

(Re) Examining Environmental, Social and Governance (ESG) and Human Rights

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Kariuki Muigua*

Abstract

This paper critically examines the place of human rights in the Environmental, Social and Governance (ESG) agenda. It argues that human rights occupy a central role in all the ESG factors. The paper discusses the progress made towards integrating human rights within the ESG framework. It also highlights some of the challenges related to ESG and human rights. In addition, the paper offers proposals towards embracing human rights in the ESG debate.

1.0 Introduction

Environmental, Social and Governance (ESG) is a framework used to assess an organization's business practices and performance on various sustainability and ethical issues¹. ESG has also been defined as a set of standards measuring a business's impact on society, the environment, and how transparent and accountable it is². ESG can also be understood as a framework that helps stakeholders understand how an organization is managing risks and opportunities related to environmental, social, and governance criteria³. ESG incorporates environmental, social, and governance factors into investment and business decision-making processes⁴. It analyses factors such as carbon emissions,

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¹ Mathis. S., 'Environmental, Social and Governance (ESG).' Available at <https://www.techtarget.com/whatis/definition/environmental-social-and-governance-ESG> (Accessed on 23/01/2024)

² British Business Bank., 'What is ESG - A Guide for Businesses.' Available at <https://www.british-business-bank.co.uk/finance-hub/business-guidance/sustainability/what-is-esg-a-guide-for-smaller-businesses/> (Accessed on 23/01/2024)

³ Peterdy. K., & Miller. N., 'What is ESG?' Available at <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/> (Accessed on 23/01/2024)

⁴ Barbosa. A et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' *Humanit Soc Sci Commun* 10, 410 (2023). Available at <https://doi.org/10.1057/s41599-023-01919-0> (Accessed on 23/01/2024)

water usage, employee diversity, labor practices, board diversity, executive compensation among others and seeks to integrate them in corporate sustainability practices⁵. ESG criteria therefore provides quantitative and qualitative information about a company's sustainability practices and their potential impact on various stakeholders⁶.

It has been asserted that ESG is a function of public accountability and Corporate Social Responsibility (CSR) that can contribute to the economic performance of organizations⁷. Integration of the ESG criteria has become an instrument responsible for defining, planning, operationalizing and executing the actions of corporations directed at environmental prevention and preservation, in addition to social responsibility and the quality performance of their activities⁸. ESG is a concept that is vital in fostering sustainable, responsible or ethical investments⁹. It has been argued that ESG is usually a standard and strategy used by investors to evaluate corporate behavior and future financial performance of organizations¹⁰. Embracing ESG factors can therefore contribute to the environmental and economic performance of organizations in terms of investment and sustainability¹¹.

Human rights are central in the ESG debate¹². It has been pointed out that ESG covers social factors including *human rights*, labour relations, employee welfare, community

⁵ Ibid

⁶ Ibid

⁷ Ahmad. H., Yaqub. M., & Lee. S. H., 'Environmental-, Social-, and Governance-Related Factors for Business Investment and Sustainability: A Scientometric Review of Global Trends.' Available at <https://link.springer.com/article/10.1007/s10668-023-02921-x> (Accessed on 23/01/2024)

⁸ Barbosa. A et al., 'Integration of Environmental, Social, and Governance (ESG) Criteria: Their Impacts on Corporate Sustainability Performance.' Op Cit

⁹ Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' *Journal of Corporate Finance* 66 (2021): 101889

¹⁰ Li. T., et al., 'ESG: Research Progress and Future Prospects.' Available at <https://pdfs.semanticscholar.org/0dd4/941ebea33330210daff5f37a1c8cdd0547d7.pdf> (Accessed on 23/01/2024)

¹¹ Ahmad. H., Yaqub. M., & Lee. S. H., 'Environmental-, Social-, and Governance-Related Factors for Business Investment and Sustainability: A Scientometric Review of Global Trends.' Op Cit

¹² Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' Op Cit

engagement, diversity and inclusion (Emphasis added)¹³. As a result, it has been argued that human rights issues should be reflected in social criteria, environmental and governance indicators within the ESG framework¹⁴.

This paper critically examines the place of human rights in the ESG agenda. It argues that human rights occupy a central role in all the ESG factors. The paper discusses the progress made towards integrating human rights within the ESG framework. It also highlights some of the challenges related to ESG and human rights. In addition, the paper offers proposals towards embracing human rights in the ESG debate.

2.0 Linking Human Rights and ESG

Human rights have been defined as fundamental universal and inalienable entitlements inherent to all human beings which they should be accorded without any form of discrimination¹⁵. Human rights are inherent to every human being by the virtue of existence and are not granted by any state¹⁶. According to the United Nations, human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status¹⁷. Every person is therefore entitled to fundamental human rights without discrimination based on grounds such as sex, religion, nationality, race, ethnicity, colour, religion among others¹⁸.

The International Human Rights Law framework lays down the obligations of states to act in certain ways or to refrain from certain acts, in order to promote and protect human

¹³ Henisz, W, Koller, T, & Nuttall, R., 'Five Ways that ESG Creates Value.' *McKinsey Quarterly*, 2019

¹⁴ Office of the High Commissioner for Human Rights., 'Investors, ESG and Human Rights.' Available at <https://www.ohchr.org/en/calls-for-input/2023/investors-esg-and-human-rights> (Accessed on 23/01/2024)

¹⁵ Office of the High Commissioner for Human Rights., 'What are Human Rights.' Available at <https://www.ohchr.org/en/what-are-human-rights> (Accessed on 24/01/2024)

¹⁶ Ibid

¹⁷ United Nations., 'Human Rights.' Available at <https://www.un.org/en/global-issues/human-rights#:~:text=International%20Human%20Rights%20Law&text=The%20United%20Nations%20has%20defined,in%20carrying%20out%20their%20responsibilities.> (Accessed on 24/01/2024)

¹⁸ Ibid

rights and fundamental freedoms of individuals or groups¹⁹. This framework sets out a broad range of internationally accepted rights, including civil, cultural, economic, political and social rights²⁰. It also establishes mechanisms to promote and protect these rights and to assist states in carrying out their responsibilities²¹. The foundation of this framework is the *Charter of the United Nations*²². The Preamble of the Charter reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small²³. The Charter encourages the international community and all states to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion²⁴.

The importance of human rights across the globe received was further strengthened following the adoption of the *Universal Declaration of Human Rights (UDHR)*²⁵ by the General Assembly of the United Nations on 10th December, 1948. The UDHR stipulates fundamental human rights to be universally protected and common standards for achievement of these rights for all people²⁶. According to the UDHR recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world²⁷. Since adoption of the UDHR many human rights instruments have been enacted at the international, continental, regional and national levels. *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*²⁸ was adopted in order to enhance the protection and fulfillment

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

²² United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

²³ Ibid, Preamble

²⁴ Ibid, Article 1 (3)

²⁵ Universal Declaration of Human Rights., Available at <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> (Accessed on 24/01/2024)

²⁶ Ibid

²⁷ Ibid

²⁸ United Nations., 'International Covenant on Economic, Social and Cultural Rights.' Available at https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf (Accessed on 24/01/2024)

of economic, social and cultural rights across the globe. Further, the *International Covenant on Civil and Political Rights (ICCPR)*²⁹ was adopted in order to foster the realization of civil and political rights in the world. At the Continental level, the *African Charter on Human and Peoples' Rights*³⁰ sets out the duty of African states to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa.

Due to their importance, countries have increasingly adopted the concept of human rights and undertaken measures towards fostering their attainment including embracing human rights in their constitutions³¹. At a national level, the *Constitution of Kenya*³² is devoted towards protection of human rights. It recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law³³. It further enshrines human rights as among the national values and principles of governance that bind all persons³⁴. Chapter four of the Constitution contains the Bill of Rights which stipulates fundamental rights and freedoms which all Kenyans are entitled to³⁵.

It has correctly been argued that human rights are applicable in the private sphere³⁶. The concept of horizontal application of the Bill of Rights entails the possibility of private persons being held accountable in constitutional litigation, that is, constitutional rights

²⁹ United Nations., 'International Covenant on Civil and Political Rights.' Available at https://treaties.un.org/doc/treaties/1976/03/19760323%2006-17%20am/ch_iv_04.pdf (Accessed on 24/01/2024)

³⁰ African Union., 'African Charter on Human and Peoples' Rights.' Available at https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf (Accessed on 24/01/2024)

³¹ Boyle. A., 'Human Rights and the Environment: Where Next' *The European Journal of International Law*, Vol. 23, No. 3

³² Constitution of Kenya., 2010., Government Printer, Nairobi

³³ Ibid, Preamble

³⁴ Ibid, Article 10 (2) (b)

³⁵ Ibid, Chapter four

³⁶ Matu. D., 'Improving Access to Justice in Kenya through Horizontal Application of the Bill of Rights and Judicial Review' Available at https://press.strathmore.edu/uploads/journals/strathmore-law-review/SLR2/2SLR1_Article_4.pdf (Accessed on 24/01/2024)

having application in the private sphere³⁷. This idea marks a shift from the traditional idea of vertical application of human rights where Constitutional rights applied in the public sphere but not in the private sphere³⁸. For example, under the Constitution of Kenya, the Bill of Rights applies to all and binds all state organs and all persons³⁹. The Bill of Rights in Kenya therefore equally applies to the private sphere. It has been argued that horizontal application of human rights is an important safeguard in the protection of socio-economic rights since most these rights are violated by private entities⁴⁰.

Based on the concept of horizontal application of the Bill of Rights, human rights are applicable in the ESG debate to bind corporations in their sustainability practices. The Social 'S' pillar of ESG emphasizes several factors including the need to uphold human rights, diversity, employee relations, and consumer protection⁴¹. As a result, corporations are increasingly required to safeguard human rights as envisaged by 'S' pillar of ESG⁴². It has been argued that the 'S' factor of the ESG framework precisely encompasses the human rights assessments that investors need to conduct prior to investing in specific companies⁴³. It is usually done under the format of a Human Rights Due Diligence (HRDD) process that seeks to evaluate a company's compliance with human rights standards⁴⁴. It has been argued that the scope of human rights covered by the 'S' tenet of ESG is broad and encompasses the whole framework of human rights enshrined in

³⁷ Ibid

³⁸ Khobe. W., 'The Horizontal Application of the Bill of the Rights and the Development of the Law to give Effect to Rights and Fundamental Freedoms' (2014) 1, *Journal of Law and Ethics*

³⁹ Constitution of Kenya., 2010., Article 20 (1)

⁴⁰ The East African Centre for Human Rights., 'A compendium on economic and social rights cases under the Constitution of Kenya, 2010' available at https://eachrights.or.ke/wp-content/uploads/2020/07/A_Compndium_On_Economic_And_Social_Rights_Cases_Under_The_Constitution_Of_Kenya_2010.pdf (Accessed on 24/01/2024)

⁴¹ Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses." *Utrecht Law Review* 14.2 (2018): 1-5.'

⁴² Ibid

⁴³ Global Campus of Human Rights., 'Rethinking Environmental, Social, and Governance (ESG) Investing for Successful Sustainability and Human Rights.' Available at <https://gchumanrights.org/gc-preparedness/preparedness-development/article-detail/rethinking-environmental-social-and-governance-esg-investing-for-successful-sustainability-and-human-rights-5039.html> (Accessed on 24/01/2024)

⁴⁴ Ibid

instruments such as the UDHR, ICESCR, and the ICCPR among other human rights instruments⁴⁵.

Human rights are therefore an integral part of the ESG framework. It has been argued that respect for human rights is not just an ESG factor, but a global standard of expected conduct for all companies, including institutional investors⁴⁶. In addition, it has been asserted that human rights are not a subset of discreet social topics to be addressed, but a globally agreed upon standard of achievement for all people, covering a wide range of interdependent civil, political, economic, social, cultural, and environmental rights⁴⁷. As a result, it has been argued that businesses have a responsibility to adopt a human rights policy, embed respect for human rights throughout the business, and undertake HRDD⁴⁸. In addition, it has been posited that taking action to address human rights risks should not be contingent on their relevance to enterprise value creation and that enterprise value creation should only happen when business can meet its responsibility to respect human rights⁴⁹. Respect for human rights is a global standard of expected conduct whereby businesses, including financial actors, take proactive steps to avoid negative impacts and enable remedy for victims of harm⁵⁰. In particular, human rights are inalienable which means that they should be upheld regardless of their value for business success.

ESG is therefore increasingly driving corporate respect for human rights⁵¹. It has been observed that as companies increasingly recognize the reputational and financial risks of

⁴⁵ Simmons & Simmons., 'Human Rights Due Diligence as Part of 'Social' in ESG.' Available at <https://www.simmons-simmons.com/en/publications/ckkce2jhz1nwg09857iumkfpb/human-rights-due-diligence-as-part-of-social-in-esg> (Accessed on 24/01/2024)

⁴⁶ Business & Human Rights Resource Centre., 'Commentary: Human Rights are not Just an ESG Factor' Available at <https://www.business-humanrights.org/en/latest-news/commentary-human-rights-are-not-just-an-esg-factor/> (Accessed on 24/01/2024)

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Munoz. P., 'Bridging the Human Rights Gap in ESG.' Available at <https://www.bsr.org/en/blog/bridging-the-human-rights-gap-in-esg> (Accessed on 24/01/2024)

⁵¹ Flacks. M., & Norman. H., 'What Does the ESG Backlash Mean for Human Rights?' Available at <https://www.csis.org/analysis/what-does-esg-backlash-mean-human-rights> (Accessed on 24/01/2024)

adverse human rights impacts, corporate human rights commitments and due diligence practices have become more prevalent⁵².

The relationship between human rights and corporate sustainability practices is recognized under the *United Nations 2030 Agenda for Sustainable Development*⁵³. The Agenda represents a shared blue print for peace and prosperity for people and the planet in the quest towards the ideal of Sustainable Development⁵⁴. It envisions attainment of the ideal of Sustainable Development through 17 Sustainable Development Goals (SDGs) which seek to strike a balance between social, economic and environmental facets of sustainability⁵⁵. It has been argued that human rights and the 2030 Agenda for Sustainable Development are inextricably linked⁵⁶. The 2030 Agenda is explicitly grounded in international human rights⁵⁷. It has been asserted that the 17 SDGs seek to realize the human rights of all, and more than 90% of the targets directly reflect elements of international human rights and labour standards⁵⁸.

The *United Nations Guiding Principles on Business and Human Rights*⁵⁹ provide a framework for realizing Environmental, Social and Governance standards within the human rights framework by enshrining the corporate responsibility to respect human rights. They are the world's most authoritative, normative framework guiding responsible business conduct and addressing human rights abuses in business operations and global supply

⁵² Ibid

⁵³ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 24/01/2024)

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ The Danish Institute for Human Rights., 'Integrated Review and Reporting on SDGs and Human Rights.' Available at https://sdghelpdesk.unescap.org/sites/default/files/2019-07/integrated_review.pdf (Accessed on 24/01/2024)

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ United Nations Guiding Principles on Business and Human Rights., Available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf (Accessed on 24/01/2024)

chains⁶⁰. The Principles are grounded in recognition of States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and the need for rights and obligations to be matched to appropriate and effective remedies when breached⁶¹. Among the fundamental principles under the framework is that business enterprises should respect human rights⁶². This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved⁶³. Embracing the United Nations Guiding Principles on Business and Human Rights can therefore promote corporate respect for human rights under the ESG agenda. In addition, *The Hague Rules on Business and Human Rights Arbitration*⁶⁴ flow from the UN Guiding Principles on Business and Human Rights and provide a framework through which business entities can be compelled to comply with ESG standards through arbitration.

Further, the *Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct*⁶⁵ are recommendations jointly addressed by governments to multinational enterprises to enhance the business contribution to Sustainable Development and address adverse impacts associated with business activities on people, planet, and society. The Guidelines provide that Multinational Enterprises should respect the internationally recognised human rights of those affected by their activities⁶⁶. They further urge Multinational Enterprises to avoid

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid, Principle 11

⁶³ Ibid

⁶⁴ The Hague Rules on Business and Human Rights Arbitration., Available at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-HumanRights-Arbitration_CILC-digital-version.pdf (Accessed on 24/01/2024)

⁶⁵ Organization for Economic Cooperation and Development (OECD)., 'Guidelines for Multinational Enterprises on Responsible Business Conduct' Available at <https://www.mofa.go.jp/mofaj/files/100514804.pdf> (Accessed on 24/01/2024)

⁶⁶ Ibid

causing or contributing to adverse human rights impacts and address such impacts when they occur;⁶⁷ seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts;⁶⁸ have a publicly available policy commitment to respect human rights;⁶⁹ carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts;⁷⁰ and provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts⁷¹. One of the key goals of ESG is to foster sustainable, responsible or ethical investments⁷². The OECD Guidelines can help Multinational Enterprises achieve this goal by integrating human rights due diligence in their investment practices⁷³.

Further, the *International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work*⁷⁴ seeks to foster respect for fundamental human rights and freedoms at work. The ILO Declaration stipulates that in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential⁷⁵. It sets out fundamental human rights and freedoms that should be upheld by all persons including states and businesses among them being the freedom of association and the effective recognition of

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Ibid, Part IV

⁷² Stuart. L.G et al., 'Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance.' Op Cit

⁷³ Simmons & Simmons., 'Human Rights Due Diligence as Part of 'Social' in ESG.' Op Cit

⁷⁴ International Labour Organization., 'Declaration on Fundamental Principles and Rights at Work.'

Available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf (Accessed on 24/01/2024)

⁷⁵ Ibid

the right to collective bargaining;⁷⁶ the elimination of all forms of forced or compulsory labour;⁷⁷ the effective abolition of child labour;⁷⁸ the elimination of discrimination in respect of employment and occupation; and a safe and healthy working environment⁷⁹. The ILO Declaration is an expression of commitment by governments, employers' and workers' organizations to uphold basic human rights and values that are vital to social and economic lives⁸⁰.

At a continental level, the African Commission on Human and Peoples' Rights through its *Resolution on Business and Human Rights in Africa*⁸¹ states that respect for human rights norms and principles by business enterprises in the countries of operation is a prerequisite for the Sustainable Development envisaged in African Union's Agenda 2063⁸². The Resolution seeks to foster effective domestication of applicable regional human rights standards on business and human rights and the development of mechanisms for their effective implementation⁸³. It urges Africa to embrace a human rights-based approach to development⁸⁴.

At a national level, the *Nairobi Securities Exchange (NSE) ESG Disclosures Guidance Manual*⁸⁵ encourages listed companies to assess impact of ESG issues to their organisations (such as climate change and *human rights*) in addition to their organisations own ESG impacts to society (such as material resource use and emissions) when

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ International Labour Organization., 'Business and the Labour Dimension of Human Rights Due Diligence.' Available at https://www.ilo.org/empent/areas/business-helpdesk/WCMS_867782/lang-en/index.htm (Accessed on 24/01/2024)

⁸¹ African Commission on Human and Peoples' Rights., 'Resolution on Business and Human Rights in Africa' -ACHPR/Res.550 (LXXIV), 2023

⁸² Ibid

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Nairobi Securities Exchange., 'ESG Disclosures Guidance Manual.' Available at <https://www.nse.co.ke/wp-content/uploads/NSE-ESG-Disclosures-Guidance-Manual.pdf> (Accessed on 24/01/2024)

determining material ESG impacts for disclosure (Emphasis added)⁸⁶. It requires listed companies to report on several ESG issues including their impacts on human rights, and how they manage these impacts⁸⁷. The NSE Disclosures Guidance Manual is therefore important in enhancing respect for human rights by listed companies in Kenya by requiring them to report on their human rights practices in their ESG Disclosures.

From the foregoing, it emerges that human rights are well placed within the ESG framework at the global, continental and national levels. However, it has been pointed out that some corporations fail to connect human rights standards and processes with ESG criteria and investment practices because of a prevailing lack of understanding on how human rights issues should be reflected in social criteria, environmental and governance indicators⁸⁸. In addition, it has been contended that in most instances where human rights are considered in the ESG framework, they are limited to the 'S' tenet of ESG and not incorporated in other factors⁸⁹. Further, it has been argued that the human rights criteria adopted by most companies is limited to addressing climate change, advancing diversity and safety in the workplace, and striving for ethical supply chains⁹⁰. It has been pointed out that while these issues are critically important, they do not reflect the full spectrum of human rights⁹¹. As a result of the foregoing, it has been contended that ESG as a framework does not sufficiently capture harms to people (and resulting risk to business) or guide decisions that take human rights into account⁹². Further, it has been argued that ESG can easily fail to identify and address notable human rights harms⁹³.

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Office of the High Commissioner for Human Rights., 'Investors, ESG and Human Rights.' Op Cit

⁸⁹ Ibid

⁹⁰ Rydzak. J., 'ESG Data Needs a Human Rights Upgrade.' Available at <https://rankingdigitalrights.org/mini-report/esg-data-needs-a-human-rights-upgrade/#:~:text=ESG%20scores%20ignore%20human%20rights,strive%20for%20ethical%20supply%20chains> (Accessed on 25/01/2024)

⁹¹ Ibid

⁹² Munoz. P., 'Bridging the Human Rights Gap in ESG.' Op Cit

⁹³ Ibid

It is therefore necessary to embrace human rights within the ESG framework in order to foster sustainability.

3.0 Way Forward

In order to integrate human rights within the ESG framework, there is need for corporations to embrace human rights due diligence⁹⁴. Human rights due diligence consists of a process that allows companies to identify, prevent and mitigate their actual and potential adverse impacts on human rights and account for how they address such impacts⁹⁵. Human rights due diligence involves the actions taken by a company to both identify and act upon actual and potential human rights risks for workers in its operations, supply chains and the services it uses⁹⁶. Further, it has been defined as a process for identifying, preventing, mitigating and addressing human rights impacts, including both actual impacts occurring in the present and potential impacts that could occur in the future⁹⁷. The *United Nations Guiding Principles on Business and Human Rights* provide that in order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human right⁹⁸.

Human rights due diligence has been advocated as a key measure for enterprises to proactively manage potential and actual adverse human rights impacts⁹⁹. It has been

⁹⁴ International Labour Organization., 'Business and the Labour Dimension of Human Rights Due Diligence.' Op Cit

⁹⁵ Ibid

⁹⁶ Ethical Trading Initiative., 'Human Rights Due Diligence.' Available at <https://www.ethicaltrade.org/insights/issues/human-rights-due-diligence> (Accessed on 25/01/2024)

⁹⁷ Geneva Centre for Security Sector Governance., 'Human Rights Due Diligence.' Available at <https://www.securityhumanrightshub.org/toolkit/factsheets/human-rights-due-diligence.html> (Accessed on 25/01/2024)

⁹⁸ United Nations Guiding Principles on Business and Human Rights., Op Cit

⁹⁹ Office of the High Commissioner for Human Rights., 'Corporate Human Rights Due Diligence - Identifying and Leveraging Emerging Practices.' Available at <https://www.ohchr.org/en/special-procedures/wg-business/corporate-human-rights-due-diligence-identifying-and-leveraging-emerging-practices#:~:text=The%20prevention%20of%20adverse%20impacts,people%2C%20not%20risks%20to%20business> (Accessed on 25/01/2024)

argued that the prevention of adverse impacts on people is the main purpose of human rights due diligence¹⁰⁰. The process not only identifies impacts a corporation directly causes, but also impacts it contributes to or is directly linked to through its business relationships, operations, products and services¹⁰¹. Further, it has been pointed out that engaging with stakeholders especially affected groups such as workers and communities is a key component of human rights due diligence¹⁰². It is therefore necessary for companies to embrace human rights due diligence in order to effectively embrace human rights within their ESG framework.

In order to effectively embrace human rights due diligence, companies should effectively identify and assess actual or potential adverse human rights impacts that they may cause or contribute to through their own activities, or which may be directly linked to their operations, products or services by their business relationships¹⁰³. In addition, there is need for corporations to integrate findings from impact assessments across relevant company processes and take appropriate action according to their involvement in the impact¹⁰⁴. Further, it is imperative for companies to track the effectiveness of measures and processes adopted to address adverse human rights impacts in order to know if they are working and communicate on how impacts are being addressed and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place¹⁰⁵. Further, it has been suggested in order to be effective, human rights due diligence should take a conflict-sensitive approach which means that the process emphasizes effectively preventing, managing and addressing conflict, including by seeking to understand wider conflict dynamics and related risks in the operating environment especially in complex environments¹⁰⁶.

¹⁰⁰ Ibid

¹⁰¹ Geneva Centre for Security Sector Governance., 'Human Rights Due Diligence.' Op Cit

¹⁰² Ibid

¹⁰³ Office of the High Commissioner for Human Rights., 'Corporate Human Rights Due Diligence - Identifying and Leveraging Emerging Practices.' Op Cit

¹⁰⁴ Ibid

¹⁰⁵ Ibid

¹⁰⁶ Geneva Centre for Security Sector Governance., 'Human Rights Due Diligence.' Op Cit

Human rights due diligence is therefore vital in embedding human rights within the ESG agenda. It has been suggested that human rights due diligence should be embraced by companies as an ongoing risk management process¹⁰⁷. It has been pointed out that companies can conduct effective human rights due diligence through several ways including through conducting a stand-alone human rights impact assessment or by integrating a thorough human rights evaluation into existing environmental and social impact assessment processes¹⁰⁸. In addition, it has been suggested that human rights due diligence can both inform and be informed by the company's other assessments and analyses such as risk assessments, situation analyses, needs assessments¹⁰⁹. Human rights due diligence is therefore a key idea that needs to be embraced in order to entrench human rights within the ESG agenda.

In addition, at a continental level, several measures have been suggested towards embracing human rights in business operations towards fostering sustainable, responsible or ethical investments in the Continent. For example, it has been suggested that there is need to mainstream human rights into trade under the African Continental Free Trade Area (AfCFTA) and ensure that the implementation of the AfCFTA does not have an adverse effect on human rights¹¹⁰. Implementation of the AfCFTA is expected to boost Intra-African trade and investments some which could potentially have negative impacts on human rights in the Continent¹¹¹. Further, it has been suggested that there is need for the African Union to expedite the adoption of its Business and Human Rights Policy Framework (the AU Policy Framework on Business and Human Rights) which is

¹⁰⁷ Office of the High Commissioner for Human Rights., 'Corporate Human Rights Due Diligence - Identifying and Leveraging Emerging Practices.' Op Cit

¹⁰⁸ Geneva Centre for Security Sector Governance., 'Human Rights Due Diligence.' Op Cit

¹⁰⁹ Ibid

¹¹⁰ Feldman, D., Mkhize, M., & Edmonds-Camara, H., '2023 African Forum on Business and Human Rights: What do companies need to know?.' Available at <https://www.globalpolicywatch.com/2023/09/2023-african-forum-on-business-and-human-rights-what-do-companies-need-to-know/> (Accessed on 25/01/2024)

¹¹¹ Ibid

designed to act as a roadmap for regulating the impact of business conduct on human rights in Africa and to encourage cohesive implementation of the United Nations Guiding Principles on Business and Human Rights by African states¹¹². In addition, it has been pointed out that there is need for African countries to develop National Action Plans (NAPs) on Business and Human Rights in order to articulate their priorities, implementation strategies and commitments to human rights¹¹³. Finally, African courts including the African Court on Human and Peoples' Rights, regional courts such as the Common Market for Eastern and Southern Africa (COMESA) Court of Justice, the Court of Justice of the Economic Community of West African States (ECOWAS) along with other regional and national courts have a key role to play in shaping jurisprudence on Business and Human Rights in the Continent¹¹⁴.

Finally, it is necessary to strengthen ESG reporting and enforcement mechanisms on human rights¹¹⁵. It has been observed that recent ESG trends have driven the requirement by businesses to report on human rights as evidenced by emerging legal frameworks requiring companies to report on human rights and environmental issues, emerging mandatory human rights due diligence legislation, and increased legal enforcement and litigation risks¹¹⁶. Global, regional and national ESG frameworks including the *United Nations Guiding Principles on Business and Human Rights*, the *European Union's Corporate Sustainability Reporting Directive*, and the *Nairobi Securities Exchange (NSE) ESG Disclosures Guidance Manual* require companies to report on their human rights standards on either voluntary or mandatory basis¹¹⁷. Further, the United Nations (UN) *Guiding Principles*

¹¹² African Commission on Human and Peoples' Rights., 'Resolution on Business and Human Rights in Africa' -ACHPR/Res.550 (LXXIV), 2023, Op Cit

¹¹³ Feldman. D., Mkhize. M., & Edmonds-Camara. H., '2023 African Forum on Business and Human Rights: What do companies need to know?.' Op Cit

¹¹⁴ Ibid

¹¹⁵ Mikhaeel. M., 'How Human Rights Due Diligence Affects the 'E' in ESG.' Available at <https://www.financierworldwide.com/how-human-rights-due-diligence-affects-the-e-in-esg> (Accessed on 25/01/2024)

¹¹⁶ Ibid

¹¹⁷ Ibid

*Reporting Framework*¹¹⁸ offers a comprehensive guidance for companies to report on human rights issues in line with their responsibility to respect human rights. It is important for companies to embrace the requirements on reporting in order to strengthen their approaches towards human rights. It is also vital to enhance enforcement of human rights in ESG through approaches such as public enforcement by the state and its agencies such as the capital markets and private enforcement through ESG litigation among other measures¹¹⁹.

Through the foregoing among other approaches, human rights will be firmly entrenched within the ESG agenda.

4.0 Conclusion

Human rights are central in the ESG debate. The 'S' tenet of ESG covers social factors including human rights, labour relations, employee welfare, community engagement, diversity and inclusion¹²⁰. Corporations are increasingly required to safeguard human rights as envisaged by 'S' pillar of ESG¹²¹. ESG frameworks at global, regional and national levels including the *United Nations Guiding Principles on Business and Human Rights*¹²², the *European Union's Corporate Sustainability Reporting Directive*¹²³, and the *Nairobi Securities Exchange (NSE) ESG Disclosures Guidance Manual*¹²⁴ require companies to comply and report on human rights. Despite the recognition of the place of human rights in ESG, human rights are yet to be fully entrenched within the ESG framework¹²⁵. ESG can therefore easily fail to identify and address notable human rights harms¹²⁶. It is

¹¹⁸ UN Guiding Principles Reporting Framework., Available at https://www.ungpreporting.org/wp-content/uploads/UNGPRreportingFramework_2017.pdf (Accessed on 25/01/2024)

¹¹⁹ Kemp. B et al., 'The Rise of ESG Litigation and Horizontal Human Rights Enforcement.' Available at <https://www.lexology.com/library/detail.aspx?g=07a94453-f2aa-490a-a7e1-f6c25256cbf9> (Accessed on 25/01/2024)

¹²⁰ Henisz. W, Koller. T, & Nuttall. R., 'Five Ways that ESG Creates Value.' Op Cit

¹²¹ Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' Op Cit

¹²² United Nations Guiding Principles on Business and Human Rights., Op Cit

¹²³ European Union's Corporate Sustainability Reporting Directive., Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464> (Accessed on 25/01/2024)

¹²⁴ Nairobi Securities Exchange., 'ESG Disclosures Guidance Manual.' Op Cit

¹²⁵ Office of the High Commissioner for Human Rights., 'Investors, ESG and Human Rights.' Op Cit

¹²⁶ Munoz. P., 'Bridging the Human Rights Gap in ESG.' Op Cit

imperative to embrace human rights in ESG. This calls for fostering human rights due diligence¹²⁷; embracing national and continental approaches towards human rights in ESG¹²⁸; and strengthening ESG reporting and enforcement mechanisms on human rights¹²⁹. Promoting human rights in ESG is an important agenda that needs to be actualized towards Sustainable Development.

¹²⁷ International Labour Organization., 'Business and the Labour Dimension of Human Rights Due Diligence.' Op Cit

¹²⁸ Feldman. D., Mkhize. M., & Edmonds-Camara. H., '2023 African Forum on Business and Human Rights: What do companies need to know?.' Op Cit

¹²⁹ Mikhaeel. M., 'How Human Rights Due Diligence Affects the 'E' in ESG.' Op Cit

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