engagement differs depending on the actor with whom they have to engage,\(^\text{1224}\) and, second, that mining companies tend to rely on consultants for their engagement efforts with local communities.\(^\text{1225}\)

If parties “jump the gun”\(^\text{1226}\) and skip prior, out-of-court engagement, they risk being reprimanded in court. Although the conduct of litigating parties is not a jurisdictional fact that determines the outcome of proceedings, it is kept in mind by the judges, *inter alia* when they decide on granting costs orders (see also [infra Section 2.6.4.3] (\text{\textit{infra}})).\(^\text{1227}\) In one case, for instance, the Constitutional Court noted that “the respondents’ litigious record portrays a lack of restraint in employing legal devices to deal with

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\(^{1223}\) R3, R28. Cf. R7, R9 (complaining about government’s willingness to engage).

\(^{1224}\) R28.

\(^{1225}\) R22, R29 (noting that dealings with communities require training and expertise on the part of the mining companies, which they generally do not have).

\(^{1226}\) R14.

\(^{1227}\) *Mtunzini Conservancy v. Tronox KZN Sands (Pty) Ltd and Another* (10629/2012) [2013] ZAKZDH 1 (8 January 2013), para. 82. Contra *Magaliesberg Protection Association v. MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government and Others* (563/12) [2013] ZASCA 80 (30 May 2013), paras 61 and 63 (reversing the High Court’s decision to impose costs).
challenges that should more appropriately be dealt with through engagement.”  

Too litigious conduct is thus not welcomed, but at the same time South African courts acknowledge that where it is necessary to advance their main object and to protect their interests, advocacy organisations have the ancillary right to litigate, which is an accessory of their ordinary activities.  

Judges have even expressed their gratitude towards these organisations for bringing important cases to the courts’ attention.

2.4.1.2. Pros and cons of litigation

Even aside from the expectation that they first try and engage with the counterparties in case of a conflict, litigation is always a last resort for civil society actors, whether law firms or advocacy organisations, given that it bears many risks and downsides. First of all, legal proceedings are costly and time-consuming. Hence, it is a big venture for advocacy organisations and public interest law firms to commit themselves to, which ties up organisational resources for a long time in the face of a counterparty, government or company, which probably has deep litigation pockets. Second, litigation is also a risky undertaking, the results of which are unpredictable. If unsuccessful, resources will be diverted for several more years in trying to undo that outcome. Third, protracted legal proceedings that are vehemently opposed by the counterparty, may destabilise the party seeking relief – in particular communities or mineworkers, but even public interest organisations as well – and cause divisions within that party. Fourth, litigation is inherently adversarial and creates a more hostile relationship. There is thus a risk that communication channels are shut off, which reduces the opportunities for civil society to have an impact on the conduct of government and mining companies.

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1228 Pilane and Another v. Pilane and Another (CCT 46/12) [2013] ZACC 3 (28 February 2013), para. 71. 
1229 Landev. v. Black Eagle Project, supra note 812, para. 44. 
1230 Biowatch v. Registrar Genetic Resources, supra note 294, para. 19; ArcelorMittal v. VEJA, supra note 570, para. 14; Landev. v. Black Eagle Project, supra note 812, para. 13; Magaliesberg Protection Association v. MEC Agriculture, supra note 1227, para. 61. 
1231 R3, R4, R14, R16, R17, R19, R20, R32. 
1232 R1, R4, R5, R7, R13, R32. 
1233 R2, R5, R7, R12, R13, R20, R30, R32, R33. Two reasons are that the courts are clogged up with cases and that they are often not severe enough with respect to delaying efforts by the counterparty. R18, R33. 
1235 R12, R16, R20. Cf. R23 (mentioning that during the court hearings on the certification, on the side of the mining companies, “the top lawyers in the country were in that court room, (…) all the senior counsels, the most respected ones in the country”). 
1236 R1, R16, R30. Cf. 32 (saying that they “are so scared of getting a bad decision”). 
1237 R10. 
1238 R10, R32. 
1239 R20, R28. Cf. R4 (describing litigation as “a particularly blunt instrument”). See also Langford (2015), supra note 112, 13 (describing how the first few years of the democratic regime civil society “largely adopted the task of implementing new government policy rather than maintaining critical distance”).
lawyers prefer, as far as possible, a collaborative strategy. Fifth and finally, the law is limited, and where specific concerns are translated into violations of certain rights, many facets to the case are lost in translation. Litigation also has a ‘narrowing’ effect in another way, as lawyers only litigate the issues that have the greatest prospect of success, which may be disappointing to victims and activists who want the entire story told.

On the other hand, there are advantages to litigation as well. Firstly, litigation can generate power. In particular, by having certain rights affirmed it can significantly empower victims and activists, and correct (at least partially) the power imbalance between them and their counterparties. Secondly, litigation, whether actually launched or used as an insurance, creates a form of leverage, which increases the pressure on the other party to come up with a solution. The bluntness of litigation may thus sometimes exactly be necessary to send a strong message. Thirdly, if the litigation results in a final decision, this judgment may contribute to the development of the law for the benefit of the general public, which is particularly important in case of legal uncertainty or legal gaps.

In sum, weighing up the pros and cons of litigation and having regard to the expectation that non-litigious remedies are exhausted first, there are two main instances where judicial proceedings constitute an appropriate tactic to seek to effect change: where everything else has failed or in case of an emergency. Some respondents also mentioned that litigation would more readily be considered, when clients specifically ask to launch judicial proceedings or when a test case is needed that may then be used in similar situations (infra Section 2.4.3). Moreover, respondents agree that when litigation is conducted, it should be combined with other strategies that focus more on public education, awareness raising, and social mobilisation. Legal proceedings are thus generally embedded in a broader strategy and complement advocacy (directed, for instance, at shareholders or at investors like pension funds), publicity and media campaigns, and lobbying government.

2.4.1.3. Contextual factor of considerable importance: the responsiveness of judges

In deciding whether or not to litigate a particular case, lawyers and activists also take into account whether judges are expected to be ‘responsive’ to their claim, which Gloppen identifies as one of the

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1240 R30.
1241 R1, R14.
1242 R13, R20, Cf. R1 (describing litigation as “a very important catalyst”).
1243 R3, R12, R18.
1244 R5, R14.
1245 R3, R4, R14, R17, R34.
1246 R3, R12, R17.
1247 R3, R4, R10, R19, R30, R32. A number of civil society actors organise community exchanges, for instance, bringing communities in whose vicinity a new mine is proposed in touch with communities that are already affected by mining so that they would better understand the actual impacts of mining. R1, R17, R28.
four stages in litigation. This willingness of judges to respond to a given concern voiced by victims of alleged human rights violations is influenced by diverse factors, which Gloppen classifies into the following four categories: legal culture (e.g. judges’ judicial ideology), nature of the legal system (e.g. structure, formalism and bureaucracy), sensitisation to human rights (e.g., training and curriculum development) and composition of the bench (e.g. social and professional background of judges).

Such factors are, in principle, out of the control of litigating parties, although they could be tackled through the broader strategy in which the litigation is embedded.

From the interviews it is apparent that respondents who are involved in or familiar with cases relating to environmental health hazards caused by mining in South Africa are mainly concerned about the attitude and legal culture of judges. Notwithstanding the independence of the South African judiciary, about which all respondents are confident, judges are still people who are members of the society in which they perform their functions and who are, at least unconsciously, influenced by a given ideology. Many respondents feel that South African judges, as far as human rights, the environment and mining is concerned, remain rather conservative, in particular at the lower levels of jurisdiction. Therefore, additional training and education of judges on those issues seems necessary. Nonetheless, lawyers and activists also realise that in particular instances the ideology of judges may turn out in their favour. Depending on the issue at stake a lot thus depends on the composition of the bench. This is captured well in the following revealing quote from a respondent discussing an ongoing case.

The judges understood our case. They not only understood our case, but also understood our argument. And one of the judges seemed quite, like blatantly, in our favour. It was so obvious that at some point I was just like ‘Oh, this is embarrassing’.

2.4.2. Preliminary question: local or transnational litigation?

Before proceeding with the discussion on strategic litigation specifically in South Africa a brief comment should be made on the role of transnational litigation (see also supra Part I, Section 1.2). In this context, ‘transnational litigation’ means litigation in third countries for human rights violations of which the actual harm was suffered by victims in South Africa.

It is safe to state that transnational litigation remains exceptional, with only two respondents actually having been involved in such litigation and both cases having been dismissed. One of the concerned

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1248 Gloppen (2006), supra note 146, 36-37. See also supra Part II, Section 2.1.1.2 and, in particular, note 331.
1249 Gloppen (2006), supra note 146, 49.
1250 R7, R10, R16.
1252 R23.
cases\textsuperscript{1253} was the silicosis lawsuit launched in the UK courts by individual mineworkers against Anglo American, which was following its dismissal relaunched in South Africa where it eventually got settled (\textit{supra} Section 2.3.3.4). As Leigh Day explains on its website, these claims were instituted in a foreign forum because they believed that the procedural rules in the UK were more beneficial for their clients. In particular, general damages awards are significantly higher in the UK and the procedures for dealing with mass claims are well-developed, while definitely at that time such claims were still a novelty and rarity in South Africa – and largely remain so until today.\textsuperscript{1254} Those procedural benefits of proceeding in the UK rather than in South Africa were acknowledged by one other respondent, who also questioned the experience of judges in the lower courts in South Africa with business-related human rights abuses as well as their willingness to send a strong message to the business community, especially the mining industry.\textsuperscript{1255}

Not only is transnational litigation for human rights violations committed in South Africa uncommon, several respondents signalled a defiance towards such litigation. Firstly, every lawsuit abroad is considered a missed opportunity to develop the law in South Africa and to move its jurisprudence forward.\textsuperscript{1256} Secondly, many respondents are not convinced that foreign courts are the appropriate forum to adjudicate such matters for both practical and principled reasons. On the one hand, the physical distance and the consequent high costs and practical barriers make it for lawyers and victims alike not easy to pursue a case in a foreign forum.\textsuperscript{1257} On the other, some respondents wondered why foreign courts should \textit{überhaupt} be competent to rule on events that took place in South Africa.\textsuperscript{1258}

Because the issue of transnational litigation falls outside the scope of this dissertation, which concentrates on host state regulation and litigation, it is not explored further. Nevertheless, it should be observed that the respondents’ resistance to transnational litigation is accompanied by a confidence that the South African courts are independent, impartial and not captured by the mining industry – which are all prerequisites for court proceedings to be fair that may not be present in other legal systems where human rights violations by transnational corporations are committed.

\textsuperscript{1253} The other one is known as the ‘South African Apartheid litigation’, instituted before the US courts under the Alien Tort Statute (\textit{supra} Part II, Section 1.1.2.4). This litigation was not discussed with the respondent involved therein.

\textsuperscript{1254} Leigh Day, “Gold mining silicosis.” When the silicosis lawsuit in the UK was eventually dismissed, this ruling was considered a huge setback, as the lawyers had been working on the case for a long time and the decision inevitably meant a further delay for their clients who were dying.

\textsuperscript{1255} R10.

\textsuperscript{1256} R25.

\textsuperscript{1257} R12.

\textsuperscript{1258} R12, R13, R25.
2.4.3. Strategic litigation as explorative litigation and the importance of test cases

A key characteristic of strategic litigation is its explorative nature. The litigation is aimed at having certain rights affirmed so as to empower the direct victims as well as other individuals who find themselves in a similar situation and to boost their ability to vindicate their rights. Hence, strategic lawsuits generally bear upon novel, uncharted legal issues, but once they are litigated and confirmed, they are there for the use of everyone – and, hopefully, without it being necessary to go to court. Strategic litigants have to be very creative as well; lawyers continuously explore new ways in which the law could empower their clients. One respondent explained, for instance, that it would be interesting to test whether extensive blasting by mines could qualify as a covered form of forced eviction, which would trigger the application of eviction law, which is very protective in South Africa and includes a requirement that the evictor obtains a court order in advance and pays adequate compensation.\textsuperscript{1259}

Given the novelty and creativity inherent to strategic litigation, such lawsuits are generally a learning experience.\textsuperscript{1260} The explorative nature of strategic litigation has a number of consequences, however. One is that it increases its unpredictability. Lawyers and activists are aware thereof and acknowledge that in some instances they should be careful not to push their luck. This may entail that they have to be content with small gains only, that they have to decide not to appeal a decision so as to prevent an even worse outcome or that they have to be careful that their litigation does not create a gap in the law or increases legal uncertainty.\textsuperscript{1261}

As strategic litigation is inherently explorative, litigating parties also tend to try and avoid additional complicating factors and prefer to concentrate on the main legal question that they want to see resolved. In relation to the class action, for instance, one lawyer involved said that “because it is a new, novel way of litigating, we want to try and keep the technical issues to a minimum, as much as possible.”\textsuperscript{1262} Other respondents confirmed that they prefer a focused strategy that fixates on one particular issue and that they avoid dragging in all the possible different facets to a particular case.\textsuperscript{1263}

This relates to what was mentioned before, namely that litigation is a blunt instrument and that in translating the harm suffered by victims into a court case a lot may be lost, because a narrow, focused strategy is considered necessary to increase the litigation’s manageability and its prospect of success.

\textsuperscript{1259} R13.

\textsuperscript{1260} E.g. R7, R12, R18. Cf. R 5 (“it is going to require some creative strategies from civil society as a whole going forward”), R16 (describing litigation as a gradual process, where you have to build upon small wins and sometimes have to face losses).

\textsuperscript{1261} R12, R16, R23, R32.

\textsuperscript{1262} AS.

\textsuperscript{1263} “The litigation strategy should be focused and should revolve around specific criteria, because you do not have the resources to attack every single piece.” R28. Cf. R20.
Because of its explorative nature, test cases are crucial in strategic litigation. When the law is uncertain and the responsiveness of judges to a particular legal argument unknown, lawyers should be careful not to raise expectations that they cannot achieve. Therefore, they look for the perfect case to test the tenacity and ambit of an argument, a so-called ‘test case’. Such case typically revolves around an aggrieved party, whose case neatly aligns with the problem in relation to which the law should be tested, who is likely to raise the sympathy of the courts, the media and/or the public, and who is well-informed about the duration and risks of litigation (see also infra Section 2.5.1).

Box 3. Mankayi v. AngloGold Ashanti: test case for the silicosis class action

South Africa adheres to a hybrid civil law/common law tradition. When a statute is adopted to regulate a specific legal domain, that statute extinguishes any common law remedies that existed previously if they essentially serve the same purpose. As was explained before (supra Sections 2.2.2 and 2.3.3.2), employees who suffer from an occupational disease or injury are entitled to statutory compensation either under the Compensation for Occupational Injuries and Diseases Act (COIDA) or under the Occupational Diseases in Mines and Works Act (ODIMWA).

For a long time, the prevailing view (at least amongst mining companies and their lawyers) was that mineworkers are covered by the definition of ‘employee’ under COIDA so that they fall under the general chapters of the latter Act and only move to ODIMWA for their compensation regime.¹²⁶⁴ According to that view, mineworkers were thus covered by the provision in COIDA that expressly indemnifies employers against damages claims by their employees.¹²⁶⁵

Hence, Richard Spoor Attorneys and Abrahams Kiewitz Attorneys, two of the three law firms representing the mineworkers in the silicosis class action first sought an authoritative ruling that ODIMWA has not extinguished the right of mineworkers to claim common law damages from their employers even though they are entitled to statutory compensation. This is the case of Mankayi v. AngloGold Ashanti, which is thus an example par excellence of a purposeful test case that served to pave the way for expanded litigation.

The case dealt with one mineworker, Thembekile Mankayi. Both the High Court and the Supreme Court of Appeal found against the plaintiff and his lawyers, but the Constitutional Court did eventually decide in their favour by holding that ODIMWA did not deprive Mankayi of his right to sue for negligence. Unfortunately, by that time Mankayi had died. Nevertheless, the Constitutional Court judgment opened the door for several other silicosis lawsuits, amongst which the silicosis class action.

¹²⁶⁴ Section 100(2) ODIMWA (cited in Annex 2) stipulates that mineworkers who have a compensatable disease cannot claim compensation under COIDA.
¹²⁶⁵ Section 35(1) COIDA (cited in Annex 2).
Naturally, any case in which a novel legal argument or strategy is employed can be considered a test case, or be used as such. The law firms or advocacy organisations that were directly involved in that case, may not always have the intention to conduct expanded, follow-up litigation in which they can reap further benefits from their initial success. The Carolina matter is a good illustration thereof. Its successful outcome encouraged several other stakeholders to approach the courts in similar situations so as to secure water for deprived communities.\textsuperscript{1266}

2.4.4. The dilemma of settling strategic court cases

Even if a court case is launched, it does not necessarily end with a final judgment. Many cases are settled out-of-court, which is often preferred by the counterparties, who want to avoid the bad publicity, the protracted process and the risk of an adverse precedent being established.\textsuperscript{1267} However, also for the parties that initiated the litigation, a settlement can be attractive or perhaps even an objective \textit{an sich}.

Lawyers’ deontology dictates that they must always act in their clients’ best interests. The two prevalent reasons why lawyers advise their clients to accept a settlement essentially boil down to this very fact: it is probably in their clients’ best interests. A settlement, first of all, takes much less time than a court case, time which may be precious for the victims.\textsuperscript{1268} The lawyers involved in the President Steyn litigation and the individual cases against Anglo American and AngloGold Ashanti mentioned earlier (\textit{supra} Section 2.3.3.4), justified their decision to settle, respectively, as follows:

There are various factors that actually pushed us to settle the case, one of them being that a third of our clients were dying.\textsuperscript{1269}

I understand why those clients take the offer. They have been at this for a long time, for 12 years. (…) They are ill and they are dying. I will also say this: they are entitled to get compensation within their life time.\textsuperscript{1270}

In addition, settlements end the uncertainty that reigns supreme during litigation, and assure victims of, at least partial, relief.\textsuperscript{1271} This uncertainty is caused not only by the fact that the outcome of litigation is inherently unpredictable but also by other, extraneous factors. A good illustration is the asbestos litigation, which is comparable to the silicosis litigation and was launched against mining

\begin{footnotes}
\item[1266] Such litigation was launched for the Louis Trichardt community and the Blyvooruitzicht community (see also \textit{supra} Sections 2.3.2.4 and 2.3.2.5, and \textit{infra} Box 32). Note that Lawyers for Human Rights (which was involved in the Carolina matter) represented the applicants in one of the two Blyvooruitzicht cases.
\item[1267] R5.
\item[1268] R12.
\item[1269] AS.
\item[1270] AS.
\item[1271] R5, R10.
\end{footnotes}
companies by former mineworkers who had contracted asbestosis from working in asbestos mines. The asbestos litigation was settled, *inter alia* because the company involved was going to be liquidated making it effectively the “last chance to settle.”

Although a settlement may be in the clients’ best interests, there are some obvious downsides to settlements. First of all, settled cases do not contribute to the development of the law and deprive public interest litigants of the opportunity to have a precedent set in their favour, which could then be used by individuals who find themselves in a similar situation as the parties to the settlement, to have their own dispute resolved more quickly and easily. Moreover, as settlements are agreed on a without-liability basis, the counterparty does not admit any guilt or liability by entering into that agreement. The contents of settlement agreements also remain confidential. Except for the parties involved, no one knows what has been agreed, for what reasons and what the victims get in terms of compensation. Because settlement agreements are not made public, the media and the general public tend to lose interest quickly, so that the matter gets obliterated. The one thing that lawyers at least know is that the counterparty is willing to settle, as one lawyer involved in the silicosis class action noted in relation to the individual silicosis cases that were settled in March 2016.

As usual they are all confidential. It is a without liability settlement, we do not know what the terms are at all. We do not even know the amount. But we see it as a positive step, because it means they are open to settlement. They are open to negotiation. They want to settle.

In any case, the dilemma to settle a case may create tensions between the attorneys of the victims and any advocacy organisation involved in the matter, either directly or indirectly (namely through their presence on the ground, for instance by providing support to victims). Advocacy organisations are primarily interested in the establishment of precedents and are not constrained by the best interests’ of the clients in the same way as lawyers are. One respondent, for instance, said the following about a settlement offered by a mining company to a community affected by its operations.

[X] did offer a settlement on that case, and we differed with the lawyers. (…) The settlement offer was kind of being pushed by them without coming to the whole committee. (…) But the lawyers, you know, their clients are the community, so they have to do what is best for the client. I know this

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1272 R6, R10.
1273 R17, R32. As Meeran says, however, “setting legal precedents is usually the goal of campaigners and politicians, not victims.” Meeran (2003), *supra* note 343, 227.
1274 R5, R10, R12, R17.
1275 R10.
1276 AS.
1277 With ‘committee’ the respondent means the committee in which all the parties involved in the case were represented, which included not only representatives from the affected communities and their lawyers, but also some advocacy organisations.
kind of conflict can come up often in a situation, but (...) I was thinking: ‘Oh my god, we have worked all this time. (...) We need precedent setting, you can do twenty million cases.’

When a case is settled and financial compensation is paid out in terms of that settlement, the general practice is to establish a trust, which then provides compensation to the victims who satisfy the conditions stipulated in the settlement agreement. Such a trust is managed by independent trustees, who have some expertise that is relevant for the issue underlying the litigation and the subsequent settlement, and who are appointed by the parties to the settlement. Examples are the Asbestos Relief Trust (following the settlement of the asbestos litigation) and the Q(h)ubeka Trust (following the settlement of the individual silicosis cases against Anglo American and AngloGold Ashanti).

2.5. Practicalities of access to justice

This second Section on strategic litigation to ensure accountability for environmental degradation caused by mining and for the consequent health hazards to which mineworkers and neighbouring communities are exposed, explains a number of practicalities confronting litigating parties. Such litigation can, for instance, only be launched, if victims are able to secure legal representation (Section 2.5.1) and if they overcome a number of practical barriers that impede access to justice or discourage victims from approaching the courts (Section 2.5.2). Following a review of these two hurdles, the Section continues with a discussion of standing rights, which could respond to some of these hurdles (Section 2.5.3). However, even when the court system seems accessible, litigating parties may anticipate on certain difficulties that may arise during the proceedings (Section 2.5.4).

2.5.1. Availability of legal services

As was mentioned several times before, communities and mineworkers who are harmed by human rights violations committed by mining companies generally do not dispose of the resources to vindicate their rights in court and, accordingly, depend on free or cheap legal representation. Furthermore, given the type of cases funded by Legal Aid South Africa and, in particular, the fact that civil matters and impact litigation remain underrepresented in the board’s strategy (supra Section 1.4.1.2), they will rarely be granted state-based legal aid. One exception is the silicosis class action, for which the Legal Resources Centre is funded by Legal Aid South Africa, as they had initially accepted to fund the President Steyn Litigation, which got settled without achieving the objective of creating an industry-wide compensation scheme. Most cases are thus taken to heart by public interest law firms that provide free legal services or by lawyers who work for a contingent fee. The latter lawyers regularly have to face comments, however, questioning where their real interest lie, notwithstanding

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1278 R17.
1279 AS. See also supra Section 2.3.3.4.
that contingency fee agreements are strictly regulated in South Africa so as to avoid abuse (supra Section 1.4.1.2). Also the mining companies cited in the silicosis class action have gone that road.

Box 4. Contingency fees and the silicosis class action

Some mining companies have objected against the contingency fee agreements concluded by Richard Spoor Attorneys and Abrahams Kiewitz Attorneys with their respective client-mineworkers. They argued that the agreements violated the law, allegedly because they did not express a preliminary view about the prospect of success, did not define what would constitute ‘success’ or ‘partial success’ and did not indicate the fees due in case of partial success. The mining companies’ concern that the case is pursued “at the instance of the lawyers for their own gain rather than in the genuine interests of class members” was quickly picked up in the media.\textsuperscript{1280}

The attorneys amended their agreements and the High Court eventually rejected the mining companies’ objections. Replying to the first objection, the judges held that “[a] legal representative will presumably not take the risk inherent in contingency fee arrangements unless s/he holds the view that the client has reasonable prospects of success in the contemplated action.”\textsuperscript{1281} The amended agreements also no longer contain any reference to a fee that would be due in case of partial success.\textsuperscript{1282}

Thanks to the various public interest law firms as well as the law firms accepting contingent fees (supra Section 2.1.2), the number of lawyers willing and able to take on human rights cases related to environmental hazards caused by mining is relatively high in South Africa. Nonetheless, in absolute figures they remain few.\textsuperscript{1283} Not every victim is thus able to secure legal representation and approach the courts. The question that arises then is how lawyers select their cases or decide whether they should take on a particular case. The determinants that transpire from the interviews can broadly be classified into three categories: lawyer-related factors, client-related factors, and subject-related factors. Before discussing these factors, it should be reiterated that whilst mineworkers and communities have to struggle to secure legal representation, they face a counterparty, whether government or mining companies, that is hugely endowed and most probably assisted by a strong legal team.\textsuperscript{1284}

The lawyer-related factors are more practical considerations. In particular, the law firm must have the required human, financial and technical resources available to conduct the case or, in other words, they

\textsuperscript{1280} See e.g. “Silicosis: the battle begins” (City Press, 8 June 2014).
\textsuperscript{1281} Nkala v. Harmony Gold (certification judgment), supra note 372, para. 152.
\textsuperscript{1282} Ibid. para. 156.
\textsuperscript{1283} R2, R12, R27. Cf. R5 (noting the problem of the high turnover in staff as well).
\textsuperscript{1284} R1, R27.
need to be able to allocate lawyers (attorneys and/or advocates) and budget to the case and they must dispose of the necessary technical expertise. As to the client-related factors, given that the stakes are high in strategic litigation and reach beyond the individual case, while the outcome is uncertain, lawyers admit that it is important to select the ‘right’ case with the ‘right’ facts and the ‘right’ client(s). Crucial is whether the case is perceived as winnable. What lawyers also find important in this regard is that their clients represent the different interests that are at stake in that particular case. For instance, where the matter relates to environmental degradation affecting a community, lawyers prefer to have two parties represented in the litigation, namely the community directly affected as well as an advocacy organisation acting in the interest of environmental protection or sustainable development, which allows them to pool limited resources and different forms of expertise. This preference is reflected in Table 17a in Annex 1, listing the litigating parties in directly relevant cases.

Box 5. The applicants in the Carolina and Tudor Shaft matters

Both in the Carolina matter and in the Tudor Shaft matter there were two applicants, that is the Federation for a Sustainable Environment and the community that was in casu affected, being the Silobela concerned community and the Tudor Shaft informal settlement.

True, in the Tudor Shaft case the urgent application was initially launched only by the Federation for a Sustainable Environment, which was due to the extreme urgency resulting in the case being launched, heard and a court order adopted within 24 hours. Afterwards, however, they ensured that the residents of the Tudor Shaft informal settlement were informed and got the opportunity to intervene as co-applicants.

“The FSE was of course concerned that the community was not represented in these proceedings and they had not even been engaged. And they then asked the community if they needed legal representation and directed them to [SERI].”

Even if no advocacy organisation is directly involved in the litigation, lawyers like to cooperate with them, because through these organisations they have an on-site contact point. Moreover, advocacy organisations are regularly the ones that inform them about a possible court case in the first place. When the affected party is a community, lawyers also prefer to get instructions from some kind of

1285 R23, R28.
1286 R7, R11, R23, R29, R32.
1287 R2, R10, R20, R23, R28, R32, R33. See also Centre for Environmental Rights, Community Casebook on Mining and Environment (2014), 17. See Table 17a in Annex 1, which mentions the applicants or plaintiffs in directly relevant cases.
1288 CALS, The Mapungubwe Story, supra note 944, 27 and 67-68.
1289 AS.
1290 R32.
1291 R17, R21, R26, R31.
community structure that represents a larger portion of the community so as to ensure that they speak with one voice.\textsuperscript{1292} Such structure ensures accountability within the community, contributes towards community empowerment and mobilisation and helps avoiding frictions and conflicts within the community, and it also forms a more formidable opponent.

In addition, the ‘right’ client needs to be informed well about the litigation process and its inherent unpredictability and lengthy nature. Especially lawyers who work with clients who belong to marginalised groups that are not familiar with the legal system, invest a lot of time in managing their clients’ expectations.\textsuperscript{1293} They need to understand the risks inherent to litigation as well as the fact that their situation is unlikely to change substantially in the short term, so as to avoid that the clients lose their interest in the lawsuit at some point during that long process and abandon the case.\textsuperscript{1294} A final client-related factor is that lawyers, as well as advocacy organisations supporting such cases, prefer to get involved as early as possible, because then they are more in charge of how the events evolve, which increases their ability to secure a good outcome.\textsuperscript{1295}

Finally, the subject-related factors have to do with the issue that is in dispute, especially whether the facts underlying the matter and the specific legal issues raised by them correspond to the strategic agenda of the law firm and to its long-term objectives (see also supra Section 2.1.2).\textsuperscript{1296} In this regard, some law firms also take into account the specific remedies that their clients want to pursue and the (social) impact that such remedies are expected to have. Most public interest law firms are not keen to initiate legal proceedings that are purely aimed at securing damages for the individual clients and concentrate their efforts on cases that pursue forward-looking remedies with a societal impact,\textsuperscript{1297} while others, especially the regular law firms, are interested precisely in the question of damages (see also infra Section 2.6.2.2)\textsuperscript{1298} – which may be related as well to the fact that their fee is dependent on the compensation that their clients eventually receive.

\textsuperscript{1292} R5, R14, R20, R23, R26, R28, R32. If no such formal community structure exists, lawyers at least want a power of attorney of as many residents as possible. See also Meeran (2003), supra note 343, 226 (writing that community structures and maintaining unity is crucial even in cases concerning mineworkers).

\textsuperscript{1293} R4. Cf. R6 (explaining how former asbestos mineworkers think they are entitled to compensation regardless of their health condition, simply for having worked at those mines, which often creates tensions).

\textsuperscript{1294} R12, R16.

\textsuperscript{1295} R5.

\textsuperscript{1296} R7, R11, R16, R20, R23, R27, R28, R32.

\textsuperscript{1297} R4, R17, R25, R27, R32. Cf. R7 (emphasizing the need to tackle the issues in a systemic way, and not on a case-by-case basis).

\textsuperscript{1298} R12, R29. Damages can, however, also have indirect effects, for instance by provoking a law reform process or a change in corporate behaviour. R12, R23.
2.5.2. Practical barriers

Mineworkers or community members who are affected by mining tend to live in remote and isolated areas, not in the towns where the law firms are located, and most of them are poor and illiterate. These are some of the practical factors that not only impede access to justice but that also inevitably affect the relationship of attorneys with their clients, which is quite special in this type of cases.

The following anecdotal quote from a respondent aptly captures this reality.

When I go and consult with clients, it is almost like an adventure. You have to call them, [but] some of them do not have phones. So, they have given you either their sons or daughters’ phones who are in the city (…) wherever they may be or you call the neighbour. So, you call them and say: “Hi, it is me, the lawyer from Johannesburg. I would like to speak with (…). When can I call?” If it is like a neighbour: “Call after 30 minutes”. You know that means they have to go and give him the phone. Then you have to tell them: “We want you to come and see us next week, can you come?”. In Lesotho, what I find interesting is that they will be like: “Oh, I will need to hire a horse”. Like literally, because there is no transport. “[I will need to] get a horse and leave it somewhere and then I need get transport. (…) I will borrow money.” Then I have to give back the transport money because they have actually borrowed, and the interest is ridiculous in areas like this.

The fact that these victim groups are generally poor and illiterate may also involve unexpected challenges for their lawyers. A good illustration is found in the President Steyn litigation (see supra Section 2.3.3.4), where after the settlement the lawyers faced the challenge that only two of their twenty-three clients had a bank account and that none of them was used to handle large sums of money. The same situation is likely to repeat itself for the silicosis class action, but this time the number of clients is many times higher.

When you get these now thousands of people coming, and I can bet you the majority of them will not have bank accounts. Like opening up accounts for them? What we did with the twenty-three, is that (…) we even provided them with financial counselling, like financial advice on how to invest the money. (…) Should we settle this case, it is a big exercise, because honestly (…) most of them cannot even write.

The practical barriers for vulnerable mineworkers and communities who seek access to justice can also be heightened purposefully by mining companies. One regularly applied tactic is to create frictions...

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1299 R1, R2, R12, R17, R18, R20, R33.
1300 R29. Cf. R4 (saying that they need to constantly reflect on what it means to represent communities, as ‘traditional’ rules do not apply).
1301 R23.
1302 R1.
1303 AS.
Mining companies often distribute pamphlets within the community to try and convince people of the benefits that mining brings to them (see, for instance, Figure 2 supra in Part I, Section 5.3.4). or they simply offer jobs to some people within the community or buy people off, mostly the chief and his entourage. When the community is fragmented and some of its members do not agree with the grievances expressed by the others, it becomes harder for lawyers to present a strong case to the courts – and, as was said before (supra Section 2.5.1), lawyers prefer to represent a strong community that speaks with one voice. Mining companies can also provoke animosity within their workforce. One element in the events that led to the wildcat strike at Marikana (supra Box 2) were the tensions amongst mineworkers based on their labour union affiliation, which were allegedly exploited by the company.

It should also be noted in this connection that many mining companies do not shy away from abusing the lack of knowledge of mineworkers and communities, or their gullibility.

Another tactic used by mining companies are SLAPP suits, which were also discussed earlier (supra Section 1.4.1.3). Such lawsuits can be directed against activists who challenge mining companies, against victims who want to vindicate their rights, or against their legal representatives. In some cases people are not merely intimidated through lawsuits or claims for damages, but even physically threatened. Finally, intimidation can take the form of ad hominem attacks against individual victims, activists or lawyers, generally in the media. An example is the smear campaign against the law firms conducting the silicosis class action pursuant to a contingency fee agreement (infra Box 4).

2.5.3. Standing rights

Litigating parties in lawsuits relating to human rights, environmental degradation and mining, generally base their claim on several types of standing. They do not only act on their own behalf but also on behalf of other members of the affected group to which they belong, and, in the case of a voluntary association, on behalf of its members, and they nearly always act in the public interest, sometimes even specifically in the interest of the environment. That advocacy organisation base their standing on Section 38(d) of the Constitution (public interest litigation) is logical. However, even direct victims tend to claim that they act in their own interest as well as in the public interest, because

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1304 R2, R8, R13, R14, R20, R28.
1305 R8, R20.
1306 R8, R20, R29, R32.
1307 Final Report of the Marikana Commission of Inquiry, supra note 955, e.g. 48-52; R15.
1308 R2, R5, R13, R17, R29. Sometimes mining companies abuse traditional governance structures by only seeking consent from the chief. R23. Cf. R8, R32.
1309 R26, R29.
1310 R26.
1311 Respectively Sections 38(a), (e), (d) and (b) of the Constitution (cited supra in Section 1.4.1.1) and Section 32(1)(e) NEMA (cited in Annex 2).
the litigation bears upon a recurring set of facts with many people finding themselves in a similar situation and because constitutional rights are at stake that affect a range of people. By way of illustration, the standing rights relied on in the focus matters are listed in Table 7 below.

<table>
<thead>
<tr>
<th>Table 7. Standing rights in the focus matters</th>
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<tbody>
<tr>
<td><strong>Tudor Shaft matter</strong></td>
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<tr>
<td>Federation for a Sustainable Environment</td>
</tr>
<tr>
<td>Residents of the informal settlement</td>
</tr>
<tr>
<td><strong>Carolina matter</strong></td>
</tr>
<tr>
<td>Federation for a Sustainable Environment</td>
</tr>
<tr>
<td>Silobela concerned community</td>
</tr>
<tr>
<td><strong>Silicosis class action</strong></td>
</tr>
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<td></td>
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</tbody>
</table>

A more interesting question is whether a collective or mass claim that seeks individualised relief, such as damages, for a high number of plaintiffs is filed as several individual cases (that are likely joined) or as a class action. The latter rule of standing has a number of straightforward advantages, which could be summarised as follows.

The class action mechanism is a powerful tool by which the poor can take on the powerful, the Davids take on the Goliaths, and the have-nots take on the haves. And, people [that have been wronged] who otherwise do not have any path to recourse, still have any hope for recourse. A more interesting question is whether a collective or mass claim that seeks individualised relief, such as damages, for a high number of plaintiffs is filed as several individual cases (that are likely joined) or as a class action. The latter rule of standing has a number of straightforward advantages, which could be summarised as follows.

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Class actions are described by public interest lawyers as the only realistic option for poor people with little education to vindicate their rights, especially when they have to face a powerful counterparty, such as government and, definitely, the mining industry. Individually, these people have no power, would not dare to litigate against such an opponent and would not be able to secure individualised free or cheap legal services. The High Court agreed with this position when it certified the silicosis class action, emphasizing that “the court should be careful not to close its doors in the face of the indigent, 

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1312 Section 38 of the Constitution is cited *supra* in Section 1.4.1.1.  
1313 The residents did not explicitly indicate on what standing rules they relied for their intervention. They did mention, however, that they had “a direct and substantial interest” in the matter. Moreover, the application was launched by ten applicants, individually named, and by the ‘further Residents of the Tudor Shaft Informal Settlement’ (82 more applicants).  
1314 R30.  
1315 R1, R12, R27, R30; Written Submissions of the Amici Curiae, in re: *Nkala v. Harmony Gold* (48226/12) (30 September 2015), para. 37.3; Applicants’ Submissions, in re: *Nkala v. Harmony Gold* (48226/12) (9 June 2015), paras 30-43 and para. 148. This argument was accepted by the High Court in its judgment certifying the classes. *Nkala v. Harmony Gold* (certification judgment), *supra* note 372, para. 108.  
1316 See also Applicants’ Submissions, in re: *Nkala v. Harmony Gold* (48226/12) (9 June 2015), paras 30-43 and para. 148.
the weak and the meek, seeking to access justice”\textsuperscript{1317} and conceding that a class action was the only realistic option for mineworkers to assert their rights.\textsuperscript{1318}

Class actions are also more egalitarian in nature given that they ensure that (the benefits of) litigation accrue to everyone, even to those people who would never consider to have recourse to the court system or who do not know their rights, let alone that they have been violated.\textsuperscript{1319} Other clear advantages of class actions recognised by respondents include their ability (1) to prevent the judicial system from being clogged up with an infinite number of individual cases by allowing courts to rule on cases raising similar factual, legal and evidential issues in one set of proceedings, and thereby to prevent the duplication of costs (judicial economy and efficiency), and (2) to correct the inequality between the parties through the power of numbers (equality of arms), but also (3) to protect defendants against a multiplicity of actions.\textsuperscript{1320}

Nonetheless, there are also some downsides to the class action mechanism. A critical one is that class actions complicate the litigation and inevitably take more time to reach a finality. That was also the specific reason why Leigh Day and Mbuyisa Neale Attorneys decided not to join the class action and filed individual summons for each of their clients in the litigation against Anglo American and AngloGold Ashanti – this was a mammoth task, however, and required a lot of double work. Nevertheless, they felt they could “put in the work, if it will cut the time short” which was all the more important given that their clients were dying.\textsuperscript{1321} This advantage of the individual cases over the class action is also recognised by lawyers involved in the silicosis class action.\textsuperscript{1322}

Class actions are, moreover, not available in every case. A basic requirement is that the experience by the victims must be sufficiently similar to raise common issues of fact and law. Even in relation to the silicosis class action the question has been raised, especially by the mining companies, whether one class action can be launched for mineworkers that have worked at different mines with varying working conditions, for instance. Accordingly, lawyers and activists are wondering whether a class action could be launched on behalf of all communities that suffer from a particular environmental

\textsuperscript{1317} Nkala v. Harmony Gold (certification judgment), supra note 372, para. 105.
\textsuperscript{1318} Ibid. para. 108.
\textsuperscript{1319} R23.
\textsuperscript{1320} R3, R12; Applicants’ Submissions, in re: Nkala v. Harmony Gold (48226/12) (9 June 2015), para. 79; Nkala v. Harmony Gold (certification judgment), supra note 372, para. 34. In particular, the following four specific reasons were mentioned as to why the class action would serve judicial economy: common legal issues are argued and decided in one suit binding on all parties; discovery is produced and disputes regarding discovery decided once; expert and fact witnesses need only prepare reports and give testimony once; and, all common factual issues are decided in a single trial. Applicants’ Founding Affidavit, in re: Nkala v. Harmony Gold (48226/12) (21 December 2012), para. 180.
\textsuperscript{1321} AS.
\textsuperscript{1322} AS.
impact caused by mining. A final drawback is that the legal framework of class actions in South Africa is not well-developed; no legislation has been enacted as yet and, in contrast with many other common law jurisdictions, there is not a lot of jurisprudence, so that there still exist a lot of uncertainties.

2.5.4. Difficulties during the proceedings

The difficulty in environmental law is environmental science, because if you do not have the science to back your claim, then you have a problem. We are already talking about impoverished communities with all sorts of diseases and the like. So, when people develop skin rashes and other ailments, government and industry are quick to say: ‘But how do you know it is the mine that causes that illness?’

As this quote indicates, when litigating parties claim that an unhealthy environment negatively affects people, a first, inevitable hurdle is the evidential burden and the need for scientific proof. Recent judgments suggest that whenever a mining company itself has conducted an environmental impact study to support its position on a particular issue in dispute, the parties opposing that position must themselves put forward the scientific evidence overturning the company’s study. Lawyers, who themselves lack such technical knowledge, have to attract experts for that task. The need for technical knowledge and expertise explains why, as mentioned before (supra Section 2.5.1), lawyers prefer to institute a lawsuit on behalf of both an affected community and an interested advocacy organisation, as the latter organisation may help with collecting the necessary evidence. In any case, the evidential burden is one of the hardest barriers to overcome in this type of cases, and generally leads to a massive draw on resources. Even the merely practical aspect of getting environmental scientists to act on behalf of the litigating parties can prove to be difficult, as many scientists are, or hope to be, employed by the mining industry.

Not only finding and submitting the evidence is challenging, but also the subsequent application of legal rules based on that evidence is not straightforward. One question that arises, for instance, is

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1323 R5. One stumbling block would be the definition of the class.
1324 R12, R24.
1325 R20.
1326 Magaliesberg Protection Association v. MEC Agriculture, supra note 1227, paras 51-52 and 60; Pilanesberg Platinum Mines (Pty) Ltd v. Chief Director: Mineral Regulations, Department of Mineral Resources and Others (61752/2013) [2014] ZAGPPHC 590 (29 July 2014), paras 29-31.
1327 R5, R9, R13, R20. Cf. R28 (mentioning the availability of own expert studies as an important consideration in selecting cases for strategic litigation).
1328 R2.
1329 R2, R3, R20.
1330 R12, R14, R23. Cf. R 13 (explaining the related problem of “independent” experts who are actually on the pay-roll of the mining company).
exactly how bad the air or water quality, or the noise pollution has to be for the claim to be wellfounded.\textsuperscript{1331} There is some helpful jurisprudence, however. A High Court judge has found, for instance that the term ‘significant pollution’, which is used in several pieces of environmental legislation, should not be interpreted too rigidly because “pollution is (…) a complex, technical and scientific issue”.\textsuperscript{1332} The judge concluded, therefore, that “in light of the constitutional right a person has to an environment conducive to health and well-being, (…) the threshold level of significance will not be particularly high.” In another judgment a High Court, checking whether the requirements for a final interdict were met, found in favour of the applicants who all had complained of similar ailments given that “[t]he evidentiary criterion of a preponderance of probability entails no more than that a court must from the conceivable probabilities to which the facts of a case lend themselves, select a conclusion which to it seems to be the more natural or plausible one.”\textsuperscript{1333} Very important is the Constitutional Court’s judgment in \textit{Lee v. Minister of Correctional Services}\textsuperscript{1334}, in which the common law was developed so as to provide for a flexible test to establish factual causation in tort law. This precedent is now also relied upon in the silicosis class action.

\begin{boxedtext}{Box 6. Factual causation in the silicosis class action}

In \textit{Lee}, the Constitutional Court found that to establish factual causation in case of an unlawful omission, the plaintiffs do not have to substitute the unlawful conduct with lawful conduct and prove that in this alternative scenario the harm would not have occurred.\textsuperscript{1335} For factual causation to be satisfied, it is sufficient for parties to establish that the omission was a ‘more probable cause’ of the harm, and that “proper systemic measures would have reduced the risk.”\textsuperscript{1336}

This precedent forms a critical part of the argumentation substantiating the claim in the silicosis class action – note that Section27, the legal representatives of the \textit{amici}, also intervened in \textit{Lee v. Minister of Correctional Services} on behalf of Treatment Action Campaign to submit arguments precisely on the need for the Court to develop the common law on factual causation. In their heads of argument for the certification proceedings in the silicosis class action, the mineworkers’ legal representatives already\textsuperscript{1337} argue that the applicants satisfy the test for

\textsuperscript{1331}R2.
\textsuperscript{1332}\textit{Hichange v. Cape, supra} note 668, p. 412.
\textsuperscript{1333}\textit{Tergniet and Toekoms v. Outeniqua, supra} note 754, para. 46. The Court’s reasoning starts at para. 36. Note that the Court also considered the fact that the right to a healthy environment was at stake. Ibid. para. 38.
\textsuperscript{1334}\textit{Lee v. Minister of Correctional Services, supra} note 685.
\textsuperscript{1335}Ibid. para. 43.
\textsuperscript{1336}Ibid. para. 66.
\textsuperscript{1337}Arguments on the merits of the claim will be elaborated in the trial proceedings, following the certification.
factual causation applied by the majority of the Constitutional Court in *Lee*.

Firstly, the mineworkers have contracted silicosis (or tuberculosis) due to the dangerous and unhealthy circumstances under which they had to work. Secondly, if the mining companies had properly discharged their duties to protect the mineworkers by taking the necessary and universally-known preventive measures, the epidemic of silicosis, silicostuberculosis and pulmonary tuberculosis among South African gold mineworkers would have been prevented.

Related to the evidential burden is the need to obtain information. Although the South African Constitution entrenches a right to have access to information in Section 32, in practice information is mostly only obtained after a long legal battle. In principle, actors who want to obtain access to certain records held by either government or a mining company, should submit a request in terms of the Promotion of Access to Information Act (supra Section 2.2.2). Nevertheless, such requests are often ignored or rejected, after which protracted court proceedings become inevitable unless the request is abandoned. Accordingly, years in court may pass by before information is effectively gotten hold of, and only then can the requesters proceed to use that information as they have planned – and provided that the information is not academic by that time. Another option is to start the litigation before having access to all relevant information, which is then requested during the proceedings by way of discovery (see supra Part II, Section 2.2.2.1). The obvious downside is that, depending on the centrality of that information to the lawsuit, it is hard to ascertain the merits of a claim and its prospect of success.

**Box 7. The quest for information in the silicosis class action**

After a battle of several years, the legal representatives of the mineworkers have still not succeeded in getting access to the database of the Employment Bureau of Africa, which is responsible for the recruitment of mineworkers. People who want to work in the mines go to this Bureau, which then sends the mineworkers to the different mines based on demand. In this system, most mineworkers work on repeated one year contracts, following which they are repatriated to their region of origin, which forms the basis of the migratory labour system (supra Section 2.1.1.2). All the employment records of the gold miners are thus at the Bureau’s

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1338 Applicants’ Submissions, in re: *Nkala v. Harmony Gold* (48226/12) (9 June 2015), paras 124 and 125. See also the evidence submitted in this regard in ibid. paras 124.1 to 124.10.
1339 R2, R7, R9, R11, R12, R14, R15, R16, R18, R23, R32. This is “beyond reach of most ordinary citizens.” Bentley and Calland, supra note 1008, 360.
1340 Access to Information Network, Shadow Report 2016, 2 (reporting inter alia that 45.5% of the requests addressed to public bodies (government) were denied in full, either actively or as a result of the request being ignored). See also Bentley and Calland, supra note 1008, 345.
1341 Wynberg and Fig (2015), supra note 175, 325-326 (discussing *Biowatch Trust v. Registrar Genetic Resources*, supra note 294).
1342 R12.
disposal, and access to those records is necessary to establish which mineworker worked for which mine(s) and for how long.

Also crucial for the class action are the service agreements that the parent mining companies, who are the responding parties in the silicosis class action (infra Box 11), have concluded with their subsidiary-mines. Fortunately, the mineworkers’ legal representatives already knew a lot about those agreements through the documents that one of the law firms involved, the Legal Resources Centre, had discovered during the earlier President Steyn Litigation.¹³⁴³

2.6. The design of strategic lawsuits

This third and final Section on accountability for environmental health hazards caused by mining discusses the three ‘umbrella decisions’ that parties conducting strategic litigation have to adopt (supra Part II, Sections 2.2.2 to 2.2.4): which type of remedy do they pursue (Section 2.6.2), who do they sue (Section 2.6.3) and which (legal) arguments do they use (Section 2.6.4). The Section begins, however, with explaining that litigating parties first assess their starting position and mission, which is a key step in ‘strategic’ litigation (supra Part I, Section 2.4) and influences the cause of action on which they will proceed, which in turn affects the available relief, the right counterparty and the appropriate arguments (Section 2.6.1).

2.6.1. Strategizing: starting position and mission

How a case is strategically designed depends on two crucial assessments, notably (a) what is the starting position of the clients (their ‘situation’), and (b) what do they want, (their ‘mission’). As was said earlier and as these two criteria suggest, the deontology of lawyers demands that they act in their clients’ best interests.¹³⁴⁴ Although attorneys may advice their clients as to where their interests lie, they ultimately depend on the clients’ instructions, as is also admitted in the following quote from an interview.

It is all very well to have strategic objectives about what we want to achieve from litigation, but we have to act in the context of obtaining meaningful remedies for the actual people we are litigating for. So, you have to be careful not to let your own objective take over.¹³⁴⁵

Therefore, a lot of the decisions that have to be adopted in the course of strategic litigation, including the umbrella decisions as to which proceedings are resorted to and what relief is claimed, who is sued and which arguments are used, depend on the clients’ starting position and their wishes and interests in solving the problem. Together with an assessment of the prospect of success, the situation and mission

¹³⁴³ AS.
¹³⁴⁴ R4, R5, R8, R12, R13, R14, R16, R19, R20, R23, R28, R32, R34.
¹³⁴⁵ R7.
of the clients will determine the cause of action. As one respondent said, “the real decisions are about cause of action and prospect of success.”1346 Hence, the principal moment at which public interest lawyers have a real say in the strategic litigation presents itself when they decide which cases they want to take on. It is at that time that they have to consider whether the clients’ particular case aligns with their broader objectives of strategic litigation. This is not to say, however, that cases cannot tackle several issues at once, both in the interest of the individual clients and in the broader public interest.

In this regard, it should also be noted that the objectives of a concrete case may well extend beyond the concrete relief that is sought from the court. Regardless of the actual reparation secured for a neighbouring community or for mineworkers, the litigation may be aimed at achieving such objectives as setting a precedent, clarifying the law, invalidating a given statute, regulation or agreement or particular conduct, or inciting legal or policy reform, whether directly or indirectly by empowering victims, by mobilizing people or by raising public awareness.1347 These different types of impact of litigation are discussed more in-depth infra in Section 2.7.

2.6.2. The preferred remedies

2.6.2.1. The road of civil, criminal or judicial review proceedings

As Table 17b in Annex 1 demonstrates, most of the directly relevant cases are civil proceedings (applications or actions) – this Table even excludes the matters that eventually got settled, which were either civil cases as well, or cases proceeding to arbitration. Also judicial review proceedings to challenge licenses, for instance, are quite common and are resorted to either to halt certain activities or, at least, to influence the decision-making process by government.1348 The more interesting question then is, arguably, why criminal proceedings remain exceptional, even though many of the duties prescribed by the applicable laws establish criminal liability on the part of the duty bearer.1349

Only a few of the respondents have ever been involved in criminal proceedings, which means that there is little experience available.1350 The one public interest law firm that has experimented more often than others with the criminal approach is the Centre for Environmental Rights. This organisation

1347 R1, R4, R5, R7, R10, R12, R13, R14, R17, R20, R23, R25, R27, R28, R30, R32.
1348 This is less common for cases concerning environmental health hazards caused by mining, because generally parties apply for judicial review either before a mine is constructed or before it expands its operations (which are both acts which require authorisations), at which time it is hard to prove health hazards. As one respondent said, “the environmental interest is not there yet.” R2.
1349 Sections 98 (offences) and 99 (penalties) MPRDA; Sections 49A (offences) and 49B (penalties) NEMA; Section 151 (offences en penalties) NWA; Section 82 (offences and penalties) WSA, Section 90 (offences and penalties) PAIA; Sections 86-91 (offences) and 92 (penalties) MHSA.
1350 R2, R34.
has even published a booklet in which they carefully explain, step-by-step, how community members can lay criminal charges when they believe a mining company has committed an offence. The Centre has also supported a criminal case that resulted in the first ever, albeit custodial, prison sentence being imposed on a director of a recalcitrant mining company.

Box 8. The Batlhabine criminal case: a first

Batlhabine is a small village nearby Tzaneen in Limpopo Province. The community suffers from severe environmental degradation caused by a clay mining company, Blue Platinum Ventures 16, that had started to operate in October 2007. For several years the community tried to obtain an intervention by the Department of Mineral Resources, because the mine clearly acted in contravention of the law. As nothing happened, one member of the community and leader of the Batlhabine Foundation (which was founded specifically to oppose the illegal activities of the mining company) decided to lay criminal charges against the mining company and its seven directors.

Eventually, in January 2014, one of the seven directors of Blue Platinum Ventures 16 was sentenced to five years’ imprisonment, a sentence that was wholly suspended for five years provided that the accused would not be convicted again for the same offence and that he would rehabilitate the areas that were damaged by the mining activities, within three months. As the sentencing transcripts demonstrate, the judge was very much aware of the need to impose an ‘appropriate sanction’, which according to her, “must be the sentence that will benefit the community and at the same time must deter the accused from committing the same offence.” She gave the following explanation as to why she did not believe that a fine was appropriate in this particular case.

“Even if the accused can be ordered to pay a fine of [5 million ZAR] the question is whether that [5 million ZAR] will be used for the benefit of the residents who were affected by these operations. The answer is no, the [5 million ZAR] will go into the coffers of the Department of Justice and the affected residents will continue to suffer. Therefore it is upon this court to see to it that an

1351 In brief, the steps are the following: (1) writing notes, taking photographs and asking others to do the same; (2) finding the police station closest to the place where the crime is committed; (3) going to the police station with the evidence and with identity documents; (4) at the police station, asking to speak to the station commander; (5) telling the observations and recordings and handing over the evidence collected; (6) making a written statement with as much detail as possible, but completely truthful; (7) after that the police should open a docket; (8) getting a crime administration system number and contact information; and (9), if necessary, paying a visit to a state doctor, free of charge. Centre for Environmental Rights, When Mines Break Environmental Laws: How to Use Criminal Prosecution to Enforce Environmental Rights (2013).
1352 “So that (...) it is the organisation there in front.” AS.
1354 Record of proceedings in the Magistrates Court (Lenyenye, Limpopo), in re: S v. Blue Platinum Ventures (Pty) Limited and Another (RN126/13) (9 January 2014), see in particular pp. 24-25.
appropriate sentence must be the sentence that will benefit the community and at the same time must
deter the accused from committing the same offence.\textsuperscript{1355}

The criminal conviction meant a huge victory for the community and was welcomed across
South Africa as a precedent-setting case, because for the first time a director was convicted to a
prison sentence, without the option of a fine – notwithstanding the fact that the sentence was
suspended on condition of rehabilitation.

Nevertheless, for two main reasons the conviction did not bring the quest for justice of the
Batlhabeine community to a happy ending. On the one hand, the site is still not rehabilitated, and
the convicted director is not in prison. The judge’s order to rehabilitate the land within three
months also showed that she did not understand the process of rehabilitation very well, which
takes much more time if it is done properly. On the other hand, the community was never satisfied with the conviction for three reasons.\textsuperscript{1356} Firstly, although the charges against the
company and one director had proceeded to trial, the criminal charges against the six other
directors of Blue Platinum Ventures 16 had all been dropped. The one remaining director
seemed to be the “lazy boy”, as one party involved noted.\textsuperscript{1357} Secondly, the prosecutor accepted
a guilty plea by the accused director, signed on behalf of himself and of the company, on one
account, while dropping the remaining charges on thirteen other accounts. Thirdly, the Regional
Court found both the director and Blue Platinum Ventures 16 guilty, in accordance with their
plea, but only pronounced sentence on the director.

Until today the community is trying to get the convicted director, as well as the other directors
who got off scot-free and government, to take responsibility for the rehabilitation. After writing
letters to the Office of the Public Prosecutor and the Head of the Regional Courts, the criminal
case against the mining company was eventually, in August 2015, remitted by the High Court to
the Regional Court so as to at least enable the judge who initially heard the case to consider
whether or not the company should be convicted and to pass sentence accordingly.\textsuperscript{1358}

As the Batlhabeine case demonstrates, the battle may be long and the road to a criminal conviction is
fraught with challenges. Nevertheless, and notwithstanding their lack of experience, many respondents
recognised that there are, in principle, a number of advantages to criminal proceedings. These include

\textsuperscript{1355} Ibid.
\textsuperscript{1356} AS.
\textsuperscript{1357} AS.
\textsuperscript{1358} S v. Blue Platinum Ventures 16 (Pty) Ltd and Another (Review 260/15) unpublished (HC) (19 August 2015).
the collection of evidence by the office of the prosecutor, the strong message sent to the mining industry and the stigma attached to a criminal conviction.\textsuperscript{1359}

At the other side of the balance, however, the problem is, first of all, that fines are believed to be too low to act as a real deterrent.\textsuperscript{1360} Therefore, some respondents call for a change in approach and would like government to introduce and enforce non-financial sanctions such as pulling licences and closing down businesses.\textsuperscript{1361} Also disadvantageous is the fact that criminal proceedings take a lot of time,\textsuperscript{1362} and that their success depends on the capabilities of the prosecutor in charge of the particular case, as is confirmed by the Batlhabe saga.\textsuperscript{1363} Although available in theory, private prosecution, in turn, is not considered a real option due to the high costs and burden of proof.\textsuperscript{1364} People are rather encouraged to lay criminal charges, which they can do without a lawyer, and should then hope that the Office of the Public Prosecutor exercises its discretion in their favour and pursues the matter.\textsuperscript{1365}

In February 2017, for instance, the Office decided to prosecute two mining companies, the Blyvooruitzicht Gold Mining Company and Village Main Reef Gold Mining Company, and three former directors of these companies in the case of the Blyvooruitzicht community, which was discussed earlier (\textit{supra} Box 1).\textsuperscript{1366} The criminal case has proceeded to court on eleven counts, charging the five accused parties with several offences in terms of the National Environmental Management Act and the Mineral and Petroleum Resources Development Act. Amongst the charges are (1) the failure to clean up the tailings spillages and instead disposing them into the public domain which resulted in radiation doses exceeding the statutory limits, (2) the failure to implement dust management measures as a result of which dust fallout exceeds statutory limits, and (3) the failure to rehabilitate the slime dams. The outcome of this case has to be awaited.

2.6.2.2. Adequate relief

As was mentioned before, the relief sought by victims is one of the criteria that is considered by lawyers when they decide whether or not to accept a particular case, because once they accept a case,

\begin{footnotesize}
\begin{enumerate}
\item R2, R7, R25. See also Centre for Environmental Rights, Booklet on Criminal Prosecution, \textit{supra} note 1351, 18-19. \textsuperscript{1359}
\item R2, R10, R16, R25. \textsuperscript{1360}
\item R16, R28. \textsuperscript{1361}
\item Centre for Environmental Rights, Booklet on Criminal Prosecution, \textit{supra} note 1351, 18-19. \textsuperscript{1362}
\item R5, R7, R26. \textsuperscript{1363}
\item R2, R25. \textsuperscript{1364}
\item R5; Centre for Environmental Rights, Booklet on Criminal Prosecution, \textit{supra} note 1351, 18-19. \textsuperscript{1364}
\item \textit{S v. Blyvooruitzicht Gold Mining Company Limited and Others}, Annexure “A” to the Charge Sheet, Regional Court (North West). \textsuperscript{1366}
\end{enumerate}
\end{footnotesize}
they should labour under the clients’ instructions.\textsuperscript{1367} Table 17b in Annex 1 lists the relief that litigating parties sought in the directly relevant cases (excluding settled cases).

The main division with respect to relief is the one between (retrospective) claims for damages and (more forward-looking) claims for other types of reparation, whereby lawyers acting on the basis of a contingency fee agreement are more likely to accept the former, whereas public interest law firms tend to support the latter – notwithstanding exceptions. In this regard, it should be emphasised, however, that even ‘individualised’, retrospective cases can generate social impacts, with the silicosis class action probably being the best example (see also infra Section 2.7).

Although they admit that damages are part of the story,\textsuperscript{1368} and are often what practically matters for the actual victims, public interest law firms only rarely accept matters that merely seek to secure damages for individual claimants.\textsuperscript{1369} The perceived shortcomings of damages include their inherently retrospective nature, namely that they are concerned with the symptoms rather than the causes of human rights violations,\textsuperscript{1370} the allegedly low level of damage awards,\textsuperscript{1371} and the supposedly narrow scope of such relief, which only benefits the actual parties to the litigation (or the members of the class).\textsuperscript{1372} It should also be observed in this connection that lawyers who represent indigent clients, like communities and mineworkers, often request the counterparty to make a deposit into a trust fund, which is managed for the benefit of all the members of the group.\textsuperscript{1373} An example is the arbitrated case of the Mooifontein community, which has to be relocated because a mine, which is already operating at close range, wants to expand its operations further onto their land. A part of the sum requested is asked to be paid in a trust, and the parties also pray for an order appointing a consultancy firm to administer the implementation of the award.\textsuperscript{1374}

Sometimes public interest law firms support claims for damages, however. One evident example is the Legal Resources Centre’s involvement in the silicosis class action. Nevertheless, even though the silicosis litigation is primarily concerned with securing financial compensation for the affected mineworkers, precisely because the case is launched as a class action it is possible to secure damages on a broader and, hence, more egalitarian basis.\textsuperscript{1375} The litigation directly and indirectly pursues broader objectives as well, respectively to “get some sort of compensation schemes for all former gold

\textsuperscript{1367} R4, R5, R7, R8, R12, R14, R17, R20, R23, R28, R32.  
\textsuperscript{1368} R4.  
\textsuperscript{1369} R4, R7, R25, R27, R28, R32.  
\textsuperscript{1370} R4.  
\textsuperscript{1371} R11.  
\textsuperscript{1372} R4.  
\textsuperscript{1373} Cf. R22.  
\textsuperscript{1374} Plaintiff’s statement of the case, in re: The Mooifontein Community v. Optimum Coal Mining (Pty) Ltd, in the arbitration before Advocate A. Dodson SC (29 March 2017).  
\textsuperscript{1375} R3.
mine workers that contracted silicosis\textsuperscript{1376} and to “lead to changes in the legislative framework or in the way in which mining companies feel they must conduct themselves”\textsuperscript{1377} (\textit{infra} Section 2.7).

More common for public interest law firms is to seek relief in the form of declaratory orders or interdicts, including structural interdicts. A mandatory interdict that is commonly requested (and granted) is an order to engage meaningfully. The respondents discerned a number of benefits to such orders, including the fact that they force the different parties to engage with one another,\textsuperscript{1378} which is often one of the few real opportunities for indigent people to be heard.\textsuperscript{1379} Moreover, if a court orders meaningful engagement, the responsibility to solve the conflict and to find a compromise is given back to the parties involved rather than being imposed from the top down.\textsuperscript{1380} Meaningful engagement is also supposed to take place out-of-court and, hence, outside of the adversarial process that court proceedings essentially are, so that the parties can cool down for a moment.\textsuperscript{1381} Nevertheless, orders to engage meaningfully are not without criticism either. In particular, there is a lot of scepticism as to whether such engagement can really be ‘meaningful’ when the parties find themselves in an unequal bargaining position, which raises the concern whether the weaker party actually has a voice in solving the problem.\textsuperscript{1382} Also structural orders are popular, because they increase the likelihood that the order is actually complied with and thus ensure better enforcement,\textsuperscript{1383} and because they rightly suggest that an effective remedy is a process, rather than a once-off event.\textsuperscript{1384}

\noindent \textbf{Box 9. The Carolina matter: order for meaningful engagement and structural interdict}

The applicants in the Carolina matter requested four types of relief, all of which were granted – except for a small adjustment in the deadline for the provision of potable water in the interim which was set at 72 hours instead of 24 hours (\textit{supra} Section 2.3.2.5). Two of the orders concerned respectively an order for meaningful engagement (on the provision of water on the short and long term) and an order to report back to the court on the measures adopted to secure the provision of water on the long term.

The municipality never complied with these orders, however. Nevertheless, the Department of Water Affairs eventually agreed to engage with the applicants and their legal representatives, out-of-court, even though contrary to what the applicants had requested, the High Court judge

\begin{footnotes}
\footnotetext[1376]{{R}23. Cf. {R}3.}
\footnotetext[1377]{{R}28. Cf. {R}12, {R}23.}
\footnotetext[1378]{{R}3, {R}9, {R}32.}
\footnotetext[1379]{{R}33.}
\footnotetext[1380]{{Cf.} {R}32 (saying that “what we try and do is to get the kind of remedy that will contribute to strengthening the community in some way, that is not some top down imposition of I do not know what.”).}
\footnotetext[1381]{{R}16.}
\footnotetext[1382]{{R}16, {R}31.}
\footnotetext[1383]{{R}3, {R}16, {R}25, {R}32.}
\footnotetext[1384]{{R}32.}
\end{footnotes}
had not granted any order against that Department (supra Section 2.3.2.4). The Department also agreed to regularly inform the applicants and their representatives about the steps taken to address the water problem in Carolina and drafted a plan of action together with them. One respondent enthusiastically said the following about this development in the case.

“This is how engagement should take place (...) So these are all the things that ordinarily would have been included in that draft order which we would seek the court to endorse and make an order of court, but we are getting it through outside advocacy and mediation.”

2.6.3. The counterparty

When a mining company causes environmental health hazards and thereby infringes upon the rights of mineworkers or communities, there are, broadly speaking, two possible scenarios: either the company violates the law or the law does not adequately protect the rights at stake. In the two scenarios, both government and the mining company are in some way involved in the chain of events leading up to the infringements of human rights. Each time the mining company is the actual culprit. As to government, its responsibility to implement and enforce the law is at stake in the first scenario, while the second scenario revolves around its responsibility to regulate. In addition, there may be instances where government purposely creates an enabling environment for mining companies to commit those human rights violations, by deliberately omitting to regulate or to enforce.

Several determinants affect the decision of victims, activists and lawyers to concentrate either on government or on the mining company. These determinants may be strategic (relating to the broader objectives pursued), practical (relating to the prospect of success) or principled (relating to a fundamental position as to who is responsible) and they generally interrelate, which means that a strategic, practical or principled consideration to sue the one actor constitutes, respectively, a strategic, practical or principled consideration not to sue the other. Table 17a of Annex 1 displays the counterparty in all directly relevant cases.

This section begins with an analysis of the determinants of the choice to sue either government or mining companies (Section 2.6.3.1). After a discussion of the relevant strategic (i), practical (ii) and principled (iii) considerations, particular attention is paid to how the choice of a counterparty may reveal something about the role of civil society (iv). Thereafter, two specific issues related to suing mining companies are explored, namely institutional versus individual corporate liability and parent company versus subsidiary liability (Section 2.6.3.2). The Section ends with a table summarizing the findings (Section 2.6.3.3).

1385 AS.
1386 R1, R30.
2.6.3.1. Government versus mining companies

(i) A matter of strategy

A preliminary observation is that, as was said before (supra Section 2.6.1), the identity of the counterparty in legal proceedings is generally linked to the choice of remedy and the cause of action on the basis of which the court is approached. For instance, if the case is about the supply of basic services, such as water, respondents do not consider it opportune to approach mining companies.\footnote{R3, R9, R19.} Claims for damages, on the other hand, are generally directed against the responsible mining company.

In terms of strategy, one important reason why public interest law firms, at least traditionally, focus on government is that the scope of such litigation is believed to be broader; it is not only about this particular mine but about how government regulates and monitors mining.\footnote{R5, R7, R9, R11, R14, R25, R28.}

If we approach every single recalcitrant mining company on a one-by-one basis, we are never getting anywhere. So, what we are starting to realise is that we have to tackle it in a systemic way.\footnote{R7.}

On the other hand, respondents working for public interest law firms acknowledge that the incentive for a mining company to change its behaviour may be greater when that particular mining company is sued, rather than government.\footnote{R32.} They also realise that in some instances the South African government lacks the capacity to regulate and to enforce.\footnote{R2, R5, R11.} Facing this obstacle, they adopt either one of the following strategies: they sue the mining company, they ask an order from the court equipping the specific state actor with the necessary capacities,\footnote{This strategy was tested in a case relating to environmental conservation. In first instance, the litigating parties were successful and the High Court ordered the appointment of environmental inspection officers, but this order was reviewed and set aside on appeal. Kloof Conservancy v. Government (HC), supra note 922, partially reversed by Minister of Water and Environmental Affairs v. Kloof Conservancy (SCA), supra note 931.} or they engage with government in order to ensure that they are capable of effectively implementing environmental legislation. In the latter scenario, they could apply for an interim interdict, however, so as to prevent that the mining company launches or continues its operations in the meantime.\footnote{R20.}

In any case, recently public interest law firms have begun to experiment more with the idea of direct corporate accountability. Moreover, even when government is sued, the involved mining companies are cited as interested parties, so that they are informed about the ongoing proceedings and about the
possible eventual judgment.1394 No direct relief is sought against those mining companies, but the applicants’ lawyers can develop arguments regarding the duties of those companies and, accordingly, provide courts with an opportunity to rule on those duties and to specify them.1395 This way civil society actors gradually explore and develop the interplay between the government’s responsibility to regulate and monitor, and the mining companies’ duties to respect constitutional rights.1396

(ii) A matter of practice and feasibility

Notwithstanding the caveat that a lot is decided at the time when lawyers accept a case, they must advice their clients on their prospect of success and on the pros and cons of a particular litigation strategy. This is where the practicalities of suing either government or mining companies come to the fore once again. Several practical determinants are relevant in this regard, including the (financial) capacity of the counterparty, its attitude and its (temporary or perpetual) existence, the complexity of the case, the stigma attached to suing government, and the (il)legality of the situation.

iia) Financial capacity of the counterparty

One important consideration to sue the responsible mining company is that this is generally where the resources are. For instance, when victims want to obtain damages for the harm that they suffered due to the environmental degradation caused by mining, the litigation is likely to concentrate on the mining company, the simple reason being that “you sue the party with the deeper pockets”.1397 This holds true all the more because the judiciary is reticent to award damages against government, which already suffers from a lack of financial resources.1398 Nevertheless, precisely because they have the resources, mining companies are formidable opponents that can recruit the best lawyers, order expensive studies and can litigate forever.1399

1394 This is standard practice in case of an application for judicial review of an administrative decision granting an authorisation to a mining company. See e.g. Escarpment Environment Protection Group v. Department of Water Affairs, supra note 707 (three joined cases, one of which was settled out of court); Director: Mineral Development (Gauteng) v. Save the Vaal Environment, supra note 990.
1395 R9, R20. See also Smit, supra note 291, 364-365.
1396 A nice illustration is the Bengwenyama case, which did not concern environmental degradation but communities’ preferent right to be granted mineral rights. In its judgment the Constitutional Court clarified the duty of mineral rights holders under the MPRDA to consult with the landowner, holding that they must (a) inform the landowner in writing that an application for prospecting rights on the owner’s land has been accepted for consideration; (b) inform the landowner in sufficient detail of what the prospecting operation will entail, so that the landowner can assess the impact of the activities on the landowner’s use of the land; (c) consult with the landowner with a view to reaching an agreement satisfying both parties; and (d) submit the result of the consultation process to the Regional Manager. As the mining company had not complied with those duties, the Court set aside the administrative decision granting a prospecting right. Bengwenyama Minerals v. Genorah Resources, supra note 590, para. 67.
1397 R12. Also R9, R14, R18.
1399 R1, R5, R16, R20, R27.
ii.b) The counterparty’s attitude

As regards the willingness of mining companies and government to cooperate during the judicial proceedings, which is another practical reflection, the respondents seem divided. On the one hand, because of their seemingly unlimited resources mining companies are not deterred by the cost of litigating and may not shy away from delaying the proceedings. On the other, some respondents feel that government is more obstructionist than private companies, partly because government is very bureaucratic.  The precise government department that is involved may also be a relevant factor, with national government having a better record than local government and the Department of Environmental Affairs scoring better than the Department of Mineral Resources, for instance. Moreover, sometimes the problem of government is not one of lacking the will to cooperate but of lacking the necessary resources, in which case the better option may be to sue the responsible mining company.

Ultimately, however, much depends on the personalities of the concrete individuals involved, rather than on their affiliation to either government or mining company.

ii.c) The counterparty’s existence

Proceeding against the responsible mining company may also be difficult when (it is submitted that) ‘the’ company that caused the environmental degradation no longer exists, either because it has been dissolved or because its ownership has changed. The discussion about the ownership over the Tudor dump is a good example thereof (see supra Section 2.3.1). This is also why members of the Blyvooruitzicht community (supra Box 1), for instance, have submitted an urgent application to the High Court to prevent the liquidation of the Blyvooruitzicht Gold Mining Company so as to protect their interests.

ii.d) Complexity of the proceedings

Another practical consideration is that suing companies seems harder than suing government. The difficulty to get access to relevant information as well as to obtain the required scientific evidence (supra Section 2.5.4) is one of the main reasons why government seems more amenable to being sued.

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1400 R10, R13.
1401 R4, R28.
1402 R2, R5, R11.
1403 R2 and R20 (both explaining that one reason for government’s sudden willingness to engage in a particular case might have been that they had recruited a new legal officer), R29 (noting the impact of a replacement of a particular person on the dealings with that mining company).
1404 R6, R10, R14.
than the mining companies.\textsuperscript{1405} This obviously relates to the causes of action and the different responsibilities of government and of mining companies. Whilst government simply failed to regulate, monitor or enforce, to substantiate a claim against a mining company, it is necessary to prove that they are indeed liable, namely that they perpetrated the act that caused actual harm (or is likely to cause such harm) and that this act constitutes a breach of legal duties.\textsuperscript{1406}

Commissioning expert studies to prove that a mining company has caused or causes pollution, that this pollution affects the health or well-being of either mineworkers or host communities, and that such conduct satisfies the legal requirements to trigger its liability, places an enormous demand on the limited resources of the litigating parties – both financially and in terms of time.\textsuperscript{1407} This becomes even more complicated when several mining companies have contributed to the same pollution, which may raise the question whether these mining companies can be held jointly and severally liable so that the litigating parties do not have to show who is responsible for what and are not dragged into a long process with the companies simply pointing the finger at one another.\textsuperscript{1408} They believe that the state should call the mine(s) to account, all the more because government has access to certain information, which communities, activists and lawyers do not have.\textsuperscript{1409}

\begin{quote}
\textbf{Box 10. Was the Carolina matter a ‘war against the state’?}

Only government was included in the 2012 urgent application by Lawyers for Human Rights and the Legal Resources Centre on behalf of the Federation for a Sustainable Environment and the Silobela community. In the media the Minister of Water Affairs, who was amongst the actors cited, spoke about “a war against the state”, and publicly questioned the lawyers’ motivations for not having sued the coal mines that were responsible for the water contamination.\textsuperscript{1410} Also in court such complaints were uttered, as the judgment reports how the responding parties “contend that the cause of the water problem is not on their part but the mines.”\textsuperscript{1411} In reply the judge noted, however, that the responding parties themselves had “not stated what steps they have taken against the mines towards coming with a permanent solution to this problem”, whereby the judge alluded to the government’s shared responsibility in the events given its duty to regulate and to enforce.
\end{quote}

\textsuperscript{1405} R3, R5, R32, R33. Cf. R4 (emphasizing the importance of assessing what kind of proof is needed to support different possible causes of action.). \textsuperscript{1406} R14, R33, R34. \textsuperscript{1407} R2, R5. \textsuperscript{1408} R24. Cf. R2, R3. \textsuperscript{1409} R2. \textsuperscript{1410} Sue Blaine, “Water lawsuit is ‘war against the state’” (Business Day, 11 July 2012). \textsuperscript{1411} \textit{FSE and Silobela v. Minister of Water Affairs} (10 July 2012), supra note 1002, para. 21.
According to the applicants’ lawyers, the decision to sue only government was motivated by two considerations. First, the immediate concern of the litigation was ensuring that the affected communities would once again have access to potable water.\(^{1412}\) Such relief is generally not sought from mining companies. Second, collecting the evidence that shows that those particular mines that were named (see the case file, *supra* Section 2.3.2.5) were indeed responsible for the water contamination, whether in full or in part,\(^{1413}\) would have required lots of resources – and would definitely not have been possible in the context of an urgent application.\(^ {1414}\) Since the water crisis in 2012, water samples are now taken on a regular basis, however.

\[\text{ii.e) Stigma}\]

The stigma to litigation arises from a lot of things. (…) Unique to South Africa is the political history of moving from the Apartheid state, domination by a white minority, (…) to a majoritarian democracy. And so the fidelity to that democracy in the sense that anything that challenges it is against the revolution that led to it. [Counter-revolutionary] is the label (…) applied to people who are challenging government. Even when that challenge to government is in the interest of constitutional rights.\(^ {1415}\)

As this quote from a respondent suggests, a practical forethought when parties decide who they should sue, which seems peculiar to South Africa and should be understood in light of its history, relates to the anticipated reactions of the general public. Especially public interest law firms and advocacy organisations have to be careful not to forfeit public support by being branded ‘counter-revolutionary’, because they continuously attack government.\(^ {1416}\) The political context should thus be taken into account and the fact that the party in power is still worshipped for its role in ending Apartheid. This concern about being branded ‘counter-revolutionary’ should also be linked to the fact that most lawyers are white people, because black people are still catching up in highly educated positions, which is a legacy from Apartheid.

\[\text{ii.f) Illegal or substandard conduct}\]

Finally, when the conduct complained of is not illegal but civil society actors believe that the mining company could and should do better, or when such conduct falls short of international standards and best practices, lawyers and activists would rather concentrate their efforts on the mining company than

\(^{1412}\) AS. See also Fuo, *supra* note 1003, 35.
\(^{1413}\) There were suggestions that the community was also partially responsible due to the way in which they handle their waste and due to a lack of sanitation.
\(^{1414}\) AS. See also Fuo, *supra* note 1003, 36-37.
\(^{1415}\) R30.
on government.\textsuperscript{1417} The purpose then is to gradually build consensus around certain standards of conduct, in particular by having them included in jurisprudence or by having them voluntarily complied with in practice, standards which government may (hopefully) eventually endorse.

(iii) A matter of principle

The decision to sue either government or mining company is not only determined by practical considerations but also by principled beliefs about who should be called to account. Some respondents feel strongly about the fact that the state should watch over its people and protect the rights in the Bill of Rights. Hence, the state is responsible when mining companies degrade the environment in such a way that it infringes upon the rights of communities or mineworkers.\textsuperscript{1418} Litigation is then used as a tool to ensure that government complies with its duty to regulate, monitor and enforce standards of behaviour for mining companies so that the rights of the people are safeguarded. This viewpoint is not only motivated by Section 7(2) of the Constitution, which imposes on all organs of state a duty to protect the rights in the Bill of Rights, but also by the legal framework that establishes that the state is the custodian of the country’s mineral resources and the public trustee of its natural resources,\textsuperscript{1419} which have to be managed for the benefit of the South African people.\textsuperscript{1420}

The overarching idea is that the state is the public trustee of all these environmental resources. Not that that allows the companies to wash their hands, but the state must, first and foremost, make sure that all these different companies and parties operate responsibly and if it has not done that well, it really ultimately is the responsible one.\textsuperscript{1421}

On the other hand, the mining companies are the ones who actually perpetrate the human rights violations,\textsuperscript{1422} whilst government is only indirectly responsible for failing to adequately regulate, monitor and enforce standards for corporate behaviour – “the state is the non-protector”.\textsuperscript{1423} Sometimes the mining companies may even be responsible for the deficient regulation, monitoring and enforcement by government, by having exploited their powerful economic position to ensure that government does not affect their interests.\textsuperscript{1424} In view of this realisation that the mining company is the actual perpetrator, as one respondent acknowledged, “trying to compel government to get the company to do what it is supposed to do is an indirect way of holding the company accountable.”\textsuperscript{1425} Therefore, where this is the preferred road for victims, respondents believe that they should have a direct recourse

\footnotesize

\textsuperscript{1417} R14, R25, R32. Cf. R23.
\textsuperscript{1418} R2, R6, R9, R12, R14, R17, R24, R25, R27, R28, R30, R32, R34.
\textsuperscript{1419} Section 3 MRPDA; Section 2(4)(o) NEMA; Section 3 NWA (all cited in Annex 2).
\textsuperscript{1420} R14, R20, R34.
\textsuperscript{1421} R34.
\textsuperscript{1422} R5, R9, R12, R17, R18, R22, R23, R25, R30.
\textsuperscript{1423} R25.
\textsuperscript{1424} R1.
\textsuperscript{1425} R7.
against the mining company.\textsuperscript{1426} Expecting them to demand the state to do its job is not the same and even disempowers victims in some way.\textsuperscript{1427}

Moreover, precisely because the mining companies are the actual perpetrators and the ones who reap the benefits from those human rights violations, the respondents agree that ultimately the financial responsibility should lie with the mining companies.\textsuperscript{1428} Hence, even when they sue government, they would try and force government to recover any costs made to remedy the pollution from the responsible mining companies.

(iv) A matter of principled pragmatism: the role of civil society

The choice of suing government or mining company also correlates with the opinion of respondents about the appropriate role of civil society. This role is evaluated in relation to three targets: government, mining industry and affected (groups of) individuals. As regards the first two targets, civil society actors can play either a more supportive, collaborative role or a watchdog role.

The respondents accept that they should watch government, meaning that they should monitor whether government performs its functions and fulfils its mandate.\textsuperscript{1429} Nevertheless, if possible, they prefer to cooperate with government, rather than to adopt an adversarial approach, because, on the one hand, they realise that in many instances government simply lacks the resources and the capacity to live up to its task and, on the other, contrary to when the Apartheid regime was in power, the current government is democratic and, hence, in principle amenable to collaboration with civil society.\textsuperscript{1430}

As far as the mining industry is concerned, respondents seem divided on the question whether watching the industry should be part of their role. They definitely want to collaborate with and support mining companies so as to ensure that they are aware of their duties and able to comply therewith.\textsuperscript{1431} However, if companies fail to comply with their obligations, the question is whether civil society should be the one to enforce compliance, whether through litigation or otherwise.\textsuperscript{1432} They would rather have government performing that task, because regulation, monitoring and enforcement is essentially the state’s job. Nevertheless, many respondents conceded that in some instances civil

\textsuperscript{1426} R27.
\textsuperscript{1427} R14.
\textsuperscript{1428} R1, R3, R9, R17, R18, R24, R28.
\textsuperscript{1429} R2, R11, R20.
\textsuperscript{1430} R14, R28.
\textsuperscript{1431} R14. A nice illustration is the human rights manual that was developed by the Centre for Human Rights at the University of Pretoria specifically for a mining and petroleum company. The manual gives a general introduction to the concept of human rights and the issue of business and human rights, following which it concentrates on the issues of security (in particular the roles and responsibilities of security personnel), ethics (corruption) and equal treatment. J. Loots, and P. Cronjé, Let’s talk about human rights: An awareness manual for BHP Billiton (Pretoria University Law Press, 2014).
\textsuperscript{1432} R2.
society has to watch the industry, because government itself lacks the resources\textsuperscript{1433} – or is captured by a conflict of interests or by corruption.\textsuperscript{1434} Adopting such a role is very resource-intensive, however.\textsuperscript{1435} Therefore, there is no question that they agree that, ideally, this should not be their responsibility.\textsuperscript{1436}

You do not want to do the state’s job. You want the state to do their job. I do not want to have a job in ten years’ time, because the only reason why [our] program [exists] is because there is a gap, because the state is not fulfilling their obligations in terms of communities and environmental imperatives.\textsuperscript{1437}

It is remarkable that also companies do not (always) appreciate that civil society actors act as watchdogs. They often try to defend themselves precisely by arguing that watching the industry is not the role of civil society, but of government. According to those companies, civil society actors should not behave as ‘alternative regulatory authorities.’\textsuperscript{1438} This viewpoint is not agreed by the judiciary,\textsuperscript{1439} however, unless a statute expressly prescribes that aggrieved parties should request the authorities to take appropriate action \textit{vis-à-vis} the company.\textsuperscript{1440}

Finally, civil society actors have an important task in empowering potential victims of abuse by mining companies, so that they themselves can stand up for their interests and rights.\textsuperscript{1441} Empowerment has by far the biggest long term impact (see also \textit{infra} Section 2.7). In fact, lawyers and activists currently function as intermediaries, because communities and mineworkers do not have the resources to defend themselves. If they are empowered, they can in turn demand government to perform its role as protector of its people and demand mining companies to respect their rights.

\begin{thebibliography}{99}
\bibitem{1433} R16, R17, R26, R29, R31, R35. See also Love, \textit{supra} note 148, 105.
\bibitem{1434} R17, R35.
\bibitem{1435} R 2, 20. See also CALS, The Mapungubwe Story, \textit{supra} note 944, 77.
\bibitem{1436} R2, R11, R17, R20, R24, R25, R28.
\bibitem{1437} R28.
\bibitem{1438} See also the argument by ArcelorMittal that an environmental organisation seeking access to certain records regarding the company’s environmental performance “was setting itself up as a parallel regulating authority in relation to the environment, which the legislation does not sanction” and that “there were (…) specific statutory mechanisms at VEJA’s disposal that provided a conduit through which a regulatory authority could be compelled to ensure compliance by persons engaged in any activity, operation or undertaking which has a detrimental effect on the environment.” The Supreme Court of Appeal rejected those arguments, finding that VEJA “is entitled as an advocate for environmental justice to monitor the operations of ArcelorMittal and its effects on the environment.” ArcelorMittal \textit{v.} VEJA, \textit{supra} note 570, respectively paras 38, 58 and 80.
\bibitem{1439} Ibid. para. 80.
\bibitem{1440} See e.g. Sections 28 NEMA and 19 NWA (both cited, in part, in Annex 2); \textit{Hichange v. Cape}, \textit{supra} note 668, p. 410.
\bibitem{1441} R2, R4, R6, R10, R17, R21, R22, R23, R27, R28, R32. Cf. R28 (saying, however, that also this should actually be done by government). A popularly-used tool are exchanges facilitated by civil society actors so that communities or mineworkers learn from each other’s experiences. This tool was mentioned by R4, R14, R17, R23, R28.
\end{thebibliography}
Moreover, as civil society actors remain relatively few in numbers, the more individuals are empowered, the more likely government and mining companies will be called to account.

If communities have the capacity to understand the impacts, to understand what kind of recourse they have, they are far more likely to be part of negotiations and to be seen as formidable opposition.\textsuperscript{1442}

\textit{(v) Schematic recapitulation}

\begin{table}[h]
\centering
\small
\begin{tabular}{|c|c|c|c|}
\hline
\textbf{Involvement} & \textbf{Government} & \textbf{Mining company} \\
\hline
Failure to regulate or to monitor and enforce & Actual perpetrator \\
\hline
\textbf{Objective of the liability} & To require government to regulate, monitor and enforce & To enforce compliance with the law & To hold them financially liable \\
\hline
\textbf{Determinants} & \textit{Yes} & \textit{No} & \textit{Yes} & \textit{No} \\
\hline
- The protector (regulator and enforcer), custodian and public trustee & - Lack of capacity, rather support government and capacitate it & - The culprit & - Deep litigation pockets & \\
- More systemic impact & - Too bureaucratic & - Greater individual impact & - Resource-intensive: information and evidence & \\
- More amenable to being sued & - Counter-revolutionary & - Development of higher standards & - ‘The’ company no longer exists & \\
- Role of civil society is to watch government & - Indirect way of holding companies accountable & - High compensations & - Direct recourse & \\
\hline
\end{tabular}
\end{table}

As Table 8 also suggests, lawsuits against government and mining companies should in fact be complementary, and not mutually exclusive. The respective involvement of government and mining company is not the same, and neither is their respective liability. This is acknowledged by lawyers and activists, who admit that the precise interplay between the respective responsibilities of government and mining companies should be explored further, whether through litigation or otherwise.

There is a really important link between regulation and obligations of the private sector. In a way we have to force the debate around what it means for corporate parties to be responsible for human rights. (…) For us it is important to have a strong constitutional and theoretical basis for any

\textsuperscript{1442} R28. Cf. R14, R25.
argument that we make. So that is why we engage in some of these court cases, so that (...) the courts can have a chance to [build their jurisprudence].

2.6.3.2. Suing mining companies: who?

As was also explained in the general discussion (supra Part II, Section 2.2.3), when litigating parties decide to sue the mining company, perhaps together with government, they also have to decide whether to sue the company as such, which is an abstract entity, or a responsible agent within that company (i) and whether to draw the parent company of the subsidiary that actually perpetrated the conduct into the proceedings (ii). Below, the viewpoints of respondents in relation to each of these further decisions is discussed in turn.

(i) Institutional versus individual corporate liability

Opinions diverge on the question whether the company as such or its agents (or both) should be sued. Pros and cons to both institutional and individual corporate liability are discerned. In practice, however, it seems that criminal proceedings are more likely to target individual agents, whereas civil litigation tends to be directed against the company as such. This can also be seen from Tables 17a and 17b in Annex 1.

Individual accountability of directors or executives has the advantage of having a real impact on those individuals, so that it is believed to act as a better deterrent and to create a greater incentive to change behaviour. Moreover, mining companies are perceived as these huge, abstract entities, which makes it hard, especially for victims, to understand how a remedy affects them. Orders to pay financial compensation, for instance, can easily be absorbed by large companies.

Also respondents acknowledge that a downside to individual accountability is that when the agent has been convicted, there is no guarantee that business within the company will not simply continue as usual. Even if the convicted individual is the one who actually committed, ordered or tolerated the activities, he or she may have been incited by the culture reigning at that mining company. Individual agents are often just one link in a chain of responsibilities leading to the eventual human rights violations. Those agents themselves do not even know the entire story. When only the individual agent is then sued and convicted, the mining company gets the opportunity to hide behind that ‘fall guy’ without reviewing its internal policies and changing its corporate culture. For instance, one

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1443 R27.
1444 R7, 14.
1445 R7, R14, R32.
1446 R14, R16.
1447 R16, R22, R26, R32.
respondent said the following about the executives that were commissioned before the Commission of Inquiry investigating the happenings at Marikana (supra Box 2).

It is a fantastic example of how Lonmin is so big and they hide behind that. So the people that they put up on the stand for phase 2 to answer the questions about the [Social and Labour Plans], they were people who had been involved at some point, but Lonmin is so big. Many of their answers were just: ‘Oh, I do not know about that.’ Which takes us nowhere.  

(ii) Parent company liability

Generally, mines are established as juristic entities in their own right, which are owned and controlled by a larger company or operated as a joint venture that is owned and controlled by two or more companies. The mineral right may be held either by the subsidiary mine or by the parent mining company. When lawyers and activists approach a mine that degrades the environment and thereby creates health hazards for mineworkers or neighbouring communities, this automatically involves the company operating that mine. In other words, the owner of the mine (the parent mining company) is nearly always part of the story. The respondents also indicated that they target these ‘controlling’ mining companies because those companies have deeper pockets (in the case of damages claims) and because the concerned mine may no longer be operational or its ownership may have changed. Parent companies are also deemed liable, because of their superior knowledge and the control that they exercise over their subsidiary mines and because, in the end, they are one and the same – given, for instance, that the same directors sit on the respective boards of the mine and of the parent company. Also the silicosis class action is launched against the parent mining companies that owned and controlled the mines where the mineworkers have allegedly contracted silicosis or pulmonary tuberculosis.

Box 11. Parent company liability in the silicosis class action

In the silicosis class action, thirty mining companies have to face justice for the purportedly poor working conditions at eighty-two mines. Many of these mines have been owned by several of the responding mining companies at different points in time. To give an example, the Buffelsfontein Gold Mine has been owned and controlled by Randgold and Exploration Company Ltd (in 1996), by DRD Gold Ltd (from 1997 to 2005), by Simmer and Jack Mines Ltd.
The applicants’ legal representatives argue that the parent mining companies are liable for the working conditions at the mines because they effectively directed, managed and controlled the business of their subsidiaries in order to maximise the returns on their investment and because they did so as an integrated part of their own business. According to the applicants, the parent companies assumed this control both on a formal and informal basis. Formally, the parent companies had concluded service agreements with their subsidiaries, on the basis of which the parent provided services, guidance and advice *inter alia* with respect to mine planning and design, mine ventilation, environmental control, dust control design, and the provision of medical services. Informally, the subsidiaries recognised that the parent company had superior knowledge of mining and that ultimate authority resided in that company, and to that extent the subsidiaries were entitled and did in fact rely on that superior knowledge and authority in the conduct of their mining activities.

The next step in their argumentation is that the parent companies were not only aware of the poor environmental conditions and of the measures that could reasonably be taken to prevent exposure to harmful quantities of dust, but also knew that their subsidiaries would rely on them to provide guidance and advice on those environmental conditions and on reasonable preventive measures, and that such guidance and advice would have a material impact on the working conditions at the mines. Hence, by not providing such guidance and advice, the parent companies acted negligently, wrongfully and unlawfully.

The claim for damages is thus based on the direct liability of the parent mining companies, in accordance with precedents from the UK courts, in particular *Chandler v. Cape Plc* and *Thompson v. The Renwick Group Plc* (see also supra Part II, Section 2.2.3.3). The parent companies are not held liable *qualitate qua*, as mere owners of their subsidiaries, but for their own negligent, wrongful and unlawful behaviour on the grounds that they have failed to guide and advice their subsidiaries on their working conditions, due to which the mineworkers have contracted silicosis or pulmonary tuberculosis.
It should be noted that this argumentation in the silicosis class action in fact amounts to assuming an obligation to protect on the part of the parent mining company for the working conditions at their subsidiary mines. Moreover, as was said, the silicosis class action is not exceptional for being directed against parent mining companies. A similar strategy was, for instance, used in Bareki v. Gencor, in which a community affected by asbestos pollution sought an order against Gencor to have the area rehabilitated. The contamination was caused by the Griqualand Chrysotile Mine, which was wholly-owned by Gefco, a subsidiary of Gencor. According to the applicants, “at all material times Gencor was the majority shareholder of (...) Gefco and provided management services to Gefco.”

More controversial than the issue of involving the South African parent company, is the question whether foreign companies should be drawn into the dispute where the mining company owning and operating a mine belongs to a multinational group. There has not been much experimenting with the question of foreign parent company liability, which is largely due to the fact that lawyers want to avoid the complex jurisdictional questions that will inevitably arise in such litigation. Nevertheless, respondents acknowledge that those parent companies are also responsible, that they have easily gotten away with their conduct until today and that their double standards (as they generally abide by higher standards in their home countries) should be denounced.

2.6.4. Use of human rights

This Section begins with discussing the possible role for international law as well as foreign and non-legally binding standards in strategic litigation in South Africa relating to environmental health hazards caused by mining (Section 2.6.4.1). That role seems rather limited in practice despite the openness to international and foreign law that is dictated by the Constitution (supra Section 1.3). Next, the Section feeds back into the questions of horizontality and protective duties that were discussed at length before (supra Section 1.2.1), by analysing what strategic litigation may reveal about litigating parties’ position on these questions (Section 2.6.4.2). Finally, the impact of using human rights arguments in litigation is scrutinised in-depth (Section 2.6.4.3).

A priori it should be emphasised that the subsidiarity principle (supra Section 1.2.1.2), which requires litigating parties to rely on any law implementing the Constitution, does not mean that as a matter of principle human rights have no place in litigation unless no implementing law is available or such law

1457 This specific judgment only concerned exceptions by Gencor to the applicants’ claims. All exceptions were accepted except for the second alternative claim, which was thus founded. That claim requested an order that Gencor prevented the dissemination of dust from the contaminated site.
1458 R12, R27.
1459 R18, R32.
is claimed to be unconstitutional. The subsidiarity principle only precludes reliance on the Constitution as a direct cause of action. However, notwithstanding occasional oblivions, it is standard practice to cite the constitutional rights that the rules of (statutory or common) law used directly in the litigation seek to implement.

2.6.4.1. The role of international (and foreign) law

Because the South African Constitution was inspired by international human rights law as it stood at the time of its adoption, the rights incorporated in the Bill of Rights are generally on par with international human rights law, and sometimes even offer more protection than international law (and definitely than many other constitutions). For this reason, the South African Constitution is rightly considered a progressive human rights instrument, which is a fact that arouses a degree of satisfaction after South Africa having been an outcast for many years.\textsuperscript{1460} This also means, however, that the use of international human rights law in litigation should not be taken for granted.

The mutually beneficial interaction between international and national human rights in theory was explained before (\textit{supra} Part II, Section 2.2.4.1), but can be briefly recapped as follows. On the one hand, international human rights law is particularly valuable for national human rights law, when there is uncertainty about its precise meaning or when judges want to ensure that national law develops in line with international standards. On the other hand, a major way in which international law is developed further is through its application by domestic courts. Nevertheless, although the contribution of domestic litigation to international human rights law is of great interest to human rights law \textit{an sich}, it is unlikely to feature prominently on the mind of actors that litigate at the domestic level, whose primary interests lie at that level and relate to furthering their (locally-defined) human rights goals.

Lawyers, but also activists, experts and scholars, reckon that, as a matter of principle, international human rights law is relevant to domestic litigation in light of the interpretative mandates of the Constitution.\textsuperscript{1461} Nonetheless, the data indicate that at least in cases related to mining, environmental degradation and human rights, respondents often omit to cite international instruments and do not seem to have a real strategy to use such instruments.\textsuperscript{1462} There are two main reasons for that omission. First, they lack the time, manpower, expertise and financial resources to conduct research into and report on international law.\textsuperscript{1463} Hence, if South African law suffices to build a strong case, they are not

\textsuperscript{1460} Cf. Oomen, \textit{supra} note 526, 63 (writing that “[t]here was also the satisfaction, after years of having been snubbed by the international community, of incorporating international human rights norms in a document that was much more progressive than many of its Western counterparts.”)

\textsuperscript{1461} R1, R3, R9, R16, R25, R27, R30, R34. Namely, Sections 39(1) and 233 of the Constitution (\textit{supra} 1.3).

\textsuperscript{1462} R2, R7, R12.

\textsuperscript{1463} R34.
inclined to make such an investment. This is somewhat different for civil society actors that are affiliated with international nongovernmental organisations or that have a human rights research department.\textsuperscript{1464} Second, they consider the Bill of Rights and South African law strong enough to substantiate their case. As the discussion of the legal framework suggested (\textit{supra} Section 2.2) and as respondents have confirmed,\textsuperscript{1465} the problem in South Africa is not one of insufficient or deficient laws, but one of lacking or inadequate application of the law. It is thus not all that surprising that many respondents said that referring to international law is often simply redundant as constitutional rights and implementing laws offer enough protection,\textsuperscript{1466} so that international human rights law “can purely add to what we have already.”\textsuperscript{1467} Moreover, an argument that constitutional rights are at stake, as opposed to international human rights, is sometimes appraised as bearing more weight, both morally and legally.\textsuperscript{1468} When it is used, international law rather serves to sustain and contextualise a case that is cogently founded on the Constitution and on national law (persuasive force).\textsuperscript{1469} As one respondent explained, “they just provide support, reassurance to courts that the approach that we are asking them to take is consistent with international law.”\textsuperscript{1470} In this regard, it is also noteworthy that many respondents admit to prefer African sources over other sources of international law.\textsuperscript{1471}

A first scenario where international law could be valuable, however, is when national standards do not exist or are below international standards.\textsuperscript{1472} A reason for lawyers to make such arguments then is that if courts accept them (in principle as persuasive rather than as prescriptive norms), these standards gradually infuse South African jurisprudence and, accordingly, get more weight.\textsuperscript{1473} Amongst the directly relevant cases there were no examples of references to hard international law as far as the concrete issue of environmental health hazards caused by mining is concerned. References to non-
legally binding or foreign standards are more common. In cases dealing with the resettlement of people who are adversely affected by mining activities, for instance, lawyers frequently revert to the performance standards of the International Finance Corporation, in particular the fifth standard dealing with land acquisition and involuntary resettlement, which makes provision for mandatory consultation and for land-based or financial compensation and other benefits, such as moving allowances. Foreign standards are, for instance, used in the case of blasting, which is an activity associated with mining that creates a lot of noise and dust pollution and regularly causes the houses of people living nearby to crack or collapse. Because South African standards are lacking, lawyers rely on standards from Canada, Australia or the US, for example, which regulate issues like the minimal distance to houses, the permissible amount of explosives used and the need for advance warnings, to assess the merits of a court case. Another example of the use of foreign standards is found in the Tudor Shaft matter.

Box 12. The Tudor Shaft matter: a preliminary health risk assessment

At some point during the dispute, the residents of the Tudor Shaft informal settlement and their legal representatives commissioned their own, preliminary study into the health impacts of the uraniumiferous tailings dam. That study was carried out based on the standards developed by the US Environmental Protection Agency. In particular, they used those standards to demonstrate that the level of exposure to contaminants and the resulting excess risk of cancer are not acceptable. They indicated, moreover, that the American standards probably underestimate the actual risk for several reasons, including the poor access of residents to health facilities and the fact that it concerns an informal settlement, not a residential area.

A second scenario in which references to international law (or to non-legally binding or foreign standards) are valuable is where South African standards are available, but should be interpreted, applied and, if necessary, developed in accordance with international standards. International law

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1474 As explained supra in Part I, Section 1.2, for the purposes of this dissertation such standards are classified as soft law. Note that they are not strictly concerned with ‘human rights’ but relate to the broader spectrum of corporate social responsibility, and that their contents are rather perceived as ‘ethical responsibilities’ as opposed to ‘duties’ stemming from ‘rights’.  
1475 R13, R29.  
1476 Clients of the International Finance Corporation should comply with these ‘corporate social responsibility standards’ in order to get funding. IFC, Performance Standards on Environmental and Social Sustainability (ed. 2012). See e.g. Plaintiff’s statement of the case, in re: The Mooifontein Community v. Optimum Coal Mining (Pty) Ltd, in the arbitration before Advocate A. Dodson SC (29 March 2017), para. 17.2.  
1477 R13, R29. This situation is not ideal, as these standards were developed having regard to the quality of houses in those countries, which cannot be compared with the mud houses of poor communities in South Africa.  
1479 Ibid. paras 41-46.
could, for instance, guide the courts in giving content to economic, social and cultural rights. As was explained (supra Section 2.2.1.1), many scholars are dissatisfied with the way in which the South African judiciary has applied a standard of reasonableness to review government conduct in relation to unqualified socio-economic rights, because they feel that courts have consistently refused to provide these rights with concrete content and that they focus on procedure as opposed to substance. Interestingly, the judgment in the Carolina matter constitutes a small step in the right direction.

**Box 13. A rare reference to international law in the Carolina matter**

When the High Court judge granted the responding parties leave to appeal its order, he also accepted the applicants’ request that such appeal would not suspend the original order. To justify that decision, the judge cited the General Comment by the UN Committee on Economic, Social and Cultural Rights on the right to water, which stipulates that water supply has to be sufficient and continuous for personal and domestic uses. This citation supported the judge’s finding that the right to water is not only violated when people actually die due to water shortages, but also when the water is unsafe for human consumption. Hence, the judge concluded that “[t]he community stands to suffer more harm” than the responding parties who “cannot suffer greater harm than that which will be suffered by the community in the form of health risk, to say the least”, and granted an interim execution order.

Another example relates to the polluter pays principle, which remains a largely elusive concept in South African law. Although the applicable legislation establishes liability on the part of the polluter, which has to take the necessary remedial measures or pay for them, the precise scope of that obligation has not been fully explored. Therefore, one respondent pondered on the need to bring cases to the courts, so as to have the principle developed in conformity with international environmental and human rights law.

A new area where the argument has been made that South African law should be developed in line with international law relates specifically to the issue of business and human rights. This debate has only more recently caught the interest of South African lawyers and activists, so that the responsiveness of judges to such arguments has yet to be tested. The most prominent case in which the

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1481 *FSE and Silobela v. Minister of Water Affairs* (10 July 2012), *supra* note 1002, para. 22.

1482 Ibid. para. 23.

1483 Ibid. para. 24.

1484 Section 28 NEMA (cited, in part, in Annex 2).

1485 R9.
international legal framework on business and human rights was actually referenced, were the certification proceedings in the silicosis class action.

**Box 14. The silicosis class action and the UNGPs**

When Section 27, the legal representatives of the *amici* (Sonke Gender Justice and Treatment Action Campaign), applied to intervene in the certification proceedings, they wanted to submit as evidence an affidavit by Anand Grover, the former Special Rapporteur on the Right to Health, in which he elaborated on corporate accountability for human rights under international law, according to the UNGPs in particular.

In their answering affidavit opposing the intervention by the *amici*, two of the largest gold mining companies involved in the class action strongly opposed the admission of this affidavit. Above all, they stressed that the UNGPs are neither binding nor enforceable and that the Court should be careful in applying soft law directly in domestic proceedings. According to the intervening parties, however, this argument is meritless because “it does not need to be binding in order to be relevant” — which is correct, see *supra* Section 1.3. In addition, on a more procedural note, the opposing mining companies argued that an expert opinion on a matter of international law is irrelevant and inadmissible since international law is part of South African law so that expert advice is not required.

The affidavit by Anand Grover was indeed not admitted by the High Court. This decision was regretted, because “there is value in having the UN Special Rapporteur responsible for (…) the reports that inform the development of [international] law (…) speak to the law.” In any case, the *amici* still invoked international law in their submissions to the court. In particular, they referred to the UN Framework on Business and Human Rights and the UNGPs and highlighted the emphasis placed by these documents on access to remedy, which is impeded by barriers such as the cost of bringing individual claims and the difficulties encountered in securing legal representation. Through this reference they sought to bolster their argument that the class action had to be certified to ensure that the mineworkers’ access to justice is effective.

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1486 AS.


1488 AS.

1489 “They remain – as a source of public international law – relevant to the decision facing this Court.” Written Submissions of the Amici Curiae, in re: *Nkala v. Harmony Gold* (48226/12) (30 September 2015), para. 43.

1490 Ibid. paras 45-47.
Without the intervention by the amici, international law would most probably not have been mentioned in the class action at all, as one lawyer involved acknowledged, saying that “there was no international element in it all until they came in.” In its judgment certifying the class action, the High Court did not explicitly respond to these submissions on international law, however.

Besides the evident scenarios where international human rights law is valuable, in particular in case of gaps in the law, legal uncertainty or new developments, the respondents mentioned two other situations in which, or reasons why, they would refer to international instruments. The first one is when government blatantly violates its obligations under international human rights law. Such cases are rare, however, and no examples related to environmental health hazards caused by mining are known. Secondly, international law is sometimes believed to add a symbolic dimension to the case. Civil society actors are still grateful for the support of the international community to the anti-Apartheid struggle and attach a great deal of importance to the new, democratic state’s membership of the international community, which is why they want the state to show compliance with international law. The perception that South Africa falls short of those international standards can have an important symbolic impact.

2.6.4.2. Human rights in cases relating to corporate accountability: questions of protective duties and horizontality

Lawyers are well aware that the rights in the Bill of Rights have horizontal effect provided that the nature of the right lends itself to such effect. Of those rights that are at stake where mining companies cause environmental health hazards (supra Section 2.2.1.2), only two do not have horizontal effect, namely the right to have the environment protected through legislative and other measures and the right to just administrative action (Sections 24(b) and 33 of the Constitution), as both these rights clearly only bind the state. The other rights (to human dignity, life, freedom and security

1491 AS.
1492 R28.
1493 In one case not relating to mining the Constitutional Court found that the South African Police Service is duty-bound to investigate allegations of torture by and against Zimbabwean citizens who had fled to South Africa. National Commissioner SAPS v. SALC, supra note 30. Another case dealt with a recent visit by president Bashir from Sudan notwithstanding him being wanted by the International Criminal Court. In the latter case the High Court first prohibited his departure, but this order was not observed by government. This led to a conviction by the Supreme Court of Appeal holding that “[t]he conduct of the [government] in failing to take steps to arrest and detain, for surrender to the International Criminal Court, [Omar Bashir]”, violated its obligations under the Rome Statute and, hence, was unlawful. Minister of Justice and Constitutional Development and Others v. Southern African Litigation Centre and Others (867/15) [2016] ZASCA 17 (15 March 2016).
1494 R14. Cf. R27 (saying, in relation to universal human rights, that “we do not think that there is any need to remove ourselves from that regime”).
1495 R3, R16, R27, R30, R33.
of the person, an environment not harmful to health, adequate housing, health care services, sufficient food and water, and information) are capable of binding mining companies.

In the end, if the Constitution only applied vertically, it would not really make sense, because the pollution is being done mainly by companies.\textsuperscript{1496}

The more difficult question relates to the horizontal scope and application of those rights. As to their horizontal scope, respondents agree that the human rights duties of mining companies cannot be the same as those of the state.\textsuperscript{1497} Although they use different terms to express this idea, the respondents coincide that mining companies should at least respect human rights. In addition, however, and as was already mentioned (\textit{supra} Section 2.6.3.2), the fact that litigation, including the silicosis class action, is often directed against parent mining companies suggests that companies may under certain circumstances also be assumed to bear an obligation to protect human rights. Moreover, corporate human rights obligations may depending on the circumstances entail that they must act in a given way, as is illustrated by the argumentation in the silicosis class action.\textsuperscript{1498}

\textbf{Box 15. The silicosis class action: positive human rights duties}

The submissions in the silicosis class action are a good illustration of the easiness with which it is accepted that mining companies must also take positive action to prevent that mineworkers’ rights are violated. The applicants’ legal representatives argue that the mining companies “failed to ensure that the conditions of work of the members of the class did not infringe [their] constitutional rights”,\textsuperscript{1499} following which they enumerate a number of reasonable preventive measures that the mining companies could and should have adopted to improve the working conditions at the mines. Those measures included informing workers of the risk and educating them as to the means by which that risk may be mitigated, identifying the source of dust, preventing or minimizing the escape of dust through the introduction of appropriate engineering controls, monitoring the efficacy of such measures by checking the amount of harmful dust to which mineworkers are exposed, and monitoring the health of mineworkers.\textsuperscript{1500}

Also the horizontal application of human rights raises many questions. The respondents admit that their understanding of horizontal application is still limited, which is also due to the fact that there is

\begin{itemize}
\item \textsuperscript{1496} R16.
\item \textsuperscript{1497} R8, R27, R32. But, when human rights do create duties for mining companies, they should comply therewith not by way of ‘doing a favour’ but because they accept being bound by them, which few companies do, however. R15
\item \textsuperscript{1498} R3, R9, R14, R25, R34.
\item \textsuperscript{1499} Applicants’ Founding Affidavit, in re: \textit{Nkala v. Harmony Gold} (48226/12) (21 December 2012), para. 140; Applicants’ Submissions, in re: \textit{Nkala v. Harmony Gold} (48226/12), para. 23.
\item \textsuperscript{1500} Applicants’ Submissions, in re: \textit{Nkala v. Harmony Gold} (48226/12) (9 June 2015), para. 101.
\end{itemize}
little jurisprudence on this issue.\textsuperscript{1501} As was explained in the general discussion on horizontal application in South Africa (\textit{supra} Section 1.2.1.2), few cases have, for instance, been based on a constitutional cause of action (direct horizontal application). A judgment in the silicosis class action on the merits may at least provide some of the much needed additional guidance on this issue.

\textbf{Box 16. Will the silicosis class action set a precedent on constitutional causes of action?}

Already in the certification proceedings the applicants’ legal representatives argue that their claim is supported by three causes of action, respectively under statutory law, common law and the Constitution. They admit, however, that at the stage of certification it is not yet necessary for the High Court to determine whether the breaches of statutory duties, common law duties, and constitutional rights indeed give rise to three separate causes of action or, rather, underpin and reinforce a common law claim for damages.\textsuperscript{1502} That issue will have to be determined by the trial court, which, if that court indeed gets the opportunity to rule on this question, may set an important precedent on the direct horizontal application of the Constitution.

Another contentious or difficult point is the indirect horizontal application of the Constitution through the common law. While the respondents accept that the Constitution infuses all legislation (indirect horizontal application through statutory law)\textsuperscript{1503} and may create an independent cause of action or a special remedy like constitutional damages (direct horizontal application, which is rare, however),\textsuperscript{1504} they are somewhat more reticent to use the Constitution when common law is applied. This finding accords with the criticism that the transformative objective has yet to be realised as far as the common law is concerned and the general ascertainment that the common law has only in rare instances been developed or sought to be developed in accordance with the Bill of Rights (see \textit{supra} Section 1.2.1 and \textit{infra} Section 2.6.4.3).\textsuperscript{1505}

The lawyers who are working in public interest organisations tend to shy away from delictual issues and the more traditional common law idea, and I think it is a problem.\textsuperscript{1506}

To me there is very little room for the Constitution in delict (…) It is difficult to bring it in, into these old, established principles, all these Latin phrases and terms.\textsuperscript{1507}

\begin{flushleft}
\footnotesize
\textsuperscript{1501} R7.
\textsuperscript{1502} Applicants’ Submissions, in re: Nkala v. Harmony Gold (48226/12) (9 June 2015), para. 24.
\textsuperscript{1503} R33. Cf. R4 (noting that whether human rights responsibilities are sourced directly in the Constitution or rather in implementing laws is not that relevant).
\textsuperscript{1504} Respectively R1, R12, R18 and R1, R4, R18, R34.
\textsuperscript{1505} Both the criticism and the general ascertainment apply generally, that is not only in litigation concerning corporate accountability for human rights violations, but also in traditional, vertical human rights litigation.
\textsuperscript{1506} R4.
\textsuperscript{1507} R12. Upon review, however, R12 retracted this position and admitted that the Constitution is supreme law so that all other laws must be interpreted in line therewith and that the Constitution plays a role in adjudicating delictual claims, as courts must consider constitutional values when interpreting the elements of a delict.
\end{flushleft}
An example of a case that was merely argued based on the (common) law of nuisance, without any reference to the Constitution and the possible rights at stake, is Van Eck v. Clyde Brickfields.\(^{1508}\) This case was launched by a neighbouring community against a company that mined clay and manufactured bricks from it. The applicants lost their application, which was fraught with strategic errors, one of which being that they narrowly constructed their case on the traditional common law of nuisance and only requested an interdict that would address the noise pollution, but not the other forms of pollution about which they had complained, notably water and dust pollution and increased traffic.\(^{1509}\) The case is interesting to compare with what one respondent said, namely that the law of nuisance may need to be developed in accordance with the Constitution so that it does cater for the specific concerns of communities living nearby mining operations that are affected by pollution.\(^{1510}\)

An important question that arises, for instance, is whether a community whose use and enjoyment of their land is not only disturbed by the activities of a neighbouring mine, but who suffer actual harm therefrom should not only be entitled to an interdict but also to a claim for damages.\(^{1511}\) Again, the silicosis class action is one of those few cases in which the litigating parties seek to have the Constitution applied indirectly to private actors, through the common law.

**Box 17. Infusing the common law with the Constitution in the silicosis class action**

According to the mineworkers’ legal representatives, the mining companies have negligently, wrongfully and unlawfully breached their common law duty of care to provide a safe and healthy working environment that was not injurious to their health.\(^{1512}\) To found a delictual action, they must show the following elements: (1) that the mining companies failed to act; (2) that this omission was wrongful (‘breach of a legal duty’); (3) that the mining companies were at fault (‘negligence’); (4) that the omission caused the damage suffered by the mineworkers; and (5) that the damage is capable of quantification.\(^{1513}\)

As their founding affidavits and heads of argument for the certification proceedings indicate, they believe that common law of delict should be infused by the Constitution. In particular, the Bill of Rights should not only inform the burden of proof in relation to factual causation (see

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\(^{1508}\) Van Eck and Others v. Clyde Brickfields (Pty) Ltd and Others (6020/2002) [2006] ZAGPHC 165 (7 April 2006).

\(^{1509}\) See also Centre for Environmental Rights and University of the Witwatersrand School of Law, Mining and Environmental Litigation Review (June 2012), 14.

\(^{1510}\) \(^{1511}\) For a discussion, see Van der Walt (2005), supra note 624, in particular at 5-6 and 51.

\(^{1512}\) Applicants’ Founding Affidavit, in re: Nkala v. Harmony Gold (48226/12) (21 December 2012), para. 132.2; Applicants’ Submissions, in re: Nkala v. Harmony Gold (48226/12) (9 June 2015), para. 84.1.

\(^{1513}\) Nkala v. Harmony Gold (certification judgment), supra note 372, para. 57.
also *infra* Box 26), but also the test to establish wrongfulness and negligence. In this regard, before the trial court the mineworker’s lawyers would like to plead on questions such as whether a violation of constitutional rights amounts to a breach of a legal duty, whether the legal convictions of the community justify the imposition of liability on the mining companies for failing to take the necessary steps to prevent silicosis and tuberculosis, and whether the breaches of the legal duties constitute grounds for imposing strict liability.

When human rights are invoked in litigation against government about a matter that in fact revolves around the conduct of mining companies, such arguments necessarily relate to the protective duties of organs of state – the judiciary’s protective duties are at stake both in litigation against private actors and against state actors. This was evident in the discussion of the (principled) determinants to sue either government or mining companies, where the respondents justified their decision to target government based on its (protective) duties of regulation, monitoring and enforcement (*supra* Section 2.6.3.1). The focus matter that provides the best example of how serious environmental degradation by mining triggers the protective duties of government is the Tudor Shaft case, which precisely relates to government’s responsibility for a situation that was in fact created by a mine.

**Box 18. Tudor Shaft and the protective duties of government**

The 2012 urgent application launched by the Federation for a Sustainable Environment, in which the residents of the informal settlement later joined as co-applicants, revolved precisely around the protective duties of the different government actors whose competence was in some way triggered by the hazardous situation at Tudor Shaft. The co-applicants argued, for instance, that those actors not only bear an obligation not to cause or exacerbate environmental risks, but also to take reasonable steps to rehabilitate an environment that poses a health risk to the community. This is all the more important in the case of a derelict mine over which no private actor assumes responsibility. Each of the government actors cited either had a duty to remedy the contamination or to ensure that the contamination would be remedied, and they had

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1514 Note that in case of omissions (where persons are sought to be held liable for not having prevented harm), the test of wrongfulness and negligence is often conflated, although their functions differ; whilst wrongfulness relates to the unreasonable infringement of a protected interest, negligence deals with the blameworthiness of the defendant for such infringements. For omissions, courts sometimes make ‘wrongfulness’ depended on whether it is considered reasonable to impose liability, according to the legal convictions of society. J. Neethling, “The conflation of wrongfulness and negligence: is it always such a bad thing for the law of delict?” *S. Afr. L.J.* (2006), 211-213.


1517 Ibid. para. 72.3.

2.6.4.3. The impact of human rights

A final question that arises with respect to the use of human rights in strategic litigation, pertains to their concrete impact, which evidently triggers the protective duties of the judges that have to decide on the dispute between victims and either government or mining companies. The question of impact is discussed at three levels: symbolic impact (i), impact on the way in which the case proceeds (ii) and impact on substantive law (iii).

(i) The symbolism of human rights arguments

Regardless of the material impact of the use of human rights arguments, there are a number of symbolic reasons for litigating parties to cite human rights. Two such reasons are that human rights add a meaningful moral layer to a legal case, and that it is hard for counterparties to defend themselves by arguing against human rights. On top of that, they represent universal language, so that everyone should be aware of and understand human rights. Although such moral arguments may not have a (straightforwardly) material impact on the resolution of the case, they can at least result in a moral condemnation of the counterparty, in the judgment itself and/or outside the courtroom, in particular in the media, which in turn can have real repercussions, especially for the latter party’s reputation.

Box 19. The silicosis class action: certifying judges reproach the mining industry

According to the legal representatives of the mineworkers, several constitutional rights are at stake in the silicosis class action, including the rights to human dignity, life, freedom and security of the person, and an environment that is not harmful to health and well-being (supra Section 2.3.3.5). These human rights, which are definitely meant to have a material impact on the litigation, as the discussion below will demonstrate, also have moral ramifications. Indeed, in their judgment certifying the class action, the judges used an exceptionally harsh and judgmental tone. They wrote, for instance, that “the mining companies stripped [the mineworkers] of their dignity, and concomitantly compromised their health and safety, with

1521 R17, R23.
1522 R17.
such intensity and ferocity that they were effectively dehumanised.”

Furthermore, at least implicitly, the judges seem to warn government and the business community at large that economic growth does not provide them with a carte blanche to violate human rights.

“Gold mining began (...) in 1886. It has grown over the years (...). In due course it became a significant contributor to the growth of the gross domestic product of South Africa and rewarded handsomely those who invested in it. (...) As this case demonstrates, simultaneous with that growth, the industry left in its trail tens of thousands, if not hundreds of thousands, of current and former underground mineworkers who suffered from debilitating and incurable silicosis and pulmonary tuberculosis (TB). Many mineworkers also died from the diseases.”

Two other, rather symbolic reasons for litigating parties to refer to human rights transpired from the interviews. First, respondents accept that the Constitution, which is the supreme law of the country, should inform all litigation. Second, on a more pragmatic note, the mission and objectives of many public interest organisations and law firms explicitly mention the protection and promotion of human rights, so that using such language is an indispensable element of their approach. The Legal Resources Centre, for instance, is “committed (...) to ensure that the principles, rights, and responsibilities enshrined in our national Constitution are respected, promoted, protected and fulfilled” and its mission includes to “enable the vulnerable and marginalised to assert and develop their rights” and to “contribute to the development of a human rights jurisprudence and to the social and economic transformation of society.”

**(ii) Human rights and the proceedings of a case**

Invoking human rights in litigation can have a concrete impact on the way in which the case proceeds. On the one hand, some procedural rules are triggered especially when a constitutional issue is raised, for instance when a case touches upon a right protected by the Bill of Rights. On the other hand, given the judiciary’s protective duties, the very fact that human rights are at stake should affect the reasoning and decision-making by judges, in particular when they apply certain procedural rules that are left to their discretion. As one respondent affirmed, human rights should inform the inquiry by judges and the standards used to decide that inquiry.

First of all, the Constitution used to limit the Constitutional Court’s jurisdiction to constitutional matters, so that parties had to argue that a constitutional issue was at stake if they wanted to be able to

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1524 ibid. para. 1.
1525 R20, R23, R27, R34.
1526 R4, R23, R27.
1528 R30.
appeal a decision from the High Court or from the Supreme Court of Appeal to the Constitutional Court. In 2012, however, the 17th Amendment of the Constitution has broadened the Court’s jurisdiction, so that in accordance with Section 167(3)(b) of the Constitution the Court may now decide constitutional matters as well as “any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.”1529 Most respondents regard the appealability of matters to the Constitutional Court as positive, although the downside is that it takes more time for a case to reach finality.1530 Secondly, the Uniform Rules of Court1531 prescribe that parties who raise a constitutional issue must give notice to the registrar, who will then place it on a notice board in order to allow interested parties to intervene in the proceedings as amici curiae. When they are admitted as amici, such parties can submit affidavits as well as heads of argument. The fact that third parties must be given an opportunity to participate in the proceedings, may again be considered as a negative impact as well, because it can delay and complicate the proceedings.1532

Aside from the fact that some procedural rules apply to constitutional litigation in particular, human rights may influence the way in which judges exercise the discretion that is left to them in the management of their proceedings. In conformity with their protective duties, judges frequently exercise the discretion that they have in relation to the application of certain procedural rules in favour of public interest litigants, including parties who litigate so as to protect the rights in the Bill of Rights (supra Section 2.1.2). The exercise of judicial discretion in favour of public interest litigants is particularly common for decisions relating to costs orders, the suspensive effect of appeals, condonation and urgency, each of which is discussed in turn.

ii.a) Costs orders

In Biowatch v. Registrar Genetic Resources,1533 the Constitutional Court established an important exception to the rule that costs follow the event. Namely, a losing party who acts in the public interest in pursuing a constitutional matter against government should not be mulcted with costs so as to prevent that the risk of adverse costs orders has a chilling effect on public interest litigants.1534 That holding and the reasoning behind it has trickled down to the lower South African courts, who, in

1529 R12, R23.
1530 R13.
1532 R13.
1533 Biowatch Trust v. Registrar Genetic Resources, supra note 294.
1534 Ibid. paras 23, 28 and 56.
principle, refuse to order costs against public interest litigants who lose a case against government. A good example is discussed below in the context of the (failed) application for condonation in the Carolina case (infra Box 21). The question whether a similar rule applies to public interest litigation raising a constitutional question against a private party has yet to be decided.

On the other hand, courts are not keen on awarding punitive costs, which is also a matter within their discretion, even when public interest litigants request such an order. They only do so under exceptional circumstances. At some point in the Carolina litigation the applicants, for instance, requested punitive costs because the municipalities never complied with the order and, according to them, acted not in good faith. This request was rejected by the judge, who held that “a punitive costs order (...) should only be meted against the Government when it is clear that the litigation is vexatious”, and cautioned for the possible chilling effect on actors within government to approach the courts to seek clarity.

ii.b) Suspensive effect of appeals

Another area where judges can use their discretion in favour of public interest litigants, relates to the suspensive effect of appeals. Rule 49(11) of the Uniform Rules of Court prescribes that the operation and execution of the order that is being appealed is suspended pending the decision on appeal, unless, on application of a party, the court that gave the order decides otherwise.

Box 20. The Carolina matter: appeal without suspensive effect

The applicants in the Carolina matter, for instance, successfully applied to the judge who had granted an order directing the district municipality inter alia to supply potable water to the community, to have the suspensive effect of the appeal against that order lifted. The judge found that the possible harm that the municipalities would suffer if the order was immediately executed could not be greater than the harm that the community would suffer if it was suspended, at least in the form of the health risk that they would face due to the lack of potable water.

1535 Unless they find good reasons to award a costs order anyways, for instance when a litigating party has a ‘litigious’ record. See e.g. Mlunzini Conservancy v. Tronox, supra note 1227, para. 82; Wildlife and Environment Society of South Africa v. MEC for Economic Affairs, Environment and Tourism, Eastern Cape Provincial Government and Others (ECJ 046/2005) [2005] ZAECHC 14 (28 April 2005).

1536 See e.g. Save the Maize Belt Society v. Regional Mining Development And Environment Committee and Others (2014/15881) [2015] ZAGPJHC 254 (26 March 2015); Escarpment Environment Protection Group v. Department of Water Affairs, supra note 707, para. 70.

1537 In its judgment on the application to join Motley Rice, the High Court opined that the exception does not apply to constitutional litigation between private parties. Gold Fields v. Motley Rice, supra note 1188, para. 31.

1538 FSE and Silobela v. Minister of Water Affairs (15 August 2012), supra note 921, paras 21-22.

1539 Uniform Rules of Court, supra note 1531.

1540 FSE and Silobela v. Minister of Water Affairs (26 July 2012), supra note 1157, para. 24.
The appeal by the municipalities against that interim execution order, was rejected by the judge, who clarified that when there is a *prima facie* case that the request by applicants to lift the suspensive effect of an appeal should be granted, it is for the responding parties to adduce evidence for its rebuttal. According to the judge, *in casu* the applicants had proven a *prima facie* case by adducing evidence that showed that water was still not supplied on a regular basis to the affected communities, in breach of a fundamental right of the residents.

ii.c) Condonation

Condonation means that a court forgives a party for failing to observe certain procedural requirements, for instance when the court accepts an application even though it is lodged out of time. Factors borne in mind by judges when they decide to grant a request for condonation are the identity of the requester and the subject-matter of the case, definitely when constitutional rights are at stake.

A good illustration amongst the directly relevant cases is the judgment of the High Court in two joined matters, in which an environmental advocacy organisation (Escarpment Environment Protection Group) and a community (respectively Wonderfontein and Langkloof) applied for judicial review of the water use licenses granted by the Department for Water Affairs to two mines, operated respectively by Xstrata Alloys and WER Mining. The appellants requested condonation for their failure to lodge the record of appeal timeously and their failure to lodge a power of attorney authorising the appellants’ attorneys to act on appeal. In considering that request, the High Court noted that the appellants were non-governmental organisations, with limited resources and represented by a public interest law firm (the Legal Resources Centre), and, additionally, that the communities are groups who were previously disadvantaged by inadequate access to educational and economic resources. According to the judge, this was relevant “not because there is one law for the appellants and their attorney and another for other, perhaps more affluent, litigants and their legal representatives but because in evaluating the case for condonation, (...) the relatively disadvantaged position in which the former have to conduct the litigation” should be taken into account. Other factors that were considered *in casu* by the judge, were the nature of the case and its importance within the context of

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1541 This is a lower onus that in case of ‘a preponderance of probabilities’. *FSE and Silobela v. Minister of Water Affairs* (15 August 2012), supra note 921, para. 12.
1542 Ibid. paras 12 and 15.
1543 *MEC Agriculture, Conservation and Environment v. HTF Developers*, supra note 709, para 22.
1545 Ibid. para. 61
the interests of justice, as it essentially concerned access to justice, namely the appellants’ right to challenge the award of water use licenses to mines.\footnote{1546}

Although public interest litigants find themselves in a favourable position to have their request for condonation accepted, such requests are not automatically accepted as requesters should still be able to establish good cause (\textit{id est} a satisfactory and acceptable explanation) for their failure to comply with the rules of the court. That no party has a right to condonation is demonstrated, for instance, by the High Court’s refusal to grant condonation to the public interest litigants in the appeal proceedings in the Carolina matter.

\begin{quote}
\textbf{Box 21. The Carolina matter: no condonation for cross-appeal}

After having been directed to provide temporary potable water, the local and district municipalities sought leave to appeal the High Court’s order, which was granted. Also the applicants filed a notice to cross-appeal, because they were not satisfied with the fact that the national and provincial governments stayed clear, but they omitted to seek leave to appeal. The appeal was postponed \textit{sine die}, as the leave to cross-appeal and the application for condonation first had to be decided by the court that had granted the original order. Given the particular circumstances of the case, like the fact that the question of condonation was only raised one and a half year after the original court order and that instead of seeking to remedy the situation at that time the lawyers simply awaited the appeal hearing, the judge was rather severe on the applicants’ legal representatives.

“The fact that the applicants themselves are not to blame for the failure to comply with the rules, nor to apply for condonation much earlier, but their legal representatives were, although it is an important fact to be considered, does not necessarily entitle them as of right to be granted condonation.”\footnote{1547}

The judge was mindful of the importance of the issue at stake (“the fundamental right of the community of Caroline [sic] to a basic priceless commodity, water”\footnote{1548}), but also took account of the cross-appeal’s prospect of success. Convinced that there is no legal basis to hold national and provincial government accountable for the water supply in Carolina, the judge concluded that “to have the national government dragged to participate in the appeal (…) would be an exercise in futility and not in the interest of justice”\footnote{1549} and rejected the request for condonation.

\footnote{1546} The Water Tribunal, which hears internal appeals, had refused them standing to challenge the licenses, following which they approached the High Court for a judicial review of the authorisations. Ibid. para. 65.

\footnote{1547} Federation For Sustainable Environment and Another v. Minister of Water Affairs and Others (35672/12) [2014] ZAGPPHC 428 (9 June 2014), para. 10.

\footnote{1548} Ibid. para. 12.

\footnote{1549} Ibid. para. 15.
As to costs, however, the judge was again considerate of the public interest at stake and of the fact that the applicants themselves were not to blame for the failed application. In such scenario, courts generally order the legal representatives to bear the costs, instead of their client, but in casu the judge refused to do so, because he was wary of the possible chilling effect on public interest attorneys. Therefore, no costs order was made, meaning that each party had to bear its own costs.\(^{1550}\)

**ii.d) Urgency**

Urgency, finally, is another issue that falls within the courts’ discretion. When a matter is urgent, parties do not have the time to comply with the rules of the court that determine the manner in which, and the time periods within which, applications should normally be filed by the parties and be handled by the courts. Hence, a party submitting an urgent application requests the court to condone non-compliance with those rules that could not be observed due to the urgency.\(^{1551}\) To decide whether a matter is indeed urgent, courts have regard to the seriousness and breadth of the prejudice and harm to the applicant and to the availability of an alternative remedy.\(^{1552}\) In the Carolina matter, the judge explicitly decided to accept that the matter was urgent because a constitutional right was at stake.

**Box 22. Urgency in the Carolina matter**

The applicants in the Carolina matter submitted that their application was ‘inherently urgent’ because the inability to access potable water constitutes a gross infringement of the community’s constitutional right to have access to sufficient water and involves a basic human need which threatens health, well-being and even life and can thus not await ordinary court proceedings.\(^{1553}\) Their argument was accepted by the judge, holding that “when fundamentally entrenched rights are violated or compromised or restoration to normality the enjoinment of those rights [sic], the matter “intrinsically” becomes urgent.”\(^{1554}\) Moreover, in his judgment providing reasons as to why he had rejected leave to appeal the interim execution order, the judge reiterated that when the fundamental right to be provided with water is at stake, “the process of finalizing the dispute should be expedited.”\(^{1555}\)

\(^{1550}\) Ibid. para. 20.

\(^{1551}\) Urgent applications should thus be tailored to the circumstances, meaning that they should comply with the rules as far as possible. *Nelson Mandela Metropolitan Municipality v. Greyvenouw CC* (3263/02) [2003] ZAECHC 5 (21 February 2003), para. 37.

\(^{1552}\) Ibid. paras 22-41.


\(^{1554}\) *FSE and Silobela v. Minister of Water Affairs* (10 July 2012), supra note 1002, para. 18.

\(^{1555}\) *FSE and Silobela v. Minister of Water Affairs* (15 August 2012), supra note 921, para. 6.
(iii) Human rights and substantive law

There are four main ways in which human rights may influence the merits of a case: by providing litigating parties with a direct cause of action or by influencing the development of the common law (iii.a), by determining how common law or statutory law should be interpreted and applied (iii.b), or by creating a special remedy, notably a right to constitutional damages (iii.c). This should again also be linked to the protective duties of judges, who are duty-bound to consider the human rights that are at stake when they rule on disputes.

iii.a) Human rights providing a direct cause of action or a reason to develop the common law

If there is legislation which deals with the right that you are talking about, you must rely on the legislation. And unfortunately or fortunately the environmental space is massively legislated. So it is quite difficult to find a path through the legislation where you could say there is no legislation which gives effect to the right in this particular way and therefore we want to bring the case directly based on Section 24.\footnote{1556}

As this quote indicates, respondents are well aware that the subsidiarity principle (\textit{supra} Section 1.2.1.2) entails that they can only rarely derive a cause of action directly from the Constitution, namely when a given constitutional right and the concrete duties imposed by that right are not implemented in (statutory or common) law – which is unlikely given the abundance of legislation (\textit{supra} Section 2.2.2) – or when they challenge the constitutionality of such implementing law.\footnote{1557} Remarkably, both in the Carolina matter and in the silicosis class action the Constitution was or is used as a direct cause of action, however.

\begin{center}
\textbf{Box 23. The constitutional cause of action in the Carolina matter}
\end{center}

The urgent application in the Carolina matter had two aspects to it. First, it sought to obtain the urgent provision of temporary potable water to the affected communities. Second, it also demanded the development of a reasonable plan to ensure the supply of water on the longer run. That second part of the urgent application was directly based on Section 27(2) of the Constitution, whilst the first part was based on the applicable law and regulations as supported by the Constitution \textit{(infra} Box 28). According to the applicants, government is obliged under Section 27(2) to develop a reasonable plan ensuring that water would be available on the long term.\footnote{1558} They referred to the Constitutional Court’s judgment in \textit{Grootboom v. Government of South Africa} to argue that the

\footnotesize\textsuperscript{1556} R7.  
\footnotesize\textsuperscript{1557} R3, R4, R7, R11, R20, R34.  
\footnotesize\textsuperscript{1558} Applicants’ Submissions, in re: \textit{Nkala v. Harmony Gold} (48226/12) (9 June 2015), para. 29.
different spheres of government should cooperate in the development and implementation of such a plan on the supply of water through the water supply services in Carolina, that this plan should respond to the needs of those who are most desperate and that they should at all time prevent retrogression in the supply of water.\textsuperscript{1559} Although the judge granted the relief linked to this argument – directing the responding parties to engage actively and meaningfully with the applicants regarding the steps being taken to ensure the supply of potable water through the water supply services and to report to the court as to the measures taken for that purpose – he did not seem to base that order on Section 27(2) of the Constitution, but rather on the Local Government Act.\textsuperscript{1560} This may have to do with the fact that he refused to grant relief against the Department, and limited the order to the responsible local government actors.\textsuperscript{1561}

**Box 24. The possible constitutional cause of action in the silicosis class action**

The mineworkers’ legal representatives base the class action on three causes of action, one of which is directly derived from the Constitution. In particular, they argue that the mining companies failed to ensure that the conditions of work of the members of the class did not infringe upon their constitutional rights but that they rather unduly exposed them to disease and death and that these “constitutional violations give rise to an independent cause of action for damages.”\textsuperscript{1562} As was said before (\textit{supra} Box 16), however, the availability of a constitutional cause of action does not have to be decided at the time of the certification so that the decision of the trial court on this issue has to be awaited.

Not only the use of the Constitution as a direct cause of action is exceptional, but also the request by parties that a court would develop the common law to ensure that it is compliant with the Constitution, which they are mandated to do by Section 8(3) of the Constitution. Given that this rarely happens, it is rather remarkable that already during the certification proceedings in the silicosis class action the mineworkers’ lawyers requested one development from the court certifying the class and already suggested that they might request another development from the trial court in the next stage of the proceedings.

**Box 25. Certifying the class action and developing the common law**

In their heads of argument submitted to the High Court for the certification proceedings, the mineworkers’ legal representatives requested the High Court to develop the common law on the

\textsuperscript{1559} Ibid. paras 30-36.
\textsuperscript{1560} \textit{FSE and Silobela v. Minister of Water Affairs} (10 July 2012), supra note 1002, para. 24.
\textsuperscript{1561} Ibid. para 20.
transmissibility of damages.\textsuperscript{1563} After all, under the common law as it stood when the class action was launched, claims for general damages were not transmissible to the estate of a claimant who died before the stage of \textit{litis contestation} was reached – \textit{id est} the closure of the pleadings.\textsuperscript{1564} This would be particularly problematic in the class action, as many mineworkers will probably die before that stage is reached given that the class action is likely to drag on for years, with certification already taking a lot of time, and may be further delayed by the mining companies, who, ironically, most probably contributed to the mineworkers’ death.\textsuperscript{1565}

Hence, the mineworkers’ lawyers submitted that the common law had to be developed to allow for transmissibility, in order to give effect to the spirit, purport and objects of the Bill of Rights, and in particular to the rights to equality, dignity, life, freedom and security of the person, the best interests of the child, and access to courts.\textsuperscript{1566} They argued that especially women and children would suffer from the non-transmissibility of general damages, as most mineworkers are men who, before they got sick, were the breadwinners of their families.\textsuperscript{1567} The law, as it stood, “served to entrench cycles of gender inequality and poverty and keep women uneducated, unemployed, poor.”\textsuperscript{1568}

The High Court judges agreed with these arguments, and considered themselves “duty-bound” to undertake such development, a duty that they could not abdicate.\textsuperscript{1569} The rule that general damages are not transmissible to the estate unless the claimant only died after the pleadings were closed, would result in indirect discrimination on the basis of gender, as it would mainly disadvantage women, notably the mineworkers’ widows.\textsuperscript{1570} The High Court thus developed the common law so that claims for general damages of a deceased claimant are transmissible to the estate provided that the action was instituted before the claimant’s death.\textsuperscript{1571} Two of the three judges did not want to restrict this development to class actions, while one judge dissented on this point.\textsuperscript{1572} As was said, however, the judgment of the High Court has been appealed.

\textsuperscript{1563} Applicants’ Submissions, in re: \textit{Nkala v. Harmony Gold} (48226/12) (9 June 2015), paras 199 and 214.
\textsuperscript{1565} Ibid. para. 210; \textit{Nkala v. Harmony Gold} (certification judgment), supra note 372, para. 188.
\textsuperscript{1566} Respectively Sections 9, 10, 11, 12, 28(2) and 34 of the Constitution.
\textsuperscript{1567} Ibid. para. 213.
\textsuperscript{1568} \textit{See} \textit{Nkala v. Harmony Gold} (certification judgment), supra note 372, para 220.
\textsuperscript{1569} One judge wrote a concurring opinion in relation to that part of the High Court’s judgment, in which she opined that the common law concerning the transmissibility of general damages to the estate of a deceased claimant should only have been developed in relation to class actions. \textit{Nkala v. Harmony Gold} (certification judgment) (Windell, J., separate opinion), supra note 372, paras 234-235, 240-241 and 243.
The problem of establishing factual causation in cases related to the health effects of environmental degradation and the reliance by the mineworkers’ lawyers on the test that was developed by the Constitutional Court in Lee were already discussed before (supra Section 2.5.4 and Box 6). Nevertheless, in their heads of argument the mineworkers’ lawyers indicate that they may also request the trial court to develop the common law on the onus of proof for negligence and causation. They would like the court to find that once a mineworker has shown that he has silicosis and/or tuberculosis and is or was employed on (one of) the mines of the cited mining companies, the onus rests on the latter actor(s) to prove that they were not negligent and/or that they did not cause the disease. Their argument thus reads that the common law should be developed so that as soon as the applicants have established a prima facie case, the burden of proof is reversed.

Whenever the Constitution is used either as a direct cause of action or as guide to develop the common law, judges have to apply the legal framework established by the Bill of Rights to rule on the issue, including for instance the requirement that any restrictions on constitutional rights satisfy the limitations clause in Section 36 of the Constitution. Moreover, if the litigation is amongst private parties, courts will conduct a balancing exercise, weighing up the rights of the mineworkers or communities against any right of the mining companies that is possibly at stake.

There is at least one interesting example where the invocation of constitutional rights did not have the desired impact on the development of the law by the courts. As was said before (supra Section 1.4.1.1), class actions are provided by Section 38(c) of the Constitution, but no legislation has ever been enacted to regulate their institution. Accordingly, the development of the law on class actions is left to the courts. In Mukaddam v. Pioneer Foods, the Constitutional Court had expressly left open the question whether the prior certification of a class action is required when it is based on a constitutional cause of action but directed against a private actor, as opposed to government. This question was tested during the certification proceedings in the silicosis class action.

Even though the mineworkers’ legal representatives apply for certification, they prayed for a finding that certification is not required where a class action is brought against a private party based on a constitutional cause of action, an argument that is supported by the intervening

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parties.\textsuperscript{1574} The certifying court did not agree. Allowing class actions to proceed without certification could result in an abuse of the court process and would cause numerous costly and time-consuming interlocutory challenges around precisely those issues that are normally decided by the court certifying the class.\textsuperscript{1575} Furthermore, the judges noted that courts should be able to protect their own process even in cases revolving around constitutional rights.\textsuperscript{1576}

iii.b) Human rights to interpret and apply statutory and common law

It is standard practice for litigating parties to cite the constitutional rights that are implemented by the rules of statutory or common law on which they directly rely – and, in the unlikely event that litigating parties omit such reference, the court will normally invoke the relevant constitutional rights at its own initiative.\textsuperscript{1577} The court should then be guided by the constitutional rights at stake when interpreting and applying those implementing rules. Accordingly, the Constitution infuses statutory and common law and bolsters an ‘ordinary’ case by emphasizing its importance, by sketching the broader context of a particular rule and by explaining why that rule is so valuable.\textsuperscript{1578} Conduct that falls short of the requirements set by law can, moreover, not only be declared unlawful, but also unconstitutional, precisely because those laws seek to give effect to the Constitution. Each of the three focus matters illustrates this.

**Box 28. The right to basic water supply in the Carolina matter**

One of the objectives of the urgent application in the Carolina water case was to secure the provision of temporary potable water within the shortest time possible – the other objective was the drafting of a plan by government (\textit{supra} Box 23). The demand was based on the Water Services Act, which implements the right of everyone to have access to sufficient water (Section 27(1)(b) of the Constitution).\textsuperscript{1579} The minimum standard for such basic water supply is, in turn, prescribed by the Regulations relating to Compulsory National Standards and Measures to Conserve Water.\textsuperscript{1580} The applicants’ lawyers reckoned that the Constitutional Court found in \textit{Mazibuko v. Johannesburg} that government cannot be obliged to provide a particular amount of free water to its citizens, but they emphasised that the Court also ruled that government is duty-

\textsuperscript{1574} Ibid. para 26.2; Written Submissions of the \textit{Amici Curiae}, in re: \textit{Nkala v. Harmony Gold} (48226/12) (30 September 2015), paras 7, 14-15 and 32.
\textsuperscript{1575} \textit{Nkala v. Harmony Gold} (certification judgment), \textit{supra} note 372, para. 38.
\textsuperscript{1576} Ibid.
\textsuperscript{1577} See e.g. \textit{Mankayi v. AngloGold}, \textit{supra} note 623, para. 13-15 (at the court’s initiative); \textit{Bareki v. Gencor}, \textit{supra} note 1456 (not known, either at the litigating parties’ initiative or at the court’s initiative).
\textsuperscript{1578} R3, R4, R9, R20, R34.
\textsuperscript{1580} Section 3(b) Water Service Regulations. This provision is cited in Annex 2.
bound to take reasonable measures to progressively realise that right. According to them, the Water Service Act and its Regulations are such measures and the responding parties are bound to comply with the minimum standard set by national government.

This argument was accepted by the High Court, which meant a huge victory and has triggered follow-up litigation by other communities that are deprived of water (infra Box 32).

**Box 29. Integrating environmental protection and socio-economic needs in the Tudor Shaft matter**

At the time of the urgent application, there was no explicit reliance on any constitutional right, because the matter was extremely urgent, with the application being launched and the court order being adopted within 24 hours of the commencement of the removal operations. However, in later court papers the Constitution was cited. In their founding affidavit, for instance, the co-applicants referred to Section 24 of the Constitution and argued that this provision at the very least requires that the responding parties would consult with the residents on any steps that they would take in addressing the problems at Tudor Shaft, following which they cited the relevant provisions of the National Environmental Management Act and the Mineral Resources and Petroleum Development Act.

In an additional affidavit, the residents of the informal settlement and their legal representatives outlined the full suite of constitutional provisions that were, according to them, triggered by the application. In particular, they argued that in this matter Section 24 of the Constitution had to be read in conjunction with Sections 10 (dignity), 11 (life), 26 (housing), and 27 (health care, food and water, and social security) of the Constitution. Also Section 28 of the Constitution stipulating children’s rights was considered relevant given the high number of children living in the settlement and the particular health risks to which they are exposed. Following this enumeration of the relevant provisions of the Constitution, they again delved into the applicable laws, this time also referring to the National Nuclear Regulator Act.

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1582 Ibid. para. 28.
1583 See, respectively, FSE and Silobela v. Minister of Water Affairs (10 July 2012), supra note 1002, paras 10-15 and FSE and Silobela v. Minister of Water Affairs (26 July 2012), supra note 1157, paras 13-14.
1584 Except for locus standi, which was based on Section 38(a), (b) and (d) of the Constitution. These provisions are cited supra in Section 1.4.1.1.
1585 See also Humby (2013), supra note 175, 103.
This argumentation arguably demonstrates an awareness on their part that the Tudor Shaft matter is in fact an expression of environmental injustice and that the problem should be resolved through an integrated approach, taking account of the environmental and socio-economic rights that are at stake.1588

**Box 30. The constitutional provisions at stake in the silicosis class action**

The test case of *Mankayi v. AngloGold Ashanti* is one of those rare cases in which the lawyers themselves omitted to refer to the constitutional rights at stake in their submissions to the Court. Nevertheless, the Constitutional Court on its own motion held that “the right to security of the person is engaged whenever a person is subjected to some form of injury deriving from either a public or a private source.”1589 The finding that the common law right to claim damages for the negligent infliction of bodily harm constitutes an effective remedy in order to protect and give effect to Section 12(1)(c) of the Constitution then influenced the Court’s interpretation of the concerned Acts (COIDA and ODIMWA), and in particular its consideration whether these Acts extinguished the right of a mineworker to sue his employer for common law damages *(supra Box 3)*.

Whilst this holding by the Constitutional Court in fact took Mr. Mankayi’s lawyers by surprise – “It attracted our surprise [to] go as far as to say that we are actually dealing with a violation of the security of the person.”1590 – in the class action they no longer omit to refer to the Constitution and invoke no less than six constitutional rights, which they believe to be implicated by the conduct of the mining companies *(supra Section 2.3.3.5)*. According to the applicants’ lawyers, aside from establishing a direct cause of action *(supra Box 24)*, “the Constitution also serves as a basis for interpreting the common law and statute law to give effect to the constitutional protections and rights” of the mineworkers.1591

Mineworkers with silicosis were employed in the mining industry for decades, however. The silicosis class action, for instance, comprises all mineworkers who have worked in the mines after 12 March 1965. This raises the question whether the Constitution is *überhaupt* relevant in relation to events that preceded its entry into force. That question was decided, however, in favour of the mineworkers in an interlocutory judgment adopted in another silicosis lawsuit, *Qubeka v. AngloGold Ashanti*, which later got settled. The High Court judges held that the

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1588 See also the statement by the applicants in their founding affidavit that “mine residue that is radioactive and toxic (…) is causing serious risk to human health, especially that of children.” First Applicant’s Founding Affidavit, in re: *Federation for a Sustainable Environment v. National Nuclear Regulator* (24611/12) (29 June 2012), para. 10.


1590 AS.

values protected by the constitutional rights at stake “are not introduced by the Constitution into South African jurisprudence for the first time in 1997. The Constitution merely entrenched these common law values against future legislation that might permit their erosion.”

iii.c) Human rights influencing the available types of relief

Finally, the fact that constitutional rights are at stake may also affect the relief that a court eventually grants. In particular, plaintiffs may claim constitutional damages, although they have only rarely been awarded (supra Section 1.2.1.2). The only known directly relevant case, in which lawyers may seek to obtain constitutional damages is the silicosis class action.

**Box 31. The silicosis class action: what about constitutional damages?**

In their heads of argument, the mineworkers’ legal representatives argued that the question whether the applicants have an action for constitutional damages is one of the common questions of law that justifies dealing with the mineworkers’ claims by way of a class action. In particular, before the trial court they want to plead on the legal issue concerning the availability of compensatory damages under Sections 12(1)(c) and/or 24 of the Constitution. It rather seems that the lawyers involved in the class action would like to contribute to building jurisprudence on this issue, as they are aware that courts are reticent to award constitutional damages and in principle only do so where there is no remedy available at common or statutory law, whilst a right to damages for the mineworkers is clearly available, as was also confirmed by the Constitutional Court in *Mankayi v. AngloGold Ashanti*.

Lastly, it should be observed that human rights could in principle influence the sentence that is imposed on a party found guilty of an offence. Although there is no example available amongst the directly relevant cases, in another criminal case dealing with an environmental crime (namely illegal trade in rhino horns), the sentencing judge explained that a too lenient attitude would not be appropriate and that a non-custodial sentence would send out the wrong message.

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1593 Even the test to decide to vary or rescind an order, for instance, can be influenced by the constitutional rights at stake. *Vhembe Forum v. MEC Economic Development (Limpopo)*, supra note 657, para. 22.
1594 Such damages are available when a cause of action is derived directly from the Constitution or when, notwithstanding an ‘ordinary’ cause of action being available, courts find that existing remedies are insufficient to vindicate the constitutional rights at stake.
1596 *Nkala v. Harmony Gold* (certification judgment), supra note 372, para. 72.7.
1597 *Fose v. Minister of Safety and Security*, supra note 107, para. 67.
1598 *Lemthongthai v. S* (849/2013) [2014] ZASCA 131 (25 September 2014), para. 20 (holding also that “[c]onstitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general” and that “allowing the kind of behaviour that resulted in the convictions (…) case to be dealt with too leniently will have the opposite effect to what was intended”).
2.7. Assessing ‘success’

The concept of success was discussed at length before (supra Part II, Section 2.2.5), and this analysis demonstrated that success has multiple dimensions. To evaluate the different possible impacts of litigation, it was suggested to use three combined classification systems. First, impacts can be direct or indirect, which depends on whether or not a particular effect expressly featured in the lawsuit (by being included in the parties’ claims or argumentation, the court’s reasoning and/or the eventual court order). Second, a distinction is made between material and symbolic impacts based on whether the effect is tangible or not. Third and finally, success is assessed at three levels, that is in court (victory or defeat in terms of the judgment and the order), at the level of the actual situation of the parties directly involved (concrete impact) and at the level of the broader society (social impact). Aside from the multidimensional nature of success, also the difficulty of attributing impacts to the litigation and the fact that it may take a long time before the impacts become apparent should be taken into account.

Public interest lawyers and activists in South Africa are well aware of the diverse dimensions to success,1599 as well as of the difficulty to measure impacts1600 and to attribute them to the litigation.1601 Hence, their approach to the question of success is definitely imbued with common sense and realism. Whether they regard a lawsuit as successful largely depends on the goals or indicators that they have set, and they admit that the more ambitious those objectives are, the harder it is to be successful.1602 Moreover, often they have to adapt their objectives in the course of the proceedings due to changing circumstances1603 – “you have to sacrifice a bit on what is the best way of going about it”.1604 What success will look like in the end is thus unpredictable at the time that the litigation is launched.1605 The unpredictability of the entire enterprise and the need to be flexible are important considerations that are borne in mind, because if parties are not satisfied with a certain outcome, they must carefully weigh their options given that the decision on appeal may even be worse.1606 Lastly, how successful litigation ultimately is also depends upon the time and resources that they are willing and able to invest not only in monitoring the impacts but also in ensuring that those impacts get the chance to materialise. In other words, the respondents acknowledge that litigation does not end with the court

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1599 R3, R4, R7, R9, R23.
1600 R4, R7, R10, R14, R34.
1601 R7, R14, R34.
1602 R34.
1603 R28.
1604 R23.
1605 R23, R28.
1606 R16. See also R. Wynberg and D. Fig, A Landmark Victory for Justice: Biowatch’s Battle With the South African State and Monsanto (Durban: Biowatch, 2013), 71.
order but requires significant post-order engagement through monitoring and enforcement, which comes at a further cost.\textsuperscript{1607}

Table 9 gives an overview of the different impacts that were mentioned by respondents to illustrate success or, if they are not achieved, (partial) failure. It is noteworthy that one specific expression of success featured prominently amongst the respondents’ reactions when they were asked about their understanding of success, which is ‘power’ – regardless of whether such power is created directly or indirectly by the litigation and whether it benefits only the parties involved or the broader society. Crucial for civil society actors is thus the question whether the litigation has changed “the repository of power”.\textsuperscript{1608} This should be aligned with Langford \textit{et al} and Andreassen and Crawford’s analysis of the different types of power that can be created (\textit{supra} Part II, Section 2.2.5). Therefore, where the examples below relate to power, the type of power created is indicated based on the classification system of Langford \textit{et al} (leverage, perception and organisational power).

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Court Victory} & \textbf{Material} & \textbf{Indirect impacts} \\
\hline
& ✓ Judgment clarifies the law or gives a certain interpretation of the law & ✓ Precedent is applied in other court cases \\
& ✓ Relief sought is ordered & ✓ The case sparks other litigation \\
& ✓ (No adverse) costs are ordered & ✓ Information obtained through the proceedings (discovery) is used in other litigation \\
Symbolic & ✓ Judgment shows understanding of the plight of the applicants/plaintiffs** and/or the context of the case & ✓ The judgment is a first \\
& ✓ Judgment uses powerful language & ✓ The case is reported in the media** \\
& ✓ Judgment morally condemns the counterparty** & \\
Concrete success & ✓ Adequate court order addressing the situation of the litigants & ✓ Relief obtained can be and is used to bring the harmful situation or activity to an end or to ensure compliance with the law \\
& ✓ Implementation of the court order: there is compliance or the order is enforced & ✓ Parties engage out-of-court \\
& & ✓ The conduct of the involved company \\
\hline
\end{tabular}
\caption{Possible impacts of litigation according to respondents}
\end{table}

\textsuperscript{1607} R7, R14, R20, R27, R32. See also Centre for Environmental Rights, Community Casebook on Mining and Environment (2014), 2 (pointing out that “a legal victory is not always a complete victory” and that “[t]he law has its own limits because it depends on the willingness of government officials (…) and mining companies to abide by the law and the orders of the court”).

\textsuperscript{1608} R25.
<table>
<thead>
<tr>
<th>True Possibility to enforce compliance through contempt of court</th>
<th>changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ The litigation affects the share prices of the company</td>
<td></td>
</tr>
<tr>
<td>✓ The relief sought is granted out-of-court</td>
<td></td>
</tr>
</tbody>
</table>

### Symbolic
- ✓ Judgment affirms the rights of the litigants*

### Social success
- ✓ Judgment changes law or policy

### Material
- ✓ Compliance with the precedent at own initiative, _id est_ without requiring new litigation
- ✓ Government initiates law or policy reform process at own initiative, perhaps involving parties involved in the litigation
- ✓ Companies agree on industry standards
- ✓ Precedent is used for advocacy

### Symbolic
- ✓ Judgment acknowledges the issue**
- ✓ A precedent-setting case

### Symbolic
- ✓ There is a change in discourse by companies**
- ✓ Media reports on the issue**
- ✓ Similarly placed individuals are empowered*
- ✓ Precedent is referenced at conferences
- ✓ Judgment confirms the receptiveness of courts to the concerned issues*/**
- ✓ Outcome of the litigation sends a message to the mining industry*/**
- ✓ There is a change in power dynamics*/**

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* _leverage_, ** _perception_, *** _organisational power_

These different possible impacts of litigation, as depicted _in abstracto_ in Table 9, can be illustrated, 1609 first of all, through two cases that were discussed earlier in this Chapter, the Batlhabine case 1610 (_supra_ Box 8) and the case of _Bareki v. Gencor_ 1611 (see also _supra_ Section 2.6.3.2). In the Batlhabine case a director was convicted to a prison sentence, without having the possibility of opting for a fine instead, 1609

1609 Only the most relevant impacts of these two cases are mentioned. For a thorough discussion of the impacts of two other example cases, see _infra_ Boxes 31 and 32.
1610 _S v. Blue Platinum Ventures, supra_ note 1353.
1611 _Bareki v. Gencor, supra_ note 1456.
which was a first and is for that reason deemed a landmark case by several respondents. They hope that this conviction has sent a strong message to the mining industry. At the same time, several respondents admitted that eventually only one of the fourteen charges had been prosecuted, that the other six directors had remained out of range, that the company itself had been found guilty but not sentence, that the area is still not rehabilitated, while the convicted director is not in prison. Moreover, whether it really has or will have an impact on the conduct of mining companies in general is as yet uncertain.

That the indirect impacts of litigation should never be underestimated is nicely illustrated by the case of *Bareki v. Gencor* on asbestos pollution. The applicants in this case (the chief of the community and an advocacy organisation) wanted to use Section 28 of NEMA, which mandates government to direct the person responsible for the pollution to take remedial measures, as their cause of action. In October 2005, the High Court decided, however, that the Act was not applicable, because the pollution complained of predated its entry into force. Dissatisfied with this finding, legal scholars called for “[l]egislative reform establishing a more comprehensive regime that takes the special characteristics of historically polluted sites into account.” In 2009, the Act was indeed amended and Section 28(1A) was inserted, stipulating *inter alia* that the provision also applies to a significant pollution or degradation that occurred before the commencement of the Act. These impacts of the Batlhabine and Bareki cases are categorised in Table 10 below. Thereafter, the impacts of the Carolina matter and silicosis class action are discussed in detail in Boxes 32 and 33.

<table>
<thead>
<tr>
<th>Court Victory</th>
<th>Material</th>
<th>Direct impacts</th>
<th>Indirect impacts</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>✓</td>
<td>13 of the 14 charges were dropped</td>
<td></td>
</tr>
<tr>
<td></td>
<td>✓</td>
<td>The director was convicted</td>
<td></td>
</tr>
<tr>
<td></td>
<td>×</td>
<td>The other six directors were not prosecuted</td>
<td></td>
</tr>
<tr>
<td></td>
<td>×</td>
<td>The company was found guilty but not sentenced</td>
<td></td>
</tr>
</tbody>
</table>

Table 10. The impacts of the Batlhabine and Bareki cases

1612 R4, R7, R14, R26, R32, R34.
1613 R14, R32.
1615 R7, R14, R34.
1617 Section 28(1A) NEMA is cited in Annex 2.
1618 Only the impacts that were discussed here are categorised.
Concrete success  
- The area is still not rehabilitated  
- The director is not in prison

Social success  
Material  
- The NEMA was amended to allow its retrospective application

Symbolic  
- The first criminal conviction of a director of a mining company without the option of a fine

Symbolic  
- A message is sent to the mining industry that non-compliance with the law can lead to a prison sentence for the directors
- It is uncertain whether the conviction will actually change the conduct of companies and their directors

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**Box 32. Evaluating the success of the urgent application in the Carolina matter**

The applicants in the 2012 urgent application got all the relief that they had requested – except that the judge only ordered the supply of temporary potable water within 72 hours instead of 24. The willingness of the High Court to order local government, on an urgent basis, to provide a given amount of water immediately to a certain community was a first. Therefore, the case is considered a landmark case that has set a ground-breaking precedent. For that reason, the judgment has also been cited at various conferences and in many papers, has extensively been covered in the media and has encouraged other communities, who are similarly deprived of access to the minimum standard of basic water supply, to approach the court for an order (supra Section 2.3.2.5). One example is the Blyvooruitzicht community, whose situation was discussed before (supra Box 1). The community, which is also represented by Lawyers for Human Rights, applied for an order that would secure their access to basic water supply.\textsuperscript{1619} Their application was based on an argumentation very similar to the one that was used in the Carolina matter, although no express reference is included.

Nevertheless, as also the respondents who were involved in the Carolina matter admit, the 2012 urgent application case was not a complete success. Firstly, the applicants’ lawyers had really hoped that the High Court would also order relief against the Department of Water Affairs and not only against local government, but this was explicitly refused by the judge. According to him, an intervention by national or provincial government in the supply of water by local government would negate the separation of the different spheres of government under the

\textsuperscript{1619} Applicants’ Notice of Motion, in re: Molefe v. Merafong Local Municipality (85928/15) (22 October 2015).
Constitution.\textsuperscript{1620} This was an important defeat for the applicants, because the case was also meant to test the extent to which national government must capacitate local government so that it can comply with its responsibilities.

Also in the application for potable water in the case of the Blyvooruitzicht community did the litigating parties seek to involve national and provincial government, in addition to local government. The matter was somewhat different, however, in that the water supply was not interrupted at that time but there was a risk that it would be in the future. The first order sought, interdicting such disconnection, was thus only directed against the municipality and the water service provider. The other orders sought, namely to draft a plan and to consult with the community, were targeted at all responding parties from government. The High Court judge granted the orders, albeit in a slightly adapted form. The judge ordered that “in developing the water service plan for the Blyvooruitzicht Mining Village, the first responding party [(the Merafong Local Municipality)] may in its discretion consult with any other entity (state or non-state).”\textsuperscript{1621} Although, unfortunately, the judge did not add any comment to the order, the judge at least seems to allude to the responsibility that national and provincial government may bear in finding of a definite solution for the water crisis in the Blyvooruitzicht community, which arguably constitutes a step into the direction in which public interest lawyers would like to see the law evolving, namely towards a system in which national, provincial and local government cooperate to resolve crises affecting basic needs.

Secondly, aside from the fact that no order was granted against provincial and national government, the court order in the Carolina matter was also never implemented. Although the litigation has sparked an out-of-court engagement process (in which the Department of Water Affairs is involved), the municipality never complied with the orders to provide temporary potable water in the interim, to meaningfully engage with the applicants and to report back to the Court on the measures taken to ensure that water would again be available through the water supply services. Instead, they appealed and they refused to abide by the Court’s decision, even though the appeal had no suspensive effect. At some point, a punitive costs order was sought by the litigating parties, but refused by the court (see also supra Section 2.6.4.3).

“The implementation of the court order was a big challenge. (...) The people of Carolina have been sitting on the problem (...) having a good court order that says they must be given water. (...) The weakness that I see was a very good High Court judgment with little results for the community.”\textsuperscript{1622}
In sum, the following successful (✓) and unsuccessful (✗) impacts of the urgent application in the Carolina matter were identified by respondents involved therein.

- Direct, material, in court
  ✓ Decided that lack of access to water is inherently urgent
  ✓ Interdicted local government to immediately provide water
  ✓ Ordered meaningful engagement
  ✓ Granted a structural interdict
  ✗ Did not order relief against national and provincial government

- Direct, symbolic, in court
  ✓ Recognised the importance of access to water

- Indirect, material, in court
  ✓ Has sparked other litigation

- Direct, material, concrete
  ✗ Local government did not provide potable water
  ✗ Local government did not meaningfully engage with the applicants for the first few months, until a new official was appointed
  ✗ Compliance could not be enforced through contempt of court proceedings because the order was vague and there was a material defect (the order targeted the wrong authority)

- Indirect, material, concrete
  ✓ The applicants succeeded in involving national government in an engagement process out-of-court
  ✓ National government eventually set up a unit to test the water, to do surveys, to do door-to-door visits, and to communicate the results of the water quality to the community
  ✓ Mining companies took measures to prevent acid mine drainage

- Indirect, symbolic, concrete
  ✗ Local government adopted a hostile attitude towards the community, and refused to cooperate
  ✗ National government spoke of a “war against the state”

- Direct, material, social
  ✓ Set a good precedent

- Indirect, symbolic, social
  ✓ The judgment is cited often at conferences

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**Box 33. Evaluating the success of the certification of the silicosis class action**

On 13 May 2016 the High Court certified the class action launched by mineworkers with silicosis or tuberculosis. The certification, if it is also confirmed on appeal, is only the end of a preliminary stage, where it is decided that a case may proceed as a class action and where

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1624 Note that the order and judgment of the High Court is appealed to the Supreme Court of Appeal and that the decision on appeal is pending (*supra* Section 2.3.3.3).
the class is defined. Certification is obviously very important given that every individual who satisfies the class definition will be bound by the outcome of the first stage of the litigation regarding the liability of the mining companies for the disease contracted by the mineworkers, unless they explicitly opt out of the class, and may in a next stage be awarded damages provided that they opt into those proceedings.

The certification judgment in first instance was a success for the applicants, because the two classes – one for silicosis and one for tuberculosis – was certified by the High Court in exactly the same terms as the mineworkers’ legal representatives had proposed. Furthermore, the High Court also acceded to their request to develop the common law regarding the transmissibility of general damages to the estate of a deceased member of the class (supra Box 25) and used bold language throughout its judgment, reproving the mining industry (supra Section 2.6.4.3).

The judgment and the certification proceedings are successful for several other reasons as well. Two significant developments since the launch of the class action are the institution of a law reform process and the establishment of an industry-working group (supra Section 2.3.3.4), which have “to a certain extent been sparked by litigation, although no one really admits that; I do not think anything of this would be happening if it was not for the litigation.”

Accordingly, the mineworkers’ legal representatives are hopeful that although the litigation concerns a claim for damages, it may have a broader, social impact by leading to a change of the working conditions at the mines and to a reform of the statutory compensation scheme.

The following successful impacts were identified by respondents involved in the certification proceedings.

- Direct, material, in court
  - Classes were certified as proposed
  - The common law on the transmissibility of general damages was developed
- Direct, symbolic, in court
  - The applicants “won on everything they could have won on”
  - It is a powerful judgment, using strong language vis-à-vis the mining industry
  - The language of the judgment shows that the judges understood the context in which the case occurred
- Indirect, material, in court
  - The judgment provides additional guidance on the mechanism of class actions to be used by future claimants
- Indirect, material, concrete
  - An industry-working group has been set up to eliminate silicosis
  - A law reform process has been instigated by government

1625 AS.
2.8. Strategic litigation for corporate accountability in South Africa: some findings

South Africa is a remarkably rich field for a study on enforcing accountability for human rights violations by business enterprises through judicial remedies. Although, admittedly, the litigating parties may themselves not always realise the significance of their domestic practice for the business and human rights debate at international level (and for the practice in other countries), there is a lot of potential. The fourth and final part of the dissertation will discuss the precise links between the experiences in South Africa and the international legal framework, and reflect on how international initiatives could strengthen the legal responsibility of business enterprises for human rights at the domestic level and facilitate the enforcement of accountability for human rights violations by business enterprises. Before going into that discussion, however, some findings that run like a leitmotif through the case study on environmental health hazards caused by mining should be highlighted first.

The key actor in the entire story is civil society. They are the indispensable link between the poor and vulnerable groups that are affected by the operations of mining companies and the justice system. Both advocacy organisations and law firms are crucial, and they form strategic alliances in order to be able to perform that role. Mineworkers and communities depend on them to know their rights and, definitely, to enforce them. Unfortunately, notwithstanding the relatively high number of civil society actors that assist communities and mineworkers in asserting their rights vis-à-vis government and the mining industry, in absolute numbers they remain few. This means that the litigated cases only represent the tip of the iceberg and that many more remain under the radar.

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1626 Cf. Gloppen (2009), supra note 341, 471 (noting “the very close connection that exists in South Africa between social rights activists and the country’s top advocates”).
That is also why respondents rightly identify the empowerment of people as the principle task of civil society, so that the victims themselves would be able to vindicate their rights, preferably without having to approach the courts. Nevertheless, the road towards a fully empowered citizenry still seems a very long one. Even civil society actors themselves admit that they often lack the capacity and the courage to take up the fight with mining companies directly. Although they admit that ideally victims should be able to call companies to account for their behaviour, it is a long road from here. For the time being, they would rather have government watching the industry, supported by civil society.

Looking at those concrete cases that are litigated, what soon becomes clear is that the decisions as to who should be cited, which type of proceedings resorted to, which forms of relief sought and which arguments used are largely determined by the cause of action on which litigating parties rely, which in turn depends on the precise situation of the clients (in particular the direct victims) and what they want to get out of the litigation. Therefore, for advocacy organisations and definitely for law firms, broader strategic goals as well as principles come to the fore especially when they have to decide whether they take on or support a case. Litigation may be inherently unpredictable, but at that time already they try to assess and predict, as well as possible, the expected course of the proceedings and to anticipate any possible negative developments. Hence, the cases that are selected and that reach the courts’ dockets are the ones that are considered ‘winnable’ and that align with the strategic agenda of the civil society actors involved.

When a case is litigated, the Constitution is nearly always cited as the framework within which the litigation takes place, regardless whether the lawsuit is directed against mining companies directly or against government for (actual or potential) adverse impacts caused by mining. In fact, the Bill of Rights and its spirit, purport and objects are to such an extent intertwined with substantive and procedural law that it becomes hard to disentangle them – and, perhaps, rightly so. The judiciary, which has a duty to protect, promote and fulfil the rights in the Bill of Rights, is a vital actor in creating, maintaining and strengthening that interconnection, which is in part explained by the fact that in a common law system like South Africa (which, in fact, has a hybrid common-law and civil-law tradition), the judiciary is not only competent to interpret and apply the law, but to develop it as well, under appropriate circumstances.

Notwithstanding this habituation that the Constitution, including its Bill of Rights, infuses all law and, thus, all litigation as well, human rights feature most prominently when there is some kind of gap in, or uncertainty regarding, the protection of poor and vulnerable people (such as mineworkers and neighbouring communities), against the adverse impacts of business enterprises (such as mining companies). This is where human rights can really make a difference. The health of mineworkers or neighbouring communities is or risks to be prejudiced by mining activities? Lawyers and activists argue that these people’s rights to dignity, life, personal integrity and an environment not harmful to health and well-being result in an obligation on the part of mining companies to take certain
preventive measures. Mineworkers or neighbouring communities are affected by environmental degradation or pollution caused by mining, but the perpetrator cannot be identified or attributing the damage to a particular perpetrator is tricky, either in terms of the law or in terms of finding the evidence? Lawyers and activists demand that government takes reasonable measures to achieve the realisation of the rights at stake, or they demand that government ensures the supply of basic needs such as access to potable water. Victims do not know their rights or that they are violated, and/or do not dispose of the individual means to approach the courts? Lawyers and activists have successfully argued that victims’ right to have access to the courts entails that a class action by a few of them can be instituted on behalf of all (unknown) victims.

The responses to these questions do not assume that human rights should affect business enterprises in one particular way (for instance through the direct horizontal application of the rights at stake) to the exclusion of all others. Rather, the precise impact that human rights have on business enterprises flows from the cause of action relied upon, which, as was said, largely determines the litigation strategy. The role of human rights is then an automatism, as it were. What makes this system work, is the close relationship between the protective duties of the state, including those of the judiciary, and the human rights duties of business enterprises, in whatever way they are enforced (directly, through statutory law or through common law). Human rights are the adhesive for a legal framework that adequately protects the most vulnerable groups in society.

The South African legal system may not be perfect, it has proven its potential for the protection and promotion of human rights where they are threatened by business enterprises, such as mining companies. For instance, while scholars have complained about the fact that the common law has hitherto to achieve its transformative objective, there have already been some developments that are particularly important for victims of human rights violations by business enterprises in their quest for justice. Two examples are the development of the rule on factual causation and the admission of class actions in litigation against private parties. Also the way in which parent companies are called to account for the conduct of their subsidiaries, could, for instance, inform the debate on the type of duties that business enterprises should bear.

Definitely, in an ideal situation mineworkers and neighbouring communities should not be forced to go to court in order to hold mining companies or government accountable and to be able to enjoy their rights. Courts being responsive to the plight of these people is a first, indispensable step, however, in the evolution towards a system in which those companies accept that they have certain human rights duties, as a matter of law. This process could be reinforced by appropriate international initiatives.
PART IV.
TAKING STOCK AND MOVING FORWARD: STRENGTHENING CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS
This final Part of the dissertation integrates the findings of the fundamental analysis in Part II and the case study in Part III. Its purpose is to highlight the links between the international legal framework on business and human rights and the experiences of local stakeholders who seek to vindicate human rights against business enterprises within domestic legal orders. The lessons learnt are recapped and some proposals for the future introduced.

In particular, Chapter 1 commences with a synopsis of the legal setting of business and human rights, both at the international level and within the South African legal order, and with a brief outline of the geopolitical context within which the international legal framework should be developed further. Following this discussion of the law on the books, the Chapter proceeds with a review of the main lessons learnt from the case study (the law in action), while taking note of its limitations.

Chapter 2 subsequently deals with new building blocks for the international legal framework on business and human rights. The recent developments at the level of the United Nations regarding access to remedies are explicated first. Thereafter, two approaches are presented, which could advance the international legal framework and thereby also strengthen the domestic approaches to ensuring that companies are accountable for human rights violations. As will be explained, each of these approaches, which constitute a particular ‘form’ that a new building block at the international level could adopt, can tackle several issues that relate to business and human rights (‘substance’). The Chapter ends with some proposals for further research.
1. BUSINESS AND HUMAN RIGHTS: THE INTERNATIONAL LEGAL FRAMEWORK AND ITS DOMESTIC OPERATIONALISATION

1.1. The law on the books

Before discussing the specific lessons that were learnt from the case study and making proposals as to how the international legal framework on business and human rights should be developed further, it is useful to recapitulate. Therefore, this Section first summarises the current international legal framework (Section 1.1.1) and briefly reiterates the way in which the legal effect of human rights on business enterprises should be scrutinised within domestic legal orders, using the South African legal order as an example (Section 1.1.2). The Section ends with a sketch of the geopolitical setting within which proposals for the future have to be made and consensus thereon obtained (Section 1.1.3).

1.1.1. The international legal framework: a recap

With globalisation, technological progress, liberalisation, privatisation and deregulation steadily but significantly having fortified the status, power and leverage of business enterprises, also the idea that these entities should be constrained by human rights has gained a foothold. The consensus is shared that this potent position of business enterprises does not only coincide with unique opportunities to protect and promote human rights, but also with an increased risk of human rights violations. Although for decades already the idea that business enterprises have a responsibility for human rights has been arousing interest, both domestically and internationally, in scholarship, in practice and in politics, international (human rights) law holds on to the image of a Westphalian society with the state as the (primary) duty bearer.

Until today any development going against that traditional paradigm has occurred outside (hard) international law, taking the form of soft law or private regulation. Advocates for direct, legally binding human rights duties for business enterprises under international law suffered their clearest defeat in 2003, when the former Commission on Human Rights decided not to endorse the UN Norms.

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1627 Popova, supra note 202, 120. Cf. A. Nolan, “Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the Obligation to Protect,” Hum. Rts. L. Rev. 9 (2009), 228 (distinguishing two main causes, namely globalisation and privatisation).
which are, as a result, doomed to remain a draft for ever. As at that time the way towards binding international norms was apparently not yet paved, John Ruggie was appointed Special Representative on Business and Human Rights to defuse the strife-torn situation.

His mission was to achieve consensus on the contours of the international legal framework that presently governs the responsibility of business enterprises for human rights, within which all existing governance regimes could be located and which could then serve as a baseline for the development of new regulatory initiatives, possibly including (on the longer term) hard international law. So it happened, and respectively in 2008 and 2011 the Human Rights Council endorsed a three-pillar Framework and its implementing Guiding Principles, which proclaim that states have an obligation under international law to protect human rights against possible interferences by business enterprises, which, in turn, have a moral responsibility to respect human rights, while victims should be assured of access to remedies.

Hence, under international law as it stands and is restated by the UNGPs, business enterprises do not bear any direct, legally binding human rights duties, let alone that such duties can be enforced before an international forum. That does not mean that business enterprises are not presumed to bear any human rights duties whatsoever, but that such duties can only become legally binding in accordance with national law and judicially enforceable before domestic courts. Indeed, in accordance with their obligation to protect, states should take all reasonably available measures to prevent that human rights are violated by business enterprises and to remedy those violations that occur notwithstanding preventive measures. The greater responsibility thus lies with states – host states in particular given the controversies about the exercise of extraterritorial jurisdiction (supra Part I, Section 1.2) – and corporate accountability for human rights should be secured mainly at the domestic level.

1.1.2. The domestic legal order as the centre of gravity

As international law has yet to impose legally binding human rights duties on business enterprises, at least for the time being the legal effect of human rights on businesses depends on the domestic legal framework of states. Given that the extent to which and the way in which human rights constrain

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1631 Also non-state-based remedies that are administered not on a purely national basis (such as the complaint mechanisms before the International Finance Corporation and the national contact points for the Guidelines for multinational enterprises of the Organisation for Economic Co-operation and Development) can make business enterprises accountable for human rights, but at present there is no (quasi-)judicial international body with jurisdiction over business enterprises, so that liability for human rights can only be established at the national level. For a discussion of the terms ‘responsibility’, ‘accountability’ and ‘liability’, see supra Part I, Section 2.2.
business enterprises differs from one domestic legal order to the other, Part II of this dissertation has proposed to scrutinise the impact of human rights having regard to two legal constructs: the horizontality of human rights, which embraces three dimensions, namely effect, scope and application, and the existence (and enforceability) of protective duties on the part of state organs.

The first step in the horizontality inquiry consists of reviewing whether in a given legal order the idea is accepted that human rights could, at least in theory, bind actors other than the state, such as business enterprises, and whether the concrete rights at stake are indeed capable of taking effect against private actors. Next, the precise duties that human rights with horizontal effect impose on private actors have to be defined and the rights holders towards whom such duties are owed identified, so as to know whether these duties have been complied with. Only after it is determined that a given right has horizontal effect and gives rise to a duty on the part of a business enterprise owed towards a particular rights holder, does the issue of horizontal application arise. Moreover, a positive result in the first two phases of the horizontality inquiry does not entail that the right will also be *applied* directly to the horizontal relationship between business enterprise and rights holder. The latter scenario occurs when a cause of action and/or a special remedy is derived directly from the right that is at stake. Other options are (1) for the right to be purely vertically applied, meaning that human rights do not feature explicitly in the horizontal relationships, but affect the laws, regulations, policies or other measures adopted by the state that govern this horizontal relationship as well as the contracts concluded between state actors and business enterprises, or (2) for the right to be applied indirectly, meaning again that the relationship between business enterprise and rights holder is affected by laws, regulations, policies or other measures but this time with human rights influencing their interpretation, application and development by the judiciary. Different sub-models of indirect horizontal application are available, depending on whether regard is had to the actual rights or to the values underlying them (direct-indirect *versus* indirect-indirect horizontal application) and on the types of remedies available (strong *versus* weak indirect horizontal application).

Also the question whether state organs have protective duties for human rights should be considered. Such duties in fact mirror the obligation to protect that exists under international law. The protective duties of the legislature and the executive should influence the laws, regulations and policies that they adopt, which in turn either constrain business enterprises or facilitate the enjoyment of rights by the rights holders, whilst the protective duties of the judiciary are triggered whenever they are called to rule on a dispute among business enterprises and rights holders or between either of them and the state, when the latter type of dispute has a radiating effect on the relationship between business enterprises and rights holders. The enforceability of the protective duties of the state depends *inter alia* on the system of judicial review that applies in a given legal order.

In Part III this abstract analytical framework was applied to evaluate the legal impact of human rights on business enterprises in the South African legal order. Briefly, this analysis can be recapped as
follows. In South African law, there is no principled objection to human rights having horizontal effect, including against legal entities like business enterprises, provided that the nature of the concrete right at stake lends itself to having such effect. The scope of human rights binding on business enterprises is not resolved decisively. First, as to the types of duties that they bear, it is not disputed that private actors should at least respect human rights, an obligation which depending on the circumstances may also lead to active conduct being required from the duty bearer. Under appropriate circumstances also an obligation to protect may be assumed to exist, for instance when a parent company is held to owe a duty to certain stakeholders who are affected by the activities of its subsidiary. Second, no abstract rule exists to identify rights holders. Nevertheless, when human rights are violated, ordinary rules of (factual and legal) causation can be used to establish liability and if laws, regulations, policies or contracts impose duties on business enterprises other than to respect human rights the rights holders are generally identified in those implementing measures. Finally, human rights can be applied to business enterprises through either of the three models of application, namely direct horizontal, indirect horizontal or vertical application, and in the case of indirect horizontal application also the different forms of that model are, in theory, available.

The South African Constitution also explicitly acknowledges that all state organs have a duty to protect human rights, including against interferences by private actors, such as business enterprises. Aside from a duty to protect that is akin to the international obligation to protect human rights and that requires the adoption of measures to achieve those rights and to remedy interferences therewith by private actors, there also exists a duty of care on the part of organs of the state to look after the physical integrity of citizens.

Given that within the current legal framework for business and human rights the focus lies on the legal system of the host state, also the question of available remedies should be assessed, first and foremost, within the domestic legal system. This dissertation has concentrated on judicial remedies, by examining the use of strategic litigation to ensure that companies bear a responsibility for human rights, regardless of whether this goal is achieved by forcing government to monitor and control corporate conduct or by directly calling business enterprises to account, in court, for their behaviour. By seeking to change the balance of power in society and to subjugate business interests to human rights, such litigation pursues a certain form of social change, which has become all the more topical in a globalised economy in which states increasingly share power with – or are even dominated by – potent business enterprises.
1.1.3. The international legal and political landscape for moving forward

No system is perfect, and criticism is all the more likely when a system emerges from a compromise, like the UN Framework on Business and Human Rights and the UNGPs do.\textsuperscript{1632} The Special Representative behind those instruments, John Ruggie, has never denied that the legal framework sketched by these instruments was dictated by a need for what he called ‘principled pragmatism’.\textsuperscript{1633} He had to work with the options that were given to him, taking into account, in particular, the vetoes expressed by the business community and backed up by important players such as the US and the EU – although the question may be asked whether human rights should ever be up for a compromise.\textsuperscript{1634} In any case, Ruggie has repeated at pains that he does not want the UNGPs to freeze the global debate on business and human rights and to preclude the development of new initiatives at the international level to strengthen the responsibility of business enterprises for human rights, within whichever of the different regimes of the polycentric governance system (\textit{supra} Part I, Section 1.1).

Six years have gone by since the Human Rights Council endorsed the UNGPs, and nine years since the UN Framework. Nevertheless, if optimistically the geopolitical landscape is considered to have undergone some changes during that period, those are taking place slowly.\textsuperscript{1635} In June 2014, the scene was still very divided when the Human Rights Council issued two resolutions, one on the implementation of the UNGPs, adopted without a vote and one on the creation of an open-ended intergovernmental working group for the elaboration of an international instrument, adopted with a divided vote – showing the continued resistance from western states, such as the US and the EU member states (\textit{supra} Table 1). Also the attendance list of the first session, in July 2015, of the open-ended intergovernmental working group that was established to elaborate a legally binding international instrument was still meagre. The second session, organised in October 2016, was more successful in the sense that the presence of a number of important players at least sent the message that they do not want to break down communication channels.\textsuperscript{1636}

Nevertheless, even if there seems to be a willingness to discuss, many questions as to what any possible novel international instrument should look like remain unanswered and highly controversial (see \textit{infra} Section 2.2.1.1). Admittedly, the UNGPs simply left open the questions that were most controversial, two important ones being which human rights bind business enterprises (given that not

\textsuperscript{1632} Even the very idea that they are a compromise is challenged by some scholars, who denounce the fact that all stakeholders (except for the direct victims) may have been consulted, but that the contours of the framework were undisputable.

\textsuperscript{1633} Interim report E/CN.4/2006/97 of the Special Representative, \textit{supra} note 88, para. 81.

\textsuperscript{1634} Bilchitz and Deva, \textit{supra} note 39, 12; Deva (2013), \textit{supra} note 42, 82.

\textsuperscript{1635} See also Ruggie (2016), \textit{supra} note 41, 69 (doubting whether even most host states where transnational corporations operate would accept interference by home states).

\textsuperscript{1636} See \textit{supra} Part I, Section 1.3.
all states have ratified the same human rights instruments) and what concrete duties business enterprises bear under those rights. Ever since the creation of the open-ended intergovernmental working group also the question whether an international instrument should only apply to the transnational corporations, however they may be defined, or all types of companies, has sparked off debates. The question as to how the international legal framework should then be advanced is explored below in Chapter 2.

1.2. The law in action: strategic litigation on human rights and environmental health hazards caused by mining

To get a better understanding of the opportunities and challenges of using litigation as a tool to ensure that business enterprises are legally responsible for human rights, the dissertation has examined the experiences of lawyers and activists in South Africa who actually engage in such an exercise. Before reflecting on the way forward for the business and human rights debate at international level, the lessons learnt from the case study are flagged (Section 1.2.1) and the limitations to the research explicitated (Section 1.2.1).

1.2.1. Lessons learnt

This Section highlights the most interesting elements from the case study, which either paint the legal landscape of business and human rights in South Africa (Section 1.2.1.1) or affect victims’ access to judicial remedies on a practical, procedural or legal level (Section 1.2.1.2). To avoid repetition of what has been explained before, the elements are merely identified and a brief assessment of their ‘learning value’ made. Those lessons are valuable in two ways; they point out gaps in the current international legal framework on business and human rights and are informative for both practitioners and politicians, in and beyond South Africa, at least on a practical level, namely as to what factors inform the preferred road to a remedy and its accessibility. The extent to which these experiences should then inform any possible international initiative is another question, however, which will be addressed in Chapter 2, taking into account the limitations of the dissertation.

1.2.1.1. The legal picture of corporate responsibility for human rights

States are given considerable leeway in implementing their obligation to protect human rights against possible interferences by business enterprises. This also applies to the way in which human rights

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1637 This is why the UNGPs simply refer to the Universal Declaration. Bilchitz and Deva, supra note 39, 17.
1638 See also supra Part I, Section 2.3.

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should constrain business under national law. It is probably illusionary to expect that this established position of international human rights law (under which the measures of implementation are left to the discretion of states, provided that they act reasonably) will change any time soon, if ever. Nevertheless, the South African legal order can definitely serve as a best practice as to the different ways in which human rights have a legal impact on business enterprises, at least on paper – the actual implementation by organs of the state is not always so exemplary. In particular, the approach to horizontality and protective duties in the South African legal order, as summarised in Table 11 below, is an example par excellence of comprehensiveness.

<table>
<thead>
<tr>
<th>Table 11. The legal effect of human rights on business enterprises in the domestic legal order: the example of South Africa</th>
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<tbody>
<tr>
<td><strong>In abstracto</strong></td>
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<tr>
<td><strong>Horizontal effect</strong></td>
</tr>
<tr>
<td>Constitutional order</td>
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<tr>
<td>Are human rights ever capable of having horizontal effect?</td>
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<tr>
<td>Individual right</td>
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<td>Does a concrete right have horizontal effect?</td>
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<td></td>
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<tr>
<td><strong>Horizontal scope</strong></td>
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<tr>
<td>Types of duties</td>
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<tr>
<td>Which types of duties do business enterprises bear?</td>
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<tr>
<td></td>
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<tr>
<td><strong>Rights holders</strong></td>
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<tr>
<td>How are the persons towards whom business enterprises owe these duties identified?</td>
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<tr>
<td><strong>Horizontal purely vertical application</strong></td>
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<tr>
<td>Do human rights get effect through implementing laws,</td>
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</table>

¹⁶⁴⁰ In this Table the abbreviation ‘CC’ stands for the Constitutional Court of South Africa.
Table 11 shows that human rights bind business enterprises (*id est* have horizontal effect) and that they can constrain them through various avenues. In accordance with their protective duties, the legislature, executive and judiciary must consider human rights when the exercise of their functions has an impact on the relations between business enterprises and individuals. Accordingly, human rights influence laws, regulations, policies, judgments and court orders, as well as other measures. Moreover, in case of an actual dispute, human rights may not only constrain business enterprises through the application and enforcement of such implementing measures, but may also have a more visible effect. At the very least, courts will consider the rights that are at stake when they interpret and apply the relevant laws and regulations. Depending on the circumstances of the case, however, they may, for instance, decide to develop the common law (strong indirect horizontal application) to give effect to the spirit, purport or objects of the Constitution (indirect-indirect horizontal application) or to specific rights in the Bill of Rights (direct-direct horizontal application). They may even accept that a direct cause of action is derived from the Constitution, or decide to grant constitutional relief (direct horizontal application).

<table>
<thead>
<tr>
<th>Application</th>
<th>Regulation</th>
<th>Policy</th>
<th>Other measures</th>
<th>Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct-indirect horizontal application</td>
<td>Do human rights affect the interpretation, application and development of private law?</td>
<td>Yes</td>
<td>See Sections 8(3) and 233 of the Constitution</td>
<td></td>
</tr>
<tr>
<td>Indirect-indirect horizontal application</td>
<td>Do the values underlying human rights affect private law?</td>
<td>Yes</td>
<td>See Sections 39(2) of the Constitution</td>
<td></td>
</tr>
<tr>
<td>Strong versus weak indirect horizontal application</td>
<td>Can new private law remedies be created if existing remedies do not suffice?</td>
<td>Yes</td>
<td>See Sections 8(3), 38 and 172 of the Constitution</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>CC: courts may forge new tools and shape innovative remedies</td>
<td></td>
</tr>
<tr>
<td>Direct horizontal</td>
<td>Can a cause of action and/or a remedy be directly derived from the Constitution?</td>
<td>Yes</td>
<td>See Sections 38 and 172 of the Constitution</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>CC: constitutional damages may be available</td>
<td></td>
</tr>
<tr>
<td>Protective duties</td>
<td>Must state organs protect and promote human rights when they perform their functions?</td>
<td>Yes</td>
<td>See Sections 7(1) and 8(1) of the Constitution</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Some rights impose specific duties See e.g. Section 24(b) of the Constitution</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Is compliance therewith subject to judicial review?</td>
<td>Yes</td>
<td>CC: in case of qualified rights, a reasonableness review</td>
<td></td>
</tr>
</tbody>
</table>
As was discussed in the concluding section of the case study (supra Part III, Section 2.8), this comprehensiveness explains why the system works so well. Key is the significant uptake by activists and lawyers, as well as by judges and authorities, of the Constitution and of the idea that it should infuse all law and society. As a result, and given that the Constitution explicitly stipulates that the Bill of Rights binds private actors, litigating parties can, and generally do, highlight the rights that are at stake in cases relating to corporate conduct interfering with constitutional rights. Such arguments suggest the ‘abusive’ or ‘egregious’ nature of certain facts and, importantly, may have practical implications for the way in which the litigation proceeds and is eventually decided on its merits. Moreover, although litigating parties only rarely resort to their human rights directly, the case study does show that there is also value in providing such an option and in having human rights as a safety net, when there is a gap or uncertainty in private law.

The South African situation is not only informative for reason of the comprehensive way in which human rights affect business enterprises, but should also be borne in mind when the ‘substance’ of possible human rights responsibilities for business enterprises is considered at the international level. Notwithstanding that the Constitution explicitly provides that human rights bind private actors and that activists, lawyers and scholars readily concede that business enterprises are responsible for human rights as a matter of law, there is more reticence as regards the types of duties that these rights should impose on companies. In particular, whilst it is undisputed that they must respect human rights and, in some instances, protect them against violations by subsidiaries, for instance, and that to comply with those obligations they must not only forebear from acting in certain ways but also take the required steps, due to negative experiences it is questioned whether it is good idea to involve companies, without more, in the protection, facilitation, promotion, and provision of human rights.

1.2.1.2. Possible barriers to remedies

The discussion of the three possible barriers to judicial remedies, namely practical (i), procedural (ii) and legal (iii) barriers, is each time broken down into ‘good practices’ and ‘(potential) obstacles’. At the end of this Section, a summary is provided in Table 12 (iv).

(i) Practical barriers

i.a) Good practices

Distinctive of South Africa is its civil society, which plays a pivotal role in ensuring accountability for human rights violations by business enterprises. As numerous other scholars have discussed, this strong civil society has its roots in Apartheid but later continued its endeavour to alleviate the plight of

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1641 See e.g. Langford (2015), supra note 112, 12-17; Langford et al., supra note 159, 421-426; Madlingozi, supra note 320.
poor and vulnerable groups, this time supported by a strong and progressive Constitution. Accordingly, civil society has contributed significantly to the establishment of a culture of constitutionalism, as Oomen calls it, where the Bill of Rights is well integrated in society and everyday life.

As the case study has also demonstrated, one reason why the record of civil society in South Africa is so impressive is the strong alliance between activists and lawyers. This alliance is characterised by an interaction at three levels. First, their number one priority is empowering the poor and most vulnerable groups in society. They are the ones who are most at risk of having their rights violated, such as neighbouring communities and mineworkers in the case of abuses in the mining industry – which is but one possible incidence, albeit an important one, of human rights violations by business enterprises in South Africa. For that purpose they often deploy innovative tactics, such as the organisation of community exchanges, but foremost they seek to raise awareness by informing people about their rights and by alerting them to possible threats. People knowing and understanding their rights is a prerequisite for them ever even to consider seeking justice.

Second, local activists ensure that the most distressing situations and the most pressing issues reach the courts’ dockets. If needed, they themselves engage lawyers, refer people to legal assistance or ensure that lawyers are informed about a case. Also of importance in that regard is that the sources for litigation funding are very diversified in South Africa. In addition to the state-based legal aid system, which mainly concentrates on individuals who seek representation in criminal proceedings, there is a relatively large pool of private, highly professionalised lawyers, who provide pro bono services, who are employed by a non-profit public interest law firm offering free legal services or who work for a contingent fee (subject to strict regulations). It is also permissible for litigation to be funded by a third party, but under appropriate circumstances that party can be joined in the proceedings so as to ensure accountability on its part. Although the demand for free or cheap legal services still exceeds supply, the diversification of sources arguably vouches for more fairness in the allocation of resources.

Third, also after lawyers have taken on a case the alliance with local activists remains important. On the one hand, lawyers are generally based in the cities, whilst their clients, like neighbouring communities and mineworkers affected by mining, tend to live in remote areas. Through local activists, they have a direct contact on the ground. On the other hand, lawyers often depend on the technical expertise of local activists, to collect certain evidence or establish certain facts, like assessing the quality of the water, air or soil or examining the health of patients. If they had to engage external experts to conduct such activities, this would constitute a massive drain on their already limited resources.

1642 Oomen, supra note 526, 58 and 70.
i.b) (Potential) obstacles

Some factors continue to represent a barrier for people seeking access to the justice system, however. One example is the intimidation of dissonant voices, whether they are members of the affected group, activists or lawyers. The tactics used range from distributing pamphlets with open or covert warnings, over physical intimidation to the launch of vexatious lawsuits. Even if people may resist such tactics, by establishing a community structure that speaks with one voice, by laying criminal complaints, by successfully defending themselves against meritless claims, the chilling effect is unmistakable and seems nearly insurmountable.

Other problems that may represent a practical barrier to access and that have surfaced in the case study are corruption, government capture and the lack of capacity. Whilst the confidence in the judiciary is high, it is unfortunate that people are often forced to resort to the courts, because due to a conflict of interests or to incompetence government does not perform its functions as it should.

(ii) Procedural barriers

ii.a) Good practices

Ever since the entry into force of the (interim) Constitution, standing rights have been very wide in South Africa. This is appreciated greatly both by activists and by lawyers who represent these activists or the actual victims. Many distressing situations and pressing issues would never find their way to the judiciary if locus standi was not so wide. Particularly public interest litigation as well as, more recently, class actions have proved their value for the development of jurisprudence on issues that matter for South African society an sich. In business-related cases that affect a large group of people, few victims would consider to file an individual claim so as to vindicate their rights, because individually the claims may be too low to merit separate litigation, because most of the victims might not be able to secure legal representation, and because they may not have the courage to face a powerful counterparty, like a mining company.

Also remarkable in this regard is that even direct victims of human rights violations, whether they litigate an individual case, joined matters or a class action, often claim that they act not only in their own interest but also in the public interest. This allows them to highlight the importance of their case for similarly placed people and to secure a remedy that may extend beyond their individual matter. Moreover, when in South Africa litigation is conducted in the public interest, a number of procedural rules are triggered to the benefit of the litigating parties, such as (some degree of) protection against adverse costs orders.

The possibility for civil society actors or individuals to intervene as amici curiae in proceedings that relate to a constitutional matter, such as a right protected in the Bill of Rights, is valued highly as well. This procedural mechanism permits interested parties to participate in the litigation so as to highlight certain questions in the public interest that could otherwise get lost in the complexities of a particular
case, whether because the litigating parties themselves have not thought about those issues or because they do not have the resources to flesh them out. Often it may be an opportunity for civil society actors to advance their strategic agenda, without having to manage the entire case but by simply adducing arguments and evidence on specific issues.

Finally, the case study has also demonstrated the significance of the wide remedial powers of the judiciary. The resulting flexibility in terms of the reparations that courts are willing and able to grant is appreciated by litigating parties. If none of the existing remedies suffices, the judiciary may even develop the common law or derive new forms of relief directly from the Constitution. Especially in public interest litigation, parties frequently request a structural order, for instance, which ensures supervision by the court as well as public participation.

ii.b) (Potential) obstacles

One element that may constitute an obstacle to justice is access to information. It is mentioned as a first potential obstacle, because in se the South African legal framework is very progressive so that it could be considered a good practice rather than an obstacle. The Constitution indeed provides for a right to information, both from government and from private parties, like business enterprises. This constitutional right is implemented in a domestic law, the Promotion of Access to Information Act. In practice, however, the law has proven to be deficient as most requests for information are either ignored or refused so that requesters are forced to approach the court and to engage in a legal battle that will take much of their time. Hence, although on paper South Africa is a very transparent society, in practice obtaining access to records that directly concern certain people who need that information to enforce their rights, proves difficult.

Furthermore, while the possibility of instituting a class action was mentioned previously as a good practice, at the same time it also constitutes a potential obstacle because the rules on class actions are not yet as developed as they should be. Parliament has not issued an act regulating class actions and, as far as known, neither is there an intention to do so. Accordingly, the mechanism is developed by the courts ad hoc, as they decide on the issues that are brought to their dockets.

Access to judicial remedies may also be hampered by the cost of litigating and, in particular, by the risk of incurring an adverse costs order. Although the latter risk is mitigated in public interest litigation, it is unclear whether a similar rule applies when such litigation is launched against a private actor. In principle, costs orders are borne by the clients, even if they are indigent and only able to approach the courts by securing free or cheap legal representation. Adverse costs are thus definitely a factor that is considered before a case is brought to the courts, and the higher the anticipated costs the more weight that factor will bear. A number of other potential procedural obstacles featured in the case study as well, including the lack of expertise on the part of prosecutors and magistrates and the collection of evidence, which is a resource-intensive enterprise for litigating parties. Nevertheless, they
are regularly forced to rebut the expensive studies commissioned by the counterparty, which, in turn, is often endowed.

(iii) Legal barriers

iii.a) Good practices

As the discussion of the legal landscape for business and human rights above has already suggested, the (potential) coverage of South Africa law is quite extensive. When an ordinary criminal or private law concept does not align with the egregiousness of the facts, parties can have the applicable rules at least interpreted and applied in light of the Constitution and, if necessary, developed in conformity therewith, and under exceptional circumstances they can even derive a direct cause of action from the rights in the Bill of Rights.

Another notable finding from the case study is that even if a company is the actual perpetrator of a certain harm, litigating parties may still prefer to sue government and causes of action are in principle available for that purpose. The reason for this preference may be, for instance, that the better cause of action (with the greatest prospect of success or requiring fewer resources) lies against government. In other instances, respondents have suggested that they may consider it to be government’s responsibility to protect its people against (possible) adverse impacts of business activities. Hence, for various reasons flexibility regarding the actors that can be sued is considered important by activists and lawyers in South Africa.

iii.b) (Potential) obstacles

A first potential obstacle regarding the legal framework in South Africa concerns the options of establishing liability on the part of the parent company of the subsidiary that actually perpetrated the harm. If the silicosis class action, which has been launched against parent mining companies, results in a judgment, this will already bring more clarity on the question whether and to what extent this constitutes a real obstacle. However, even if the South African courts accept that parent companies bear a legal responsibility towards the employees of their subsidiaries, in line with the specific duty of care that has been recognised at common law in the English courts, the question is whether a similar duty may be found to exist vis-à-vis other groups of people who may be affected by the activities of subsidiaries.

Secondly, even though human rights may be binding on business enterprises – whether directly in terms of the Constitution or indirectly through implementing laws and regulations that are interpreted, applied or developed in conformity with the Constitution – there is a lot of ambiguity and uncertainty regarding the precise duties that these rights create on their part (subsidiaries and parent companies) and the right holders towards whom they owe such duties. These issues are presently decided in a ‘piecemeal’ way, namely when a dispute manifests itself and the case goes to court, the court gets an
opportunity to rule on the issues raised in that case, unless the parties eventually agree on a settlement out-of-court.

Furthermore, although institutional corporate liability is recognised as a general concept under South African criminal law, criminal cases are the exception, tend to focus on individuals rather than the company as such and the penalties for companies are limited. Civil cases, on the other hand, have mainly focused on institutional as opposed to individual corporate liability.

(iv) Overview of the barriers

Table 12 below provides an overview of all good practices and (potential) obstacles relating to access to judicial remedies that were mentioned in the preceding discussion.

<table>
<thead>
<tr>
<th>Table 12. Overview of barriers to judicial remedies in South Africa</th>
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</thead>
<tbody>
<tr>
<td>Good practices</td>
</tr>
<tr>
<td><strong>Practical barriers</strong></td>
</tr>
<tr>
<td>- Empowerment of victims by civil society</td>
</tr>
<tr>
<td>- Diversification of litigation funding</td>
</tr>
<tr>
<td>- Relatively high number of experienced lawyers</td>
</tr>
<tr>
<td>- Alliance and pooling of resources:</td>
</tr>
<tr>
<td>⋅ Potential court cases are brought to the attention of lawyers</td>
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<tr>
<td>⋅ Contact point on the ground</td>
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<tr>
<td>⋅ Technical expertise and collection of evidence</td>
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<tr>
<td><strong>Procedural barriers</strong></td>
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<tr>
<td>- Wide standing rights, including</td>
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<tr>
<td>representative claims, public interest litigation, and class actions</td>
</tr>
<tr>
<td>- Amicus curiae interventions</td>
</tr>
<tr>
<td>- Flexible remedial powers</td>
</tr>
<tr>
<td><strong>Legal barriers</strong></td>
</tr>
<tr>
<td>- Extensive legal coverage</td>
</tr>
<tr>
<td>- State and company liability</td>
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<tr>
<td>- Institutional and individual criminal and civil liability</td>
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</tbody>
</table>

1.2.2. Limitations to the scope of the research

The case study concentrated on one legal order (South Africa), one topic (human rights violations associated with environmental health hazards caused by mining), and one type of remedies (judicial
remedies in the host state, where the violations actually occur). Some limitations are thus inherent to the scope of the dissertation.

1.2.2.1. **Country focus: South Africa**

*(i) Contextualism*

A basic tenet of the dissertation is that the way ahead in the international debate on business and human rights should be informed by the practical experiences of local stakeholders who actually try to enforce accountability for human rights violations by business enterprises. The case study examined those experiences in a single country. Contextualism warns, however, that the unique interplay between constitutional cultures and the specific historical, social, political and economic features of a country makes that legal constructs or approaches cannot simply be transposed from one legal order to the other and be expected to produce exactly the same result. This precept suggests that the extent to which domestic experiences from South Africa may inform the debate at the international level and subsequently trickle down to other countries is limited. Rules do not exist independently from one another, may not be effective in isolation or may generate different outcomes in different legal systems. Accordingly, as Zerk has confirmed in her report on access to remedies, commissioned by the Office of the UN High Commissioner for Human Rights (see infra Section 2.1), any changes to domestic law so as to respond to the challenges of enforcing corporate accountability through domestic remedies must take place against the background of existing law in that country.

A key feature of the South African context in relation to business and human rights is, for instance, its history of Apartheid, when many companies openly or covertly collaborated with the regime in the design and implementation of discriminatory and segregating policies. Accordingly, for a very long time already, the awareness that business enterprises are as capable as the state of committing human rights abuses is shared widely amongst South Africans, in particular scholars, lawyers, activists as well as politicians. Given that the Constitution of the new democratic state even entrenches the binding effect of human rights on business enterprises, litigating parties are little to not hesitant to claim that a company has breached human rights, whilst in many other legal orders the express use of human rights arguments against actors other than the state still provokes feelings of discomfort. Cases dealing with accountability for human rights violations committed by business enterprises are thus litigated in quite a unique historical, social, political and legal context.

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1643 See also Tushnet (2008), supra note 291, 5-15.
1644 Zerk (2014), supra note 212, 111; Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 5, paras 4-6.
1645 Zerk (2014), supra note 212, 110.
The specific history to the debate on business and human rights in South Africa is but one example of various features that limit the generalisability of findings. Nevertheless, the value of research into the experiences of local stakeholders should not be denied altogether for that reason. Rather, such limitations should be taken into account when proposals are developed as to how the international debate should learn from those experiences. This caveat applies to the form that a building block for the international legal framework should adopt as well as to its substance, which will be discussed in Chapter 2 below.

(ii) Special note: not a conflict zone

A fundamental prerequisite for the discussion on strategic litigation in host states to be relevant is that the rule of law is – at least by and large – respected in the concerned country. This is definitely problematic in the case of ‘weak governance zones’, where the state is either absent or actively involved in human rights violations. In such scenario the basic idea of relying on the host state to regulate and monitor the behaviour of business enterprises arguably becomes an exercise in futility. That is also why the UNGPs explicitly acknowledge that in conflict-affected areas the role of home states and of business enterprises themselves has to carry more weight.

This dissertation has not considered the specific challenges that arise in the context of weak governance zones, which constitute a peculiar concern within the debate on business and human rights and require an approach that is appropriately adjusted to reckon with those challenges, exceeding the purposes of this study. Accordingly, the proposals discussed below should not be considered as solutions for governance gaps that are due to totally unwilling or incompetent governments.

1.2.2.2. Thematic focus: direct human rights violations associated with environmental health hazards caused by mining

To ensure its manageability, the case study in South Africa focused on the mining industry and was demarcated on the basis of three indicators, namely (1) direct human rights violations, that are (2)

1646 See also Gloppen (2009), supra note 341, 471-473 (arguing why the South African situation, in many respects, is different from other countries).
1647 Cf. D. Baumann-Pauly and J. Nolan (eds), Business and Human Rights: From Principles to Practice (Abingdon: Routledge, 2016), 31-32 (writing that the laws and enforcement mechanisms in host states should be the primary option for ensuring greater human rights protection, but that “the reality is that in many countries this simply is not occurring”, as “[l]aws are sometimes weak but enforcement is weaker still”).
1648 See e.g. Organisation for Economic Development and Cooperation, Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (2006), 11 (defining weak governance zones as environments in which governments are unable or unwilling to assume their responsibilities).
1649 Commentaries to Principles 7 and 23 of the UNGPs, annexed to Report A/HRC/17/31, supra note 33.
associated with the health hazards created by environmental degradation or pollution that is caused during the extraction of minerals, and (3) suffered by neighbouring communities or mineworkers.\footnote{1650}

As was explained in Part I, these indicators exclude a number of cases, such as instances of complicity that do not amount to direct complicity (\textit{id est} when a business enterprise knowingly assists another actor in violating human rights) and of human rights violations committed by public enterprises or enterprises acting as a public actor. Neither are violations considered that are not linked to the core activities of mining companies, such as acts perpetrated by private security personnel or by actors downstream. Lastly, as the mining industry extracts raw materials, the risk of human rights violations in the supply chain of goods processed at those companies does not arise. None of the proposals below thus bears on the specific issues that are triggered by those excluded scenarios.

1.2.2.3. 	extbf{Remedy: litigation in the host state}

Given that, as was again explained and justified in Part I, the focus of the dissertation is on host state regulation and litigation, two important issues in the debate on business and human rights have been left out, namely extraterritoriality and cooperation in cross-border cases. Hence, it is important to stress that the proposals in Chapter 2 do not take into account whether and how an international initiative should be adopted so as to clarify and/or develop the standards on the exercise of extraterritorial jurisdiction by home states and/or third states. This exclusion is merely motivated by the scope of the dissertation and does not deny the need for further guidance on extraterritoriality and for strengthened cooperation in cross-border cases.

1.2.2.4. 	extbf{Other elements beyond the scope of the dissertation}

Finally, at several occasions throughout the dissertation, the caveat is added that a particular discussion does not intend to be exhaustive. Indeed, not all possible legal, procedural and practical factors that may hinder or facilitate victims’ access to judicial remedies and influence the effectiveness of their litigation strategy were discussed. Some were left out (such as the problem of too restrictive statutes of limitation), whilst others were only briefly touched upon (such as the attribution of conduct by natural persons to corporate entities). Which elements were included in the discussions and their prominence was determined on the basis of the interaction between the fundamental study and the case study. For instance, the issue of attributing specific conduct to a company and the risk of prescription of claims did not feature prominently or even at all on the minds of the South African respondents who shared their experiences with strategic litigation. It is suggested that a possible reason therefor may be the fact that they accept limitation periods and rules on attribution as a legal fact, on which they cannot

\footnote{1650} See \textit{supra} Part I, Section 5.1.
exert any influence and about which they cannot be very strategic. In the case study it was, for instance, explained that where litigating parties believe that it will be too hard to attribute a certain event to a company, they will rather sue government.
2. THE WINDOW OF OPPORTUNITY FOR INTERNATIONAL LAW: PROPOSALS FOR NEW ‘BUILDING BLOCKS’

The last Chapter of this dissertation reflects on how the international legal framework on business and human rights should be developed further. First, an overview is given of some recent initiatives at the UN level that specifically deal with access to remedies, in particular judicial remedies (Section 2.1). Thereafter, two building blocks for the international legal framework are proposed, namely authoritative guidance from (quasi-)judicial regional and international human rights bodies and principles derived from best practice models (Section 2.2). Finally, suggestions are made regarding which topics would benefit from further research (Section 2.3).

2.1. Developments at the UN concerning access to remedies

No human rights framework can be effective without providing remedies; if victims cannot enforce their rights, then those rights are mere privileges.\textsuperscript{1651} This was already acknowledged at the time of the adoption of the Universal Declaration of Human Rights in 1948, which incorporates the following right.

\textit{Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.}\textsuperscript{1652}

Also the UN Framework on Business and Human Rights recognises that remedies are vital, and devotes a separate pillar to access to remedies. Nevertheless, in practice, Pillar III is frequently considered the poor relative of Pillars I (on the state obligation to protect) and II (on the corporate responsibility to respect).\textsuperscript{1653} Key to an effective system of remedies are judicial remedies,\textsuperscript{1654} but existing domestic law remedies have been found to be “fragmented, poorly designed or

\begin{footnotesize}
\begin{enumerate}
\item See also Černič (2016), supra note 77, 211 (writing that the effectiveness of all other rights depends on access to an effective remedy); Drimmer and Laplante, supra note 238, 316 (writing that “for rights to have meaning, they must be enforceable”).
\item Article 8 of the Universal Declaration of Human Rights, supra note 116.
\item See also the commentary to Principle 26 of the UNGPs, annexed to Report A/HRC/17/31, supra note 33.
\end{enumerate}
\end{footnotesize}
In addition, legal, practical and procedural barriers that impede victims’ access to remedies are numerous. In an attempt to address the concern that judicial remedies fall short of offering the protection that victims of human rights violations by business enterprises need, the Office of the UN High Commissioner for Human Rights decided, in early 2013, “to commence a process of conceptual, normative and practical clarification of key issues relating to corporate liability for gross human rights abuses with the aim of creating a fairer and more effective system of domestic law remedies.” First, a study was commissioned into the effectiveness of domestic judicial responses to business involvement in gross human rights abuses. That study was carried out by Jennifer Zerk, who published her report in February 2014, mapping the elements of criminal and civil law that are relevant in business-related matters, as well as the different barriers to judicial remedies that may exist.

Following a request by the Human Rights Council to continue the work on improving access to remedy, the Office of the High Commissioner officially launched its ‘accountability and remedy project’ in November 2014. After months of research, a report was submitted to the Human Rights Council in May 2016, to which a ‘guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse’ (the UN Guidance) was annexed as well as an addendum with explanatory notes. The Office also published a companion document with illustrative examples. The UN Guidance consists of nineteen policy objectives for domestic legal

1655 Report on corporate accountability and access to remedy (A/HRC/32/19), supra note 1653, para. 4. Or, to be “patchy, unpredictable, often ineffective and fragile”. Zerk (2014), supra note 212, 7.
1656 Report on corporate accountability and access to remedy (A/HRC/32/19), supra note 1653, paras 1-7; Preamble of Resolution 32/10 of the Human Rights Council of 30 June 2016 on Business and human rights: improving accountability and access to remedy, UN Doc. A/HRC/RES/32/10 (15 July 2016). See also Baumann-Pauly and Nolan (eds), supra note 1647, 243 (writing that “more work needs to be done to transform ‘access to remedy’ from mere principles into practice”).
1657 The Office conducts work on the issue of business and human rights in the following four areas: advocacy; guidance on the interpretation of the Guiding Principles; support to the Working Group; and, active involvement in the UN Global Compact.
1658 Zerk (2014), supra note 212, 2.
1659 Ibid.
1661 The project tackled six topics: (1) the domestic law tests for corporate accountability, (2) the roles and responsibilities of interested states, (3) financial obstacles to legal claims, (4) criminal law sanctions, (5) civil law remedies and (6) practices and policies of domestic law prosecution bodies.
1662 Report on corporate accountability and access to remedy (A/HRC/32/19), supra note 1653; Addendum to the guidance on corporate accountability and access to remedy (A/HRC/32/19/Add.1), supra note 387.
1663 Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230.
responses, each of which is specified by a number of elements. They are, however, formulated in a very flexible way so as to allow states to adapt them to their local context.\textsuperscript{1664}

In the recommendations part of the report, states are urged to conduct a formal legal review of their domestic legal systems so as to assess the extent to which they satisfy the policy objectives and to identify areas for improvement.\textsuperscript{1665} If states respond positively to that request, it will lead to an extensive mapping exercise of the existing legal systems across the globe, which could, arguably, create a fertile ground for a possible harmonisation effort, provided that there is sufficient support and common ground. This call upon states to review their domestic legal system is also supported by the Human Rights Council itself. In it is resolution welcoming the report and the UN Guidance, the High Commissioner was again requested to continue the work and, importantly, to organise additional consultation rounds \textit{inter alia} to discuss the possibilities for states to review their domestic law remedies and to develop a comprehensive strategy for improving accountability and access to remedy, for instance as part of their national action plans.\textsuperscript{1666} At the same time, the Working Group on Business and Human Rights was requested “to prepare a study on best practices and how to improve on the effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights.”\textsuperscript{1667}

This brief discussion of recent developments at the UN suggests a renewed attention for the third pillar of the UNGPs. For the time being, this has mainly resulted in preliminary studies and mapping exercises, through which the Human Rights Council tries to get hold of the complex legal picture as to how corporate accountability can currently be enforced through domestic legal remedies. Further developments will definitely ensue, as both the Working Group and the High Commissioner are working on the topic, and there is a clear commitment “to improve corporate accountability and access to remedies for victims of business-related human rights abuse.”\textsuperscript{1668}

2.2. Proposals

\textbf{2.2.1. Introduction}

Before discussing the building blocks that are proposed for the international legal framework on business and human rights, the context within which those proposals are made is explained first (Section 2.2.1.1), as well as the general approach used to develop those proposals (Section 2.2.1.2).

\begin{itemize}
  \item \textsuperscript{1664} Addendum to the guidance on corporate accountability and access to remedy (A/HRC/32/19/Add.1), \textit{supra} note 387, para. 5.
  \item \textsuperscript{1665} Report on corporate accountability and access to remedy (A/HRC/32/19), \textit{supra} note 1653, para. 31.
  \item \textsuperscript{1666} Resolution 32/10 of the Human Rights Council, \textit{supra} note 1656, paras. 4-6 and 13.
  \item \textsuperscript{1667} Ibid. para. 11.
  \item \textsuperscript{1668} Ibid. para. 2.
\end{itemize}
2.2.1.1. The context of the further development of the international legal framework

Plenty of knowledge has been produced on the implementation of the UNGPs in general and its third pillar in particular since the research project leading to this dissertation was launched in October 2014. At the level of the United Nations, for instance, the Office of the High Commissioner initiated an ‘accountability and remedy’ project in the context of which different domestic corporate accountability regimes have been mapped (see supra Section 2.1), but also scholars have conducted a lot of research on the UNGPs, including on the access-to-remedy pillar. The proposals developed below are restricted, however, by the scope of the dissertation, as was discussed before (supra Section 1.2.2), and, hence, do not tackle all of the issues on which knowledge has been produced recently. The dissertation never aimed at advancing an exhaustive list of proposals as to how the international legal framework on business and human rights should be developed further. Rather, the objective was to explore whether and how responsibility for human rights on the part of business enterprises can be strengthened through host state regulation and enforcement (including through litigation), given that the host state is, according to the UNGPs, the primary responsible actor from the perspective of international law. It was argued that the practical experiences of local stakeholders that seek to ensure accountability for human rights violations by business enterprises may reveal some of the challenges to, and opportunities of, this approach.

Some additional preliminary observations must be made regarding the context within which building blocks for the international legal framework are to be developed. Firstly, whatever initiative is adopted, it will involve a delicate balancing exercise between providing more guidance to states (and ‘levelling the playing field’) and leaving sufficient room for manoeuvre for domestic implementation – see also the discussion concerning contextualism supra in Section 1.2.2.1.

Secondly, the following comment by Zerk on the limits to what international law can achieve should be kept in mind.


1670 See e.g. Backer et al., supra note 78; Drimmer and Laplante, supra note 238; K. Genovese, “Access to remedy: non-judicial grievance mechanisms,” in eds. D. Baumann-Pauly and J. Nolan, Business and Human Rights 266 (Abingdon: Routledge, 2016); Kaufman, supra note 36; Sanders, supra note 223.

1671 According to Zerk, this would benefit each of the three main actors involved, namely states (giving them the opportunity to build capacity and to develop their legal systems), victims (improving their ability to access remedies) and business enterprises (removing legal uncertainty). Zerk (2014), supra note 212, 7 and 98-102. See also Wetzel, supra note 189, 248.

1672 See also Zerk (2014), supra note 212, 110.
Convergence of legal standards and procedural matters will not, of itself, address all of the problems identified(…) Many of these can only be addressed by a significant injection of resources (both financial and technical) at domestic level.\textsuperscript{1673}

Thirdly, the difficulty with the business and human rights field is that it covers an infinite number of issues and cuts across several branches of the law. In particular, the field could be carved up based on factors such as the nature of the human rights violations (which specific right, which generation of right, a ‘gross violation’ or not, \textit{etcetera}), the type of business enterprises (national or transnational, subsidiary or parent company, which size, which industry, \textit{etcetera}), the kind of corporate involvement (actual perpetrator, direct, silent or beneficial complicity, violations in the supply chain, \textit{etcetera}), and the pillar(s) at stake (state obligation to protect, corporate responsibility to respect, access to remedy), to name but a few. The question is, however, whether all issues can ever be covered in one initiative or whether several instruments should be developed dealing with the different aspects to the business and human rights field.\textsuperscript{1674} The latter approach would also be hard, however, given that these issues are not clearly defined, and intersect in various ways. Perhaps a range of initiatives tackling different issues should be developed first, which could then at a later stage be merged into one umbrella initiative at a higher level of abstraction.

Fourthly and finally, the dissertation has argued at several occasions that it does not seem conceivable, at present, that a significant number of states would sign and ratify a treaty regulating the human rights responsibilities of business enterprises directly as a matter of international law and creating an international enforcement mechanism (whether judicial, quasi-judicial or non-judicial) – the latter issue being particularly tricky. A more minimalist treaty, such as one that specifies\textsuperscript{1675} the human rights binding on business enterprises and the duties borne by business enterprises under those rights but that leaves their enforcement to domestic instances,\textsuperscript{1676} may have a greater prospect of success.\textsuperscript{1677}

\textsuperscript{1673} Ibid 111.
\textsuperscript{1674} See also Ramasastry, \textit{supra} note 76, 173 (admitting that compared with ‘business and human rights’ the anti-corruption movement was more limited, focussing on one particular harm).
\textsuperscript{1675} Mere specification would still align with the traditional ‘obligation to protect’ approach. States may, however, even accept a more intrusive approach, entailing that those responsibilities are directly regulated as a matter of international law, but still need to be enforced at the domestic level. See the terminology of Knox explained earlier, \textit{supra} Part II, Section 1.1.1.1.
\textsuperscript{1676} Another option would be to codify a number of procedural rights only, akin to what the Aarhus Convention (\textit{supra} note 765) does in relation to environmental protection. The problem, however, is that contrary to the Aarhus Convention, which is concerned with a specific subject matter, the business and human rights field cuts across so many different areas that it may be hard to deal with all issues in one treaty. Moreover, the scope of application of such a treaty would raise similar unresolved questions as those enumerated in the main text.
\textsuperscript{1677} Some scholars, however, have more fundamental reservations about using treaties to create international law. See e.g. Tamo (2016b), \textit{supra} note 11, 160-161 (writing that treaties do not sufficiently take into account the international law-making capacity of non-state actors and that the issue of business and human rights cuts across several regimes of international law); Wetzel, \textit{supra} note 189, 249-250 (writing that treaties have become less important and non-state governance systems more, and that there is a risk that it would be a “paper tiger” rather than a functioning system). See also Ruggie (2016), \textit{supra} note 41, 68-69.
Even such an instrument is a long way from here, however, as many controversial questions remain, including the following: which human rights will bind business enterprises considering that not all states have ratified all human rights instruments; how should responsibilities for companies be deduced from these existing human rights instruments, which are essentially state-centred; which business enterprises will be bound by such instrument; towards whom will business enterprises owe their duties; will human rights responsibilities differ depending on the size of a business enterprise and the type of activities that it carries out; and, which standard of conduct will apply and will due diligence serve as a defence.

Therefore, instead of jumping the gun and forcing a treaty for which insufficient support exists or which does not succeed in tackling those pressing questions, the better approach would arguably consist of taking a number of intermediate steps first. It is submitted that this interim period should serve two main goals, namely (1) strengthening the UN Framework and the UNGPs, leaving, at least for time being, its basic tenets unchanged, while (2) searching for common ground to move forward.

2.2.1.2. The approach adopted

Two transitional initiatives at the international level will be explored in the next two Sections, namely authoritative guidance from international and regional (quasi-)judicial human rights bodies (Section 2.2.2) and the issuance of principles based on best practices by the Human Rights Council (Section 2.2.3). These are but two illustrative approaches that could serve the priorities of strengthening the existing framework and finding (or forging) common ground. It is not argued that either of them is necessary for the further development of the international legal framework on business and human rights, nor are they the only options.

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1678 See also Bilchitz and Deva, supra note 39, 25 (writing that “the human rights obligations of corporations (…) could be expressly recognized in a treaty which, given current political realities, could be developed only in the distant future”).

1679 Perhaps a treaty should first be adopted on the grossest human rights violations. Wetzel, supra note, 249. Or, attention could be given first to situations where corporations act as public actors or where they have a direct effect on violations by the state or aid and abet such violations. Popova, supra note 202, 140.

1680 Bilchitz and Deva, supra note 39, 17.

1681 Cf. López, supra note 17, 61; Michalowski, supra note 229, 236 (both denouncing that within the UNGPs the concept of due diligence and its legal implications remain unclear).

1682 Cf. Bilchitz and Deva, supra note 39, 25 (arguing in the interim for a purposive interpretation of existing international human rights instruments, for the implementation of international norms in domestic law and for declarations of commitments to the Universal Declaration by business enterprises); Tamo (2016b), supra note 11, 161 (pleading for the further development of multi-stakeholder initiatives so as to establish common ground).

1683 The latter option is arguably already explored given the Council’s requests to the Working Group on Business and Human Rights and to the Office of the High Commissioner (see supra Section 2.1).
For each of those two ‘forms’ of building blocks (international jurisprudence and principles), a number of suggestions are made as regards the issues that they could cover (‘substance’). Where relevant the analysis below will refer to the UN Guidance on corporate accountability and access to remedy, because many issues are mentioned in that document, albeit that the objectives and elements in the UN Guidance remain very flexible. Based on the research undertaken for this dissertation an assessment is made regarding how these substantive questions should be dealt with. That is assessment is preliminary, however, in the sense that, first, it cannot be excluded that an extensive mapping exercise of the legal systems across the globe may necessitate different findings and, second, there may not exist sufficient support for the suggestions made. One controversial issue, for instance, relates to the permission of contingency fee agreements even if they are strictly regulated. It was also stressed several times before that the analysis is necessarily restricted by the ambit of the dissertation and, hence, not exhaustive.

Lastly, it should be observed that there is arguably a third dimension to the debate as to how the international legal framework should be developed further, namely aside from the ‘form’ that any building blocks for the framework should adopt and the subjects that they should tackle (their ‘substance’), also the ‘process’ from which they should emerge. The latter dimension is not discussed below, although it is in fact inherent to the bottom-up approach that was adopted in this dissertation and if principles emerge from mapping exercises at the domestic level and from best practices derived therefrom, the actual experiences of local stakeholders are necessarily considered in that context. Two further comments should be made, being that a lot of criticism has been voiced over the fact that the former Special Representative never consulted with people who are actually suffering from human rights violations by business enterprises (and that his consultation with other stakeholders was allegedly rather limited given his non-negotiable framework), and that, evidently, different stakeholders should be involved meaningfully, including representatives from the business community, nongovernmental organisations and labour unions.

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1686 Deva, supra note, 83-83.

1687 Civil society was actively involved during the first two sessions of the open-ended intergovernmental working group for the elaboration of a binding instrument. Prior to the second session, for instance, some twenty nongovernmental organisations with consultative status in the Economic and Social Council (and many others) submitted a written contribution, and over forty participated in the session. Report A/HRC/34/47 on the second session of the intergovernmental working group, supra note 54, Annex 1. See also ibid. para. 14 (on the EU’s plea for stakeholder involvement); Ramasastry, supra note 76, 183 (arguing in favour of engaging civil society).
2.2.2. The role of international and regional human rights courts

One of the main deficits in the current debate on business and human rights is the lack of consensus on the human rights responsibilities of business enterprises, namely which human rights bind business enterprises and which duties do they owe towards whom.\textsuperscript{1688} Authoritative guidance on these questions, as well as on how such responsibilities should then be enforced domestically, could come from the existing international and regional (quasi-)judicial bodies, including especially the UN treaty bodies, the European Court of Human Rights,\textsuperscript{1690} the European Committee of Social Rights, the Inter-American Court of Human Rights,\textsuperscript{1691} and the African Commission and Court on Human and Peoples’ Rights.

Obviously, the human rights instruments monitored by these bodies were only signed onto by states, and they do not create jurisdiction over private parties, like business enterprises\textsuperscript{1692} – although more recent treaties at least already refer to the duties of business enterprises.\textsuperscript{1693} That does not mean, however, that they cannot play a role in crystallizing the responsibility of business enterprises for human rights under domestic law.\textsuperscript{1694} Many cases that have been brought before these bodies were business-related matters. Well-known examples are López Ostra v. Spain\textsuperscript{1695} (European Court of Human Rights), Marangopoulos v. Greece\textsuperscript{1696} (European Committee of Social Rights), and Sarayaku v. Peru\textsuperscript{1697} (Inter-American Court of Human Rights). Each time the state was held responsible for human rights violations that were (at least in part) perpetrated by a business enterprise. This aligns

\begin{itemize}
\item Addo and Martin, supra note 17, 348; Baumann-Pauly and Nolan (eds), supra note 1647, 77 (referring to a study by the Economist Intelligent Unit in 2015 finding that the biggest obstacle is the lack of understanding about what corporate responsibility for human rights entails); J.M. Kamatali, “The New Guiding Principles on Business and Human Rights’ Contribution in Ending the Divisive Debate over Human Rights Responsibiltiies of Companies: Is it Time for an ICJ Advisory Opinion?” Cardozo J. Int’l & Comp. L. 20(2) (2011-2012), 440.
\item Compare with Kamatali’s call for authoritative guidance through a ruling by the International Court of Justice. Kamatali, supra note 1688.
\item For a discussion, see L. Verdonck, “How the European Court for Human Rights evaded the Business and Human Rights Debate in Özel v. Turkey,” Turk. Com. L. Rev. 2(1) (2016); 111-118.
\item For a discussion, see L. Verdonck and E. Desmet, “Moving human rights jurisprudence to a higher gear: Rewriting the Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,” in eds. E. Brems and E. Desmet, Rewriting Integrated Human Rights (Cheltenham: Edward Elgar Publishing, 2017 [forthcoming]).
\item A. Nolan (2009), supra note 1627, 229.
\item See e.g. Articles 4 and 9 of Convention on the Rights of Persons with Disabilities, supra note 198.
\item See also the Commentary to Principle 28 of the UNGPS, annexed to Report A/HRC/17/31, supra note 33 (recognising the role of regional and international human rights bodies as non-state based remedies).
\item European Court of Human Rights, López Ostra v. Spain, App. No. 16798/90 (9 December 1994) (concerning the noise and air pollution caused by a waste treatment plant).
\item Inter-American Court for Human Rights, The Kichwa Indigenous People of Sarayaku v. Ecuador, IACHR Series C No 245 (27 June 2012) (concerning an oil concession that covered an indigenous community’s traditional territory, causing environmental degradation and affecting the community’s traditional way of living).
\end{itemize}
with the prevailing ‘obligation to protect’ approach\textsuperscript{1698} and is thus perfectly justifiable, but the least that these bodies could have done is explicitly acknowledging that the actual perpetrator of the violations was a company and guiding states as to how corporate accountability for human rights violations should be enforced within the domestic legal order. In other words, they should recognise that business enterprises are responsible for human rights and specify their duties (Section 2.2.2.1) and provide guidance on the interaction between different liability regimes at the domestic level, such as state versus company liability, criminal versus civil liability and individual versus institutional liability (Section 2.2.2.2).

2.2.2.1. The human rights responsibilities of companies

It should become standard practice for human rights bodies to acknowledge, instead of ignore, the business element in cases that concern human rights violations by business enterprises. Some UN treaty bodies already do so, in particular in their general comments and concluding observations, where they address the human rights responsibilities of business enterprises, albeit in quite general terms.\textsuperscript{1699} A nice illustration is the following paragraph, included in one of the most recent general comments of the Committee on Economic, Social and Cultural Rights,\textsuperscript{1700} concerning the right to just and favourable conditions of work – which is obviously very relevant in the relationships between individuals and companies.

Business enterprises, irrespective of size, sector, ownership and structure, should comply with laws that are consistent with the Covenant and have a responsibility to respect the right to just and favourable conditions of work, avoiding any infringements and addressing any abuse of the right as a result of their actions. In situations in which a business enterprise has caused or

\textsuperscript{1698} Different terminology is used by those bodies, however. For a comparison of the European Court, the Inter-American Court, the African Commission and the European Committee, see A. Nolan (2009), \textit{supra} note 1627. For a discussion of the UN treaty bodies, see Human Rights Council, “State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries,” Addendum to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/35/Add.1 (13 February 2007), see in particular para. 9.

\textsuperscript{1699} In individual communications, they adopt the ‘obligation to protect’ approach, like the other bodies. For a general discussion, see Report A/HRC/4/35/Add.1 on state responsibilities, \textit{supra} note 1698. Note that the Committee on the Rights of the Child has even adopted a general comment dealing specifically with the obligations of states regarding the impact of business enterprises on children’s rights. Committee on the Rights of the Child, General comment No. 16 on State obligations regarding the impact of the business sector on children’s rights, UN Doc. CRC/C/GC/16 (17 April 2013).

\textsuperscript{1700} Note that this Committee, ever since its General Comment No. 12 (E/C.12/1999/5), \textit{supra} note 995, has discussed the state obligation to protect against possible interferences by business enterprises in all its general comments. Report A/HRC/4/35/Add.1 on state responsibilities, \textit{supra} note 1698, para. 19.
contributed to adverse impacts, the enterprise should remedy the damage or cooperate in its remediation through legitimate processes that meet recognized standards of due process.1701

Every business-related case should be seen as an opportunity for the reviewing human rights body to reprove the company involved, to declare that business enterprises have human rights responsibilities and to specify the precise duties that business enterprises hold under the infringed rights that bind them1702 – the wording should preferably be less general or abstract than in the quoted paragraph, which is included in a general comment, however, and was thus not adopted at the occasion of a specific incident which would allow for more concrete findings. Depending on whether these corporate human rights duties are not implemented in domestic law or not enforced, and/or no effective remedy is available for victims, the state can then be found to have breached its obligation to protect for failing to take all reasonably available measures to regulate, enforce and/or ensure redress.1703 This would not amount to the exercise of jurisdiction over business enterprises, which these human rights bodies do not have, but would entail that they scrutinise corporate conduct in order to assess whether the state is at fault and in what way. This is only a small step to take, as in any case their decisions have an impact, albeit indirectly, on business enterprises.1704

Although this approach would change little in terms of practical outcomes, all the more because no relief can be awarded directly against the company involved, such jurisprudence would offer invaluable, authoritative guidance on the human rights responsibilities of business enterprises. Besides strengthening the international legal framework on business and human rights by specifying the responsibility of business enterprises for human rights that should be implemented by states under domestic law in accordance with their obligation to protect,1705 such jurisprudence could also ‘forge’ common ground given that they are international bodies with jurisdiction over multiple states and, in principle, have a lot of authority. Moreover, by reproving both the responsible business enterprises and the state, a clear message would be sent that corporate human rights duties, even though they should be implemented and enforced domestically, exist independently from and complement the

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1701 Committee on Economic, Social and Cultural Rights, General comment No. 23: the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/23 (27 April 2016), para. 75.

1702 A good practice is found at the UN Working Group on Business and Human Rights. In its report following a visit to Mongolia, it mentioned two concrete corporate responsibilities, namely to consult regularly and directly with communities where their operations take place and inform them as to how they will be affected by their operations and restore land after mining. Human Rights Council, “Visit to Mongolia,” Addendum to the Report of the working group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/23/32/Add.1 (2 April 2013), para. 95 (e)-(l).

1703 Admittedly, in some cases the state will be complicit in the human rights violations and thus also be responsible in its own capacity and not only vicariously.

1704 Drimmer and Laplante, supra note 238, 340.

1705 Greater specification of the human rights responsibilities of business enterprises is one of the most pressing needs in the debate on business and human rights, as was argued before (supra Part II, Section 1.2.2.2). See also Knox, supra note 99, 45; Ratner, supra note 98, 448 and 538.
responsibility of the state. Thus, a state’s failure to comply with its obligation to protect should not be interpreted as a safe-conduct by and for business enterprises. More guidance on the interaction between the respective responsibilities of the state and business enterprises is welcome. As soon as the jurisprudence would become more settled, companies would also no longer be able to argue that they do not know their duties, as they would have been clarified in authoritative rulings by human rights bodies.

2.2.2.2. The interaction between different accountability regimes

Another topical issue in the business and human rights debate relates to the judicial enforcement of accountability for human rights violations committed by business enterprises, which also takes centre stage in this dissertation. As the discussion of strategic litigation has demonstrated, a diversity of accountability regimes may exist at the domestic level. The question is, however, whether particular circumstances require specific judicial remedies. At least three questions regarding the judicial enforcement of accountability could be addressed by regional and international (quasi)-judicial human rights bodies, when they assess whether the domestic legal framework of a responding state accords with its obligations. In particular, these imponderables relate to the interaction between state and company liability, between criminal and civil liability, and between institutional and individual liability.

A first concern relates to the interplay between state and company liability, in particular whether, if a business enterprise violates human rights, a cause of action should be available against both the state and the company, or whether victims should be content if they can sue one of them, or whether that depends on the circumstances of the case and, if so, in what way. On the one hand, it is possible that a state decides to implement its obligation to protect the rights of its people by creating a public remedy that substitutes any private remedy and, hence, excludes the possibility to sue the actual perpetrator. In that regard, the South African Constitutional Court, for instance, has held that “the state’s constitutional duty to protect and enforce the right to security of the person need not always include a

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1706 See also Bilchitz (2013b), supra note 217, 128 (writing that “in order to justify differential responsibilities, there is a need to have a clear conception of the respective roles of the corporation and the state”). For a discussion of how obligations could be attributed to different actors, see e.g. Vandenhole, supra note 117. In relation to primary norms, they argue for complementary duties on the part of host states, third states and non-state actors, with primary obligations for the host state, and either simultaneous or subsidiary obligations for the other actors. As to secondary norms, they argue for shared responsibility, with the degree of responsibility being dependent on the scope of obligations and the liability for monetary compensation on the degree of responsibility. Note, however, that contrary to most domestic legal systems, international law is not very familiar with the idea of shared responsibility. A. Nollkaemper and D. Jacobs, “Shared Responsibility in International Law: A Conceptual Framework,” Mich. J. Int’l L. 34 (2012-2013): 359-438.

1707 See supra Part II, Section 2.2 (fundamental part) and Part III, Section 2.6 (case study).

1708 Compare also with the statement by Zerk that “there is still a lack of consensus as to which specific features of specific jurisdictions amount to unacceptable barriers to justice in practice.” Zerk (2014), supra note 212, 87.
civil claim for damages in delict or indeed any private law remedy”\textsuperscript{1709} – this judgment did not relate specifically to business and human rights, however, but concerned the fact that in South Africa victims of traffic accidents are entitled to a compensation award from a fund, but cannot sue any person who allegedly caused the accident. Arguably, however, at least under certain circumstances, depriving victims of the opportunity to call the actual perpetrator to account interferes with their right to have access to the courts.

On the other hand, a state may also decide to restrict victims’ ability to sue state actors. It is remarkable in this regard that discussions on ‘access to remedy’ focus mainly on the possibilities of calling companies to account. The more recent ‘accountability and access to remedy’ project of the Office of the UN High Commissioner, for instance, makes no mention of the possibilities to hold government accountable for its failure to prevent human rights violations and/or to offer an effective remedy.\textsuperscript{1710} Nonetheless, the case study has indicated that victims, activists and their lawyers sometimes prefer to sue government for its failure to regulate, enforce or ensure redress. Therefore, it would be useful to know under what circumstances, if any, it is sufficient for states to provide a cause of action against companies but not against any state actor that may have failed to comply with its duties.\textsuperscript{1711}

Second, there is little guidance as regards which human rights violations by business enterprises should be dealt with under criminal law, as opposed to mere civil or administrative law. Arguably, not every failure by a company to comply with its human rights duties should qualify as a crime, whilst, in turn, there may be instances where dealing with corporate abuse through civil or administrative law would fly in the face of justice. Human rights bodies are not unfamiliar with making such assessments. The European Court of Human Rights, for instance, has in a number of cases found that certain breaches of human rights, like intentional killings, slavery and forced labour and human trafficking,\textsuperscript{1712} should be covered by criminal law. Evidently, however, those judgments did not deal directly with the

\textsuperscript{1709} Law Society of South Africa and Others v. Minister for Transport and Another (CCT 38/10) [2010] ZACC 25 (25 November 2010), para. 79.

\textsuperscript{1710} A rare exception is found in the recommendations following the visit by the Working Group on business and human rights to Mongolia, one of which stipulates that government should “ensure that independent administrative courts are empowered to effectively review complaints against administrative organs; review the decisions and actions of public officials that violate human rights; and prevent administrative abuses and misconduct.” “Visit to Mongolia” (A/HRC/23/32/Add.1), supra note 1702, para. 87(c).

\textsuperscript{1711} In Özel v. Turkey, for instance, the European Court held that “the absence of criminalisation and prosecution of persons exercising public functions, due to the refusal to authorise [such proceedings] by the administrative authorities, raise[s] an issue under Article 2,” without more. European Court of Human Rights, M. Özel and Others v. Turkey, App. Nos. 14350/05, 15245/05 and 16051/05 (17 November 2015), para. 198 [Free translation from French by the Author]. See also supra note 1706 on attributing obligations and liabilities.

\textsuperscript{1712} European Court of Human Rights, Oneryildiz v. Turkey, App. No. 48939/99 (30 November 2004), para. 92; Siliadin v. France, App. no. 73316/01 (26 July 2005), paras 89 and 112; Rantsev v. Cyprus and Russia, App. No. 25965/04 (7 January 2010), para. 284.
liability of business enterprises but stuck to the traditional approach, meaning that the Court assessed the extent to which the state complied with its obligations by designing an effective domestic legal framework.

The third and final question relating to the enforcement of accountability for human rights violations by business enterprises concerns the extent to which states are free, first, to accept or decline that legal entities, such as companies, can be held accountable and, second, if they provide for such liability, to regulate the interaction between individual and institutional liability. In relation to the controversial issue of institutional corporate criminal liability (supra Part II, Section 2.2.3.2), the UN Guidance, for instance, stipulates that if no such liability exists there should be a viable alternative, such as an administrative law regime that includes the option of imposing certain sanctions on companies.\textsuperscript{1713} Human rights bodies should at least side with that position – and may even recommend states to consider recognizing that companies are criminally responsible. Next, when both individual and institutional liability is available in principle, which should be the case at least in civil matters, human rights bodies could also provide guidance as to how responsibility should be allocated between individuals and companies. For instance, victims would benefit most if the responsibility of company and responsible individuals is shared and if they can be held jointly and severally liable, which improves their chances of actually being compensated.

At present, states are left the discretion to adopt the liability regime they see fit. As both the fundamental part of the dissertation and the case study have demonstrated,\textsuperscript{1714} however, litigating parties may hold different views about who is responsible, and they may pursue different objectives when they resort to litigation.\textsuperscript{1715} Therefore, adopting a victim-oriented perspective, this dissertation submits that in relation to the different liability regimes (state \textit{versus} company, criminal \textit{versus} civil and institutional \textit{versus} individual) as much flexibility as possible should be left to victims. Such perspective is arguably mandated by human rights law given the prominent place of the right to an effective remedy within the system (\textit{supra} Section 2.1), a right that is vested in the persons whose rights are violated. Hence, victims should be able to decide, based on the circumstances of the case and their personal preferences, who they want to hold accountable (state, company or individual agents) and on what basis (civil or criminal). From a victim-oriented perspective, a one-size-fits-all approach does not seem to be appropriate. Rather, a holistic approach should be adopted that offers all

\textsuperscript{1713} Guidance on corporate accountability and access to judicial remedy (A/HRC/32/19), \textit{supra} note 213, element 1.2 (stipulating that “domestic public law regimes make appropriate provisions for corporate criminal liability, or its functional equivalent, in cases where business-related human rights impacts are severe”) [emphasis added].

\textsuperscript{1714} See, in particular, Part II, Sections 2.2.2 and 2.2.3, and Part III, Sections 2.6.2 and 2.6.3.

\textsuperscript{1715} Saunders identifies at least the following ten objectives: securing redress; assigning responsibility; seeing that the wrong is recognised; punishing the wrongdoer; obtaining legal reform; deterring future misconduct; promoting reconciliation; uncovering the truth; accessing the judicial process (telling their story and creating an official record of events); and, expressing and promoting certain messages. Saunders, \textit{supra} note 414, 625-628.
available avenues. In this context, human rights bodies should take up their role to guide states as to when, at the very minimum, the different liability regimes should exist concurrently, without being mutually exclusive.

Of course, the jurisprudence of human rights bodies could also provide guidance on other issues relating to the enforcement of accountability, aside from the interaction between the different liability regimes. By way of illustration, two such questions concern the impact that the qualification of certain conduct as a human rights violation may or should have, respectively, on the applicable rules of procedural law and on the available forms of relief. An important concern in relation to the rules of procedural law concerns the burden and standard of proof, for instance. The UN Guidance is quite vague on that point and stipulates only that an ‘appropriate balance’ should be struck “between considerations of access to remedy and fairness to all parties”. As to the issue of relief, there is little clarity on the precise forms of relief that should be available against companies. Both the fundamental study and the case study in this dissertation suggest that flexibility is again crucial. This is also recognised by the UN Guidance, which provides that courts should be able “to award a range of remedies (…) that may include monetary damages and/or non-monetary remedial measures, such as orders for restitution, measures to assist with the rehabilitation of victims and/or resources, satisfaction (…) and guarantees of non-repetition (…)”.

When they are called to rule on business-related matters, human rights bodies could thus also integrate guidelines in their rulings concerning burdens and standards of proof and the forms of relief that should be available, against the actual perpetrator and state actors that have failed to comply with their duties.

2.2.3. Principles based on mapping and best practices

2.2.3.1. The approach

The second proposal to advance the international legal framework on business and human rights is to develop principles regarding specific issues within the business and human rights field, either immediately at the level of the UN or first at the regional level, like the African Union, the

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1716 See also Černič (2015b), supra note 217, 86; Černič (2016), supra note 77, 209 and 211.
1717 Guidance on corporate accountability and access to judicial remedy (A/HRC/32/19), supra note 213, elements 1.7 and 12.5. Illustrative examples given in the companion document are the adjustment of standards and burdens of proof for certain types of offences, such as, respectively, a balance of probabilities test instead of beyond reasonable doubt test and strict or absolute liability instead of requiring intent and/or causation. Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 7, 11, and 25-26.
1718 Cf. Deva (2013), supra note 42, 102 (writing that the UNGPs are “silent as to what exact remedies victims of corporate human rights abuses can have against companies”).
1719 Guidance on corporate accountability and access to judicial remedy (A/HRC/32/19), supra note 213, element 19.1.
Organization of American States and the Council of Europe or the EU, and subsequently at the international level. Admittedly, the UN Guidance on improving corporate accountability and access to remedy is an important step in this direction, but at the same time the document only includes very general policy objectives and implementing elements, and the concrete examples in the companion document are illustrative, not prescriptive and “certainly not exhaustive”. The Human Rights Council has, moreover, not endorsed the UN Guidance but only ‘welcomed’ the work by the High Commissioner.

A first step towards the adoption of a more robust set of principles would arguably require “a thorough investigation of approaches taken in different jurisdictions.” That is also why this dissertation supports the call by the Human Rights Council that states would review their domestic law regimes based on the UN Guidance. The higher the number of states acting upon that call, the fuller the picture that will be painted of existing judicial remedies, which could then be used not only to identify common ground but possibly also to ascertain whether there are certain features of domestic legal orders that are unacceptable because they seriously hamper the ability of rights holders to vindicate their rights.

Based on such extensive mapping exercise, best practice models could then be discerned and, subsequently, principles derived from them. In a first stage those principles could still be formulated as recommendations, being more or less deferential to states depending on the degree of convergence that exists regarding a particular element. However, if based on the mapping exercise certain rules or practices are considered insuperable obstacles to justice, the recommendation should be more robust and states should be urged to eliminate those obstacles. Following their adoption states should be encouraged to draft a strategy to respond to the recommendations, for instance by making specific commitments in the context of their national action plans. After a few years, the principles could be re-evaluated in order to assess whether it is necessary and possible to translate them into binding rules or to make them more concrete or robust in another way, and whether other principles

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\begin{enumerate}
\item[1720] Compare with Ramasastry, who has examined the lessons that the business and human rights field could learn from the anti-corruption movement. Also the United Nations Convention Against Corruption was preceded by a series of regional treaties. Ramasastry, supra note 76.
\item[1721] Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 2.
\item[1722] Resolution 32/10 of the Human Rights Council, supra note 1656, para. 1.
\item[1723] Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 2.
\item[1724] Resolution 32/10 of the Human Rights Council, supra note 1656, para. 4.
\item[1725] Zerk (2014), supra note 212, 87 (quoted supra in note 1707).
\item[1726] Ibid. 11 (writing that best practice models can show “what effective state responses to the problem of business involvement in gross human rights abuses would look like in practice”).
\item[1727] Cf. Resolution 32/10 of the Human Rights Council, supra note 1656, para. 5.
\end{enumerate}
need to be added. Also their endorsement by the Human Rights Council – or possibly even the General Assembly – should be considered.

As also Zerk has acknowledged, the risk to this approach is that if principles are presented as minimum standards, they may become a floor. In particular, states may refrain from pursuing higher objectives and adopting more stringent standards. Arguably, however, human rights law is familiar with such a risk, as any human rights treaty or instrument may become a floor. The challenge will rather be to formulate principles that are sufficiently flexible for adaptation to the local context as well as to the company-specific context while avoiding that they are so vague that they become inconsequential. Moreover, an advantage of this approach is that it is quite common for principles to be developed at the international (or regional) level so as to guide states on how they should design their domestic legal framework. One illustration are the ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation’, which were referenced at several occasions throughout this dissertation. Those principles were adopted by the UN General Assembly, which has recommended states to “take [them] into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, (…) legislative bodies, the judiciary (…)”.

Examples can be found at the regional level as well. In June 2013, for instance, the EU Commission has issued a recommendation on collective redress mechanisms – which is not concerned specifically with business and human rights, but more generally with “violations of rights granted under Union law”. The instrument concentrates on one specific element, namely the availability of collective redress mechanisms – although in connection therewith it touches upon a number of related issues such as litigation funding – and is quite robust in at least two ways. First, states are urged to take measures so as to implement the principles included in the recommendation within two years of its adoption and they have to report thereon to the Commission. Within four years the Commission would then assess the need for further action, including, possibly, legislative measures at the level of the EU. Second, the principles are not always very deferential to states. A good example is Article 4 which stipulates that states “should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility” and is followed by three requirements that

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1729 After all, contrary to states, which in abstracto share many common features, the diversity amongst business enterprises is quasi-infinite.
1730 UN Basic Principles and Guidelines on the Right to a Remedy (A/RES/60/147), supra note 396.
1731 Resolution 60/147 of the General Assembly, supra note 396, para. 2.
1732 Recommendation n° 2013/396/EU of the Commission of the European Union of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, O.J. L 201/60 (26 July 2013).
1733 Ibid. Article 1.
1734 Ibid. Recitals 24-26. At the time of writing it was not clear whether any follow-up action is being considered by the Commission.
should at least be included in the conditions set by law. Importantly, although the recommendation claims to pursue an appropriate balance between ensuring access to the courts, on the one hand, and avoiding abuse and protecting sound administration of justice, on the other, that balance seems to have resulted in a bias against certain ideas, which stands at odds with the findings in this dissertation as well as with the recommendations of the Office of the UN High Commissioner. Examples are the prejudice against contingency fees, and the principled acceptance of the loser pays rule.

It should be observed that also nongovernmental organisations have studied domestic legal frameworks and issued principles or recommendations as to how states should design their laws and policies so as to improve their effectiveness. Two examples are the ‘Corporate Crime Principles’ developed jointly by Amnesty International and the International Corporate Accountability Roundtable and, at the regional level, the project by the International Alliance on Natural Resources in Africa to develop model mining legislation.

### 2.2.3.2. Some issues to be covered

It was said before that the business and human rights field embraces a nearly infinite diversity of issues. Whether all these issues can be tackled in one instrument is even questionable, although there are many links amongst them. The discussion below, however, focuses on four issues that can either facilitate or obstruct access to judicial remedies for victims of human rights violations by business enterprises and that featured prominently in the case study: access to legal services (i), standing rights (ii), costs (including adverse costs orders) (iii), and rules on establishing parent company liability (iv). These issues were selected having regard to the earlier examination of the lessons learnt from the case study (supra Section 1.2.1) and taking into account the issues that have already been mentioned in the context of the first proposal on the role of human rights bodies (supra Section 2.2.2).

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1735 See ibid. Recitals 9-10 and 20-21 and Article 1.
1736 Ibid. Article 30.
1737 Ibid. Article 13.
1739 Based on an examination of the mining law in five countries (Angola, Democratic Republic of Congo, Kenya, South Africa, and Zimbabwe), focusing on fourteen ‘focus areas’ (such as ownership or custodianship of minerals, mineral rights, resettlement and access to information), the Alliance has identified a number of gaps in the law and has already issued some recommendations for the model mining law (which they are still working on). International Alliance on Natural Resources in Africa, African Mining and Mineral Policy Guide: A resource for non-governmental organisations, activists, communities, governments and academics (2016).
1740 Note that the potential barriers that the rules and practices relating to these issues could create is not unique to the business and human rights debate, or even to human rights litigation as such. See also Addendum to the guidance on corporate accountability and access to remedy (A/HRC/32/19/Add.1), supra note 387, para. 57.
(i) **Access to legal services**

Diversified sources for free or cheap legal representation are one important way to facilitate, on a practical level, access to judicial remedies, as also the UN Guidance already acknowledges.\(^\text{1741}\) Aside from the creation of a state-based legal aid system, the UN Guidance recommends states to encourage pro bono legal services and to permit a range of private funding arrangements, albeit subject to appropriate regulation, including funding by third party litigation funders, by providers of litigation insurances and by lawyers pursuant to a contingency fee agreement.\(^\text{1742}\) In addition, the companion document of the Office of the High Commissioner lists some examples of state-based legal aid systems, of manners to improve the availability of and access to pro bono legal services and of adequate ways to regulate private litigation funding arrangements.\(^\text{1743}\) One specific source of legal aid that does not feature explicitly in the companion document, but that is typical to the South Africa legal landscape, for instance, are the free legal services offered by non-profit, donor-funded public interest law firms. That experience may definitely also be informative for other states.

As to the way forward, a mapping of the different sources for legal aid available in countries across the globe would, first of all, be intrinsically valuable, as the South African example shows that there may exist interesting practices from which other states could learn as well. Furthermore, future principles should not only urge states to facilitate the availability of, and access to, diversified private sources of legal aid, which should exist alongside a state-based legal aid system, but should also provide more robust recommendations especially as regards private funding arrangements. For instance, in many countries contingency fee agreements are prohibited, either by law or by lawyers’ professional code of conduct.\(^\text{1744}\) Also the recommendation of the EU Commission demonstrates that there still exists a strong prejudice against such arrangements.\(^\text{1745}\) Nevertheless, rather than prohibiting private funding arrangements, which may be the last resort for indigent victims of human rights violations, it seems more appropriate to adopt adequate regulations that minimise the risk of abuse.\(^\text{1746}\)

(ii) **Standing rights**

Another issue that should be the subject of an extensive mapping exercise and that could, subsequently, be included in principles, are standing rights. Rules on the capacity to sue may

\(^{1741}\) Guidance on corporate accountability and access to remedy (A/HRC/32/19), supra note 213, policy objective 15.

\(^{1742}\) Ibid. elements 15.2, 15.4 and 15.5.

\(^{1743}\) Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 29-31.

\(^{1744}\) Zerk (2014), supra note 212, 80-81.

\(^{1745}\) See Article 30 of Recommendation n° 2013/396/EU, supra note 1732.

\(^{1746}\) Cf. Zerk (2014), supra note 212, 80-81 (identifying the “impermissibility of contingency fee arrangements” as a financial barrier).
constitute an important procedural barrier to judicial remedies. The case study in South Africa has, for instance, demonstrated how access to the courts is improved significantly by wide standing rights, which admit public interest litigation and class actions. Sometimes these vehicles constitute the only road to a remedy for the poorest and most vulnerable victim groups, definitely when they are dispersed and when the number of affected persons is not well known.

Also the UN Guidance stipulates, in the context of the need to ensure access to diversified sources of litigation funding, that rules of civil procedure should provide for ‘collective redress mechanisms’. Whilst it is indeed true that such mechanisms may increase litigants’ ability to secure access to free or cheap legal services, their value extends beyond this one advantage and includes benefits such as facilitating the production of evidence, lowering the cost of litigating, reducing the work load for courts, and ensuring more collectivised forms of relief. The companion document to the UN Guidance enumerates, by way of example, a number of collective redress mechanisms, namely class actions, representative actions, regime-specific actions (for instance in environmental law), and provisions for the consolidation of claims or their simultaneous hearing, but leaves states free to provide for any of them.

A more robust recommendation urging states to provide for collective redress mechanisms should be adopted, which recognises their overall importance, not only for access to legal services. Notwithstanding its limitations, the recommendation of the EU Commission, for instance, urges states at least to allow certain organisations to bring actions on behalf of a group of affected individuals. Another example of a strong recommendation is found in the report of the Working Group on Business and Human Rights following its visit to Mongolia, in which it calls upon that state to consider broadening its standing rights so as to enable public interest litigation. Depending on the results of an extensive mapping exercise, a general principle in that regard could perhaps be issued. More detailed guidelines could also be provided regarding the conditions that should be met for

1747 Guidance on corporate accountability and access to remedy (A/HRC/32/19), supra note 213, element 15.3.
1748 Note that the companion document of the Office of the High Commissioner mentions the possibility of both opt-in and opt-out class actions, whilst the recommendation of the European Commission is clearly in favour of opt-in classes. Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 30; Article 21 of Recommendation n° 2013/396/EU, supra note 1732. See also Zerk (2014), supra note 212, 82 (explaining why opt-in proceedings may not be appropriate).
1749 Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 30.
1750 Article 4 of Recommendation n° 2013/396/EU, supra note 1732.
1751 “Visit to Mongolia” (A/HRC/23/32/Add.1), supra note 1702, para. 87(f).
collective redress mechanisms to be available.\textsuperscript{1752} The flexible criteria applicable to public interest litigation and class actions in South Africa could, for instance, be informative in that regard.

\begin{quote}
\textit{(iii) Costs}
\end{quote}

Because the costs of litigation can be high and even too high for many victims of human rights violations by business enterprises, states should be encouraged to cap those costs as much as possible.\textsuperscript{1753} In that regard the UN Guidance, for instance, states that court fees should be reasonable and proportionate and that the costs associated with litigation should be reduced through better case management and other efficiency measures.\textsuperscript{1754} Moreover, waivers of court fees should be considered in case of indigent parties or litigation in the public interest.\textsuperscript{1755}

Another issue concerns the risk for a losing party to be slapped with costs. The UN Guidance, for instance, pleads for rules on the allocation of costs that “encourage reasonableness on the part of litigants, efficient use of legal and other resources in the pursuit of any claim or defence to a claim and, as far as possible, the swift conclusion of legal claims.”\textsuperscript{1756} This part of the UN Guidance should have stressed more that states must also be careful not to discourage litigants. Even if they are able to secure legal services, a potential adverse costs order may deter them from pursuing their case, and thus constitute an important barrier to access the courts.\textsuperscript{1757} As the case study has demonstrated, in South Africa, for instance, in principle no costs order is adopted if public interest litigation against the state is unsuccessful. Therefore, it would be interesting to know how other states deal with the issue of costs orders and whether best practices could be identified and principles recommended to all states.\textsuperscript{1758}

\begin{quote}
\textit{(iv) Parent company liability}
\end{quote}

Finally, the issue of parent company liability has attracted a lot of scholarly debate, in particular in the context of multinational enterprise groups.\textsuperscript{1759} However, even in the case of litigation in the host state,

\textsuperscript{1752} The Guidance only stipulates that the criteria for such mechanisms should be “clearly expressed and consistently applied”. Guidance on corporate accountability and access to remedy (A/HRC/32/19), \textit{supra} note 213, element 15.3.

\textsuperscript{1753} See e.g. “Visit to Mongolia” (A/HRC/23/32/Add.1), \textit{supra} note 1702, para. 87(f).

\textsuperscript{1754} Guidance on corporate accountability and access to remedy (A/HRC/32/19), \textit{supra} note 213, policy objective 16 and element 16.1.

\textsuperscript{1755} Ibid. A similar recommendation was made by the Working Group on Business and Human Rights to Mongolia. “Visit to Mongolia” (A/HRC/23/32/Add.1), \textit{supra} note 1702, para. 87(f).

\textsuperscript{1756} Guidance on corporate accountability and access to remedy (A/HRC/32/19), \textit{supra} note 213, element 16.4. See also Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, \textit{supra} note 230, 33.

\textsuperscript{1757} See also Zerk (2014), \textit{supra} note 212, 80.

\textsuperscript{1758} An illustrative step that states could take to lower financial obstacles mentioned by the companion document is permitting courts to depart from usual costs rules in case of a public interest issue. Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, \textit{supra} note 230, 32.

\textsuperscript{1759} See e.g. Bilchitz (2008), \textit{supra} note 29, 785-787; Meeran (2011), \textit{supra} note 436; Muchlinski, \textit{supra} note 137; Palombo, \textit{supra} note 443; van Dam, \textit{supra} note 95; Verdonck (2015), \textit{supra} note 437.
parties may be interested to sue a parent company that is based in that same country for the conduct or activities of its subsidiary. The problem is that establishing liability on the part of a parent company is complex due to the principle of separate legal personality, which is widely shared amongst states.\textsuperscript{1760}

The UN Guidance only addresses the problem of parent company liability by advising states to be transparent about what is expected from business enterprises, as the following element shows.

\begin{quote}
Domestic public law regimes communicate clearly the standards of management and supervision expected of different constituents of group business enterprises with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from group operations, on the basis of their role and position within the group business enterprise, and take appropriate account of the diversity of relationships and linkages through which business enterprises may operate, including equity-based and contract-based relationships.\textsuperscript{1761}
\end{quote}

The UN Guidance does not include any recommendations on the substance of such standards, which is left to the discretion of states. Also the companion document is mainly concerned with the way in which standards should be communicated and less with their content; the recommendations mention only very few concrete duties,\textsuperscript{1762} including the establishment of management and risk control systems, the training of personnel, and the provision of internal communication systems.\textsuperscript{1763}

The best chance for litigating parties to hold parent companies accountable seems to consist of arguing that the parent company has violated a specific duty of care that it owed towards a certain stakeholder group. It is not clear, however, how many states accept such (or a similar) rule. Moreover, whether a specific duty of care on the part of parent companies may exist towards other stakeholder groups than their subsidiaries’ employees, is uncertain. There are many other outstanding questions, such as the precise duties that may arise from such a duty of care. Hence, international principles could, for instance, recommend states to provide for a specific duty of care on the part of parent companies, advance general standards concerning the elements that must be established for such duty to exist and concerning how the stakeholders towards whom such duty is owed should be identified, and specify the minimum standards of conduct that would be expected from parent companies under this duty.

\textsuperscript{1760} Zerk (2014), supra note 212, 37 and 65.
\textsuperscript{1761} Guidance on corporate accountability and access to remedy (A/HRC/32/19), supra note 213, elements 1.5 and 12.3. This element is not limited to the issue of parent company liability but is also concerned with human rights violations by contractors. For possible violations in the supply chain a separate but similar element is included in the guidance. Ibid. element 1.6.
\textsuperscript{1762} Companion document to A/HRC/32/19 with illustrative examples on corporate accountability and access to remedy, supra note 230, 6.
\textsuperscript{1763} Ibid.
2.3. Need for further mapping and research

The business and human rights field looks like an enormous spider web that criss-crosses the entire legal spectrum and touches upon infinite issues, which are not limited to law. It seems nearly impossible to give a straightforward answer to the question whether the responsibility of business enterprises for human rights is effectively ensured within a given domestic legal order and whether, in case of a violation, victims can access the domestic court system in order to vindicate their rights. It was mentioned several times throughout this final Part of the dissertation, but further research is definitely required. In particular, existing laws and practices relating to business and human rights should be mapped and normative research should be conducted into a number of specific issues.

First of all, the need to comprehensively map the existing domestic law regimes and to collect data on the actual experiences of stakeholders who get involved in cases relating to business and human rights (similar to the data that were collected in the context of the case study for this dissertation) is pressing. As was argued before, best practice models could be developed based on such mapping exercises and principles issued, which could gradually forge common ground at least with regard to those rules and practices that could significantly improve the protection of human rights and strengthen accountability for business-related abuses, or that could remove unacceptable barriers to remedies. The results of such research could also be useful for regional and international (quasi-)judicial human rights bodies when they are called to rule on business-related cases, if they accept their role in strengthening the international legal framework on business and human rights.

In addition, a number of normative questions should be explored further. One such query, which was not discussed in this dissertation but with which the researcher has struggled, relates to which conduct by business enterprises should rightly qualify as a human rights violation. This concern is not unique to the business and human rights debate, however. More generally, the concern has been voiced whether human rights are not bandied about, in the sense that ‘ordinary’ cases, such as ‘ordinary torts’, are upgraded to human rights cases. Other normative questions concern how corporate human rights duties should be derived from the existing state-centred human rights instruments, which types of obligations business enterprises should bear, and how an adequate approach to business-related abuses in weak governance zones could look like. In relation to the enforcement of accountability for human rights violations by business enterprises, issues that require further research relate, for instance, to the question when the exercise of extraterritorial jurisdiction over business enterprises should be considered legitimate (and perhaps obligatory), and whether the ‘sacred’ principle of separate legal personality is still justified in the present times.

The business and human rights field remains in many ways uncharted legal domain. The UNGPs are invaluable, however, in that they have provided a common baseline from which the international legal framework can be advanced as well as a skeleton to further explore the nitty-gritty of the business and
human rights field. Nevertheless, at this stage, discussing the elaboration of a comprehensive initiative, such as a binding treaty on business and human rights, seems premature. More data need to be collected and processed first, and more knowledge acquired.
ANNEXES
Annex 1. Empirical data .................................................................................................................. 348

Table 13. Respondents .................................................................................................................. 348
Table 14. Observations .................................................................................................................. 350
Table 15. Directly relevant and related cases .................................................................................. 352
Table 16. Legally relevant cases .................................................................................................. 353
Table 17. Elements of the litigation in directly relevant cases ...................................................... 357

Annex 2. Relevant legal provisions ............................................................................................... 362

The Constitution .......................................................................................................................... 362
Vexatious Proceedings Act [VPA] ............................................................................................... 364
Criminal Procedure Act [CPA] ................................................................................................. 365
Compensation of Occupational Injuries and Diseases Act [COIDA] ....................................... 365
Occupational Diseases in Mines and Works Act [ODIMWA] .................................................. 365
Mine Health and Safety Act [MHSA] ......................................................................................... 366
Water Services Act [WSA] ......................................................................................................... 367
Regulations relating to compulsory national standards and measures to conserve water [Water Service Regulations] ................................................................................................. 367
Contingency Fees Act [CFA] ..................................................................................................... 367
National Water Act [NWA] ....................................................................................................... 368
National Environmental Management Act [NEMA] .................................................................. 369
National Nuclear Regulator Act [NNRA] .................................................................................. 372
Promotion of Administrative Justice Act [PAJA] ...................................................................... 373
Promotion of Access to Information Act [PAIA] ..................................................................... 374
Mineral and Petroleum Resources Development Act [MPRDA] ............................................. 375
Legal Aid South Africa Act [LASAA] ........................................................................................ 379
Protection of Investment Act [PIA] .............................................................................................. 379
Uniform Rules of the Court ....................................................................................................... 380
### ANNEX 1. EMPIRICAL DATA

#### Table 13. Respondents

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Organisation</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Emma Algotsson</td>
<td>Attorney</td>
<td>Lawyers for human rights</td>
<td>12/11/2014</td>
</tr>
<tr>
<td>Michael Clements</td>
<td>Attorney</td>
<td>Lawyers for human rights</td>
<td>18/03/2016</td>
</tr>
<tr>
<td>Louise du Plessis</td>
<td>Attorney</td>
<td>Lawyers for human rights</td>
<td>23/05/2016</td>
</tr>
<tr>
<td>Naseema Fakir</td>
<td>Attorney</td>
<td>Legal Resources Centre</td>
<td>19/11/2014 16/03/2016</td>
</tr>
<tr>
<td>Sayi Nindi</td>
<td>Attorney</td>
<td>Legal Resources Centre</td>
<td>19/11/2014 16/03/2016</td>
</tr>
<tr>
<td>Jason Brickhill</td>
<td>Counsel</td>
<td>Legal Resources Centre</td>
<td>25/11/2014</td>
</tr>
<tr>
<td>Wilmien Wicomb</td>
<td>Attorney</td>
<td>Legal Resources Centre</td>
<td>11/02/2015</td>
</tr>
<tr>
<td>Sithuthukile Mkhize</td>
<td>Attorney</td>
<td>Legal Resources Centre</td>
<td>25/03/2015</td>
</tr>
<tr>
<td>Neo Nong</td>
<td>Legal researcher</td>
<td>Legal Resources Centre</td>
<td>16/03/2016</td>
</tr>
<tr>
<td>Richard Spoor</td>
<td>Attorney</td>
<td>Richard Spoor Attorneys</td>
<td>02/12/2014</td>
</tr>
<tr>
<td>George Kahn</td>
<td>Attorney</td>
<td>Richard Spoor Attorneys</td>
<td>15/12/2014 e-mail</td>
</tr>
<tr>
<td>Georgina Jephson</td>
<td>Attorney</td>
<td>Richard Spoor Attorneys</td>
<td>12/01/2015 11/03/2016 e-mail</td>
</tr>
<tr>
<td>Tracey Davies</td>
<td>Attorney</td>
<td>Centre for Environmental Rights</td>
<td>04/12/2015</td>
</tr>
<tr>
<td>Catherine Horsfield</td>
<td>Attorney</td>
<td>Centre for Environmental Rights</td>
<td>04/12/2015</td>
</tr>
<tr>
<td>Lisa Chamberlain</td>
<td>Attorney</td>
<td>Centre for Applied Legal Studies</td>
<td>09/12/2014</td>
</tr>
<tr>
<td>Louis Snyman</td>
<td>Attorney</td>
<td>Centre for Applied Legal Studies</td>
<td>09/12/2014</td>
</tr>
<tr>
<td>Robert Krause</td>
<td>Legal researcher</td>
<td>Centre for Applied Legal Studies</td>
<td>11/12/2014 24/03/2016</td>
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<tr>
<td>Nomonde Nyembe</td>
<td>Attorney</td>
<td>Centre for Applied Legal Studies</td>
<td>09/12/2014</td>
</tr>
<tr>
<td>Nomzano Zondo</td>
<td>Attorney</td>
<td>Socio-Economic Rights Institute</td>
<td>12/12/2014</td>
</tr>
<tr>
<td>Achmed Mayet</td>
<td>Attorney</td>
<td>Legal Aid South Africa</td>
<td>08/01/2015</td>
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*He had changed jobs by the time of the second interview.*
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<th>Title/Role</th>
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<tr>
<td>Umunyana Rugege</td>
<td>Attorney</td>
<td>Section 27</td>
<td>23/01/2015</td>
</tr>
<tr>
<td>John Stephens</td>
<td>Legal Researcher</td>
<td>Section 27</td>
<td>26/02/2015</td>
</tr>
<tr>
<td></td>
<td></td>
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<td>01/06/2016</td>
</tr>
<tr>
<td>Charles Abraham</td>
<td>Attorney</td>
<td>Abrahams Kiewitz Attorneys</td>
<td>13/02/2015</td>
</tr>
<tr>
<td>Zanele Mbuyisa</td>
<td>Attorney</td>
<td>Mbuyisa Neale Attorneys</td>
<td>11/04/2016</td>
</tr>
<tr>
<td><strong>Activists</strong></td>
<td>Robby Mogalaka</td>
<td>Coal Campaign Manager</td>
<td>27/11/2014</td>
</tr>
<tr>
<td>Mashile Phalane</td>
<td>Director Community Liaison Officer</td>
<td>Batlhabin Foundation Centre for Applied Legal Studies</td>
<td>15/12/2014</td>
</tr>
<tr>
<td>Judith Taylor</td>
<td>Member</td>
<td>Earthlife Africa Johannesburg</td>
<td>10/01/2015</td>
</tr>
<tr>
<td>Anne Mayher</td>
<td>Coordinator</td>
<td>International Alliance on Natural Resources in Africa</td>
<td>18/02/2015</td>
</tr>
<tr>
<td>Mariette Liefferink</td>
<td>Director</td>
<td>Federation for a Sustainable Environment</td>
<td>e-mail</td>
</tr>
<tr>
<td>Lucas Moloto</td>
<td>Workshop facilitator</td>
<td>Federation for a Sustainable Environment</td>
<td>27/02/2015</td>
</tr>
<tr>
<td><strong>Experts</strong></td>
<td>Melanie Murcott</td>
<td>Lecturer</td>
<td>15/01/2015</td>
</tr>
<tr>
<td>David Fig</td>
<td>Chair Researcher</td>
<td>Board of Trustees Biowatch University of Cape Town and the Transnational Institute in Amsterdam</td>
<td>14/01/2015</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>06/05/2016</td>
</tr>
<tr>
<td>Jill Murray</td>
<td>Pathologist</td>
<td>National Institute for Occupational Health</td>
<td>03/02/2015</td>
</tr>
<tr>
<td>Tina Da Cruz</td>
<td>Trust manager</td>
<td>Asbestos Relief Trust Kgalagadi Relief Trust</td>
<td>11/03/2016</td>
</tr>
<tr>
<td>Janet Love(^{1765})</td>
<td>Commissioner</td>
<td>South African Human Rights Commission Legal Resources Centre</td>
<td>09/05/2016</td>
</tr>
</tbody>
</table>

\(^{1765}\) Shortly before the interview she was appointed to the Electoral Commission and a few weeks later she left her position at the Human Rights Commission.
Table 14. Observations

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<tr>
<th>Type (and title)</th>
<th>Parties</th>
<th>Date</th>
<th>Explanatory notes</th>
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<tr>
<td>Field visit to the</td>
<td>Federation for a Sustainable</td>
<td>28/11/2014</td>
<td>- Visit of (abandoned and operating) mines and affected communities, including Tudor Shaft</td>
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<td>West Rand mines</td>
<td>Environment</td>
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<td>6th Alternative</td>
<td>Economic Justice Network of the</td>
<td>09-12/02/2015</td>
<td>- A platform for communities affected by mining</td>
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<td>Mining Indaba</td>
<td>Fellowship of Christian Councils in Southern Africa</td>
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<td>- Organised in parallel with the African Mining Indaba</td>
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<td></td>
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<td>- Attended mainly by representatives from civil society and members of affected communities</td>
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<td>- Not limited to South Africa</td>
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<td>Mining company - Community</td>
<td>Federation for a Sustainable</td>
<td>27/02/2015</td>
<td>- Feedback meetings between representatives of the mine and members of the neighbouring community on adverse impacts and on social investment projects</td>
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<tr>
<td></td>
<td>Environment</td>
<td>17/03/2016</td>
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<tr>
<td>Training on natural</td>
<td>Southern African Development</td>
<td>09/03/2015</td>
<td>- Included sessions on natural resource governance, advocacy and strategic litigation</td>
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<td>resource governance</td>
<td>Community (SADC) Lawyers’</td>
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<td>Field visit to the</td>
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<td>12/03/2015</td>
<td>- Visit of abandoned mines and affected communities</td>
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<tr>
<td>Attorney – client</td>
<td>Richard Spoor Attorneys</td>
<td>07/03/2015</td>
<td>- Community affected by a mine</td>
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<td>- Instructions from the client</td>
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<tr>
<td>Short course on</td>
<td>University of Pretoria</td>
<td>17/03/2015</td>
<td>- Introduction to the applicable legal framework, including NEMA, PAJA and PAIA</td>
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<td>environmental law</td>
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<td>- Attended mainly by civil servants and lawyers</td>
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</table>

\[1766\] The information is anonymised for confidential meetings.

\[1767\] This column mentions either the organiser (in case of a seminar, conference, course or field trip) or the party that invited the researcher (in case of a meeting).

\[1768\] This field trip took place in the context of the training organised by the Southern African Development Community Lawyers’ Association.
<table>
<thead>
<tr>
<th>Event Description</th>
<th>Organizing Body</th>
<th>Date</th>
<th>Key Details</th>
</tr>
</thead>
</table>
| Seminar on transparency in the mining industry | South African Human Rights Commission | 20/03/2015 | - Included discussions on open government and open data, the use of the law to promote disclosure, and transparency in relation to social and labour plans  
- Attended mainly by representatives from civil society |
| Field visit to the Blyvooruitzicht mine | Federation for a Sustainable Environment | 23/03/2016 | - Visit of an abandoned mine and the affected community |
| Attorney – counsel – expert | Richard Spoor Attorneys | 12/04/2016 | - Health hazards due to the working conditions at the mines  
- Preparation for trial: consultation with experts |
| Attorney – counsel – client | Richard Spoor Attorneys | 13/04/2016 | - Health hazards due to the working conditions at the mines  
- Preparation for trial: story of the mineworkers |
| Attorney – mining company | Richard Spoor Attorneys | 21/04/2016 | - Resettlement of a community affected by mining  
- Negotiations between the community’s attorneys, representatives of the mine and the former landowner |
| Attorney – counsel | Richard Spoor Attorneys | 21/04/2016 | - Community affected by mining  
- Strategic discussion on a possible test case |
| Seminar on mine closure | Centre for Environmental Rights | 05/05/2016 | - Panel presentation by experts on the applicable legal framework in relation to mine closure  
- Attended mainly by activists and lawyers |
- General discussion of the options to litigate |
## Table 15. Directly relevant and related cases

<table>
<thead>
<tr>
<th>Short case title</th>
<th>Litigating party</th>
<th>Counterparty</th>
<th>Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bareki v. Gencor</td>
<td>Community &amp; advocacy organisation</td>
<td>Mining company &amp; government</td>
<td>Rehabilitation of a site polluted by asbestos</td>
</tr>
<tr>
<td>Blom v. Anglo American*</td>
<td>Mineworker</td>
<td>Mining company</td>
<td>Silicosis</td>
</tr>
<tr>
<td>Escarpment Environment Protection Group v. Department of Water Affairs</td>
<td>Community &amp; advocacy organisation</td>
<td>Government &amp; mining company</td>
<td>Water use license (environmental impacts)</td>
</tr>
<tr>
<td>Escarpment Environment Protection Group v. President of Water Affairs</td>
<td>Community &amp; advocacy organisation</td>
<td>Government &amp; mining company</td>
<td>Water use license (environmental impacts); appointment of water tribunal</td>
</tr>
<tr>
<td>Federation for Sustainable Environment v. Minister of Water Affairs</td>
<td>Community &amp; advocacy organisation</td>
<td>Government</td>
<td>Water contamination due to acid mine drainage</td>
</tr>
<tr>
<td>Federation for Sustainable Environment v. National Nuclear Regulator</td>
<td>Community &amp; advocacy organisation</td>
<td>Government &amp; company</td>
<td>Rehabilitation of a uranium site</td>
</tr>
<tr>
<td>Mahaeeane v. AngloGold Ashanti**</td>
<td>Mineworkers</td>
<td>Mining company</td>
<td>Access to information relating to silicosis</td>
</tr>
<tr>
<td>Makoti v. Sasol</td>
<td>Mineworkers</td>
<td>Mining company</td>
<td>Pneumoconiosis</td>
</tr>
<tr>
<td>Mankayi v. AngloGold Ashanti</td>
<td>Mineworkers</td>
<td>Mining company</td>
<td>Silicosis</td>
</tr>
<tr>
<td>Nkala v. Harmony Gold**</td>
<td>Mineworkers</td>
<td>Mining company</td>
<td>Silicosis</td>
</tr>
<tr>
<td>Qubeka v. AngloGold*</td>
<td>Mineworker</td>
<td>Mining company</td>
<td>Silicosis</td>
</tr>
<tr>
<td>S v. Blue Platinum Ventures***</td>
<td>Community</td>
<td>Mining company</td>
<td>Rehabilitation of a degraded area</td>
</tr>
</tbody>
</table>

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1769 The table is organised alphabetically. The title of ongoing cases (in which a final decision has not yet been adopted) is italicised. If the title is followed by one or most asterisks, this means that the case was settled (*), is on appeal (**) or has been remitted to the court that took the original decision (**).  
1770 For this Table, the term ‘litigating parties’ refers to (1) the applicants or plaintiffs, or (2) the aggrieved parties in criminal proceedings, even though the prosecuting party is the state. Note that ‘litigating party’ refers to the party that initiated the proceedings, even if on appeal that party becomes the ‘responding party’.  
1771 For this Table, the term ‘counterparty’ refers to (1) the respondents or defendants (even if the party is only cited for its interests, see Table 17a), or (2) the accused parties in criminal proceedings. Note that ‘counterparty’ refers to the party against whom the proceedings were initiated, even if on appeal that party is the ‘appellant’.  


<table>
<thead>
<tr>
<th><strong>Short case title</strong></th>
<th><strong>Relevant legal issue</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Agri South Africa v. Minister of Minerals and Energy</strong></td>
<td>Expropriation <em>versus</em> deprivation of mineral rights</td>
</tr>
<tr>
<td><strong>ArcelorMittal v. Vaal Environmental Justice Alliance</strong></td>
<td>Access to information regarding environmental impacts; the role of civil society</td>
</tr>
<tr>
<td><strong>Bengwenyama v. Genorah</strong></td>
<td>Consultation with landowners, occupiers and interested and affected parties; interpretation in conformity with the Constitution</td>
</tr>
<tr>
<td><strong>Bengwenyama-Ya-Maswazi Community v.</strong></td>
<td><strong>Appropriate relief in judicial review proceedings</strong></td>
</tr>
</tbody>
</table>

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1772 The classification of a case as a SLAPP suit is based on a personal assessment by the researcher.
1773 Note that this is an interlocutory decision adopted in the context of the certifications proceedings for the silicosis class action.
1774 *Id est* the issue in relation to which the case is cited in the dissertation.
<table>
<thead>
<tr>
<th>Case</th>
<th>Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Minister for Mineral Resources</strong></td>
<td></td>
</tr>
<tr>
<td>Coal of Africa v. Akkerland Boerdery</td>
<td>Environmental impacts of mining</td>
</tr>
<tr>
<td>Director Mineral Development v. Save the Vaal Environment</td>
<td>Impact of constitutional environmental rights on decision-making by administrative authorities</td>
</tr>
<tr>
<td>Exxaro v. Minister of Water Affairs</td>
<td>Obligatory mediation instead of appeal to a tribunal</td>
</tr>
<tr>
<td>Fuel Retailers v. DG Environmental Management</td>
<td>Impact of constitutional environmental rights on decision-making by administrative authorities</td>
</tr>
<tr>
<td>Hangklip/Kleinmond v. Minister for Environmental Planning</td>
<td>Interpretation in conformity with the Constitution; judicial review of the conditions included in an environmental authorisation <em>versus</em> separation of powers</td>
</tr>
<tr>
<td>Harmony Gold v. Regional Director Water Affairs</td>
<td>Interpretation of environmental legislation in conformity with the Constitution</td>
</tr>
<tr>
<td>Hekpoort v. Minister of Land Affairs</td>
<td>Direct access to the Constitutional Court in litigation in the interest of the environmental</td>
</tr>
<tr>
<td>Hichange Investments v. Cape</td>
<td>Constitutional relief for polluting industrial activities; separation of powers</td>
</tr>
<tr>
<td>Jacobs v. Transand</td>
<td>Contractual clause restricting access to the courts</td>
</tr>
<tr>
<td>Kuhne v. Vhembe</td>
<td>Government’s duty to provide potable water</td>
</tr>
<tr>
<td>Kebble v. Minister of Water</td>
<td>Test for contempt of court</td>
</tr>
<tr>
<td>Kenton on Sea v. Ndlambe</td>
<td>Test for contempt of court; elements for a structural interdict</td>
</tr>
<tr>
<td>Kloof Conservancy v. Government</td>
<td>Separation of powers; punitive costs</td>
</tr>
<tr>
<td>Landev v. Black Eagle</td>
<td>Demand for security for costs (SLAPP)</td>
</tr>
<tr>
<td>Lemthongthai v. S</td>
<td>Impact of constitutional environmental rights on sentences</td>
</tr>
<tr>
<td>Lionswatch v. MEC Local Government</td>
<td>Public interest litigation</td>
</tr>
<tr>
<td>Louisvale Irrigation Board v. Minister of Mineral Resources</td>
<td>Consultation with landowner and occupier; access to information; punitive costs</td>
</tr>
<tr>
<td>Magaliesberg Protection Association v. MEC Agriculture</td>
<td>Adverse costs; scientific proof</td>
</tr>
<tr>
<td>Makhanya v. Goede Wellington Boerdery</td>
<td>Comparative institutional competence of the judiciary and administrative authorities</td>
</tr>
<tr>
<td>MEC Agriculture v. HTF Developers</td>
<td>Condonation in public interest litigation; interpretation in conformity with the Constitution</td>
</tr>
<tr>
<td>Minister of Water Affairs v. Stilfontein</td>
<td>Corporate governance</td>
</tr>
<tr>
<td>Mtunzini Conservancy v. Tronox Sands</td>
<td>Adverse costs in case of litigious conduct</td>
</tr>
<tr>
<td>Petro Props v. Barlow</td>
<td>Restraining order for speech (SLAPP)</td>
</tr>
<tr>
<td>Pilanesberg Platinum Mine v. Chief Director</td>
<td>Scientific evidence</td>
</tr>
<tr>
<td>Mineral Regulations</td>
<td></td>
</tr>
<tr>
<td>Case Title</td>
<td>Description</td>
</tr>
<tr>
<td>------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Save the Maize Belt v. Regional Mining Development and Environment Committee</td>
<td>Environmental impacts of mining; costs order</td>
</tr>
<tr>
<td>Scholes v. Minister of Mineral Resources</td>
<td>Legal status of the Mining Charter</td>
</tr>
<tr>
<td>Sepha Tu Kin v. Kranskoppie Boerdery</td>
<td>Environmental impacts of mining</td>
</tr>
<tr>
<td>Shear v. Eye of Africa</td>
<td>Comparative institutional competence of the judiciary and administrative authorities</td>
</tr>
<tr>
<td>Tergniet and Toekoms v. Outeniqua Kreosootpale</td>
<td>Criminal sanctions; test for a declaratory order; test for a final interdict; standard of proof</td>
</tr>
<tr>
<td>Thamae v. Roering</td>
<td>Abandoned mining village</td>
</tr>
<tr>
<td>Van Rensburg v. Cloete</td>
<td>Restraining order for speech (SLAPP)</td>
</tr>
<tr>
<td>Wildlife and Environment Society of South Africa v. MEC Economic Affairs</td>
<td>Adverse costs for litigious conduct</td>
</tr>
</tbody>
</table>

### Legally relevant cases (ii): business and human rights cases

<table>
<thead>
<tr>
<th>Case Title</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAA Investments v. Micro Finance Regulatory Council</td>
<td>Privatisation and state responsibilities</td>
</tr>
<tr>
<td>AllPay v. South African Social Security Agency</td>
<td>Privatisation and responsibilities of private partner</td>
</tr>
<tr>
<td>Boycott, Divestment and Sanctions v. Continental</td>
<td>Horizontal effect and scope of the right to freedom of expression; duty to perform a contractual duty</td>
</tr>
<tr>
<td>City of Johannesburg v. Blue Moonlight</td>
<td>Horizontal effect of the right to have access to adequate housing</td>
</tr>
<tr>
<td>Juma Musjid v. Essay</td>
<td>Horizontal effect and scope of the right to education; protective duties of the judiciary</td>
</tr>
<tr>
<td>Khumalo v. Holomisa</td>
<td>Horizontal effect and application of the right to freedom of expression; balancing of rights</td>
</tr>
<tr>
<td>Minister of Public Works v. Kyalami Ridge</td>
<td>Balancing of rights</td>
</tr>
<tr>
<td>Modder East Squatters v. Modderklip Boerdery</td>
<td>Protective duties of the state; appropriate relief; constitutional damages</td>
</tr>
<tr>
<td>President v. Modderklip Boerdery</td>
<td>Access to the courts; execution of court orders</td>
</tr>
<tr>
<td>Ramakatsa v. Magashule</td>
<td>Direct horizontal application</td>
</tr>
</tbody>
</table>

### Legally relevant cases (iii): general legal and constitutional framework

<table>
<thead>
<tr>
<th>Case Title</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barkhuizen v. Napier</td>
<td>Constitutionality of a contractual time limitation clause</td>
</tr>
<tr>
<td>Biowatch v. Registrar Generic Resources</td>
<td>Access to information from government and companies; costs orders in public interest litigation</td>
</tr>
<tr>
<td>Carmichele v. Minister of Safety</td>
<td>The state’s duty of care vis-à-vis its citizens</td>
</tr>
<tr>
<td>Certification of the Constitution</td>
<td>Certification of the new Constitution</td>
</tr>
<tr>
<td>Children's Resource Centre Trust v. Pioneer Food</td>
<td>Class actions</td>
</tr>
<tr>
<td>Economic Freedom Fighters v. Speaker of the National Assembly</td>
<td>The legal effect and enforcement of reports by the public protector</td>
</tr>
<tr>
<td>Ferreira v. Levin</td>
<td>Public interest litigation</td>
</tr>
<tr>
<td>Case</td>
<td>Legal Issues</td>
</tr>
<tr>
<td>-------------------------------------------------</td>
<td>-------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Fose v. Minister of Safety and Security</td>
<td>Adequate relief</td>
</tr>
<tr>
<td>Glenister v. President</td>
<td>The effect of international law within South Africa</td>
</tr>
<tr>
<td>Government v. Grootboom</td>
<td>Reasonableness review; structural interdict</td>
</tr>
<tr>
<td>K v. Minister of Safety and Security</td>
<td>The state’s duty of care vis-à-vis its citizens</td>
</tr>
<tr>
<td>Law Society v. Minister for Transport</td>
<td>Substitution of a private law remedy by a public law remedy</td>
</tr>
<tr>
<td>Lawyers for Human Rights v. Minister of Home Affairs</td>
<td>Public interest litigation</td>
</tr>
<tr>
<td>Lee v. Minister of Correctional Services</td>
<td>Factual causation</td>
</tr>
<tr>
<td>Magidiwana v. President</td>
<td>Right to legal representation at state expense before a commission of inquiry</td>
</tr>
<tr>
<td>Mazibuko v. City of Johannesburg</td>
<td>Reasonableness review; adequate relief; separation of powers</td>
</tr>
<tr>
<td>Minister of Basic Education v. Basic Education for All</td>
<td>Successful rights-battle: Government’s duty to provide access to schoolbooks</td>
</tr>
<tr>
<td>Minister of Health v. Treatment Action Campaign</td>
<td>Successful rights-battle: Government’s duty to provide access to schoolbooks</td>
</tr>
<tr>
<td>Minister of Health v. New Clicks</td>
<td>Principle of subsidiarity</td>
</tr>
<tr>
<td>Minister of Justice v. Southern African Litigation Centre</td>
<td>Effect of the Rome Statute within South Africa</td>
</tr>
<tr>
<td>Minister of Safety and Security v. Van Duivenboden</td>
<td>The state’s duty to protect</td>
</tr>
<tr>
<td>Mukaddam v. Pioneer Foods</td>
<td>Class actions</td>
</tr>
<tr>
<td>National Commissioner SAPS v. Southern African Human Rights Litigation Centre</td>
<td>Domestication of international agreements</td>
</tr>
<tr>
<td>Nelson Mandela Metropolitan Municipality v. Greyvenouw</td>
<td>Urgent applications</td>
</tr>
<tr>
<td>Pharmaceutical Manufacturers Association of South Africa</td>
<td>Relationship between common law and constitutional law</td>
</tr>
<tr>
<td>Progress Office Machines v. South African Revenue Services</td>
<td>Effect of non-incorporated international agreements</td>
</tr>
<tr>
<td>Pilane v. Pilane</td>
<td>Prior engagement versus litigious conduct</td>
</tr>
<tr>
<td>Occupiers of 51 Olivia Road v. Johannesburg</td>
<td>Successful rights-battle: protection against eviction</td>
</tr>
<tr>
<td>S v. Makwanyane</td>
<td>Successful rights-battle: Abolition of the death penalty</td>
</tr>
<tr>
<td>Steenkamp v. Provincial Tender Board</td>
<td>Adequate relief; private versus public law remedies</td>
</tr>
<tr>
<td>Transvaal Agricultural Union v. Minister of Land Affairs</td>
<td>Direct access to the Constitutional Court</td>
</tr>
<tr>
<td>Tswelopele v. City of Tshwane</td>
<td>Constitutional relief</td>
</tr>
</tbody>
</table>
Table 17. Elements of the litigation in directly relevant cases

<table>
<thead>
<tr>
<th>Table 17a. Parties and rights</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Short case title</strong></td>
</tr>
<tr>
<td>Bareki v. Gencor</td>
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<tr>
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<tr>
<td>Escarpment Environment Protection Group v. Minister of Water</td>
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<tr>
<td>Federation for Sustainable Environment v. Minister of Water</td>
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</tbody>
</table>

1776 Tables 17a and 17b are filled out from the perspective of the litigating parties, based on their court papers and/or the judgment. It is not mentioned whether, in case of a judgment, the requested relief was granted and the cited parties convicted. The title of ongoing cases (in which a final decision has not yet been adopted) is italicised. Settled and arbitrated cases are not included.

1777 For the term’s definition, see supra note.

1778 For the term’s definition, see supra note. ‘IP’ stands for interested party, meaning that a party is only cited for its interests. ‘PC’ stands for parent company.

1779 This column mentions the constitutional provisions referenced in the case.
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Parties</th>
<th>Parties</th>
<th>Judgment/Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federation for Sustainable Environment v. National Nuclear Regulator</td>
<td>Federation for a sustainable environment - Residents of the Tudor Shaft informal settlement</td>
<td>National Nuclear Regulator - Mogale City Local municipality - Minister of Environmental Affairs - Minister of Mineral Resources</td>
<td>S10; S11; S24; S26; S27; S28</td>
</tr>
<tr>
<td><strong>Mahaeeane v. AngloGold Ashanti</strong></td>
<td>M. Mahaeeane - M. Thakaso</td>
<td>AngloGold Ashanti (PC)</td>
<td>S32</td>
</tr>
<tr>
<td><strong>Makoti v. Sasol</strong></td>
<td>M.J. Makoti &amp; 21 other plaintiffs</td>
<td>Sasol Mining (PC)</td>
<td>“const'l norms”</td>
</tr>
<tr>
<td>Mankayi v. AngloGold Ashanti</td>
<td>T. Mankayi</td>
<td>AngloGold Ashanti (PC)</td>
<td>S12</td>
</tr>
<tr>
<td><strong>Nkala v. Harmony Gold</strong></td>
<td>B. Nkala &amp; 68 other class representatives</td>
<td>Harmony Gold and twenty-nine other respondents (PC)</td>
<td>S10, S11, S12(1)(c), S23, S24, S27(1)(a)</td>
</tr>
<tr>
<td><strong>S v. Blue Platinum Ventures</strong></td>
<td>Batlahbine Community</td>
<td>Blue Platinum Ventures - M.S. Maponya, a director</td>
<td>/</td>
</tr>
<tr>
<td><strong>S v. Blyvooruitzicht Gold Mining Company</strong></td>
<td>Blyvooruitzicht community</td>
<td>Blyvooruitzicht Gold Mining Company - D. Ncube, a director - P.M. Saaiman, a director - M. Burrell, a director - Village Main Reef Gold Mining Company</td>
<td>/</td>
</tr>
<tr>
<td><strong>Strömbeck v. Harmony Gold</strong></td>
<td>H.S. Strömbeck</td>
<td>Harmony Gold (PC) - Gold Fields (PC) - AvGold (PC) - Gold Fields Operations (PC) - GFI (PC)</td>
<td>/</td>
</tr>
<tr>
<td>Van Eck v. Clyde Brickfields</td>
<td>J.F. Van Eck - Seven other members of the community</td>
<td>Clyde Brickfields - Ekurhuleni Metropolitan Council (IP) - Minister of Mineral and Energy Affairs (IP)</td>
<td>/</td>
</tr>
<tr>
<td><strong>Vhembe v. MEC</strong></td>
<td>Vhembe Mineral</td>
<td>MEC Economic Development,</td>
<td>S24</td>
</tr>
</tbody>
</table>

1780 This party was originally cited as ‘Minister of Energy’ (see supra Part III, Section 2.3.1.3).
| Economic Development | Resources Stakeholders Forum  
- Makhado Action Group  
- Mudimele Community | Environment and Tourism, Limpopo  
- Regional Manager of Mineral Resources, Limpopo  
- Department of Environmental Affairs  
- Head of Economic Development, Environment and Tourism, Limpopo  
- Senior General Manager: Environment and Tourism, Limpopo  
- Coal of Africa |

### Table 17b. Attorneys and remedies

<table>
<thead>
<tr>
<th>Short case title</th>
<th>Attorneys&lt;sup&gt;1781&lt;/sup&gt;</th>
<th>Proceedings&lt;sup&gt;1782&lt;/sup&gt;</th>
<th>Orders</th>
</tr>
</thead>
</table>
| Bareki v. Gencor  | Legal Resources Centre  | Action  | - Ordering government to investigate, evaluate and assess the impact of the mining operations and to report thereon to the court, to commence taking reasonable measures to rectify the pollution and/or environmental degradation, to continue with such measures and to complete them on or before a date determined by the court  
- Costs  
Alternative claims:  
- Directing Gencor and Gefco to cover the dumps or otherwise deal therewith so as to prevent dissemination of dust or sand  
- Directing Gencor and Gefco to rehabilitate the surface at the opencast mine  
- Ordering the Minister to instruct Gencor and Gefco to ensure rehabilitation as near to its natural state as is practicable |
| Escarpment Environment Protection Group v. Minister of Water | Legal Resources Centre  | Judicial review  | - Reviewing and setting aside the failure to appoint members to the Water Tribunal  
- Directing the appointment of a chairperson and deputy chairperson and such other members as may be necessary  
- Punitive costs |

<sup>1781</sup> This column mentions the public interest law firm or regular law firm acting for a contingent fee (<i>supra</i> Part III, Section 2.1.2) representing the litigating parties. If the litigating parties are not represented by such a law firm or if this information is not known, this is marked with n/a (not applicable) or n/k (not known).

<sup>1782</sup> They can be civil (application/action), criminal or judicial review proceedings.
| Escarpment Environment Protection Group v. Department of Water | Legal Resources Centre | Judicial review | - Setting aside and substituting the decision by the Water Tribunal declaring that the applicants have no standing to appeal the grant of a water use license  
- Reviewing and setting aside the water use licenses  
- Costs |
|---|---|---|---|
| Federation for Environment v. Minister of Water | Legal Resources Centre  
Lawyers for Human Rights | Application | - Declaring the failure to provide potable water unlawful and unconstitutional  
- Directing to provide temporary potable water within 24 hours  
- Directing to engage actively and meaningfully on the immediate and long-term supply of water  
- Directing to report to the court within one month on the measures taken to ensure water supply on the medium and long term  
- Permission for any party to re-enrol the application for hearing on the same papers  
- Costs |
| Federation for Sustainable Environment v. National Nuclear Regulator | Legal Resources Centre  
Socio-Economic Rights Institute | Application | - Declaring the mine residue removal operations unlawful and hazardous to public health  
- Directing the respondents to cease the operation with immediate effect pending the supply of the risk assessment report or other satisfactory measures showing that public health will not be adversely affected  
- Costs |
| Mahaecane v. AngloGold Ashanti | Richard Spoor Attorneys | Application | - Setting aside the refusal to grant access to records and ordering to provide access, within 30 days  
- Costs |
| Makoti v. Sasol | Richard Spoor Attorneys | Action | - Damages with interest  
- Costs |
| Mankayi v. AngloGold Ashanti | Abrahams Kiewitz Attorneys  
Richard Spoor Attorneys | Action | - Damages with interest  
- Costs |
<table>
<thead>
<tr>
<th>Case</th>
<th>Parties</th>
<th>Nature of Action</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>S v. Blue Platinum Ventures</td>
<td>Centre for Environmental Rights</td>
<td>Criminal</td>
<td>(In accordance with the penalty clause)</td>
</tr>
<tr>
<td>S v. Blyvooruitzicht Gold Mining Company</td>
<td>n/k</td>
<td>Criminal</td>
<td>(In accordance with the penalty clause)</td>
</tr>
<tr>
<td>Strömbeck v. Harmony Gold</td>
<td>Richard Spoor Attorneys</td>
<td>Action</td>
<td>- Damages with interest - Costs</td>
</tr>
<tr>
<td>Van Eck v. Clyde Brickfields</td>
<td>n/a</td>
<td>Application</td>
<td>- Interdicting to operate any machinery and vehicles and to make any noise whatsoever between specific times on specific days - Costs</td>
</tr>
<tr>
<td>Vhembe v. MEC Economic Development</td>
<td>n/k</td>
<td>Judicial review</td>
<td>- Interim order interdicting the activities identified in the environmental authorisation, pending the judicial review and the finalisation of a regional strategic environmental impact assessment for the cumulative effects of all proposed mines - Reviewing and setting aside the decision granting the environmental authorisation or, alternatively, reviewing and setting aside the decision dismissing the administrative appeal against the former decision - Confirming the interim order - Remitting the matter for reconsideration and correction in accordance with any recommendations by the court and orders to eliminate or remedy pollution and degradation - Costs</td>
</tr>
</tbody>
</table>

\(^{1783}\) The class first needs to be certified, but the litigating parties’ intention is to claim damages with interest and costs.
ANNEX 2. RELEVANT LEGAL PROVISIONS

The Constitution

Property

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—
   (a) for a public purpose or in the public interest; and
   (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. (…)

(4) For the purposes of this section—
   (a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
   (b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. (…)

Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
   (a) the nature of the right;
   (b) the importance of the purpose of the limitation;
   (c) the nature and extent of the limitation;
   (d) the relation between the limitation and its purpose; and
   (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Assent to Bills

79. (…) (4) If, after reconsideration, a Bill fully accommodates the President’s reservations, the President must assent to and sign the Bill; if not, the President must either—
   (a) assent to and sign the Bill; or
   (b) refer it to the Constitutional Court for a decision on its constitutionality. (…)

Application by members of National Assembly to Constitutional Court

80. (1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional. (…)

1784 Note that only the relevant (parts of the) provisions are cited. Parts that are left out are indicated with (…).
Powers and functions of President
84. (…) (2) The President is responsible for—
   (c) referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality; (…)

Assent to Bills
121. (…) (2) If, after reconsideration, a Bill fully accommodates the Premier’s reservations, the Premier must
   assent to and sign the Bill; if not, the Premier must either—
   (a) assent to and sign the Bill; or
   (b) refer it to the Constitutional Court for a decision on its constitutionality. (…)

Application by members to Constitutional Court
122. (1) Members of a provincial legislature may apply to the Constitutional Court for an order declaring that all
   or part of a provincial Act is unconstitutional. (…)

Powers and functions of Premiers
127. (…) (2) The Premier of a province is responsible for— (…)
   (c) referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality. (…)

Constitutional Court
167. (…) (3) The Constitutional Court— (…)
   (b) may decide-
      (i) constitutional matters, and issues connected with decisions on constitutional matters; and
      (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises
           an arguable point of law of general public importance which ought to be considered by that Court; and
   (c) makes the final decision whether a matter is within its jurisdiction.
(4) Only the Constitutional Court may— (…)
   (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the
      circumstances anticipated in section 79 or 121;
   (c) decide applications envisaged in section 80 or 122; (…)
(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct
   of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of
   Appeal, a High Court, or a court of similar status, before that order has any force. (…)

Supreme Court of Appeal
168. (…) (3) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of
   South Africa or a court of a status similar to the High Court of South Africa (…)

High Courts
169. A High Court may decide—
   (a) any constitutional matter (…)

Powers of courts in constitutional matters
172. (…) (2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may
   make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of
   the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional
   Court. (…)

Establishment and governing principles
181.(1) The following state institutions strengthen constitutional democracy in the Republic:
   (a) The Public Protector.
   (b) The South African Human Rights Commission. (…)
(2) These institutions are independent, and subject only to the Constitution and the law, and they must be
   impartial and must exercise their powers and perform their functions without fear, favour or prejudice. (…)

363
Functions of Public Protector

182. (1) The Public Protector has the power, as regulated by national legislation—
   (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that
       is alleged or suspected to be improper or to result in any impropriety or prejudice;
   (b) to report on that conduct; and
   (c) to take appropriate remedial action. (…)

Functions of South African Human Rights Commission

184. (1) The South African Human Rights Commission must—
   (a) promote respect for human rights and a culture of human rights;
   (b) promote the protection, development and attainment of human rights; and
   (c) monitor and assess the observance of human rights in the Republic.

   (2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary
       to perform its functions, including the power—
       (a) to investigate and to report on the observance of human rights;
       (b) to take steps to secure appropriate redress where human rights have been violated;
       (c) to carry out research; and
       (d) to educate.

   (3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the
       Commission with information on the measures that they have taken towards the realisation of the rights in the
       Bill of Rights concerning housing, health care, food, water, social security, education and the environment. (…)

International agreements

231. (…) (4) Any international agreement becomes law in the Republic when it is enacted into law by national
        legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the
        Republic unless it is inconsistent with the Constitution or an Act of Parliament. (…)

Customary international law

232. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act
        of Parliament.

Application of international law

233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation
        that is consistent with international law over any alternative interpretation that is inconsistent with international
        law.

Vexatious Proceedings Act [VPA]

2. Powers of court to impose restrictions on the institution of vexatious legal proceedings.
   (1) (…) (b) If, on an application made by any person against whom legal proceedings have been instituted by
       any other person or who has reason to believe that the institution of legal proceedings against him is
       contemplated by any other person, the court is satisfied that the said person has persistently and without any
       reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same
       person or against different persons, the court may, after hearing that other person or giving him an opportunity of
       being heard, order that no legal proceedings shall be instituted by him against any person in any court or any
       inferior court without the leave of that court, or any judge thereof, or that inferior court, as the case may be, and
       such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that
       the proceedings are not an abuse of the process of the court and that there is prima facie ground for the
       proceedings. (…
Criminal Procedure Act [CPA]

7. Private prosecution on certificate nolle prosequi
   (1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence—
      (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of
         some injury which he individually suffered in consequence of the commission of the said offence; (...)
      May (...) either in person or by a legal representative, institute and conduct a prosecution in respect of such
      offence in any court competent to try that offence.

8. Private prosecution under statutory right
   (1) Any body upon which or person upon whom the right to prosecute in respect of any offence is expressly
      conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to
      try that offence.
   (2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise
      such right only after consultation with the attorney-general concerned and after the attorney-general has
      withdrawn his right of prosecution in respect of any specified offence or any specified class or category of
      offences with reference to which such body or person may by law exercise such right of prosecution. (...)

332. Prosecution of corporations and members of associations
   (1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law
      or at common law -
      (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or
         implied, given by a director or servant of that corporate body; and
      (b) the omission, with or without a particular intent, of any act which ought to have been but was not
         performed by or on instructions given by a director or servant of that corporate body,
      in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or
      endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with
      the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the
      same intent, if any) on the part of that corporate body. (...)
   (5) When an offence has been committed, whether by the performance of any act or by the failure to perform any
      act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the
      commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said
      offence, unless it is proved that he did not take part in the commission of the offence and that he could not have
      prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom,
      and shall on conviction be personally liable to punishment therefor. (…)

Compensation of Occupational Injuries and Diseases Act [COIDA]

35. Substitution of compensation for other legal remedies
   (1) No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect
      of any occupational injury or disease resulting in the disablement or death of such employee against such
      employee’s employer, and no liability for compensation on the part of such employer shall arise save under the
      provisions of this Act in respect of such disablement or death. (…)

Occupational Diseases in Mines and Works Act [ODIMWA]

100. No person entitled to benefits from more than one source in respect of same disease
   (…) (2) Notwithstanding anything in any other law contained, no person who has a claim to benefits under this
   Act in respect of a compensatable disease as defined in this Act, on the ground that such person is or was
employed at a controlled mine or a controlled works, shall be entitled, in respect of such disease, to benefits under the Workmen’s Compensation Act, 1941 (Act No. 30 of 1941), or any other law.

Mine Health and Safety Act [MHSA]

1. Objects of Act
The objects of this Act are
(a) to protect the health and safety of persons at mines;
(b) to require employers and employees to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines; (…)
(e) to provide for effective monitoring of health and safety conditions at mines; (…)
(g) to provide for investigations and inquiries to improve health and safety at mines; and
(h) to promote
(i) a culture of health and safety in the mining industry; (…)

2. Employer to ensure safety
(1) The employer of every mine that is being worked must
(a) ensure, as far as reasonably practicable, that the mine is designed, constructed and equipped
(i) to provide conditions for safe operation and a healthy working environment; and
(ii) with a communication system and with electrical, mechanical and other equipment as necessary to achieve those conditions; (…)

5. Employer to maintain healthy and safe mine environment
(1) As far as reasonably practicable, every employer must provide and maintain a working environment that is safe and without risk to the health of employees.
(2) As far as reasonably practicable, every employer must—
(a) identify the relevant hazards and assess the related risks to which persons who are not employees may be exposed; and
(b) ensure that persons who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety.

6. Employer to ensure adequate supply of health and safety equipment
(1) Every employer must—
(a) supply all necessary health and safety equipment and health and safety facilities to each employee; and
(b) maintain, as far as reasonably practicable, that equipment and those facilities in a serviceable and hygienic condition.
(2) Every employer must ensure that sufficient quantities of all necessary personal protective equipment are available so that every employee who is required to use that equipment is able to do so.
(3) Every employer must take reasonable steps to ensure that all employees who are required to use personal protective equipment are instructed in the proper use, the limitations and the appropriate maintenance of that equipment.

7. Employer to staff mine with due regard to health and safety
(1) As far as reasonably practicable, every employer must—
(a) ensure that every employee complies with the requirements of this Act;
(b) institute the measures necessary to secure, maintain and enhance health and safety;
(c) provide persons appointed under subsections (2) and (4) with the means to comply with the requirements of this Act and with any instruction given by an inspector;
(d) consider an employee’s training and capabilities in respect of health and safety before assigning a task to that employee; and
(e) ensure that work is performed under the general supervision of a person trained to understand the hazards associated with the work and who has the authority to ensure that the precautionary measures laid down by the employer are implemented. (…)

Water Services Act [WSA]

3. Right of access to basic water supply and basic sanitation
(1) Everyone has a right of access to basic water supply and basic sanitation.
(2) Every water services institution must take reasonable measures to realise these rights.
(3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.
(4) The rights mentioned in this section are subject to the limitations contained in this Act.

Regulations relating to compulsory national standards and measures to conserve water [Water Service Regulations]

3. Basic water supply
The minimum standard for basic water supply services is -
(a) the provision of appropriate education in respect of effective water use; and
(b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month—
   (i) at a minimum flow rate of not less than 10 litres per minute;
   (ii) within 200 metres of a household; and
   (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

4. Interruption in provision of water services
A water services institution must take steps to ensure that where the water services usually provided by or on behalf of that water services institution are interrupted for a period of more than 24 hours for reasons other than those contemplated in section 4 of the Act, a consumer has access to alternative water services comprising -
(a) at least 10 litres of potable water per person per day; and
(b) sanitation services sufficient to protect health.

Contingency Fees Act [CFA]

2. Contingency fees agreements
(1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed-
   (a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;
   (b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.
(2) Any fees referred to in subsection (1)(b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the ‘success fee’), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained
by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.

3. Form and content of contingency fees agreement

(…) (3) A contingency fees agreement shall state— (…)

(b) that, before the agreement was entered into, the client-

(i) was advised of any other ways of financing the litigation and of their respective implications; (…) (b) that the client will have a period of 14 days, calculated from the date of the agreement, during which he, she or it will have the right to withdraw from the agreement by giving notice to the legal practitioner in writing: Provided that in the event of withdrawal the legal practitioner shall be entitled to fees and disbursements in respect of any necessary or essential work done to protect the interests of the client during such period, calculated on an attorney and client basis; and

4. Settlement

(1) Any offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the professional controlling body, if the matter is not before court, stating— (…) (3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.

5. Client may claim review of agreement or fees

(1) A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the Gazette for the purposes of this section.

(2) Such professional controlling body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his, her or its opinion the provision or fees are unreasonable or unjust.

National Water Act [NWA]

2. Purpose of Act

The purpose of this Act is to ensure that the nation’s water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors—

(a) meeting the basic human needs of present and future generations;
(b) promoting equitable access to water;
(c) redressing the results of past racial and gender discrimination;
(d) promoting the efficient, sustainable and beneficial use of water in the public interest;
(e) facilitating social and economic development; (…) (3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before court.

3. Public trusteeship of nation’s water resources

(1) As the public trustee of the nation’s water resourced the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.

(2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.

(3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic.

19. Prevention and remedying effects of pollution

(1) An owner of land, a person in control of land or a person who occupies or used the land on which—
(a) any activity or process is or was performed or undertaken, or
(b) any other situation exists,
which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

(2) The measures referred to in subsection (1) may include measures to—
(a) cease, modify or control any act or process causing the pollution;
(b) comply with any prescribed waste standard or management practice;
(c) contain or prevent the movement of pollutants;
(d) eliminate any source of the pollution;
(e) remedy the effects of the pollution; and
(f) remedy the effects of any disturbance to the bed and banks of a watercourse.

(3) A catchment management agency may direct any person who fails to take the measures required under subsection (1) to—
(a) commence taking specific measures before a given date;
(b) diligently continue with those measures; and
(c) complete them before a given date.

(4) Should a person fail to comply, or comply inadequately with a directive given under subsection (3), the catchment management agency may take the measures it consider necessary to remedy the situation.

(5) Subject to subsection (6), a catchment management agency may recover all costs incurred as a result of it acting under subsection (4) jointly and severally from the following persons:
(a) Any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or the potential pollution;
(b) the owner of the land at the time when the pollution or the potential for pollution occurred, or that owner’s successor-in-title;
(c) the person in control of the land or any person who has a right to use the land at the time when (…)
(d) any person who negligently failed to prevent (…)

(6) The catchment management agency may in respect of the recovery of costs under subsection (5), claim from any other person who, in the opinion of the catchment management agency, benefitted from the measures undertaken under subsection (4), to the extent of such benefit. (…)

National Environmental Management Act [NEMA]

2. Principles

(1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and (…) 
(a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;
(b) serve as the general framework within which environmental management and implementation plans must be formulated;
(c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;
(d) serve as principles by reference to which a conciliator appointed under this Act must make recommendations; and
(e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.

(2) Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.

(3) Development must be socially, environmentally and economically sustainable.
(4) (…)
(c) Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons. (…)
(o) The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage. (…)

28. Duty of care and remediation of environmental damage
(1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.
(1A) Subsection (1) also applies to a significant pollution or degradation that—
(a) occurred before the commencement of this Act;
(b) arises or is likely to arise at a different time from the actual activity that caused the contamination; or
(c) arises through an act or activity of a person that results in a change to pre-existing contamination.
(2) Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which—
(a) any activity or process is or was performed or undertaken; or
(b) any other situation exists,
which causes, has caused or is likely to cause significant pollution or degradation of the environment.
(3) The measures required in terms of subsection (1) may include measures to—
(a) investigate, assess and evaluate the impact on the environment;
(b) inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment;
(d) cease, modify or control any act, activity or process causing the pollution or degradation;
(e) contain or prevent the movement of pollutants or the causant of degradation;
(f) eliminate any source of the pollution or degradation; or
(g) remedy the effects of the pollution or degradation.
(4) The Director-General, the Director-General of the department responsible for mineral resources or a provincial head of department may, after having given adequate opportunity to affected persons to inform him or her of their relevant interests, direct any person who is causing, has caused or may cause significant pollution or degradation of the environment to—
(a) cease any activity, operation or undertaking;
(b) investigate, evaluate and assess the impact of specific activities and report thereon;
(c) commence taking specific measures before a given date;
(d) diligently continue with those measures; and
(e) complete those measures before a specified reasonable date:
Provided that the Director-General or a provincial head of department may, if urgent action is necessary for the protection of the environment, issue such directive, and consult and give such opportunity to inform as soon thereafter as is reasonable. (…)
(7) Should a person fail to comply, or inadequately comply, with a directive under subsection (4), the Director-General or provincial head of department may take reasonable measures to remedy the situation or apply to a competent court for appropriate relief.
(8) Subject to subsection (9), the Director-General, the Director-General of the department responsible for mineral resources or provincial head of department may recover costs for reasonable remedial measures to be
undertaken under subsection (7), before such measures are taken and all costs incurred as a result of acting under subsection (7), from any or all of the following persons—
(a) any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or degradation or the potential pollution or degradation;
(b) the owner of the land at the time when the pollution or degradation or the potential for pollution or degradation occurred, or that owner's successor in title;
(c) the person in control of the land or any person who has or had a right to use the land at the time when (…)
(d) any person who negligently failed to prevent (…) Provided that such person failed to take the measures required of him or her under subsection (1). (…)

(12) Any person may, after giving the Director-General, the Director-General of the department responsible for mineral resources or provincial head of department 30 days' notice, apply to a competent court for an order directing the Director-General, the Director-General of the department responsible for mineral resources or any provincial head of department to take any of the steps listed in subsection (4) if the Director-General, the Director-General of the department responsible for mineral resources or provincial head of department fails to inform such person in writing that he or she has directed a person contemplated in subsection (8) to take one of those steps, and the provisions of section 32(2) and (3) shall apply to such proceedings, with the necessary changes.

(13) When considering any application in terms of subsection (12), the court must take into account the factors set out in subsection (5).

32. Legal standing to enforce environmental laws

(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources—
(a) in that person's or group of person's own interest;
(b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
(c) in the interest of or on behalf of a group or class of persons whose interests are affected;
(d) in the public interest; and
(e) in the interest of protecting the environment.

(2) A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.

(3) Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of this Act, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment, a court may on application—
(a) award costs on an appropriate scale to any person or persons entitled to practise as advocate or attorney in the Republic who provided free legal assistance or representation to such person or group in the preparation for or conduct of the proceedings; and
(b) order that the party against whom the relief is granted pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings.

33. Private prosecution

(1) Any person may—
(a) in the public interest; or
(b) in the interest of the protection of the environment,
institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public
duty resting on an organ of state, in any national or provincial legislation or municipal bylaw, or any regulation,
licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the
protection of the environment and the breach of that duty is an offence.

34. Criminal proceedings
(…) (7) Any person who is or was a director of a firm at the time of the commission by that firm of an offence
under any provision listed in Schedule 3 shall himself or herself be guilty of the said offence and liable on
conviction to the penalty specified in the relevant law, including an order under subsection (2), (3) and (4), if the
offence in question resulted from the failure of the director to take all reasonable steps that were necessary under
the circumstances to prevent the commission of the offence: Provided that proof of the said offence by the firm
shall constitute prima facie evidence that the director is guilty under this subsection. (…) 

43. Appeals
(1) Any person may appeal to the Minister against a decision taken by any person acting under a power
delegated by the Minister under this Act or a specific environmental management Act. (…) 
(2) Any person may appeal to an MEC against a decision taken by any person acting under a power delegated by
that MEC under this Act or a specific environmental management Act. (…) 
(4) An appeal under subsection (1), (1A) or (2) must be noted and must be dealt with in the manner prescribed
and upon payment of a prescribed fee. 
(5) The Minister or an MEC, as the case may be, may consider and decide an appeal or appoint an appeal panel
to consider and advise the Minister or MEC on the appeal. 
(6) The Minister or an MEC may, after considering such an appeal, confirm, set aside or vary the decision,
provision, condition or directive or make any other appropriate decision, including a decision that the prescribed
fee paid by the appellant, or any part thereof, be refunded. (…) 

National Nuclear Regulator Act [NNRA]

3. Establishment of National Nuclear Regulator
A juristic person to be known as the National Nuclear Regulator, comprising a board, a chief executive officer
and staff, is hereby established.

5. Objects of Regulator
The objects of the Regulator are to—
(a) provide for the protection of persons, property and the environment against nuclear damage through the
establishment of safety standards and regulatory practices;
(b) exercise regulatory control related to safety over—
(i) the siting, design, construction, operation, manufacture of component parts, and decontamination,
decommissioning and closure of nuclear installations; and (…) 

6. Co-operative governance
(1) To give effect to the principles of co-operative government and intergovernmental relations contemplated in
Chapter 3 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), all organs of state, as
defined in section 239 of the Constitution, on which functions in respect of the monitoring and control of
radioactive material or exposure to ionizing radiation are conferred by this Act or other legislation, must co-
operate with one another in order to—
(a) ensure the effective monitoring and control of the nuclear hazard;
(b) co-ordinate the exercise of such functions:
(c) minimise the duplication of such functions and procedures regarding the exercise of such functions; and
(d) promote consistency in the exercise of such functions.

(2) The Regulator must conclude a Co-operative agreement with every relevant organ of state to give effect to the co-operation contemplated in subsection (1).

20. Restrictions on certain actions

(1) No person may site, construct, operate, decontaminate or decommission a nuclear installation, except under the authority of a nuclear installation licence.

Promotion of Administrative Justice Act [PAJA]

3. Procedurally fair administrative action affecting any person

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2)

(a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—

(a) obtain assistance and, in serious or complex cases, legal representation;

(b) present and dispute information and arguments; and

(c) appear in person. (…)

4. Administrative action affecting public

(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—

(a) to hold a public inquiry in terms of subsection (2);

(b) to follow a notice and comment procedure in terms of subsection (3);

(c) to follow the procedures in both subsections (2) and (3);

(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or

(e) to follow another appropriate procedure which gives effect to section 3. (…)

6. Judicial review of administrative action

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if— (…)

7. Procedure for judicial review

(…) (2)

(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) …

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice. (…)
8. Remedies in proceedings for judicial review

(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—
(a) directing the administrator—
   (ii) to give reasons; or
   (iii) to act in the manner the court or tribunal requires;
(b) prohibiting the administrator from acting in a particular manner;
(c) setting aside the administrative action and—
   (i) remitting the matter for reconsideration by the administrator, with or without directions; or
   (ii) in exceptional cases—
      (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
      (bb) directing the administrator or any other party to the proceedings to pay compensation;
(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
(e) granting a temporary interdict or other temporary relief; or
(f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders—
(a) directing the taking of the decision;
(b) declaring the rights of the parties in relation to the taking of the decision;
(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
(d) as to costs.

Promotion of Access to Information Act [PAIA]

9. Objects of Act

The objects of this Act are—
(a) to give effect to the constitutional right of access to—
   (i) any information held by the State; and
   (ii) any information that is held by another person and that is required for the exercise or protection of any rights;
(b) to give effect to that right—
   (i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and
   (ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution;
(c) to give effect to the constitutional obligations of the State of promoting a human rights culture and social justice (…)
(d) generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone—
   (i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;
   (ii) to understand the functions and operation of public bodies; and
   (iii) to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights.

7. Act not applying to records requested for criminal or civil proceedings after commencement of proceedings

(1) This Act does not apply to a record of a public body or a private body if—
(a) that record is requested for the purpose of criminal or civil proceedings;
(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
(c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any
other law. (...)

50. Right of access to records of private bodies
(1) A requester must be given access to a record of a private body if—
(a) that record is required for the exercise or protection of any rights;
(b) that person complies with the procedural requirements in this Act relating to a request for access to that
record; and
(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
(2) In addition to the requirements referred to in subsection (1), when a public body, referred to in paragraph (a)
or (b)(i) of the definition of “public body” in section 1, requests access to a record of a private body for the
exercise or protection of any rights, other than its rights, it must be acting in the public interest.
(3) A request contemplated in subsection (1) includes a request for access to a record containing personal
information about the requester or the person on whose behalf the request is made.

Mineral and Petroleum Resources Development Act [MPRDA]

2. Objects of Act
The objects of this Act are to— (...)
(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including
women and communities, to enter into and actively participate in the mineral and petroleum industries and
to benefit from the exploitation of the nation's mineral and petroleum resources;
(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources
are developed in an orderly and ecologically sustainable manner while promoting justifiable social and
economic development; and
(i) ensure that holders of mining and production rights contribute towards the socio-economic development of
the areas in which they are operating.

3. Custodianship of nation's mineral and petroleum resources
(1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is
the custodian thereof for the benefit of all South Africans.
(2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may-
(a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right,
permission to remove, mining right, mining permit, retention permit, technical co-operation permit,
reconnaissance permit, exploration right and production right; and
(b) in consultation with the Minister of Finance, prescribe and levy, any fee payable in terms of this Act. (...)

6. Principles of administrative justice
(1) Subject to the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000), any administrative process
conducted or decision taken in terms of this Act must be conducted or taken, as the case may be, within a
reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.
(2) Any decision contemplated in subsection (1) must be in writing and accompanied by written reasons for such
decision.

23. Granting and duration of mining right
(1) Subject to subsection (4), the Minister must grant a mining right if— (...)
(e) the applicant has provided for the prescribed social and labour plan; (...)

38A. Environmental authorisations
(1) The Minister is the responsible authority for implementing environmental provisions in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) as it relates to prospecting, mining, exploration, production or activities incidental thereto on a prospecting, mining, exploration or production area.

(2) An environmental authorisation issued by the Minister shall be a condition prior to the issuing of a permit or the granting of a right in terms of this Act.

43. Issuing of a closure certificate

(1) The holder of a prospecting right, mining right, retention permit, mining permit, or previous holder of an old order right or previous owner of works that has ceased to exist, remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to the conditions of the environmental authorisation and the management and sustainable closure thereof, until the Minister has issued a closure certificate in terms of this Act to the holder or owner concerned. (…)

45. Minister's power to recover costs in event of urgent remedial measures

(1) If any prospecting, mining, reconnaissance, exploration or production operations or activities incidental thereto cause or results in ecological degradation, pollution or environmental damage, or is in contravention of the conditions of the environmental authorisation, or which may be harmful to health, safety or well-being of anyone and requires urgent remedial measures, the Minister, in consultation with the Minister of Environmental Affairs and Tourism, may direct the holder of the relevant right or permit in terms of this Act or the holder of an environmental authorisation in terms of National Environmental Management Act, 1998, to-

(a) investigate, evaluate, assess and report on the impact of any pollution or ecological degradation or any contravention of the conditions of the environmental authorisation;

(b) take such measures as may be specified in such directive in terms of this Act or the National Environmental Management Act, 1998; and

(c) complete such measures before a date specified in the directive.

(2)

(a) If the holder fails to comply with the directive, the Minister may take such measures as may be necessary to protect the health and well-being of any affected person or to remedy ecological degradation and to stop pollution of the environment.

(b) Before the Minister implements any measure, he or she must afford the holder an opportunity to make representations to him or her.

(c) In order to implement the measures contemplated in paragraph (a), the Minister may by way of an ex parte application apply to a High Court for an order to seize and sell such property of the holder as may be necessary to cover the expenses of implementing such measures.

(d) In addition to the application in terms of paragraph (c), the Minister may use funds appropriated for that purpose by Parliament to fully implement such measures.

(e) The Minister may recover an amount equal to the funds necessary to fully implement the measures from the holder concerned.

46. Minister's power to remedy environmental damage in certain instances

(1) If the Minister directs that measures contemplated in section 45 must be taken to prevent pollution or ecological degradation of the environment, to address any contravention in the environmental authorisation or to rehabilitate dangerous health or safety occurrences but establishes that the holder of a reconnaissance permission, prospecting right, mining right, retention permit or mining permit, the holder of an old order right or the previous owner of works, as the case may be or his or her successor in title is deceased or cannot be traced or in the case of a juristic person, has ceased to exist, has been liquidated or cannot be traced, the Minister in consultation with the Minister of Environmental Affairs and Tourism, may instruct the Regional Manager concerned to take the necessary measures to prevent pollution or ecological degradation of the environment or to rehabilitate dangerous health and social occurrences or to make an area safe.
(2) The measures contemplated in subsection (1) must be funded from financial provision made by the holder of the relevant right, permit, the previous holder of an old order right or the previous owner of works in terms of the National Environmental Management Act, 1998, where appropriate, or if there is no such provision or if it is inadequate, from money appropriated by Parliament for the purpose.

47. Minister's power to suspend or cancel rights, permits or permissions

(1) Subject to subsections (2), (3) and (4), the Minister may cancel or suspend any reconnaissance permission, prospecting right, mining right, mining permit, retention permit or holders of old order rights or previous owner of works, if the holder or owner thereof— (…)

(2) Before acting under subsection (1), the Minister must—

(a) give written notice to the holder indicating the intention to suspend or cancel the right;

(b) set out the reasons why he or she is considering suspending or canceling the right;

(c) afford the holder a reasonable opportunity to show why the right, permit or permission should not be suspended or cancelled; and

(d) notify the mortgagee, if any, of the prospecting right, mining right or mining permit concerned of his or her intention to suspend or cancel the right or permit. (…)

96. Internal appeal process and access to courts

(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal within 30 days becoming aware of such administrative decision in the prescribed manner to—

(a) the Director-General, if it is an administrative decision by a Regional Manager or any officer to whom the power has been delegated or a duty has been assigned by or under this Act;

(b) the Minister, if it is an administrative decision that was taken by the Director-General or the designated agency.

(2)

(a) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

(b) Any subsequent application in terms of this Act must be suspended pending the finalisation of the appeal referred to in paragraph (a).

(3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.

(4) Sections 6,7(1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000), apply to any court proceedings contemplated in this section.

100. Transformation of minerals industry

(1) The Minister must, within five years from the date on which this Act took effect—

(a) and after consultation with the Minister for Housing, develop a housing and living conditions standard for the minerals industry; and

(b) develop a code of good practice for the minerals industry in the Republic.

(2)

(a) To ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources and the beneficiation of such mineral resources.

(b) The Charter must set out, amongst others how the objects referred to in section 2(c), (d), (e), (f) and (i) can be achieved.
Mineral and Petroleum Resources Development Regulations [MPRDA Regulations]

41. Objectives of social and labour plan
The objectives of the social and labour plan are to—
(a) promote employment and advance the social and economic welfare of all South Africans;
(b) contribute to the transformation of the mining industry; and
(c) ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating.

45. Reporting of social and labour plan
The holder of a mining right must submit an annual report on the compliance with the social and labour plan to the relevant Regional Manager.

46. Contents of social and labour plan
The contents of a social and labour plan must include the following:
(a) A preamble which provides background information of the mine in question;
(b) a human resources development programme which must include—
   (i) a skills development plan which identifies and reports on—
      (aa) the number and education levels of the employees (…) ; and
      (bb) the number of vacancies that the mining operation has been unable to fill for a period longer than 12 months (…) ;
   (ii) a career progression plan and its implementation in line with the skills development plan;
   (iii) a mentorship plan and its implementation in line with the skills development plan and the needs for the empowerment groups;
   (iv) an internship and bursary plan and its implementation in line with the skills development plan; and
   (v) the employment equity statistics (…)
(c) A local economic development programme which must include—
   (i) the social and economic background of the area in which the mine operates;
   (ii) the key economic activities of the area in which the mine operates;
   (iii) the impact that the mine would have in the local and sending communities;
   (iv) the infrastructure and poverty eradication projects that the mine would support in line with the Integrated Development Plan of the areas in which the mine operates and the major sending areas;
   (v) the measures to address the housing and living conditions of the mine employees;
   (vi) the measures to address the nutrition of the mine employees; and
   (vii) the procurement progression plan and its implementation for HDSA companies in terms of capital goods, services and consumables and the breakdown of the procurement (…)
(d) processes pertaining to management of downscaling and retrenchment which must include—
   (i) the establishment of the future forum;
   (ii) mechanisms to save jobs and avoid job losses and a decline in employment;
   (iii) mechanisms to provide alternative solutions and procedures for creating job security where job losses cannot be avoided; and
   (iv) mechanisms to ameliorate the social and economic impact on individuals, regions and economies where retrenchment or closure of the mine is certain.
(e) to provide financially for the implementation of the social and labour plan in terms of the implementation of—
   (i) the human resource development programme;
   (ii) the local economic development programmes; and
   (iii) the processes to manage downscaling and retrenchment.
(f) an undertaking by the holder of the mining right to ensure compliance with the social and labour plan and to make it known to the employees.
Legal Aid South Africa Act [LASAA]

3. Objects of Legal Aid South Africa
The objects of Legal Aid South Africa are to—
(a) render or make available legal aid and legal advice;
(b) provide legal representation to persons at state expense; and
(c) provide education and information concerning legal rights and obligations,
as envisaged in the Constitution and this Act.

4. Powers, functions and duties of Board
(1) The Board may do all that is necessary or expedient to achieve the objects referred to in section 3, including
the following:
(a) Provide legal services, representation and advice, by—
   (i) employing legal practitioners and candidate attorneys;
   (ii) employing paralegals, who are persons that are not legal practitioners but have knowledge and
        understanding of the law, its procedures and its social context acquired through training, education,
        work experience or a national registered qualification in paralegal practice; and
   (iii) procuring the services of legal practitioners in private practice by entering into contracts or agreements
        with them and other entities. (…)

Protection of Investment Act [PIA]

4. Purpose of Act
The purpose of this Act is to—
(a) protect investment in accordance with and subject to the Constitution, in a manner which balances the
    public interest and the rights and obligations of investors;
(b) affirm the Republic’s sovereign right to regulate investments in the public interest; and
(c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments
    in the Republic.

10. Legal protection of investment
Investors have the right to property in terms of section 25 of the Constitution.

12. Right to regulate
(1) Notwithstanding anything to the contrary in this Act, the government or any organ of state may, in
    accordance with the Constitution and applicable legislation, take measures, which may include—
    (a) redressing historical, social and economic inequalities and injustices; (…)
    (c) upholding the rights guaranteed in the Constitution; (…)
    (f) achieving the progressive realisation of socio-economic rights; or
    (g) protecting the environment and the conservation and sustainable use of natural resources. (…)

13. Dispute resolution
(4) Subject to applicable legislation, an investor, upon becoming aware of a dispute as referred to in
    subsection (1), is not precluded from approaching any competent court, independent tribunal or statutory body
    within the Republic for the resolution of a dispute relating to an investment.
(5) The government may consent to international arbitration in respect of investments covered by this Act,
    subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will
    be subject to the administrative processes set out in section 6. Such arbitration will be conducted between the
    Republic and the home state of the applicable investor.
Uniform Rules of the Court

16A Submissions by an amicus curiae

(1)
(a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.
(b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.
(c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.
(d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days.

(2) Subject to the provisions of national legislation enacted in accordance with section 171 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and these Rules, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein as amicus curiae upon such terms and conditions as may be agreed upon in writing by the parties. (…)

(5) If the interested party contemplated in subrule (2) is unable to obtain the written consent as contemplated therein, he or she may, within five days of the expiry of the 20-day period prescribed in that subrule, apply to the court to be admitted as an amicus curiae in the proceedings.(…)

49 Civil Appeals from the High Court

(…) (11) Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs. (…)
SOURCES
<table>
<thead>
<tr>
<th>LEGISLATION</th>
<th>383</th>
</tr>
</thead>
<tbody>
<tr>
<td>International (hard and soft) law</td>
<td>383</td>
</tr>
<tr>
<td>International agreements</td>
<td>383</td>
</tr>
<tr>
<td>UN documents</td>
<td>383</td>
</tr>
<tr>
<td>UN publications</td>
<td>386</td>
</tr>
<tr>
<td>Other international documents</td>
<td>386</td>
</tr>
<tr>
<td>South African law</td>
<td>386</td>
</tr>
<tr>
<td>Numbered Acts</td>
<td>386</td>
</tr>
<tr>
<td>Regulations</td>
<td>387</td>
</tr>
<tr>
<td>Court rules</td>
<td>387</td>
</tr>
<tr>
<td>Other government documents</td>
<td>387</td>
</tr>
<tr>
<td>Foreign law</td>
<td>387</td>
</tr>
<tr>
<td>Private regulation</td>
<td>388</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>JURISPRUDENCE</th>
<th>388</th>
</tr>
</thead>
<tbody>
<tr>
<td>International case law</td>
<td>388</td>
</tr>
<tr>
<td>South African case law</td>
<td>388</td>
</tr>
<tr>
<td>Constitutional Court</td>
<td>388</td>
</tr>
<tr>
<td>Supreme Court of Appeal</td>
<td>390</td>
</tr>
<tr>
<td>High Court</td>
<td>391</td>
</tr>
<tr>
<td>Regional Court</td>
<td>393</td>
</tr>
<tr>
<td>Commissions of Inquiry</td>
<td>393</td>
</tr>
<tr>
<td>Court papers</td>
<td>393</td>
</tr>
<tr>
<td>Foreign case law</td>
<td>395</td>
</tr>
<tr>
<td>Other papers</td>
<td>396</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>DOCTRINE</th>
<th>396</th>
</tr>
</thead>
<tbody>
<tr>
<td>Books and book chapters</td>
<td>396</td>
</tr>
<tr>
<td>Journal articles</td>
<td>408</td>
</tr>
<tr>
<td>Other doctrinal sources</td>
<td>415</td>
</tr>
</tbody>
</table>

| OTHER PUBLICATIONS | 415 |
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