Katholieke Universiteit Leuven
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The Legalization of Corporate Social Responsibility:
Towards a New Doctrine of International Legal Status in a Global Governance Context

De juridisering van maatschappelijk verantwoord ondernemen:
naar een nieuwe doctrine van internationale rechtsstatus in de context van 'global governance'

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Table of Contents

List of abbreviations 7

Summary 9

1 Objective of the Thesis 11

1.1 The Problem Statement of the Thesis 12
1.1.1 The Legal Definition of Corporate Social Responsibility and Business` Human Rights Responsibilities. 12
1.1.2 CSR and the International Legal Status of Business Enterprises 15
1.1.3 Business and Human Rights and International Legal Status in a Global Governance Context 16
1.2 Structure of the Thesis 18
1.3 Research Methodology 23

2 Factual and Legal Origins of the UN Guiding Principles: The Emergence of the Business and Human Rights Agenda 26

2.1 Introduction 26
2.2 The 1970s: International Codes of Conduct 26
2.3 The 1980s-90s: Globalization and the CSR Movement 34
2.3.1 The Regulatory Challenges Posed by Globalization: Closing the Gaps 34
2.4 The 2000s: The Business and Human Rights Movement and the UN Norms 52
2.4.1 The UN Norms 53
2.4.2 The Legal Authority of the UN Norms 57
2.5 Conclusion 68

3 The UN Guiding Principles on Business and Human Rights: Theoretical Foundations and Principled Pragmatism 72

3.1 Introduction 72
3.2 The SRSG's Project and Its Theoretical Foundations 73
3.2.1 Embedded Liberalism Compromise and the Pursuit of a Macro Agenda: Framing the Problem 73
3.2.2 The Constitutive Public Domain and Polycentric Governance 76
3.2.3 The SRSG's Approach of Principled Pragmatism 79
3.2.4 The UNGPs as a Platform for Institutionalist Reform 83
3.2.5 An Institutional Approach to Resolving Governance Gaps 85
3.3 The UN Guiding Principles on Business and Human Rights 89
3.3.1 The General Principles 89
3.3.2 The State Duty to Protect 91
3.3.3 Corporate Responsibility to Respect Human Rights 101
3.3.4 Access to Remedies 104
3.4 Conclusion 105

4 The Evolution of the Corporate Responsibility to Respect Human Rights: from a Soft into a Hard Obligation for Companies under National and International Law? 107

4.1 Introduction 107
4.2 The Legal Status of the UN Guiding Principles on Business and Human Rights as Soft Law 108
4.3 The Choice of Soft Law v. Hard Law: Why the SRSG decided not to Recommend the Negotiation of an Overarching International Treaty 112
4.4 A Soft-Law Approach to Corporate Responsibility to Respect Human Rights and Expectations of Compliance 119
4.4.1 Context 120
4.4.2 Content of the Norm 121
4.4.3 The Institutional Setting 124
4.4.4 Preliminary Considerations 132
4.5 A Scenario for an Emerging Regulatory Regime on Business and Human Rights 132
4.6 The State Duty to Protect and Regulatory Action to Ensure Business Respect for Human Rights 139
4.6.1 The 2011 Statement by the Committee on Economic, Social and Cultural Rights 141
4.6.2 General Comment No. 16 of the Committee on the Rights of the Child 142
4.6.3 The 2016 Recommendation by the Committee of Ministers of the Council of Europe on Human Rights and Business 145
4.7 The Feasibility and Desirability of a Legalization of the Corporate Responsibility to Respect at National and International level 148
4.8 The Implementation of the UNGPs: the UN Working Group on Business and Human Rights 151
4.8.1 Mandate 152
4.8.2 Strategic Considerations and Work Streams 154
4.8.3 National Action Plans 154
4.8.4 Measurement 156
4.8.5 Support for External Initiatives 159
4.8.6 The UN Human Rights System 161
4.8.7 UN Forum on Business and Human Rights and Regional Forums 163
4.9 The Treaty Initiative 165
4.10 Conclusion 168

5 Human Rights Due Diligence as a Legal Concept: its Characteristics and Reformatory Potential 170

5.1 Introduction 170
5.2 The Human Rights Due Diligence Concept 172
5.2.1 Preliminary Considerations 172
5.2.2 Human Rights Due Diligence: Substantive Measures Required 173
5.3 Human Rights Due Diligence as a Standard of Conduct: a Balancing Exercise 187
5.4 The Human Rights Due Diligence Concept from an International Human Rights Perspective 189
5.5 Human Rights Due Diligence as an Open-Ended and Adaptable Concept 194
5.6 Conclusion 199

6 The Role of Tort Law and Private International Law in Operationalizing the Human Rights Due Diligence Concept: Towards a Presumption of a Legal Duty of Human Rights Due Diligence 201

6.1 Introduction 201
6.2 Private International Law, Human Rights and Human Rights Due Diligence 202
6.2.1 Jurisdiction: the Brussels I Regulation / Brussels Recast 202
6.2.2 Applicable law: the Rome II Regulation 216
6.2.3 Human Rights, EU law and EU Private International law 221
6.3 Substantive Liability 222
6.3.1 Preliminary Considerations 222
6.3.2 Primary Liability for Negligence and the Legal Duty of Care: Chandler v. Cape 224
6.3.3 Complicity Liability 228
6.3.4 Piercing the Corporate Veil 234
6.3.5 Preliminary Considerations 240
6.4 A Presumption of a Legal Duty of Care Based on the Human Rights Due Diligence Concept 247
6.4.1 Human Rights Due Diligence as a Standard of Fault 247
6.4.2 The Rationale for Introducing a Legal Duty of Human Rights Due Diligence 250
6.4.3 A Human Rights Due Diligence Defense: Too Much Protection for Companies? 252
6.4.4 A 'three stage' test 254
6.4.5 Setting a Penalty through a Balancing Act: The Case of Trafigura 255
6.4.6 A Legal Duty of Care for Human Rights Due Diligence Through Statute 257
6.4.7 The French Proposal to Create a Legal Duty of Vigilance 260
6.4.8 What should be the Law Governing the Conduct? 263
6.4.9 What Implications for Jurisdiction? 268
6.5 Conclusion 271

7 The Role of Mandatory Disclosure in Operationalizing Human Rights Due Diligence: the Case of the EU Directive on Non-financial Disclosure and Board Diversity 272

7.1 Introduction 272
7.2 The UNGPs and the Corporate Responsibility to Disclose on Human Rights 275
7.3 The Non-Financial Reporting Directive: Origin and Objectives 276
7.3.1 Legislative History and Factual Origins 276
7.3.2 Rationales and Objectives 278
7.3.3 Fragmentation 280
7.3.4 Disclosure as a Regulatory Tool 281
7.4 The non-financial Reporting Directive and the Human Rights Due Diligence Concept: Exploring the Links 283
7.4.1 Mandatory Disclosure on Corporate Respect for Human Rights 283
7.4.2 Conceptual Clarity: The Due Diligence Concept 286
7.5 The Non-Financial Reporting Directive in the Light of the Doctrines of 'Direct' and 'Indirect' Effect 288
7.5.1 Indirect Effect of the Directive and EU Protected Fundamental Rights 288
7.5.2 Direct Effect 293
7.6 The Non-Financial Reporting Directive: Flexibility of Action and Effectiveness 295
7.6.1 The Disclosure Requirements and Flexibility 296
7.6.2 Verification 306
7.7 Human Rights Due Diligence and the Concept of the Group Entity 306

7.8 The Extraterritorial Dimension of the Directive: Disclosure on Respect for Human Rights in Corporate Supply Chains 318
7.8.1 The Extraterritorial Dimension of the Directive 318
7.8.2 The Scope of the Disclosure Requirements 321
7.8.3 Extraterritorial (indirect) Regulatory Effects 323
7.9 Legal Implications of Mandatory Disclosure on Due Diligence 324
7.9.1 The UK Modern Slavery Act 2015 326
7.9.2 California's Transparency in Supply Chain Act of 2010 327
7.9.3 Mandatory Disclosure on Human Rights Due Diligence and Transnational Supply Chain Cases 328
7.9.4 Mandatory Disclosure and the Link to Director's Duties 331
7.10 Conclusion 335

8 The EU's Contribution to the Normative Evolution of the Corporate Responsibility to Respect Human Rights: Critical Reflections on the European Commission's Strategy on CSR. 338

8.1 Introduction 338
8.2 The Evolution of EU CSR Policy and its Human Rights Dimension 339
8.2.1 The Origins of EU CSR Policy 339
8.2.2 EU CSR Policy and Human Rights 342
8.2.3 The EU Response to the Protect, Respect Remedy Framework and the UNGPs 344
8.3 The Renewed EU CSR Strategy 2011-2014 346
8.3.1 EU Competences in the Area of Business and Human Rights 349
8.3.2 A New Definition and Approach to CSR 351
8.4 An Agenda for Action 2011-14 353
8.5 The Impact of EU Action on Fostering Business Responses to the UNGPs 354
8.5.1 Fostering Business Responses to the UNGPs: the Concept of Corporate Respect for Human Rights 354
8.5.2 EU Action to Promote the Union's Response to the UNGPs 355
8.5.3 EU Action to Promote State Responses to the UNGPs 357
8.5.4 EU Action to Promote Responses to the UNGPs through Markets and Social Pressure 358
8.5.5 EU Action to Promote Business Responses to the UNGPs 358
8.5.6 The Agenda for Action: EU Follow-Up 359
8.6 EU Action: Fostering Responses to the UNGPs 360
8.6.1 National Action Plans 360
8.6.2 Peer Review Mechanism 366
8.6.3 Compendium on CSR National Public Policies in the EU 366
8.6.4 Analysis of NAPs 368
8.7 EU Regulatory and 'Smart Mix' Measures 369
8.7.1 The Revision of the EU Public Procurement Directives 369
8.7.2 The EU Draft Conflict Mineral Regulation 373
8.7.3 The EU Proposal on Shareholder Engagement and Transparency at EU Level 378
8.8 Analysis 380
8.9 Conclusion 385

9 The International Legal Status of Business Enterprises: Towards a New Doctrine? 388

9.1 Introduction 388
9.2 The Legal Personality of Business Enterprises: Traditional Conceptions of Legal Personality 388
9.2.1 The 'States-Only' Conception 389
9.2.2 The 'Recognition' Conception 395
9.2.3 The 'Individual' Conception 408
9.2.4 The 'Formal' Conception 415
9.2.5 The 'Actor' Conception 421
9.3 Conclusion 433

10 Conclusion 438

Bibliography 451

Book Chapters and Edited Works 451
Cases 458
Journal Articles 462
Legislation and Implementing Acts 471
News Articles and Blogs 476
Reports, Research Papers and Policy Briefs 481

List of abbreviations

ATCA	Alien Tort Claims Act
BIT	Bilateral Investment Treaty
BHR	Business and Human Rights
CEDAW	Committee on the Elimination of Discrimination Against Women
CFREU	Charter of Fundamental Rights of the European Union
CJEU	European Court of Justice
CRC	Convention on the Rights of the Child
CSR	Corporate Social Responsibility
CtESCR	United Nations Committee on Economic, Social and Cultural Rights
CtRC	United Nations Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
FRAME	Fostering Human Rights Among European Policies
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GRI	Global Reporting Initiative
HRC	United Nations Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFC	International Finance Corporation
ILO	International Labour Organisation
IMF	International Monetary Fund
ISO	International Organization for Standardization
MNE	Multinational Enterprise
NAFTA	North American Free Trade Agreement
NAP	National Action Plan
NCP	National Contact Point
NGO	Non-Governmental Organisation

NHRI	National Human Rights Institution
NIEO	New International Economic Order
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OJ	Official Journal
PCIJ	(League of Nations) Permanent Court of International Justice
RAFI	Human Rights Reporting and Assurance Frameworks Initiative
SME	Small and Medium-sized Enterprises
SOMO	Centre for Research on Multinational Corporations (Stichting Onderzoek Multinationale Ondernemingen)
SRSG	Special Representative of the Secretary-General on the issue of human rights and transnational and other business enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNEP	United Nations Environmental Program
UNGA	United Nations General Assembly
UNGC	United Nations Global Compact
UNGPs	United Nations Guiding Principles on Business and Human Rights
UN Norms	Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights
US	United States
WG BH	United Nations Working Group on Business and Human Rights
WTO	World Trade Organisation

Summary

Business enterprises have assumed a prominent role in the international arena. With operations and relations encompassing the entire globe, their activities have impacts on essential interests of an economic, financial, environmental and social nature. There is an established concern that many, if not most, national jurisdictions are unable or unwilling to exercise effective control over business enterprises. The legal challenges faced in disciplining the increasingly powerful, wealthy and mobile business enterprises are well documented. The focus and aspirations of human rights has shifted towards corporate social responsibility ('CSR') initially. Calls for business enterprises to assume governance responsibilities have resulted in a proliferation of international CSR regulatory schemes and transnational norms that have acquired non-negligible regulatory effects. As part of the social aspect of CSR, human rights have developed into one of the core considerations of CSR. Calls for legal corporate accountability for negative human rights impacts gained in strength as the legitimacy and effectiveness of voluntary CSR initiatives became questioned. However, the attempts to create a legally binding instrument on business and human rights at the international level have not materialized.

The polarization of the debate on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights ('UN Norms) along the conflicting positions of the CSR and the business and human rights movement resulted in the failure of this initiative, with the result of the appointment of John Ruggie as the UN Secretary-General's Special Representative on Business and Human Rights (the 'SRSG') in 2005. The SRSG opted for an approach of 'principled pragmatism' in the pursuit of what was, in essence a macro-project. The SRSG developed a three-pillared 'Protect, Respect, Remedy' Framework for a better functioning systems for business and human rights governance on a global scale. Adopted by the Human Rights Council (the 'HRC') in 2008, this Framework articulated a common definition of corporate responsibilities to respect human rights, which furthermore linked business conduct to the public construction of internationally recognized human rights. This responsibility is a soft norm founded in social expectations, and thus, strictly speaking from a formalistic positivist perspective, of a non-legally binding nature. However, such responsibility is not without any legal relevance. The SRSG developed the UN Guiding Principles on Business and Human Rights (the 'UNGPs') to serve as a platform for guidance and action to translate the above mentioned Framework to practice. The HRC 'endorsed' the UNGPs in 2011. The UN Working Group on Business and Human Rights (the `WG BH`) was created in 2011 to promote the effective implementation and dissemination of the UNGPs.

Looking back at five years of implementation efforts, the point of the legalization of the corporate responsibility to respect human rights has become increasingly noteworthy. The basic assumption is that the corporate responsibility to respect human rights, as it is currently conceived, should further evolve and acquire normative force and 'binding-ness' in practice. Whilst it is always a matter of legal obligation for States to adopt the necessary rules and regulations to ensure that business enterprises respect human rights in practice, the scenario of the corporate responsibility to respect human rights acquiring normative force and the translation of such responsibility into a 'hard' (legally binding) norms at the national, regional and international level has become less distant. There are ever-increasing calls for legislation creating legal obligations of due diligence for companies at the national and supranational (EU) level. Further legal developments at the international level are anticipated with the creation, within the

HRC, in 2013 of an inter-governmental working group with a mandate to develop an internationally legally binding instrument on business and human rights.

Partially as a result of the substance of the corporate responsibility to respect being indicative of the content of potential future legal ('hard') norms, an analysis of such responsibility, its legal character and content becomes of the utmost legal relevance. The thesis examines the intensity of implementation efforts, identifies gaps and assesses the extent to which States have an obligation to incorporate and embed the concept of human rights due diligence into existing laws and regulations. This analysis, in turn, generates novel insights and impetus for reconsidering the international legal personality of business enterprises in a global governance context. CSR regulatory initiatives are trends in global governance that increasingly question the relevance of the (arguably still dominant) positivist perspective and, hence, conventional doctrines on international legal personality. This thesis will confront, and test the validity of, existing doctrinal approaches to the legal personality of business enterprises with the evolving realities in the emerging business and human rights regime. In doing so, insights will be drawn from theoretical approaches to global governance to determine the impact of CSR in the thorny topic of 'subjects of (international) law' and what, if anything, makes business enterprises 'legal persons' in a global governance context.

1 Objective of the Thesis

The objective of this thesis is to examine the desirability of a revision of current doctrinal approaches to the legal status of business enterprises in light of recent developments in the definition and regulation of business responsibilities for human rights within the context of global governance. The objectives of the thesis are the following:

The *first* objective is to assess the conception that currently reflects an international consensus, *i.e.* the corporate responsibility to respect human rights, the (legal) character of this concept and its substantive content. This entails an examination of the origins, goal and objectives of the UNGPs in which this concept has been recognized and 'endorsed' by the HRC.

A *second* objective is to assess in detail the basic assumption that the implementation of the UNGPs will affect the evolution of this soft-law instrument (as the UNGPs have been conceived), into a more binding norm and, possibly, its translation into 'hard' norms, be it under national, supranational (EU) and international law. The thesis sets out a possible future scenario for the 'legalisation' of corporate responsibility to respect human rights that keeps within the thrust of the UNGPs and reflects current realities in the human rights landscape. The thesis will assess the way in which the design of this responsibility and, more precisely, its core element of human rights due diligence, enables such legalisation. The thesis will also address the intensity of implementation efforts, identify gaps and demonstrate the need and obligations of States to adopt regulatory measures in order to scale up efforts.

Third, the thesis will link these findings to doctrinal debates on the international legal status of business enterprises. It will be concluded that traditional legal perspectives have become increasingly unhelpful in appreciating how CSR is becoming legalized within a global governance context. A new doctrine on international legal status is therefore called for. This thesis aims to fill this gap in academic literature.

This project aims to answer to the following research questions.

Have CSR, and the responsibilities of business enterprises for human rights, been legally defined in and fully adopted by international law, European law and national law? (with a particular emphasis in UK and US law).

In the affirmative, have these responsibilities been defined as a new category of legal obligations with corresponding rights and obligations or as a reconceptualization of other areas of the law?

If the answer to preceding question is that a new category arises, does this constitute the breakthrough that makes business enterprises subjects of international law from a positivist legal perspective?

Can new forms of international CSR regulation be analysed in legal terms, even if they are found not to be a part of international law in the legal positivist sense of the word? Why? (or why not?).

What makes CSR have 'legal status' in a global governance context?

1.1 The Problem Statement of the Thesis

1.1.1 The Legal Definition of Corporate Social Responsibility and Business` Human Rights Responsibilities.

Business enterprises have assumed a prominent role in the international arena. With operations and relations encompassing the entire globe, their activities have impacts on essential interests of an economic, financial, environmental and social nature. In the 1990s, the benefits of globalization were increasingly questioned. Concerns about unprecedented power of corporations and the perceived negative impact of their activities, including an alleged 'race to the bottom' in business regulations and an alleged regulatory vacuum at the domestic and international level, triggered calls for business enterprises to assume greater governance responsibilities. The focus and aspirations of human rights shifted towards corporate social responsibility (`CSR`) initially. A rich history of theories, approaches and terminologies on CSR has developed since the 1950s, when it was first introduced as a management idea.[1] CSR gained new momentum and a CSR 'movement'[2] arose, which resulted in a proliferation of a plethora of CSR regulatory initiatives ranging from principles, codes of conduct and norms to guidelines and framework conventions.[3] Business enterprises play an important role in the development of these initiatives, claiming to protect human rights in production processes and business activities.[4]

The notion of business enterprises having responsibilities towards human rights is not new to CSR scholarship. Human rights developed into a key social concern of CSR in the 1970s, although it was more narrowly defined then as encompassing labour and worker rights.[5] It is by now well-established that the human rights responsibilities of business largely inform and define the social aspect of CSR. However, the CSR approach to human rights diverges considerably from the positivist approach based on the understanding of human rights as moral and legal entitlements with corresponding legally binding obligations. This approach views human rights as part of a broader CSR agenda that covers substantive issues like transparency, management and community investment. It holds, moreover, that human rights address corporate activities directly and are premised on the notion that it is not governments, but rather employees, investors, consumers and the public who should be the drivers and enforcers of CSR initiatives.[6]

The voluntary/mandatory dichotomy has long captured the CSR discourse. Still today, many scholars continue to view business responsibilities as mere voluntary undertakings. CSR is

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[1] *See, e.g.*, Rangan Kasturi, et al. *Business Solutions for the Global Poor: Creating Social and Economic Value*, (Jossey-Bass 2007).

[2] Michael R. Macleod, *Emerging investor networks and the construction of corporate social responsibility*, The Journal of Corporate Citizenship, 69-96 (2009).

[3] Deborah Leipziger, The Corporate Social Responsibility Code Book (Greenleaf Publishing, 2003).

[4] CRS has not only left a mark on management literature, the phenomenon has been analysed philosophically, sociologically, economically, psychologically and even aesthetically. O. Alvar Elbing, *The Value Issue of Business: The Responsibility of the Businessman* 13 The Academy of Management Journal, 79-89 (1970).

[5] Florian Wettstein, *From side show to main act: can business and human rights save corporate responsibility*, *in* Business and Human Rights: From Principles to Practise (Dorothe Baumann-Pauly & Justine Nolan eds., 2016).

[6] *Id.*

viewed as voluntary not only in the sense of non- binding legally speaking, but also discretionary in a moral sense, and thus 'hardly a 'must` for companies`.[7] CSR has been traditionally referred to as obligations beyond the law and voluntary commitments of firms towards the societies in which they operate.[8] Whilst legal scholars take ('hard' law) obligations, compliance and corporate liability as point of departure, the CSR narrative has focused on 'softer' forms of responsibility, self-regulation and sustainability. Conventional conceptions of CSR perceive markets and business enterprises as belonging to the private domain, which is separated from the public domain, which is organised by the State.[9] The scarcity of domestic and international legal regulation imposing binding obligations upon business enterprises vis-à-vis a specified legal or natural person is thus often emphasised. This narrow approach to CSR and its human rights aspect more specifically, has not only caused uncertainty about its exact scope, it has also made scholars question the role of law in it.[10]

CSR has therefore long remained outside the scope of legal analysis. A legal debate on CSR unfolded as scholars began to point to the various manners in which CSR has legal implications including for legal studies; to demonstrate *why* CSR constitutes a legitimate field of legal study;[11] establishing that certain substantive issues of CSR like health and safety are already subject to legal regulation;[12] setting out how the principles that underlie international CSR initiatives are often derived from legal instruments;[13] according to which CSR embodies values of the spirit of the law that serve as inspiration and guidance to CSR;[14] explaining that the law can act as a driver for greater corporate accountability and, conversely, that CSR can influence national and international legal trends.[15] As scholars seek to assess these (reciprocal) linkages between CSR and law, the voluntary/mandatory distinction pervasive the CSR debate has been noted to become 'unhelpful'.[16]

The status quo in the CSR legal debate was pushed forward by a publication by Kerr, Janda & Pitts (2009) entitled 'Corporate Social Responsibility: a legal analysis'. The authors review seven sustainable development principles that fuse in the concept of CSR to examine how 'hard' and 'soft' law have given substance, meaning and accountability to CSR initiatives. The

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7 Wettstein, *supra* note 5, at 80.

8 Andrew Crane, et al., The Oxford Handbook of Corporate Social Responsibility (Oxford University Press 2009).

9 Wettstein, *supra* note 5, at 80.

10 J.A. Zerk, Multinationals and corporate social responsibility: limitations and opportunities in international law (Cambridge University Press. 2006).

11 M. Torrance, Corporate Social Responsibility: A Legal Analysis (book review), 56 McGill Law Journal, 483-480 (2011).

12 Zerk, *supra* note 10.

13 K Buhmann, *Regulating Corporate Social and Human Rights Responsibilities at the UN Plane: Institutionalising New Forms of Law and Law-making Approaches?*, 78 Nordic Journal of International 1-52 (2009).

14 Michael Kerr, et al., Corporate Social Responsibility: A Legal Analysis (LexisNexis. 2009).

15 Zerk, *supra* note 10.

16 Kerr, et al., *supra* note 14.

argument of these authors holds that these principles have merged with formal law to such an extent that CSR can be characterized as a legally meaningful concept.[17] Whilst their work provides further justification for legal interest in CSR and presents a valuable framework to explain the manner in which CSR can be analysed from a legal perspective, it has been noted that the authors often struggle to find definite conceptual anchors for their analysis.[18] Moreover, the authors pay scant attention to whether CSR has been legally defined in the law and, if so, how?

The legal debate on the human rights responsibilities of business enterprises (BHR) has developed independent from and in parallel to the debate on CSR.[19] Its origins can be traced back to the 1990s when the true impact of globalisation became more apparent. The BHR scholarship views an active role for States and national and international legislation to hold business enterprises legally accountable for human rights abuses, including through selective human rights litigation. Calls for legal corporate accountability gained in strength as the legitimacy and effectiveness of voluntary CSR initiatives became questioned. However, the attempts to create a legally binding instrument on business and human rights at the international level have not materialized. The polarization of the debate on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights ('UN Norms') along the conflicting positions of the CSR and the business and human rights movement led to the failure of this initiative, with the result of the appointment of John Ruggie as the UN Secretary-General's Special Representative on the issue of human rights and transnational and other business enterprises (the 'SRSG') in 2005.

The SRSG developed a three-pillared 'Protect, Respect, Remedy' Framework for a better functioning systems for business and human rights governance on a global scale. Adopted by the Human Rights Council (the 'HRC') in 2008, this Framework articulated a common definition of corporate responsibilities to respect human rights, which furthermore linked business conduct to the public construction of internationally recognized human rights. The responsibility to respect entails not only that business enterprises must comply with all applicable laws, it also includes a responsibility to respect internationally recognized human rights, wherever they operate. This is a negative responsibility to do no harm, yet it calls for affirmative 'due diligence' steps to identify, prevent and mitigate the human rights risks deriving from their operations and account how these are addressed.[20] This responsibility is a soft norm founded in social expectations, and thus, strictly speaking from a formalistic positivist perspective, of a non-legally binding nature.

The responsibility to respect human rights may not constitute, in and of itself, a legal definition of CSR or create international legal obligations for business enterprises as such. John Ruggie has clearly stated that, in his view, business enterprises presently do not have direct human rights obligations under international law. The emphasis is therefore placed in the corporate 'responsibility', rather than a 'duty' to respect, and in 'social expectations' rather than 'legal obligations'.[21] However, such responsibility is not without any legal relevance. The SRSG

[17] *Id.*

[18] *Id.*

[19] Wettstein, *supra* note 5, at 80.

[20] Kerr, et al., *supra* note 14, at 15.

[21] *Id*.

developed the UN Guiding Principles on Business and Human Rights (the 'UNGPs') to serve as a platform for guidance and action to translate the above mentioned Framework to practice. The HRC 'endorsed' the UNGPs on 23 June 2011. The UN Working Group on Business and Human Rights (the `WG BH`) was created in 2011 to promote the effective implementation and dissemination of the UNGPs.

The UNGPs have spurred new legislative and policy initiatives at the national, supranational (EU) and international level across the globe. The EU Commission`s new policy initiative on CSR including proposals on the further implementation of the PRR Framework is a case in point. Also, the UNGPs have served as input in the process of updating and creating new global CSR instruments, including the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the International Finance Corporation (IFC)'s Performance Standards, the Global Reporting Initiative ('GRI'), and ISO26000. Recent years has seen the development of hybrid and private initiatives, some sector or issue specific, instruments and tools that seek to enhance standards and practices through innovative approaches. It is in this aspect that the corporate responsibility to respect human rights may constitute the point of departure that elevates, once and for all, the responsibilities of business enterprises for human rights from the management narrative to a firm legal plane.

The basic assumption is that the corporate responsibility to respect human rights, as it is currently conceived, should further evolve and acquire normative force and 'binding-ness' in practice. Whilst it is always a matter of legal obligation for States to adopt the necessary rules and regulations to ensure that business enterprises respect human rights in practice, the scenario of the corporate responsibility to respect human rights acquiring normative force and the translation of such responsibility into a 'hard' (legally binding) norms at the national, regional and international level has become less distant. There are ever-increasing calls for legislation creating legal obligations of due diligence for companies at the national and supranational (EU) level. Looking back at five years of implementation efforts, the point of the legalization of the corporate responsibility to respect human rights has become increasingly noteworthy. Further legal developments at the international level are anticipated with the creation, within the HRC, in 2013 of an inter-governmental working group with a mandate to develop an internationally legally binding instrument on business and human rights.

1.1.2 CSR and the International Legal Status of Business Enterprises

Clarity about whether and how CSR has been legally defined is highly relevant within the broader context of international law, specifically in relation to the international legal personality of business enterprises. The international legal personality of business enterprises remains a contested and intensely debated issue. The (arguably still dominant) positivist legal perception of a State-based international legal system holds that States are the only or primary international legal subjects of international law. This reasoning finds a (perhaps counterintuitive) support in the conclusion of the International Court of Justice in the *Reparations for Injuries* case, according to which the UN is a subject of international law 'capable of possessing international rights and duties' with a capacity to 'maintain its rights by bringing international claims'.[22] In the

[22] *See Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr 11).

absence of a treaty or convention that regulates the international legal personality of business enterprises, or an explicit recognition by States of business enterprises as legal persons in international law, some legal scholars do not consider business enterprises to have any legal personality.[23] Others view business enterprises as participants in international law with a legal capacity recognized by customary law to obtain international rights and duties. The extent and nature of the rights and duties of business enterprises may not be identical to those of States,[24] nevertheless there is support for the view that international law confers at least some degree of international legal status to business enterprises.

This conventional view on the international legal personality of business enterprises increasingly stands challenge. Legal scholars have argued that such traditional approaches fail to capture the legal relevance of non-State actors in today's international system. The legalization of CSR could shed new light on this controversial matter. If CSR has been defined as a new category of legal obligations at the international level, an analysis of the exact legal capacities that CSR confers on business enterprises under customary international law and international treaty law becomes crucial in the assessment of the current legal status of business enterprises in international law. This involves a study of whether (1) CSR imposes rights and duties upon business enterprises, (2) whether these can be legally enforced and (3) whether these rights and duties have been recognized by States. Could this be the breakthrough required to interpret the current status of business enterprises as making them international legal persons of international law? Is it desirable?

1.1.3 Business and Human Rights and International Legal Status in a Global Governance Context

Business and Human Rights as a new field of 'global governance' has had a profound impact on modern international law. According to Fauchald and Stigen, 'global governance' is a concept widely used by scholars across disciplines to capture certain empirical characteristics of evolutions in international politics that are largely left unaccounted for by traditional perspectives on international relations. In the midst of an ever expanding and diversifying body of research on this hot, yet controversial topic, legal literature on global governance most often ponders on two key observable phenomena: the emergence of new normatively relevant global regulatory processes and the role played by non-State actors in their development and enforcement.[25] The emergence of civil society actors, business enterprises and various CSR regulatory initiatives in the business and human rights domain are illustrative of such global governance trends. Also referred to as 'poly-centric governance',[26] the SRSG has noted three

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[23] O.K. Fauchald & J. Stigen, *Corporate Responsibility Before International Institutions*, 40 The George Washington International Law Review (2009).

[24] *See Reparations for Injuries, supra* note 22, at 179.

[25] K. Nowrot, Global governance and international law (Inst. für Wirtschaftsrecht. 2004).

[26] Vincent Ostrom, Charles Tiebout, and Robert Warren (1961) first introduced the concept of 'polycentricity', in the words of nobel price winner Elinor Ostrom:

> In their effort to understand whether the activities of a diverse array of public and private agencies engaged in providing and producing of public services in metropolitan areas was chaotic, as charged by other scholars – or potentially a productive arrangement. 'Polycentric' connotes many centers of decision making that are formally independent of each other. Whether they actually function independently, or instead

distinct governance systems that have come to affect the conduct of business enterprises in relation to human rights. Apart from the system of public law and policy, national and international, there is 'the civil governance system involving external stakeholders that are affected by or otherwise have an interest in multinationals' and the 'corporate governance, which internalizes elements of the other two'.[27]

In this context, as noted by Mares, the SRSG's 'project was not a legalistic one, to begin with, […]. [The SRSG's] project would be one of mobilizing many more sources of leverage for the protection of human rights, rather than moving liability upwards towards the parent company. To succeed, this "leverage project" would require a multifaceted narrative of globalization that accounted explicitly for its threats and opportunities for protecting human rights transnationally'.[28] As a result, in the words of […] Sauvant 'policies have become more nuanced, international guidelines have been strengthened and new ones added, and some agreements have become more cautious […]. Rulemaking may therefore be haphazard, messy and uneven, depending on what is needed and what is feasible in a given constellation of interests and forces. But, hopefully, over time, the combination of various instruments add up to a regime that covers, comprehensively and in a balanced manner, the range of issues related to international investment, including issues related to human rights'.[29]

Positivist legal doctrines increasingly fail to capture these trends, partly because the initiatives are not legally binding in the traditional sense of the law and are not directly linked to the will of sovereign States or governments. Legal theories on global governance, notably regulatory theory, have studied these phenomena. They describe and conceptualize how new forms of global regulation are generated, what their legitimate sources of law are and the regulatory authority they exercise.[30] [31] Theories on global governance thus analyse new regulatory initiatives in legal

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> constitute an interdependent system of relations, is an empirical question in particular cases. To the extent that they take each other into account in competitive relationships, enter into various contractual and cooperative undertakings or have recourse to central mechanisms to resolve conflicts, the various political jurisdictions in a metropolitan area may function in a coherent manner with consistent and predictable patterns of interacting behavior. To the extent that this is so, they may be said to function as a 'system'.

Ostrom, Elinor, Beyond Markets and States: Polycentric Governance of Complex Economic Systems, Prize Lecture, (Dec. 8, 2009), https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2009/ostrom_lecture.pdf. Vincent Ostrom, et al., *The Organization of Government in Metropolitian Areas: A Theoretical Inquiry* 55 The American Political Science Review, 831-32 (1961).

[27] John Gerard Ruggie, Just Business Multinational Corporations and Human Rights, xliii (W.W. Norton & Company. 2013).

[28] R. Mares, *A Rejoinder to G. Skinner`s rethinking limited liability of parent corporations for foreign subsidiaries` violations of international human rights law* 73 Washington and Lee Law Review Online, 1-24 (2016).

[29] Karl P. Sauvant, *Looking Back, Looking Ahead: What lessons should we learn from past UN efforts to adopt a Code of Conduct on Transnational Corporations*, Institute for Business and Human Rights (Apr. 16, 2016), http://www.ihrb.org/other/treaty-on-business-human-rights/looking-back-looking-ahead.

[30] Kevin Kolben, *Transnational labor regulation and the limits of governance, Theoretical inquiries in law (2011).* 12 Theoretical Inquiries in Law 403(2011).

[31] These include Global Administrative Law ('GAL'), 'New Governance'[31] and 'Legal Pluralism'. GAL, for example, provides a unique perspective of explaining global governance as administrative action. It presupposes the existence of a global administrative space where the distinction between national and international becomes

terms without relying on international law in the legal positivist sense of the word. However, if CSR becomes increasingly 'legalized' in a non-traditional legal manner, several relevant questions arise including, *inter alia*, 'what makes global CSR regulation "legal"' and 'what makes business enterprises have "legal personality" in the global governance context'?

1.2 Structure of the Thesis

Chapter 2 examines the evolution of the regulatory landscape on CSR and business and human rights. These origins are traced back to the 1970's when the first international codes of conducts were adopted. The chapter provides a condensed overview of the most important regulatory initiatives and their conceptions of business' responsibility for human rights, as well as the evolving socio-political context in which these arose. The ideological, institutional and political factors that have played a role in previous efforts to create international legally binding standards on business and human rights will be identified. This chapter addresses two movements that have emerged in the 1980's, namely the CSR movement and the Business and Human Rights Movement. While these movements are aligned in their quest to respond to the regulatory problems deriving from the activities of corporations in a globalized world, their conceptions and regulatory agenda's differ in crucial aspects. The divisions between them resulted in a polarization of debates in the UN and in negotiations on a previous UN initiative of the UN Norms to go into impasse. These political challenges that the former UN Commission on Human Rights (replaced by the HRC in 2006) faced have informed also the SRSG's approach of principled pragmatism and the strategic and normative considerations that have guided the SRSG in the fulfilment of his mandate.

Chapter 3 assesses the SRSG's project in its own terms, and analyses the theoretical foundations underpinning the UNGPs. The focus is on the character of the UNGPs as a global normative framework for business and human rights, and their functionality in advancing a dynamic approach to institutional developments on a global scale. The UNGPs are set out to begin a long term process of enhancing standards and practices that can result in more effective governance systems and a global regime for the effective prevention of, and remedy for, business-related human rights harm. This chapter will provide a synopsis of the SRSG's views on the embedded liberalism compromise, which has been of importance in framing the problem in the business and human rights domain. This is followed by a brief description of the SRSG's views on the constitutive global public domain and 'polycentric' governance. The UNGPs incorporate these views, and articulate norms that correspond with the public role and responsibilities that business enterprises and other non-state actors have in the current human rights landscape. The SRSG's approach of principled pragmatism will be addressed next. This is followed by an explanation of the 'Protect, Respect, Remedy' Framework and the UNGPs as a platform for systemic change and the characteristics of the institutional approach that the UNGPs promotes in order to advance

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blurred and in which regulatory activities are also carried out beyond formally public, government structures, most notably by 'hybrid private-public or purely private institutions'. N. Krisch & B. Kingsbury, *Introduction: Global governance and global administrative law in the international legal order*, 17 European Journal of International Law (2006). Kevin Kolben, *Transnational labor regulation and the limits of governance, Theoretical inquiries in law (2011).* 12 Theoretical Inquiries in Law 403(2011). Schiff Paul Berman, *Global legal pluralism*, 80 Southern California Law Review, 1155-1237 (2007).

towards the constitution of a global business and human rights regime. This is followed by a description of the UNGPs.

Chapter 4 examines the SRSG's soft law approach to the corporate responsibility to respect human rights. The focus is the potential contribution of the UNGPs to the evolution of this norm from 'soft' law into more binding, and their potential translation into a hard law norm ('legalisation') at the national, supranational (EU) and international level. This responsibility is a social norm founded in international social expectations. While this norm is thus not non-legally binding in a strict legal sense, this 'soft' norm is not without legal effects. This chapter explores the factors (i.e., context, content, and institutional setting) that can explain compliance (i.e., factual adherence) by business enterprises with this norm. The UNGPs promotes a regulatory dynamic that affects and coordinates the regulation of these factors. This dynamic draws from the implementing measures adopted by key stakeholders and their governance systems (national and international public law and governance, civil and corporate governance). The resulting corporate responsibility to respect human rights may take on normative force as result of its restatement in more precise language and acceptance by State and non-state actors, and binding force as a result of ideational factors and its internalization in business practices and cultures. This chapter argues that a transposition of this norm into a hard norm at the national level can and should happen if the duties and responsibilities of States and business enterprises, as recognized by the UNGPs, are given full effect in order to promote the normative objective of ensuring human rights and fundamental freedoms. The following section explores the degree and intensity of efforts to implement the UNGPs. This involves an examination of the strategic priorities and activities of the WG BH, *inter alia*, National Action Plans, State and business surveys, stakeholder engagement and the UN Forum on Business and Human Rights.

Chapter 5 examines in greater detail the corporate responsibility to respect human rights. The focus is on the concept of human rights due diligence and its potential to drive analytical improvements in, and facilitate convergence across national laws affecting business behaviour. The focus of this chapter is the (legal) character of the human rights due diligence concept as a standard of conduct and form of compliance. The human rights due diligence concept may be used also in the sense of a forward-looking management process aimed at the prevention of adverse human rights impacts. The UNGPs do not exclude the resort to the human rights due diligence concept in either way, as a management process or a standard of conduct. This chapter will explain and emphasise human rights due diligence as a legal concept. This involves an analysis of the interpretations of this concept and an evaluation of differences and similarities between this concept and other (legal) due diligence concepts used in various areas of law. The substantive and procedural aspects of human rights due diligence will be explained in relation to due diligence under corporate law and securities law. The legal character of human rights due diligence will be explored by comparison to the duty of care concept which currently exists under certain national (tort) laws of non-contractual obligations. The balancing act that the human rights due diligence concept entails will be explored further through a parallelism with the due diligence obligations that are applicable to States under International Human Rights law.

The chapter will reflect on the functionality of the human rights due diligence concept in terms of enabling and promoting future legal developments within legal systems. The design and open-endedness of the concept lends easily to its implementation in different areas of law. This facilitates the further crystallization of the corporate responsibility to respect human rights and

its transposition into legal obligations at the national (or even supranational, i.e., EU) level. The further 'hardening' of the human rights due diligence concept into a legal obligation under different national laws is desirable to foster corporate cultures respectful of human rights. It should be recalled, in this regard, that International Human Rights law imposes obligations on States to adopt such regulatory measures as necessary in order to ensure that business enterprises meet their responsibility to respect human rights in practice. The human rights due diligence concept may thus be viewed as a reformatory concept, bound to fruitfully redefine the standards of due diligence that different areas of the legal order currently set out for business enterprises. The human rights due diligence through the restatement of these standards in other areas of law that affect business behaviour may contribute to the reconceptualization of such laws.

Chapter 6 examines the legal implications of giving effect to the corporate responsibility to respect human rights as defined in the UNGPs through Tort law and EU and national Private international law. The chapter examines the intertwinement of private international law with human rights in general and, more specifically, with human rights due diligence. It will be found that the human rights due diligence concept can have a role in a court's decisions on jurisdiction and which country's substantive law to apply to the underlying dispute. The chapter explores in detail the main approaches to establishing civil liability of a parent entity for human rights breaches that are the result of the activities of its subsidiary outside the EU. These three approaches are: (i) negligence; (ii) complicity; and (iii) piercing the corporate veil. The chapter examines the extent to which these approaches are challenged by and can be reconciled with the concept of human rights due diligence.

It will be argued that, if the concept of human rights due diligence is to be operationalized in an optimal manner, a rebuttable presumption of a legal duty of human rights due diligence as the standard for liability should be considered. Such presumption would be construed on the basis of the human rights due diligence concept as defined by the UNGPs. Amendments to EU Private international law to achieve such objective will also be suggested. The possibility of creating a legal duty of human rights due diligence through statute will be discussed next. Finally, a reference will be made to the proposed French law creating a legal duty of vigilance, since it constitutes a particularly illustrative example of the manner in which such duty of care can work in practice. The Chapter examines the effects of such duty in reinforcing State responses to UNGP 7(d), according to which 'States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'.

The value of creating such a legal duty of human rights due diligence is assessed within the broader context of the business and human rights system and the regulatory dynamics within this system. The legal duty of human rights due diligence is viewed as a method to advance towards a maximum reduction in adverse human rights impacts by business enterprises through legalisation. Attention will be drawn to the transnational regulatory effects that such duty may create and the solution it could offer to current challenges in regulating transnational corporate networks, which are of particular focus in business and human rights domain. From the perspective of polycentric governance, the focus more generally is on the potential impact of such legal duty on the incentives and capacities of business enterprises, and other related factors that explain human rights compliance behaviour by such entities in practice.

Chapter 7 will examine the legal implications of giving effect to the corporate responsibility to respect human rights as defined in the UNGPs, through EU and national mandatory disclosure legislation. The focus is on Directive 2014/95/EU, of 22 October 2014, as regards disclosure of non-financial and diversity information by certain large undertakings and groups ('the Directive'). The chapter examines the potential of the Directive in fostering a culture of reporting and communication by business, in conformity with UNGPs 17 and 21, which articulate the responsibility of business enterprises to communicate. Chapter 7 also examines the effect of the Directive in reinforcing State responses to UNGP 3, according to which, in meeting their duty to protect, States should 'encourage, and where appropriate require business enterprises to communicate how they address their human rights impacts'. More precisely, this chapter explores the connections between the approaches of the Directive to defining the scope of the application, obligation and required substance and the human rights due diligence concept.

First, the chapter analyses the so-called 'indirect' and 'direct' of the Directive. It is argued that the Directive is unlikely to acquire direct effect, *inter alia*, since to the extent that such direct effect is framed as obligations for (non publicly-owned) corporations vis à vis stake holders (NGOs, shareholders, etc.), it would be hard for the Directive to overcome the CJEU's prohibition of direct effect of Directives. Which is not to say that the Directive will not have *any* legal effects. Apart from the indirect effects the Directive may have, stakeholders might file a complaint for a breach of EU law before the European Commission in order for the Commission to bring an action against the Member State in question before the CJEU pursuant to Article 258 TFEU. All in all, it is concluded that by enacting the Directive, the EU opted for a *type of legal instrument* which has potentially sweeping implications in the rights of stakeholders when it comes to the disclosure obligations of corporations. However, irrespective to the *type* of instrument chosen, as will be explained in detail, in particular, in relation to the 'comply or explain' framework, it is uncertain whether the *content* of the Directive will contribute to further the rights of stake-holders.

Second, the chapter will set out the manner in which the Directive confirms the importance of regulating and increasing the transparency of human rights due diligence within a corporate group. It was found that the Directive supports a functional approach to the notion of 'group' that might potentially go beyond the more traditional conception of the group entity in law that centers on notions of control and ownership. The application of such traditional approach to delineate the boundaries of the group entity for the purpose of disclosure on human rights would be unduly restrictive. Third, this chapter will also argue that the Directive, in the light of its objectives and pursuant to well-established case-law supporting a purposive interpretation of secondary EU legislation should have certain extraterritorial effects. The analysis in the chapter suggests, in short that the adoption by the EU of disclosure requirements for certain companies on human rights due diligence, while being a welcome development, nonetheless provides only a partial response to the UNGPs, and in certain aspects, may even restrict EU Member States in their implementation of the UNGPs.

The analysis in the chapter, concludes, in relation to the Directive, that the adoption by the EU of disclosure requirements for certain companies on human rights due diligence, while being a welcome development, nonetheless provides only a partial response to the UNGPs, and in certain aspects, may even restrict EU Member States in their implementation of the UNGPs. Finally, the chapter will briefly reflect on recent developments which indicate that the information on human

rights due diligence that companies may disclose in order to comply with the requirements of the Directive, or national legislations in the United Kingdom ('UK') and United States ('US') that regulate the disclosure by companies on slavery and trafficking-related risks in corporate supply chains, may be used by Non-Governmental Organisations ('NGOs') for the purpose of transnational supply chain litigation.

Chapter 8 sets out the efforts of the EU to foster responses to the UNGPs and examines the potential contribution of the EU to the normative evolution of the corporate responsibility to respect human rights in the EU and beyond. The European Commission issued the Communication 'A renewed EU Strategy 2011-14 for Corporate Social Responsibility' (the 'EU CSR Strategy') on 25 October 2011. This communication provides the European Commission's internal policy framework for the promotion of CSR, and business respect for human rights and sets out a renewed European Strategy for CSR.[32] The European Commission recognizes in this communication human rights as a prominent aspect of CSR that business enterprises should address, and indicates that it seeks policy consistency with global approaches in promoting CSR, inter alia, the UNGPs. The European Commission's CSR Strategy presents a new definition of CSR, 'the responsibility of enterprises for their impact on society'. Also a new plan of action is introduced, one which advances a 'smart-mix' approach pursuant to which, besides voluntary measures, a role for complementary regulation is envisaged.

This chapter assesses the EU's concrete efforts to foster respect for human rights by business enterprises in the EU and beyond. The chapter focuses on the activities of the EU to affect and coordinate the regulation of factors (context, content, institutional setting) that explain human rights compliant conduct in practice. The EU advances a dynamic regulatory approach that fosters responses by the EU itself, EU Member States, third countries, business enterprises, NGOs and other relevant stakeholders. Special attention will be paid to aspects of EU CSR policy that signal the possible translation of the corporate responsibility to respect from 'soft' law into more binding norms and, potentially, its translation into 'hard' hard law norms ('legalisation') at the national, European and international level. The EU advances a dynamic regulatory approach that fosters responses by the EU itself, EU Member States, third countries, multi-stakeholder initiatives and business enterprises. This chapter argues that there is scope for the EU to increase its level of engagement with the UNGPs in order to actively implement this commitment. The chapter also notes that the substance of the efforts of the EU and the regulatory responses by the EU, States, business enterprises and other actors to the UNGPs, provide indication of evolving practices in relation to corporate responsibility and accountability for human rights and the crystallization of corporate respect for human rights in the EU context.

Chapter 9 examines the legal status of business enterprises in the international system. This chapter sets out different doctrinal approaches to international legal personality and how such status has been conferred to actors in the international system, including to non-State actors. The chapter will reflect the different doctrinal perspectives on the legal status of business enterprises. These perspectives will be confronted with the evolving reality in the business and human rights regime. I will examine the extent to which developments in the implementation of the UNGPs inform these debates and the validity of these approaches in light of the current state of affairs. It

[32] Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play, 6, SWD (2015) 144 final (Jul. 14, 2015).

will tackle the question whether CSR can be analysed in legal terms without recourse to international law in the traditional positivist sense of the concept and, if so, how. This will allow the identification and analysis of those characteristics that makes CSR have 'legal status' and business enterprises have 'legal personality' in a context of global governance. In a critique of these theories, the thesis will determine whether the theories adequately capture today's global governance realities and if an adjustment or expansion of these theories is called for. It will be argued that a new doctrine on international legal status is called for, one which adequately reflects today's global governance realities. The new insights gained will pave the way for the construction of a new doctrine on international legal status.

1.3 Research Methodology

This thesis resorts to a combination of desk-top research and comparative studies. The specificities of the methodology resorted to will be set out in detail below. More precisely, I conduct a study of primary sources (i.e., legislation and case law at the national, regional and international level) to find, organize and interpret legal standards, practices and developments that are relevant for the regulation of the corporate responsibility to respect human rights as defined in the UNGPs.

I will examine legal materials in the *national* legal system of the UK. The analysis is confined to this legal system, partially due to the ease of availability of reliable sources in the English language. Perhaps more importantly, the Common law jurisdiction of the *UK* is one of the most advanced European legal systems in terms of legalizing CSR. For example, the UK Company Act 2006 placed CSR at the heart of director's functions by rendering it mandatory for directors to take into consideration the interests of stakeholders when managing the company. New director's duties were supplemented by new reporting requirements for UK public companies that call upon directors to prepare a report each financial year reflecting on certain social and environmental matters. Unlike in most other jurisdictions, these duties are accompanied by penalties for non-compliance.[33] The UK has been regarded as a precursor in terms of having been the first to launch a national action plan on business and human rights in 2013. Moreover, the UK has been a prominent venue for the enforcement of business activities through corporate liability. The analysis of how the responsibilities of business enterprises in relation to human rights have been defined within the UK legal context and the UK's engagement with the UNGPs is therefore highly relevant.

The thesis will furthermore examine selected legal materials from the legal system of the *US*. The reason for this is threefold. It was in the US that the idea of CSR originated and the practice of CSR first emerged. CSR has flourished in the US partly due to the its loosely regulated markets for labour and capital, the low level of welfare state protection and the emphasis placed on individual freedom and responsibility. As one of the world's largest economies with business enterprises having impacts on a global scale, the commitment of the US to CSR is of great significance. More importantly, legislative initiatives in the US in the area of, *inter alia*, conflict minerals and modern-day slavery and trafficking have served as a drivers and inspiration for policy changes and regulatory initiatives at the national (i.e., UK) and European level. Moreover, the enforcement of corporate liability has been firmly established in the US: the US is one of few

[33] *See* the UK Companies Act 2006, c.46, S 423.

legal systems, which provides an effective venue for adjudicating civil liability for harm committed by companies operating abroad, under the US Alien Tort Claims Act (the 'ATCA').[34]

At the *regional* level, this Chapter will conduct a study of the principle sources of primary and secondary EU law (*i.e.*, Regulations, Directives and Decisions) as well as the rulings which the European Court of Justice (the 'CJEU') has rendered in this context. The analysis of the legal concept of CSR in the EU has been timely, with the EU Commission having issued a communication setting out a renewed CSR Strategy in 2011. Relevant considerations are that this Communication presents a renewed EU definition of CSR, the EU aim of seeking policy alignment with the global approaches to CSR, the commitment of the EU to the implementation of the UNGPs, as well as the renewed Agenda for Action for 2011-2014, which encompasses regulatory actions besides voluntary actions to promote CSR. The European Commission's departure from the entirely voluntary approach to CSR policy it adopted in several previous initiatives, has revived hopes for further regulatory developments supportive of business respect for human rights in the EU context.

In European countries (unlike, to some degree in the US), issues core to CSR, like healthcare and education, have been considered part of the government agenda and have been object of regulation.[35] Some aspects of CSR are already object of EU regulation, such as reporting obligations, misleading advertising,[36] unfair commercial practices and public procurement standards. Many of these regulations can be applied directly by judges in domestic courts.[37] Also, in the light of the EU's large internal market, role in foreign direct investment and community values, its stance on CSR can influence business enterprises and suppliers from every region in the world.[38]

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[34] The ATCA, 28 U.S.C. §1350 provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. Alien Tort Claim Act, U.S.C. United States.

[35] Andrew Crane et al., Corporate Social Responsibility: Reading and Cases in a Global Context (Routledge 2008).

[36] A business enterprise may be held liable for inaccurate or incomplete representation about CSR or non-compliance with codes of conduct on the basis of the 2005 Unfair Commercial Practices Directive. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (`Unfair Commercial Practice Directive`), 2005, O.J. (L 149), 22. Also *see*, the updated version of the guidance document on the application of this Directive. Commission Staff Working Document: Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, accompanying the document Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions; A comprehensive approach to stimulating cross border e-commerce for Europe`s citizens and businesses {COM(2016) 320}, COM(2016) 163 final (May 25, 2016). Corporate liability may also arise on the basis of the 2006 Directive Concerning Misleading and Comparative Advertising. Directive 2006/114/EC, of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, 2006 O.J. (L 376) 21.

[37] Cf. *e.g.*, Case 213/89 Factortame, 1990, E.C.R. I-02433.

[38] Kerr, et al., *supra* note 14, at 568.

At the *international* level, I will undertake an examination of the legal obligations of States and business enterprises under international law, deriving from treaties or international custom and practice in different areas of international law (international human rights law, international criminal law and international economic law) and case law interpreting these obligations, as well as secondary academic sources.

Two comparative studies will be conducted.

First, I will compare the *elements* of the human rights due diligence component of the corporate responsibility to respect, as defined in the UNGPs. The study will analyse the elements of this concept by comparison to legal definitions of the due diligence that have been used in other areas of law (*e.g.*, Civil law, Company law, Securities law and, of course, International Human Rights Law). A comparison of due diligence definitions can result in an enhanced understanding of the elements of the human rights due diligence concept and hence, the (legal) character of the corporate responsibility to respect human rights as a standard of conduct.

Second, on the basis of these findings, the legal *definitions* of CSR as identified in the policies and laws adopted within the respective legal systems will be examined. This will involve a comparison between corporate responsibility to respect human rights, as defined in the UNGPs and the definitions of CSR encountered in EU policy and legislation, as well as the national legal system of the UK and the US in the specific areas that regulate business responsibilities in relation to human rights (e.g., conflict minerals and modern-day slavery). The examination of the reasons for the similarities and differences in concepts to the UNGPs and implications will be based on a study of secondary sources (i.e., academic journal articles, books, policy documents etc.) elaborating upon the legal context and origins of the respective legislative or measures and the legal system more generally.

2 Factual and Legal Origins of the UN Guiding Principles: The Emergence of the Business and Human Rights Agenda

2.1 Introduction

This chapter provides an overview of relevant initiatives that emerged over the course of the previous decades to regulate the conduct of business enterprises in relation to human rights. The first attempts to regulate these at the international level can be traced back to the early 1970s when the first international codes of conduct were adopted, though business practices of CSR date back centuries.[1] The analysis will shed light on the problem that regulatory initiatives seek to address, which relate to the challenges that globalisation has posed to society to regulate business in order to ensure that individuals are protected against infringements of their human rights by business, and that remediation is available in case such abuses have occurred. The chapter will address various contextual, ideological and political factors that caused previous attempts to create international legally binding standards on business and human rights to be unsuccessful. Attention will be drawn to two movements that emerged in the 1980s to respond to the negative impacts by globalization; the CSR movement and the Business and Human Rights Movement. The division between these movements whose agendas divert on critical points has affected previous attempts to create international standards for business and human rights. Prominent among such attempts is the initiative of draft UN Norms that stranded after the debate in the UN had turned divisive and polarized. This initiative will be examined in further detail. The aim of this chapter is to shed light on factual and legal origins of the mandate of the SRSG. The context in which the mandate of the SRSG was created and the factors that led to previous unsuccessful attempts to regulate business enterprises through hard obligations proved to be of importance in the SRSG`s choice for the approach of 'principled pragmatism', which guided the SRSG in the fulfillment of his mandate. The next chapter will examine this approach and the SRSG`s project.

2.2 The 1970s: International Codes of Conduct

The 1970s witnessed increasing concerns about the overarching power of MNEs on the national development agendas of countries at different stages of development.[2] The power of MNEs was reflected in their size and geographical spread. Their sales in goods and services amounted to billions of dollars. They exceeded the size of the domestic economies of most of the 150 countries existing at the time. While headquartered in developed countries, the majority of MNEs had affiliates in many developing countries across the world. MNEs employed a large percentage of the global workforce. Their production-distribution systems extended globally. The MNEs had significant financial resources at their disposal for research and innovation. Due

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[1] John Ruggie & Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* (John F. Kennedy School of Government, Corporate Social Responsibility Initiative Working Paper No. 66, 2015).

[2] A. Ramasastry, *Closing the governance gap in the business and human rights area: lessons from the anti-corruption movement, in* Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (Surya Deva & David Bilchitz eds., 2013).

to the capabilities of companies to satisfy the needs of both advanced and developing countries, their operations where perceived as important attributes to greater interdependence in international economic relations.[3] [4]

While the expansion of business enterprises was a welcome development to some,[5] [6] most developing countries perceived it as a threat to their economic and social development and possibly, to democracy.[7] A concern of newly emerging colonial States was that the asymmetry in economic relations among States and companies would create new dependencies and restrictions on their national autonomy. The hope was that by inviting the influx of large companies, business would lead to the creation of wealth, jobs, tax revenues, technological innovation, scientific know-how, and more generally, economic growth and development. These benefits were not necessarily forthcoming, however. Policies of export restrictions, repatriation of profits and intra-company transfer pricing resulted in earnings to flow out of the country, and the costs for technology, consumer goods and healthcare to rise.[8]

Reaping the benefits of increased economic activity could come at significant political and social cost for developing countries. Social tensions could run high over labor rights[9] and growing inequalities. Political misconduct by business enterprises was also not uncommon. Companies were known to leverage governments in case of conflicting interests, sometimes having the latter act under direct instructions of the foreign diplomacy of the home countries of the corporations.[10]

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[3] Werner J. Feld, *Multinational Corporations and UN Politics: The Quest for Codes of Conduct*, 5 (Pergamon Press, 1980).

[4] Their importance in developing countries varied per country and sector. In developing countries, MNEs were active especially in the extractive, agriculture and public utilities area, manufacturing and the service sector, especially banking. UN Department of Economic and Social Affairs, Multinational corporations in world development (United Nations, 1973).

[5] Companies were perceived by some as 'key instruments for maximizing world welfare'. *Id.* at 1.

[6] As catalysts of economic progress in both home and host countries, companies and their activities could equalize living standards and narrow the economic and social gap, it was argued. Centre of Transnational Corporations, *International Action on the Problem of Corrupt Practices*, 1 The CTC Reporter, 19 (1977).

[7] Sten Niklasson, *The OECD Guidelines for MNEs and the UN Draft Code of Conduct: Some Political Considerations*, *in* Studies in Transnational Economic Law (Horn ed. 1980).

[8] Feld, *supra* note 3, at 29.

[9] As explained by Hepple, wage costs and labour standards were unfairly oppressed due to social oppression, for instance wage differential per sex or forced and child labour, which has been linked to social dumping. Social dumping refers 'to costs that are for their part depressed below a 'natural' level by means of 'social oppression' facilitating unfair pricing strategies against foreign competitors. Remedial action would either consist of the offending firms consenting to raise their prices accordingly or failing that, imposing equivalent import restrictions. Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct (1999)* 20 Comparative Labor Law & Policy Journal, 347 (1999).

[10] Companies could influence governments for instance through advertisement in local media, support for corrupt practices and direct infringement in domestic affairs. Foreign diplomacy may give direct instructions to companies to exert their influence, relying on their presence in developing countries to pursue their economic policies of external raw material supply, currency rates, balance of payment equilibrium more effectively. Centre of Transnational Corporations, *supra* note 6, at 17. It has been noted that negotiations on a binding code of conduct for business enterprises begun after corporate involvement in efforts by the United States to

The perceived threat of companies encroaching on national affairs left leaders of developing countries at unease. The 1970s witnessed strategic maneuvering by these countries to consolidate international controls over the conduct of business enterprises through different forums at the international level.

The issue of MNEs was integral to a broader agenda advocated by developing countries to found a New International Economic Order (NIEO). The purpose of the NIEO was agreed at the Bandung Conference in 1955.[11] The NIEO was propelled on the UN agenda with support from the G77,[12] after which it received official backing by the UN General Assembly ('UNGA'). The 1974 Declaration for the Establishment of a New International Economic Order first introduced the concept of the NIEO, and outlined a list of core principles upon which the new order was to be founded. These principles alluded to the sovereign equality of States, broadest cooperation of all States based on equity, full and equal participation in solving world economic problems, and full permanent sovereignty of every state of its national resources and all economic activities.[13] [14]

The Plan of Action and The Charter on Economic Rights and Duties of States were passed at the same time. Article 1 of the Charter stipulated;

> Every State has the sovereign and inalienable right to choose its economic system as well as it political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.[15]

The Charter recognized the right of States to regulate and control foreign investment and the activities of transnational corporations within its national jurisdiction, including through nationalization and expropriation of foreign property, and to settle disputes before domestic courts.[16] The Plan of Action called for the development and implementation of an international code of conduct to regulate business enterprises.[17]

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destabilize regimes in Iran, Guatemala, and Chile in the 1950s and 1970s came to the light. Jeffrey J. Dunoff, et al., International law: norms, actors, process: a problem oriented approach, 220 (Aspen Publishers, 2006).

[11] Ramasastry, *supra* note 2, at 165.

[12] The Group of 77 (G77) is a loose coalition of developing nations, designed to promote its members' collective economic interests and create an enhanced joint negotiating capacity in the United Nations (for more information refer to: http://www.g77.org/doc/).

[13] Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201 (1 May 1974).

[14] With regards to MNC`s, the Declaration stated the following principle; 'Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries'. *Id.* Principle 4(g).

[15] Charter of Economic Rights and Duties of States, Article 1, G.A. Res. 3281 (XXIX), A/RES/29/3281 (Dec.12, 1974).

[16] *Id.* art. 2.

[17] The code was intended for the following purposes:

1. to prevent interference in the internal affairs of the countries where they operate and their collaboration with racist regimes and colonial administrations;

Through a strong joint representation as the G77, developing countries raised their concerns at the United Nations Conference on Trade and Development (UNCTAD), which was established in 1963. UNCTAD issued various reports and resolutions, and developed codes addressing two practices that could impact negatively on the economic development of developing countries; a special technology transfer draft code,[18] as well as principles and rules governing the use and control of restrictive business practices.[19]

Discussions were also started in the International Labour Organisation (ILO), which resulted in the adoption by the ILO Governing Body of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO Tripartite Declaration) in 1977.[20] The ILO Tripartite Declaration was as a nonbinding declaration inviting the governments of the State Members of the ILO, the employer's and workers' organisations in these host and home countries and Multinational Enterprises (MNEs) operating in their territories to observe a set of principles in the areas of employment, training, conditions of work and life, and industrial relations. These principles offered guidance on appropriate laws, policies, measures and actions that these actors may take to further social progress. They are founded on the international labour conventions and recommendations that the ILO developed since 1919, which are referenced in the text.[21] States that joined the ILO Tripartite Declaration were urged to ratify these conventions and recommendations if they have not done so already.

The ILO Tripartite Declaration recognises that MNEs make an important contribution 'to the promotion of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly; and to the enjoyment of basic human rights, including freedom of association, throughout the world'.[22] However, the ILO Tripartite Declaration also warned that 'the advances made by multinational enterprises in organising their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy

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2. to regulate their activities in host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context facilitate, as necessary, the review and revision of previously concluded arrangements;
3. to bring about assistance, transfer of technology and management skills to developing countries on equitable and favourable terms;
4. to regulate the repatriation of the profits accruing from their operations, taking into account the legitimate interests of all parties concerned; and
5. to promote reinvestment of their profits in developing countries.

[18] Draft International Code of Conduct on the Transfer of Technology, U.N. GA Res. A/RES/40/184, 119th Sess. (Dec. 17, 1985).

[19] Restrictive Business Practices, U.N. GA Resolution 35/63 (Dec. 5, 1980).

[20] The following three paragraphs originate from: Bijlmakers, et al., Report on tracking CSR responses FRAME Deliverable 7.4 (Nov. 2015, 2014), http://www.fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-7.4.pdf.

[21] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, ILO (2006), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

[22] *Id.*

objectives and with the interest of the workers'.[23] Therefore, the aim of the MNE Declaration was to provide principles and recommendations to Governments, MNEs and workers 'to encourage the positive contribution that MNEs can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise'.[24]

The ILO Tripartite Declaration calls on MNEs 'to fully take into account' and to act 'in harmony with' the established general policy objectives of the countries in which they operate, especially the development priorities and social aims of these countries.[25] To this effect, consultations must be held between the MNEs, the government and the national employers and workers organisations in these countries. Governments of home countries 'should promote good social practice in accordance with this Declaration of Principles'. These governments in so doing, must give 'regard to the social and labour law, regulations and practices in host countries as well as to relevant international standards'.[26] Both home and host countries should be prepared to have consultations with each other on these issues when need arises. The Declaration is structured around five areas, for which recommendations on particular themes are developed: (i) general policies; (ii) employment; (iii) training; (iv) conditions of work and life; (v) industrial relations. The MNE Declaration was amended in 2000 and 2006. An addendum was added in 2000, recognizing that MNEs should 'fully take into account' the objectives of the 1998 ILO Declaration on Fundamental Principles and Rights at Work.[27]

Public concerns about the political and social-economic impact of the operations of individual MNEs gave impetus to the development OECD Guidelines on MNEs in 1974, in the context of negotiations on international investment matters.[28] The first edition was adopted on 21 June 1976. The Guidelines purported to help ensure harmony between MNEs operations and the national policies of the countries in which they operated and to consolidate relations of mutual

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[23] *Id.* ¶ 1.

[24] *Id.* ¶ 2.

[25] *Id.* ¶ 10.

[26] *Id.* ¶ 12.

[27] *Id.* Addendum II.

> Article 2 of this ILO Declaration establishes that:
>
> **2.** Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;
>
> (b) the elimination of all forms of forced or compulsory labour;
>
> (c) the effective abolition of child labour; and
>
> (d) the elimination of discrimination in respect of employment and occupation.

[28] Theo W. Vogelaar, *The OECD Guidelines: Their Philosophy, History, Negotiation, Form, Legal Nature, Follow-up Procedures and Review*, *in* Legal Problems of Codes of Conduct for Multinational Enterprises, 130-131 (Norbert Horn ed. 1980).

confidence between MNEs and States.[29] The underlying rationale was the improvement of the international investment climate. The OECD Guidelines were adopted in an Annex to an OECD Declaration on international investment and MNEs.[30]

The Declaration introduced policy principles to strengthen the cooperation and consultation between member countries with regards to issues related to both international investment and MNEs.[31] The issuance of a set of joint recommendations by the members of the OECD to MNEs operating in their territory to observe the Guidelines as Annexed thereto, the OECD Guidelines for MNEs, was one of these policy principles. Governments identified a common interest in encouraging the positive contributions of MNEs to social progress and to minimize and resolve problems that could arise due to their international structure and to contribute to improving the foreign investment climate.[32] The OECD Guidelines were intended as part of a framework comprising of interrelated and complementary instruments. The OECD Council promulgated two other decisions simultaneously, as part of this framework, relating to national treatment for foreign-controlled entities and international investment incentives and disincentives.[33]

The OECD Guidelines for MNEs were thus adopted by States as joint recommendations to the MNEs that operated in their territories. The Guidelines had been created by mutual agreement between States on the Declaration. This agreement was sanctioned by a declaratory act not of the OECD, but of governments acting within the framework of the OECD.[34] While thus distinct in form from decisions and recommendations of the OECD Council, the Guidelines assumed the same effects since their implementation was entrusted to the OECD.[35] The Guidelines introduced international standards on the activities of MNEs in the different Member countries. The guidelines established that enterprises should 'take fully into account established general policy objectives of Member countries in which they operate [. . .] in particular, give due consideration to those countries` aims and priorities with regards to economic and social process'. It also addressed disclosure of information, competition, financing, taxation, employment and industrial

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[29] Norbert Horn, Legal problems of codes of conduct for multinational enterprises, 4 (Kluwer 1980). Since 1979, the OECD Guidelines for Multinational Enterprises were revised on several occasions, in 1984, 1991, 2000 and 2011. The latest 2011 version phrases the aim of the OECD Guidelines as follows; *"The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises".* OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing, preface, ¶ 1 (2011), http://dx.doi.org/10.1787/9789264115415-en.

[30] After its adoption on 21 June 1976, the OECD Declaration on International Investment and Multinational Enterprises was reviewed on several occasions (1979, 1984, 1991, 2000 and 2011), *see* http://www.oecd.org/investment/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm.

[31] Vogelaar, *supra* note 28, at 134.

[32] Declaration on International Investment and Multinational Enterprises (June 21,1976) *in* Legal Problems of Codes of Conduct for Multinational Enterprises, 452 (Horn ed. 1980).

[33] OECD, *supra* note 29, Introduction, ¶ 5.

[34] Vogelaar, *supra* note 28, at 133.

[35] *Id.*

relations and science and technology. Directed at MNEs, the Guidelines sought to correct[36] their conduct, but did not levy sanctions for noncompliance. While their promotion by States was mandatory, the Guidelines stipulate that observance by MNEs was 'voluntary and not legally enforceable'.[37]

In a separate decision related to intergovernmental consultation procedures, the Council established a follow-up and consultation procedure allowing for discussions on the application of the Guidelines by individual MNEs. The Committee on International Investment and Multinational Enterprise was tasked to hold exchange of views on relevant issues and experiences in the application of the Guidelines, and to report periodically to the Council on these matters, to which the BIAC and the TUAC were allowed to contribute. Business enterprises could be given the opportunity to express their views. The purpose of the consultations was not to evaluate the individual conduct of MNEs, but to express views, and to provide understanding and clarification of the Guidelines that would inform the 1979 review of the Guidelines.[38] The Commission was not authorized to issue conclusions on the conduct of individual enterprises.[39] In 1984, the Members of the OECD agreed to establish a complaints mechanism in each government, so-called 'National Contact Points' (NCPs), that were tasked to not only promote the OECD Guidelines, but also 'to contribute to the solution of problems that may arise' related to the observance of the Guidelines.[40]

Another international initiative to regulate the conduct of business enterprises was adopted in 1977, the (then) EEC code for South Africa (also known as the 'Anti-Apartheid code'). The 'Anti-Apartheid code' was as a foreign policy document[41] setting the expectation that MNEs uphold specified industrial relations, employment and social policies with regards to their 'Black African' employees. The purpose was to mitigate the effect of apartheid and segregation policies in South Africa.[42]

In 1981, the World Health Organization (WHO) launched the International Code of Marketing of Breast Milk Substitutes. This international code was narrowly focused on the product infant-formula. The WHO enacted the Code on the face of evidence that certain Western business enterprises, including Nestle, employed intense advertising and marketing methods to promote instant formula in developing countries.[43] These methods, which encompassed mass

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[36] *Id.* at 135.

[37] OECD, *supra* note 29, ¶ 6.

[38] Roger Blanpain, *The OECD Guidelines and Labour Relations: Badger and Beyond, in* Legal Problems of Codes of Conduct for Multinational Enterprises, 145, 148 (Kluwer ed. 1980).

[39] Decision of the Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises*, in* Legal Problems of Codes of Conduct for Multinational Enterprises, 462 (Horn ed. 1980).

[40] John Ruggie & Tamaryn Nelson, *supra* note 1.

[41] Martin Holland, *The EEC Code for South Africa: a reassessment* 41 The World Today, at 12 (1985).

[42] Hans W. Baade, *Codes of Conduct for Multinational Enterprises: An Introductory Survey*, *in* Legal Problems of Codes of Conduct for Multinational Enterprises, 429 (Kluwer ed. 1980).

[43] Kathyn Sikkink, *Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code*, 40 International Organization, 182 (1986).

campaigning, free samples and the so-called 'mother-craft nurses' promoting the formula at health care facilities, failed to inform about the conditions under which the instant formula could be used safely and effectively. Due to poverty, illiteracy and unsanitary conditions, misuse became common, and this transformed the infant-formula into a potentially hazardous substance.[44]

Prior to these initiatives, the UN started a process to establish a multilateral framework, the Transnational Code of Conduct. The theme of MNCs was fostered on the UN Agenda by the ECOSOC in 1972, after the Chilean Representative addressed the ECOSOC earlier that year, denouncing the US International Telephone and Telegraph Company (ITTC) for its interference in Chilean internal politics.[45] [46] The ECOSOC requested the appointment of a Group of Immanent Persons to study the role and impact of business enterprises.[47] Upon the Group`s recommendations, the Commission on Transnational Corporations (CTN) was created in 1974 in the form of an intergovernmental forum.[48] [49] The CTN chairman presented the first formulations of the UN Code of Conduct in 1979.[50] The text addressed three subjects: the activities of transnational enterprises, their treatment by the countries in which they operated, and intergovernmental cooperation.

The draft text identified, amongst other general and political aspects, the obligations for transnational enterprises to 'respect the national sovereignty' and 'observe the laws, regulation and administrative practices of the countries in which they operate'. Transnational enterprises were furthermore obligated to 'take effective measures to ensure that their activities are compatible with and make a positive contribution towards the achievement of the economic goals and established development objectives of these countries. Where the treatment of companies is concerned, the draft stipulated the criteria of 'fair and equitable treatment' of transnational enterprises by the countries in which they operate, as well as the right of States 'acting in the public interest, to nationalize property in their territory'.[51] It furthermore emphasized the relevance of intergovernmental co-operation 'in encouraging the positive

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[44] *Id.*

[45] Helen Keller, *Corporate Codes of Conduct and their Implementation: the question of legitimacy,* 9, http://www.yale.edu/macmillan/Heken_Keller_Paper.pdf.

[46] UN Department of Economic and Social Affairs, *supra* note 4.

[47] The Group was to study the role of business enterprises, their impact on the process of development and their implications for international relations, and to formulate conclusions and recommendations for international action. Report of the Secretary General: The Impact of Multinational Corporations on Development and International Relations, UN Economic and Social Council, U.N. Doc. E/5500/Rev.1 ST/ESA/6 (Jun. 14, 1974).

[48] The Commission was supported by a group of 16 expert advisors from developed and developing countries, with expertise from different stakeholder groups and reflecting a functional and geographical balance. Centre of Transnational Corporations, *supra* note 6, at 17.

[49] ECOSOC resolution 1913 (LVII) of 5 December 1974.

[50] UN ECOSOC, *Transnational Corporations: Code of Conduct; Formulations by the Chairman*, *in* Horn, 493 (Norbert Horn ed. 1979).

[51] *Id.* at 502.

contributions that transnational corporations can make to economic and social progress and in alleviating difficulties to which the activities of transnational corporation may give rise'.[52]

The final draft of the UN draft code of conduct, which was issued in 1991,[53] did not feature any human rights.[54] After a lengthy and costly process, negotiations were suspended in 1992. No consensus could be achieved due to opposition by most industrialized home-state governments and TNCs to the initiative.[55]

2.3 The 1980s-90s: Globalization and the CSR Movement

2.3.1 The Regulatory Challenges Posed by Globalization: Closing the Gaps

The concerns about the negative impacts of powerful business enterprises on national development agendas of developing countries in particular subsided in the 1980s.[56] The 1980s was a decade of economic regulatory reforms and shifts in regulatory approaches.[57] State policies in the 1960s and early 1970s were set out to control and regulate the activities of business enterprises and foreign direct investment.[58] By the early 1980s, policies had shifted towards neo-liberalist-inspired de-regulatory, market-friendly policies and processes. 'De-regulation' involved the withdrawal of the State from certain areas of the economy by relaxing or removing regulations and the opening up of certain industries to competition.[59] The privatization[60] of certain government activities and the subcontracting of certain of these to private service providers was part of this trend.[61] Certain public regulatory functions were delegated to public

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[52] *Id.* at 503.

[53] Proposed Text of the Draft Code of Conduct on Transnational Corporations, UN ECOSOC, 2d Sess., Annex, U.N. Doc. E/1990/94 (1990).

[54] J. Ruggie, Business and Human Rights: The Evolving International Agenda, 2 (John F. Kennedy School of Government, *Corporate Social Responsibility Initiative Working Paper No. 31*, 2007).

[55] A. Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 Journal of Human Rights, 241 (2015). Karin Buhmann, *The Development of the 'UN Framework': a Pragmatic Process towards a Pragmatic Output*, *in* The UN Guiding Principles on Business and Human Rights: Foundations and Implementation, 87 (R. Mares ed. 2012).

[56] David Levy & Rami Kaplan, *Corporate Social Responsibility and Theories of Global Governance: Strategic Contestation in Global Issue Arenas in* The Oxford Handbook of Corporate Social Responsibility, 2 (A. Crane, et al. eds., 2008).

[57] Keller, *supra* note 45, at 12.

[58] Hans W. Baade, *The Legal Effects of Codes of Conduct for MNEs: Commentary*, *in* Legal Problems of Codes of Conduct for Multinational Enterprises, 354 (Horn ed. 1980).

[59] Peter Utting, *Regulating Business Via Multistakeholder Initiatives: A Preliminary Assessment* (UNRISD project on Business Responsibility for Sustainable Development, Technology, Business and Society, 2001), http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/35F2BD0379CB6647C1256CE6002B70AA/$file/uttngls.pdf.

[60] Privatization entails 'the introduction of contracting into public arenas and the delegation of a range of activities (from waste disposal to the running of prisons) to service providers'. Sol Picciotto, Regulating Global Corporate Capitalism, 9 (Cambridge University Press, 2011).

[61] This is said to have contributed to a de-centralization of responsibility for the provision of public goods to managerial actors.

bodies and agencies operating autonomously from government.[62] This involved a transfer of regulatory authority from States to non-state actors.[63] 'De-regulation' at national level was accompanied by 're-regulation' that involved the strengthening of rules at multiple levels, from the local to the international, to facilitate and protect economic prerogatives.[64]

Nearing the end of the 1980s, neo-liberal policies and reform programs were widespread.[65] These programs were generally associated with dis-embedding or economic liberalisation.[66] Implementation varied in both the North and South, however, according to the model of capitalism and local and industrial contexts.[67] The reform programs accelerated after the collapse of the Soviet economic model in 1989.[68] They involved far-reaching state policies of privatisation and deregulation. These were promoted and on occasions, imposed on debt-ridden countries by International Monetary Fund and the World Bank as a condition for financial support, in certain cases with detrimental results.[69] These programs brought the 'market-fundamentalist'-inspired policies set out in the Washington Consensus to reality, also in the developing world.[70]

International regimes of trade, finance and investment, as organized through the mechanisms of the Bretton Woods Institutions and from 1995 onwards, the World Trade Organisation ('WTO'),

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[62] This is said to have contributed to a fragmentation of the state. The regulation of financial markets has come to be performed by private industry bodies; 'exchanges, clearinghouses, credit-rating agencies (CRAs) and private associations such as the International Swaps and Derivatives Association (ISDA), although acting under powers granted by public authorities or backed by law'. Picciotto, *supra* note 60, at 266.

[63] Peter Utting, *Rethinking Business Regulation: From Self-Regulation to Social Control,* 1 (UNRISD Programme Papers on Technology, Business and Society, Paper No. 15, Sept. 2005), http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/F02AC3DB0ED406E0C12570A10029BEC8/$file/utting.pdf..

[64] Richard Snyder, *After Neoliberalism: The Politics of Reregulation in Mexico*, 51 World Politics (1999). Utting, *Id.* at 1.

[65] Single European Act, Feb. 28, 1986, O.J. (L 169), Treaty on European Union (Maastricht Treaty), Feb. 7, 1992, O.J. (C 191).

[66] Utting, *supra* note 63, at 19.

[67] *Id.* at 1.

[68] Michael Kerr, et al., Corporate Social Responsibility: A Legal Analysis, 35 (LexisNexis. 2009).

[69] For instance, Stiglitz documents how, through conditioning, the IMF imposed on countries reform programs inspired by the Washington consensus. These involved rigid privatisation, excessive austerity accompanied by high interest rates and trade liberalisation measures biased toward meeting special interests of developed countries. The implementation of these social and economic policies are said to have caused economic decline, to undermine trust in democratic and market institutions, and to have resulted in major setbacks in efforts to alleviate poverty and tackle inequality in a number of countries. Failure was partly attributed to sequencing errors. Developing countries often did not meet all the conditions that ought to be fulfilled for a market economy to be effective, *e.g.*, the appropriate regulatory framework and competition policies to evade abuse by monopoly power and transparency. Stiglitz, Globalization and its discontents (W.W. Norton & Company. 2003).

[70] *Id.* at 74. Joseph Stiglitz, Making Globalization Work (W.W. Norton & Company, 2006).

created a permissive environment for the emergence of international transaction flows.[71] Controls on currency exchanges and capital movements were lifted. Cross-border financial and capital flows increased significantly.[72] Successive negotiation rounds of the former General Agreements on Trade and Tariffs (GATT) had facilitated free trade and the reduction of trade barriers. This contributed to increased trade in goods, services and capital. The global FDI investment regime through BITs, FTAs and other IIAs consolidated far-reaching legally enforceable protections of investor`s interests, creating favorable conditions for FDI investment flows.[73] Legal protections granted through the intellectual property regimes (e.g., the TRIPS agreement of the WTO) allowed enterprises to exploit and reap the economic benefits of their inventions, at least for a certain time period.[74]

These global regimes created favourable environments that allowed business enterprises to grow and their power to rise to unprecedented levels.[75] Business enterprises benefited from advances in technology, transportations, telecommunications,[76] and financial instruments that reduced costs of investing abroad. Changes in production systems and the vertical integration of production flows and transactional costs into companies created economic incentives for business enterprises to engage in profit-creating activities abroad.[77] [78] Business enterprises served as vehicles for the movement of foreign capital, currency and management to all corners of the world. Cross-border investments by business enterprises drove the flow of capital, goods and ideas on a global scale. By linking different production sites and locations, business enterprises contributed to wider patterns of social, political and economic integration. Companies experienced incremental growth in size, geographical spread, economic power and influence.[79]

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[71] According to Ruggie, the nature of the relationship between international regimes and international transaction flows is one of complementarity; 'That is to say, international economic regimes provide a permissive environment for the emergence of specific kinds of international transaction flows that actors take to be complementary to the particular fusion of power and purpose that is embodied within those regimes'. J. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 International Regimes, 383 (1982).

[72] Sol Picciotto, Regulating Global Corporate Capitalism, 261 (Cambridge University Press, 2011).

[73] UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, at xvii, UNCTAD/ITE/IIA/2006/5 (2007).

[74] Daniele Archibugi & Andrea Filippetti, *The Globalisation of Intellectual Property Rights: Four Learned Lessons and Four Theses*, 1 Global Policy (2010).

[75] Kerr et al., *supra* note 68, at 3.

[76] J.A. Zerk, *Multinationals and corporate social responsibility: limitations and opportunities in international law* (Cambridge University Press, 2006).

[77] *Id.*

[78] Robert O`Brien & Marc Williams, *Global Political Economy: Evolution and Dynamics*, 183 (Palgrave Macmillan, 2004).

[79] This growth does not apply to all business enterprises. Indeed, the landscape of business enterprises is highly diverse, in terms of organizational structure, nature of activities, and clearly, globalisation has not affected all business enterprises equally. The growth of business enterprises relative to that of States is said to have been overestimated. For a critical note, *see* Paul de Grauwe & Filip Camerman, *Are Multinationals Really Bigger Than Nations?*, 4 World Economics (2003).

While business enterprises had been perceived in the 1970s as evil creatures eager to make profits at any cost, by the 1980s and 1990s they were viewed more positively as embodiments of progress, competitiveness and globalization.[80] This perception corresponded to the underlying neo-liberal policies according to which business enterprises, as a source of jobs, capital, technology and investment, made significant contributions to national economic growth. This growth could potentially promote the socioeconomic conditions conducive to the realisation of a wide range of human rights, including the economic rights to an adequate standard of living and the right to development.[81] [82] The positive effects of globalisation on human rights were far from self-evident, though. As studies have shown, economic growth would not automatically translate into progress,[83] and, in fact, could potentially have detrimental effects on human rights. When promoting human rights through development,[84] types of economic growth that do not create conditions conducive to human rights are simply unwelcome.[85] Economic growth that exacerbates growing inequality, and in gender relations in particular, is a case in point.[86] Certain developing countries in the South were (and are) in a relatively worse position than developed countries to reap the benefits of globalization.[87]

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[80] *Id.* at 4.

[81] Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 *Human Rights Quarterly*, 743 (1999).

[82] Business enterprises can increase tax revenues, promote a more efficient division of labor, and their investments can contribute to improving 'the balance of payments through import substitution, export generation or efficiency-seeking investment' and further the competitiveness of countries. O`Brien & Williams, *supra* note 79, at 173.

[83] Utting, *supra* note 63*,* at 19.

[84] The intersections between human rights and development are well established. A human right to development has been recognized in the Declaration to the Right to Development of 1986. Article 1 of The Declaration on the Human Rights to Development defines the right to development as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'. Article 2 stipulates that '[t]he human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources'.

[85] As stipulated in the 1996 Human Development Report, examples of unwelcome forms of economic growth are: 'jobless growth, which does not increase employment opportunities; ruthless growth, which is accompanied by rising inequality; voiceless growth, which denies the participation of the most vulnerable communities; rootless growth, which uses inappropriate models transplanted from elsewhere; and futureless growth, which is based on unbridled exploitation of environmental resources'. UNDP, *Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World,* 65 (2013).

[86] Sub-Commission on the Promotion and Protection of Human Rights, The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights. Preliminary report submitted in accordance with Sub-Commission resolution 1999/8, E/CN.4/Sub.2/2000/13, at 12 (Jun.15, 2000) (by J. Oloka-Onyango and Deepika Udagama).

[87] J. Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, 2 (2002), http://www.cid.harvard.edu/events/papers/LSE-final.pdf.

Globalisation has been paired with disparities in the distribution of these benefits globally, and to developing countries in particular.[88] These countries also often faced barrier to effectively participate in the decision-making processes and policies in the WTO that affected them and to have their voice heard and views considered. This is in part due to the asymmetric influence of developed countries in the WTO structures and a lack of resources and expertise that often inhibited developing countries to effectively participate in these processes.[89] [90] There were established concerns that developing 'host' States were in a worse position to mitigate the adverse effects of globalization.[91] In the pursuit of a neo-liberal reform agenda and economic prosperity, certain countries lacked the economic and/or political incentives or capacity to impose and enforce human rights on business enterprises. Institutional capacity to discipline powerful corporations could be lacking as a result of corruption, a weak rule of law and weak democratic control.[92] Resource-rich countries in development frequently suffered the so-called 'resource curse' and ended up 'blighted by inequality and bad governance'.[93] Implementation gaps more generally have been attributed to State's changing regulatory role and an alleged loss of capacity to steer the market forces and capital flows that globalization unleashed towards public interest objectives.[94]

By the time globalisation entered into an advanced stage, in the 1990s, its true negative effects[95] had become increasingly visible. A series of events involving MNEs with high public profiles

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[88] *Id.*

[89] Sub-Commission on the Promotion and Protection of Human Rights, *supra* note 86, at 6.

[90] This prompted the Committee on Economic Social and Cultural rights to issue a statement that called for the WTO to review all its international trade and investment rules to ensure conformity to existing international human rights instruments and commitments. The Committee also noted that '[h]uman rights norms must shape the process of international economic policy formulation so that the benefits for human development of the evolving international trading regime will be shared equitably by all, in particular the most vulnerable sectors'. It also noted that 'Trade liberalization must be understood as a means, not an end. The end which trade liberalization should serve is the objective of human well being to which the international human rights instruments give legal expression'. The Commission on the Promotion and Protection of Human Rights in its resolution 1999/30 of 26 August 1999 called for steps to be taken 'to ensure that human rights principles and obligations are fully integrated in future negotiations in the World Trade Organization', and for proper study to be undertaken of the 'human rights and social impacts of economic liberalisation programmes, policies and laws'. Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization, at 5-6, U.N. Doc. E/C.12/1999/9, 21st Sess. (Nov. 26, 1999).

[91] Ruggie, *supra* note 87, at 2.

[92] Liesbeth F. Enneking, Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability (Eleven International Publishing. 2012).

[93] Cees van Dam, Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights, 3 Journal of European Tort Law, 223 (2011).

[94] '[S]tates acting individually are to a growing extent lacking the necessary steering capacity to effectively channel the various processes of globalisation to the benefit of their citizens and in pursuance of the promotion of global public goods`. K. Nowrot, Global governance and international law, 14 (Inst. für Wirtschaftsrecht. 2004).

[95] As noted by Stiglitz, critical perspectives on globalization have pointed to five concerns: the unfair nature of the rules that govern globalisation that work in favor of advanced industrial countries and at the expense of poorest countries; the advancement of material values over public interest concerns like the environment; the erosion of developing countries sovereignty and decision-making capacity as a result of the way globalization has been

drew public attention to the adverse human rights impacts caused by these enterprises themselves, or more commonly, their involvement in human rights violations by other actors, including grave human rights violations by government in high-risk areas. The 1984 Bhopal disaster is one example of an event causing poisonous gas to leak from a pesticide plant operated by Union Carbide India Ltd in Bhopal, resulting in over 7000 deaths and hundreds of thousands injured. Other cases involving Shell, Rio Tinto, Nike and other large multinationals also exposed the prevalence of implementation gaps in domestic jurisdictions. States had ratified and committed to international human rights law and assumed a primary obligation to protect human rights against infringements by business enterprises. The willingness, capacity and autonomy[96] of States to govern in the interest of human rights seemed relegated to the interest and demands of business enterprises, investors and markets.

Business enterprises reaped great benefits from arranging their business activities and operations in ways that allowed them to escape the regulatory grip of any single State or group of States.[97] The corporate legal structures and mobility were used to their commercial advantage by descending their production, activities, operations and money to the most favorable regulatory regimes. Business enterprises engaged in strategic manoeuvring to take optimal advantage of variations between national regulatory regimes. Often combined with rent-seeking behavior and cronyism, this exacerbated competition between States in certain cases. States sought to retain or attract foreign investment through loosening regulatory economic and social restraints on companies. Examples are exemptions from tax and labour laws and free-trade conditions in export processing zones as well as favourable safety, labour and environmental regulations.[98] This raised concerns about the so-called race to the bottom, which is well documented in the literature, at least in theory.[99]

There were also concerns about the State capacity, and potentially autonomy to regulate in the public interest being affected by the obligations and commitments of States under BITs and FTAs. After the first BIT was signed in 1959, the protection and promotion of FDI came to be governed through a multifaceted, multilayered, and increasingly complex network of

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managed; evidence showing that globalisation does not benefit all; and the imposition of an Americanisation or economic policy or culture on developing countries. Joseph Stiglitz, *Making Globalization Work*, 9 (W.W. Norton & Company, 2006).

[96] Regulatory autonomy implies the extent to which a State is able to formulate and pursue goals of a public nature.

[97] Larry Catá Backer, *On the Evolution of the United Nations 'Protect-Respect-Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 *Santa Clara Journal of International Law*, 41 (2011).

[98] Archibugi & Filippetti, *supra* note 74, at 1.

[99] The race to the bottom is condemned widely, even in the FDI community. *See* for example, North American Free Trade Agreement, art. 1114(2); 'The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor'. North American Free Trade Agreement, 32 International Legal Materials 289 and 605 (1993).

International Investment Agreements (IIAs).[100] This is in part because previous attempts to negotiate a multilateral investment treaty failed.[101] The triumph of the market capitalism model from the 1980s until the end of the 1990s triggered a surge in the number of BITs.[102] BITs afforded foreign investors, prima facie, extensive one-sided protections of their economic expectations without imposing obligations. These were guarded through an investor-to-state dispute mechanism agreed to by the parties.[103] [104] The potential economic and political costs incurred by FDI arbitration potentially caused a 'regulatory chill' on national regulation. This meant that States were unwilling to enact regulation, design policies in the interest of human rights, or to take on new human rights obligations in fear of costly lawsuits from investors.[105]

In the context of perceived and actual cases demonstrating negative effects of economic forces and actors on human rights, combined with the regulatory vacuum at the domestic and international level that left the adverse human rights impacts of business enterprises largely unattended to, a new wave of social activism ensued in an attempt to regain social control over these forces. An increasing number of international and globally active NGOs[106] began to target markets and business enterprises directly, rather than indirectly through states and conventional

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[100] Karl P. Sauvant, *The Rise of International Investment Agreements and Investment Disputes, in* Appeals Mechanism in International Investment Disputes, 3, 7 (Karl P. Sauvant ed. 2008).

[101] For instance, the Multilateral Agreement on Investment (MAI), developed under the auspices of the OECD, was abandoned in 1996. This was after civil society organisations had protested against it out of concern for its adverse effects on human rights, as well as on the capacity of States to satisfy their human rights obligations to ensure economic, social and cultural rights. There was also concern about it creating unequal advantages between a privileged minority and disenfranchised majority. Report of the Subcommission on Prevention of Discrimination and Protection of Minorities on its 50th Sess., 3-28 Aug. 1998, U.N. Doc E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (Sept. 30, 1998).

[102] Initially primarily a European affair, in 1981 the United States also established their own BIT program. Until the 1990s, IIAs were predominantly concluded between capital-exporting and capital-importing states, usually based on the model of BITs of the former, with an asymmetric flow of investment as the result. From the 1990s onwards, BITs were signed between developed and developing countries, as well as between developing countries themselves, also referred to as South-South BITs. Eastern European countries newly liberated from communism, Latin American countries and, albeit with some fine-tuning of provisions, China signed a growing number of IIAs. Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 Harvard International Law Journal, 433-34 (2010) (Salacuse 2010).

[103] The BIT introduced investor-state dispute settlement to depoliticizing investment disputes by allowing investors to bring a claim in their own right outside a state-to-state forum. *Id.*

[104] Certain BITs, notably those signed by Canada and the United States, embody establishment clauses that extend protections to the pre-establishment phase, notably national treatment and most favorable nation treatment ('MFN'). The Canada-Jordan BIT (2009) is a case in point. Most BITs, however, follow the European post-establishment protection model and provide for substantive forms of protection once an investment has entered the host state in the form of an establishment clause. These protections generally include the following key protections: adequate compensation in case of expropriation of investment, most favorable nation treatment, fair and equitable treatment, full protection and security, and guarantees of free transfer of funds.

[105] Jeff Waincymer, *Balancing Property Rights and Human Rights in Expropriation*, *in* Human Rights in International Investment Law and Arbitration (Pierre-Marie Dupuy, et al. eds., 2010). While the right of a country to regulate in the interest of human rights may be recognized in IIAs, concerns partly emanate from perceived structural biases inherent to IIAs that make arbitration awards most likely to be ruled in favour of the investor.

[106] Kerr et al., *supra* note 68, at 37.

political means at the national level. Grass-root human rights NGOs demanded greater responsibility and accountability from business enterprises for their adverse human rights impacts. Technological developments facilitated widespread media coverage of corporate abuses on a global scale, giving greater visibility to NGO's cause. NGOs became empowered with new tools and platforms to retrieve and distribute information, foster awareness, mobilize support and leverage public debates.

NGOs employed strategies and confrontational tactics[107] that went beyond traditional tools of awareness raising.[108] Examples are public chastisement, demonstrations, inflicting reputational damage, consumer boycotts,[109] [110] shareholder activism and divestments. These were intended to incite business enterprise to change their behavior, inter alia, by leveraging their cost-benefit analysis of noncompliance and to engage business enterprises in the creation of international codes. Significant economic, political and moral pressures came to bear on business enterprises and mounted as also consumers, investors, and trade unions became more diligent in evaluating their social performance.[111] There was a tendency for NGO and consumer activism to target renowned multinationals,[112] which were especially vulnerable to such pressures,[113] as well as specific products and sectors.[114]

A pioneering initiative in the human rights domain, which relied on shareholder activism to leverage corporate behavior, was the Sullivan Principles. Initiated by anti-apartheid activist Reverent Leon Sullivan in 1977, the Sullivan Principles specified six operating principles relating non-discriminatory labour standards of US corporations conducting business in South Africa. These included non-segregation in work facilitates, equal and fair employment practices

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[107] *See*, David P. Baron, The Industrial Organization of Private Politics (Stanford University, 2011). The analysis sheds light on how such activities are organized and the strategies and targets that activist select as a function of the likelihood of success, costs and characteristics of a target.

[108] For an extensive database on business and human rights reports covering NGO activities, *see* the Business and Human Rights Documentation (B-HRD) database: http://www.bhrd.org/fe/keysearch.php?cx=005946333796321323341%3Ayyspjuq2fiy&cof=FORID%3A10&ie=UTF-8&q=campaign&x=0&y=0.

[109] Baron, *supra* note 107, at 13. For a study of why concerted action in the form of a boycott against a firm emerged in the absence of cooperation or coordination among members of the public, and why some occurred more quickly than others, *see* David P. Baron, Private Politics and Private Policy: The Theory of Boycotts (Stanford Graduate School of Business ed., 2002).

[110] For instance, a seven-year consumer boycott against Nestlé that accounted for a large percentage of instant formula sales in development countries at that time was suspended after Nestlé and NGOs signed a joint agreement. Both parties expressed their firm commitment to see the 1981 International Code of Marketing of Breast-milk Substitutes implemented. Sikkink, *supra* note 43, at 823, 835.

[111] *Id.* at 828.

[112] Levy & Kaplan, *supra* note 56.

[113] For instance, Nestle' was vulnerable to pressure regarding the negative impacts of their instant formula in the developing countries for three reasons: these could easily be traced back to Nestle through the brand and parent-company name that were clearly visible on the food products; the food products were easily replaceable; and; human rights abuses clashed with the corporate image of high quality products in which Nestle' had invested heavily. Sikkink, *supra* note 43, 826.

[114] Peter Utting & Kate Ives, *The Politics of Corporate Responsibility and the Oil Industry*, 2 Stair, 23 (2006).

of all employees, equal pay for equal or comparable work and others. Sullivan used his position as a member of General Motors, one of the largest employers of black workers in South Africa at the time, to get companies to publicly endorse and implement the six Sullivan Principles.[115] A new requirement was added in 1984 that business enterprises engage in political activism. It challenged the commonly held view that business enterprises should not interfere in the internal domestic affairs of a host country.[116] This is said to have contributed to the Principles themselves enjoying limited success,[117] although the Sullivan Principles served as a precursor for other initiatives, including the 1984 MacBride Principles relating to the conduct of business enterprises in Northern Ireland.[118]

2.3.1.1 The CSR Movement

Within this context and in response to social pressure,[119] business enterprises started to embrace the concept of CSR[120] in the late 1980s-90s. While there was potentially a compelling business case for CSR (e.g., improved market image, employment morale, insurance premiums, consumer confidence, avoiding legal costs, maintaining long-term competitiveness, etc.), it had not been substantiated at the time. Imperatives for CSR were mainly political for this reason.[121] CSR presented a strategic tool for companies to accommodate external NGO and consumer pressures by displaying their commitment to human rights and demonstrating a capacity to self-regulate. Codes of conduct could create positive perceptions of their policies and actions in the eyes of public affected by their activities.[122] CSR also served as a means to preempt external legal

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[115] The Sullivan Principles were originally signed by the following 12 companies: 'American Cyanamid, Burroughs Corporation, Caltex Petroleum Corporation, Citicorp, Ford Motor Company, General Motors Corporation, IBM Corporation, International Harvester Company, Minnesota Mining & Manufacturing Company, Mobil Corporation, Otis Elevator, and Union Carbide Corporation'. S. Prakash Sethi & Oliver F. Williams, *Creating and Implementing Global Codes of Conduct: An Assessment of the Sullivan Principles as a Role Model for Developing International Codes of Conduct - Lessons Learned and Unlearned*, 105 Business and Society Review, 170-171 (2000).

[116] S. Prakash & Oliver F. Williams, Economic Imperatives and Ethical Values in Global Business: The South African Experience and International Codes Today, 186 (Kluwer Academic Publisher, 2000).

[117] This can be explained, as Hepple argues, by the fact that if business enterprises operating in South Africa complied with the Sullivan Principles, this would mean that they would have to act in breach of apartheid laws. The Sullivan Principles lost credibility because business enterprises were not willing to do so, which resulted in company divestment rather than engagement in the mid-1980s. Hepple, *supra* note 9, at 361. For an analysis of the success of the Sullivan Principles, *see* S. Prakash Sethi, Setting Global Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations (Wiley, 2003).

[118] The original Sullivan Principles were amended several times before the ending of the program in 1994. They were re-launched in 1999 as the Global Sullivan Principles of Social Responsibility. They served as a catalyst for other labour-oriented codes of conduct, for instance the 1984 MacBride Principles, the Slepak Principles, the Miller Principles and the Maquiladora Standards of Conduct. Keller, *supra* note 45*,* at 7-8. Ramasastry, *supra* note 55, at 240.

[119] Shamir Rohen, *The De-Radicalization of Corporate Social Responsibility*, 30 Critical Sociology, 671 (2004).

[120] Kerr et al., *supra* note 68, at 35.

[121] Levy & Kaplan, *supra* note 56.

[122] M. C. Suchman, *Managing legitimacy: Strategic and institutional approaches*, 20 Academy of management review (1995). M. Rahim, *Raising Corporate Social Responsibility - The 'Legitimacy`Approach'*, 9 Macquarie Journal of Business Law, 72 (2012)

regulation and accountability at the national and international level for which many NGOs advocated.[123] Business enterprises presented private and self-regulation as an alternative and sufficient tool to fill the regulatory void.

Individual codes adopted by companies unilaterally and industry-wide codes undertaken jointly by companies or by an associations representing a particular industry[124] figured prominently initially.[125] The uptake and substance of these codes were not uniform across countries. Codes emerged in the US at first, and later in Europe.[126] The national institutional environment in the US is said to have been more conducive to MNEs assuming explicit responsibility through voluntary commitment, programs and strategies as compared to European countries.[127] Industry-wide codes were adopted at the regional and the international level. An early example is the 1975 International Council of Infant Food Industries (ICIFI) code of business ethics. The self-regulatory approaches drew from the scholarly works in business management and found a basis in ethics, corporate citizenship and the triple-bottom line concept.[128]

The CSR agenda then covered only a few of the broad range and diversity of CSR issues that the concept encompasses today. These issues were mainly environmental and social.[129] The social aspect of CSR furthermore was confined to only a limited range of labour issues.[130] This has been explained in relation to the strategic approaches to CSR prevalent in the 1970s-80s, which were reactive. Codes of conducts tended to emerge especially in those industries that sold their products on consumer markets and that for this reason were especially vulnerable to social and

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123 Rohen, *supra* note 119, at 671.

124 Keller, *supra* note 45, at 17.

125 Shamir Rohen, *Capitalism, Governance and Authority: The Case of Corporate Social Responsibility*, Annual Review of Law and Social Science, 539 (2010).

126 A study by Langlois and Schlegelmilch shows that uptake of codes by companies in the US was much greater than in Europe, and that there were differences in the content of codes across countries, and their treatment of political issues in particular. Catherine Langlois & Bodo B. Schlegelmilch, *Do Corporate Codes of Ethics Reflect National Character? Evidence From Europe and the United States*, Fourth Quarter Journal of International Business Studies (1990).

127 A study by Mann and Moon notes that differences in the national business systems have a significant role in shaping business approaches to CSR. The authors argue that national business systems have created incentives and opportunities for explicit CSR in the US and implicit CSR in Europe. In European countries, companies are incentivised to assume implicit responsibility by ensuring that their policies and practices are in conformity with the definition and rules, values and norms set out by formal and informal institutions that impose requirements on companies. The responsibility is formulated in collective terms, and reflects the interests of society as a whole. CSR is driven by a consensus on the legitimate expectations in society as it relates to role and responsibilities of business enterprises in society. In the US, companies are incentivised to assume explicit responsibility by adopting voluntary CSR polices, programs and strategies. The extent of CSR is defined in individual term and is responsive to the expectations of stakeholders. Dirk Matten & Jeremy Moon, *"Implicit" and 'explicit' CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility*, 33 Academy of Management Review (2008).

128 *See* John Elkington, Cannibals with Forks: The Tripple Bottom line of 21st Century Business (2002).

129 The environmental prong of CSR can be linked to the 1992 Earth Summit in Rio de Janeiro and the Agenda 21 that had recognized a role for business and industry in achieving sustainable development. Kerr et al., *supra* note 68, at 18.

130 Keller, *supra* note 45, at 20.

consumer pressure. Examples of these industries are apparel, carpets, retail, tourism, electronics and the coffee industry.[131] The codes tended to focus on labour rights, and child labour in particular, because of the relatively high (child) labour intensity of these industries and their global supply chains.[132] Western companies often extended the scope of their codes to cover labour issues that they may be involved in through their suppliers and contracts.[133] The ILO`s core labour standards, as codified in the ILO Labor Conventions relating to children, forced labour, freedom of association, collective bargaining and discrimination issues often served as a reference for these codes.[134]

In the 1990s, the integrity of these responsive displays of CSR and self-regulation approaches became increasingly questioned.[135] Perceptions and exposures of actual business malpractices led to accusations of self-regulation amounting to nothing more than 'public relations'[136] and 'green-washing'[137] exercises.[138] This critique was also directed at the proliferation of codes that varied greatly in order to respond to issues and stakeholder concerns, and the fact also that these did not address these concerns in a comprehensive and objective manner. The actual implementation of the codes in the workplace and supply chains was deemed inadequate, hence leaving the substance of codes meaningless in practice.[139] Independent verification and monitoring mechanisms that could expose these shortcomings in performance and encourage compliance was often lacking or insufficient.[140]

In what has been perceived as an attempt to overcome the limitations of self-regulation, as well as those of government regulation,[141] regulatory approaches took a turn to civil regulation and multi-stakeholder initiatives.[142] If business enterprises sought self-regulation, NGOs collaborated

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131 Ans Kolk & Rob Tulder, *Setting new global rules? TNCs and codes of conduct*, 14 Transnational corporations, 7 (2005).

132 *Id.*

133 Next to labour issues, codes often addressed environmental standards, bribery and corruption and consumer protection. Keller, *supra* note 45*,* at 18.

134 First codified in ILO Convention No. 138, 182, 29, 87, 98, 100 and 111. In 1998, these labour standards were incorporated in a single normative framework, the ILO Declaration on Fundamental Principles and Rights at Work. *Id.* at 20.

135 Utting, *supra* note 59, at 5-7.

136 For instance, accounting research indicates that corporate representation through formalistic reporting amounts to mere `public relations` to leverage societal perceptions that the company acts responsibly, ie 'to manage public perceptions, to respond to public pressure, or to react to perceived public opinion', without actual improvements in performance. Laufer W., *Social Accountability and Corporate Greenwashing*, 43 Journal of Business Ethics, 255 (2003).

137 The Oxford Dictionary defined the term `greenwash` as: `"disinformation disseminated by an organization so as to present an environmentally responsible image"`. Utting, *supra* note 59, at 6.

138 Rohen, *supra* note 125, at 539.

139 Utting, *supra* note 59*,* at 6-7.

140 Utting, *supra* note 63*,* at 3.

141 Utting, *supra* note 59, at 4.

142 *Id.*

with business enterprises in the development of new regulatory arrangements to govern this change of practices in a manner externally perceived as legitimate.[143] Also multi-stakeholder initiatives were created to improve both the legitimacy and quality of CSR activities. The engagement of a broad range of stakeholder interests other than business in decision-making made these initiatives seem more credible.[144] [145] The initiatives were intended to assist business enterprises in improving their CSR policies and practices for a more systematic integration of CSR within corporate structures.[146] They developed standards and systems for monitoring, verification and reporting.[147]

The Kimberly Process, a multi-stakeholder process engaging governments, industry and civil society, was created to control the flow of so-called conflict diamonds that are used by rebels to finance war. The impetus for this initiative was a report by Amnesty International exposing the role of the diamond industry in fuelling bloody armed conflict in Sierra Leone through the purchase of these diamonds.[148] The Fair Labor Association (FLA), another multi-stakeholder initiative in the apparel and footwear industries, was created in response to public discontent about sweatshop practices in the supply chain of key brands involving Nike, Wall-Mart and GAP.[149] Other examples of multi-stakeholder initiatives are the Global Network Initiative (GNI), the GRI, accounting schemes (SA8000) and standard-setting and monitoring schemes (CCC, Ethical Trading Initiatives). Certain multi-stakeholder initiatives were also created to harmonize and standardize a proliferation of standards creating confusion and possibly imposing diverging and conflicting requirements on companies.[150]

The UN Global Compact (the 'UNGC') was created in 2000 as a network-model organisation to promote constructive engagement between powerful business and market leaders and other actors, including NGOs, around best practices based on the UNGC Principles. Business enterprises that voluntarily joined the initiative, embrace, support and enact within their sphere of influence a set of ten core principles in the area of human rights, labor standards, the environment and anti-corruption. The aim of the UNGC was, through social learning and accumulated business experiences, to arrive at a common understanding of these Principles and desired best practices. The initiative sought to induce change in corporate behavior through such

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143 Baron, *supra* note 107.

144 Keller, *supra* note 45, at 14.

145 The engagement of one or more actors in their design and implementation of codes of conduct has been referred to as 'co-regulation'. If multi-stakeholder initiatives viewed an active or leading role for NGOs and civil society organizations, they were said to involve 'civil regulation'. Utting, *supra* note 59, at 4. Vogel defines 'global civil regulation' as: 'voluntary, private, nonstate industry and cross-industry codes that specify the responsibilities of global firms for addressing labor practices, environmental performance, and human rights policies'. David Vogel, *The Private Regulation of Global Corporate Conduct: Achievements and Limitations*, 49 Business Society 68, 68 (2010).

146 Kerr et al., *supra* note 68, at 15.

147 Utting, *supra* note 63, at 9.

148 Ramasastry, *supra* note 55, at 242.

149 *Id.*

150 Utting, *supra* note 59, at 14.

learning and the internalisation of the Principles in business enterprises, conforming to best practices.[151]

Multi-stakeholder initiatives involved a cooperative engagement between State and non-state actors, including civil society, companies, business associations, and governmental and intergovernmental organisations.[152] The active participation by certain business enterprises in these initiatives has been explained by these business enterprises having a clear interest in not only averting criticism, but also in leveraging the CSR movement, or even by taking a lead in order to shape the CSR agenda at their convenience.[153] New academic theories signalled the significance of stakeholder engagement and the clear strategic, organisational and economic benefits that can be gained through such proactive engagement.[154] The role of business enterprises alongside NGOs and citizens in 'good governance' was supported by the Commission on Global Governance in its 1995 report,[155] in which it called for 'more inclusive and more participatory mechanisms of global governance that included not only the traditional state-based actors but also NGOs, citizen movements and TNCs'.[156]

While these multi-stakeholder initiatives emerged in part to improve the quality of self-regulation, they came to be perceived as inhibiting similar shortcomings.[157] Multi-stakeholder initiatives reached limited scale in efforts.[158] They engaged only a small portion of the tens of thousands of business enterprises that spanned the globe, and their hundreds of thousands affiliates and suppliers. They also addressed only those initiatives that decided to join the initiatives on a voluntary basis.[159] Corporate laggards thus fell outside their scope. The companies tended to belong to certain sectors and firm categories particularly sensitive to brand reputation.[160] The adverse impacts of business enterprises operating in other sectors and contexts, and beyond the supply chains were thus left largely unregulated and unaccounted for by these multi-stakeholder initiatives.

Critique about weak standards and procedures for monitoring and verifying compliance also figured prominently.[161] The UNGC lacked such procedures and faced accusations for assisting signatory business enterprises with half-hearted CSR performances in 'blue-washing' their

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151 J. Ruggie, *The Global Compact as Learning Network*, 7 Global Governance (2001).

152 Utting, *supra* note 63, at 2.

153 *Id.*

154 Utting, *supra* note 59, at 5.

155 *Id.* at 6.

156 *Id.*

157 *Id.* at 22.

158 *Id.* at 12.

159 *Id.* at 12.

160 *Id.* at 12.

161 *Id.* at 18.

public image by associating themselves with the blue flag of the United Nations.[162] Other multi-stakeholder initiatives were poorly implemented.[163] This was in part because they were responsive to a wide range of issues. Monitoring actual compliance with all these issues throughout vast corporate structures and complex global supply chains proved highly challenging.[164] 'Given the scale and international reach of TNC activities, the costs involved, and the reliance on commercial auditing techniques and analytical frameworks that often ignore the root causes of noncompliance and fail to obtain reliable information from workers and managers, mainstream monitoring and reporting often simply scratch the surface'.[165] The standards and systems that multi-stakeholder initiatives developed were considered 'relatively superficial'.[166]

There were also concerns that CSR standards and procedures were ineffective and had adverse implication for workers, business enterprises and government in the global South.[167] Where the design of multi-stakeholder initiatives reflected the interests and agendas of Northern actors, the standards and measurement were not necessarily relevant or appropriate to the priorities, concerns and problems of Southern workers.[168] The institutional and economic conditions in developing countries made for an environment that was hardly conducive to achieving progress on CSR.[169] Where standards and practices are incompatible with domestic laws, or inappropriate to local practices and traditions, this could incite noncompliance. Southern firms have, relative to companies in the North, also lesser capacities to comply.

The challenges of southern firms were amplified by the need to abide by a growing number of standards and processes imposing diverging and contradicting requirements. This risked introducing confusion and enhancing the cost of doing business considerably. Multi-stakeholder initiatives were charged of having protectionist implications by erecting non-tariff barriers or obstructing access to global markets for such southern firms.[170] Also more generally, the growing body of multi-stakeholder initiatives was perceived as problematic. This was especially the case because there were significant differences between the substantive CSR standards, approaches and methods and levels of stakeholder involvement of these initiatives.[171] Some

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[162] *Id.* at 16. Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth From Realities*, 19 Florida Journal of International Law (2007). Berliner & Prakash, *From norms to programs: The United Nations Global Compact and global governance*, 6 Regulation & Governance, 149-166 (2012).

[163] Utting, supra note 63, at 8.

[164] *Id.* at 8

[165] *Id.* at 9.

[166] *Id.* at 7.

[167] Utting, *supra* note 59.

[168] *Id.* at 20.

[169] *Id.* at 20-21.

[170] *Id.* at 21.

[171] *Id.* at 23-25.

initiatives were said to be in competition with other initiatives for influence, authority and business adherence.[172]

Multi-stakeholder initiatives were also considered lacking in legitimacy and democratic governance. Concerns were raised relating to participation, representivity and accountability. Stakeholder participation was not perceived as 'genuine'. There were imbalances in the participation of different stakeholders' interests and North/South interests.[173] In certain initiatives, the governance structure, design and implementation processes exhibited a clear business interest.[174] Calls were made for an expansion of stakeholder participation in all stages of verification, monitoring and certification processes, and at all levels. Some argued that both civil society organisation and business enterprises are unaccountable and not legitimate representatives of the public interest. Multi-stakeholder initiatives were considered as 'largely detached from democratic processes and public policy'.[175] There were also calls for complaint mechanisms to redress corporate malpractices.[176]

2.3.1.2 The Corporate Accountability and the Business and Human Rights Movement

Concerns resulted in efforts being reframed and redirected towards enhancing corporate accountability, including through law and public policy. The corporate accountability movement has been identified as the main driving force behind this shift. The quest for accountability grew in strength and legitimacy as concerns about the credibility of multi-stakeholder initiatives increased. This movement had emerged around the same time as, and had evolved in parallel to, the CSR movement, also in response to similar concerns about the negative effects of globalization. It incorporated ideas of the human rights approach to development and 'anti- or alternative globalization',[177] hence it differed from the CSR movement in significant aspects, however.

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[172] A study by Fransen indicates that certain schemes differentiated and tailored their products to suit the company`s preference for lower standards or less stringent requirements. This risks a regulatory race to the bottom, consumer confusion, but also ineffective implementation as their efforts overlap and contradict, the argument holds. L. Fransen, *Why Do Private Governance Organizations Not Converge? A Political-Institutional Analysis of Transnational Labor Standards Regulation*, 24 Governance: An International Journal of Policy, Administration, and Institutions (2011). Fransen (2011) notes how CSR schemes adopt competing approaches to regulating labor standards, in terms of the public arrangements they relate to (*e.g.,* core ILO conventions, UN Frameworks, domestic and local laws), the extent to which they apply the issue of *living wage*, and the actors who are in control of the implementation and enforcement of standards (*e.g.,* business or social actors).

[173] Utting, *supra* note 63*,* at 21.

[174] Utting, *supra* note 59, at 19.

[175] Utting, *supra* note 63, at 9.

[176] *Id.* at 7.

[177] *Id.* at 18. 'Those calling for a more fundamental reshaping or rolling-back of globalization emphasized the need to reassert social control over corporations via civil society, social movements, national policy and regulations, and international rules designed and implemented by democratic institutions; the downsizing or break-up of corporations; halting altogether certain economic activities that have perverse social and environmental impacts; redirecting state resources and creating a policy environment conducive to local development and small enterprises; subsidiarity; and collective property rights.` Broad cited in: *Id.* at 18.

The ideas of the human rights-based approach, which the accountability movement incorporates and that had gained traction in policies and practice after the end of the Cold War, sets the realisation of human rights as the objective of development.[178] It applies the human rights discourse, which has its foundation in law at the national, regional and international levels.[179] Accountability is understood in terms of legal justiciability, however alternative approaches that rely on performance standards and employ monitoring, reporting, public debate, and citizen participation to determine conformity were also relied upon as complementary means to operationalize the rights-based approach.[180] The demand for compliance mechanisms to enhance the accountability of multi-stakeholder initiatives has been related to this accountability movement.

The accountability movement also has been linked to the efforts of certain NGOs and lawyers advocating for criminal accountability for business enterprises before the International Criminal Court ('ICC').[181] This prompted France to issue a proposal at the 1998 Rome Diplomatic Conference on the establishment of the ICC to include a provision in the Rome Statute that would grant the ICC jurisdiction over juridical persons.[182] This proposal triggered deeply diverging responses. Amongst the opponents were countries whose domestic criminal law did not provide for corporate liability for international crimes. It followed from the concept of complementarity[183] that the ICC would gain jurisdiction automatically if a company would commit a crime in a State's jurisdiction and this country would be unable to carry out the prosecution. The proposal was eventually withdrawn, after it had become clear that no consensus could be reached in the short time span foreseen for the negotiations. The ICC was granted jurisdiction over natural persons only.[184]

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178 *Id.* at 18. Overseas Development Institute, *What can we do with a rights-based approach to development?,* 1 (Briefing Paper 3, Sept. 1999), *available at:* http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2614.pdf.

179 Overseas Development Institute*, Id*. at 1.

180 *Id*. at 4.

181 Utting, *supra* note 63, at 6.

182 "Juridical persons" was defined as 'a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in exercise of State authority, a public international body or organization registered, and acting under the national law of a State as a non-profit organization'. A. Clapham. Human Rights Obligations of Non-State Actors, 245 (Oxford University Press. 2006). State and public corporations were thus excluded from its scope. Criminal liability was furthermore linked to the criminal liability of a natural person, and more specifically, 'the individual criminal responsibility of a leading member of a corporation who was in a position of control and committed the crimes, acting on behalf of and with the explicit consent of the corporation in the course of its activities'. International Commission of Jurists, Corporate Complicity and Legal Accountability, Volume 2: Criminal Law and International Crimes, 56 (2008), http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf.

183 The Preambule of the ICC Statute states that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. Art.17 of the Rome Statute. Art. 17.1 (a) stipulates that 'the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State [that] has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'. Rome Statute of the International Criminal Court art 17, July 17, 1998.

184 *Id.* art 25(1).

The signing of the ICC gave impetus for national jurisdictions to the creation of new avenues for corporate criminally liable for violations of international crimes. In certain jurisdictions, these avenues were created incidentally[185] through the implementation of the Statute of the ICC and the integration of its provisions in national criminal law. Where national criminal laws applied the same standards to individual and legal persons, the incorporation of the ICC statute in these laws extended responsibility and liability for international crimes to corporations.[186] In other jurisdictions, criminal codes were amended in order to create new causes of action for prosecuting also legal persons for violations of international crimes under national criminal law. These developments enable victims to sue corporations under national law for having committed an international crime that is codified in the Rome Statute. This possibility remains theoretical however, since no cases have been brought on this basis thus far.[187]

The incorporation of the ICC into national criminal laws has had some influence on the development of national criminal law norms. National judges have turned to the jurisprudence and law of the ICC for guidance when developing concepts for attributing criminal liability to corporations and corporate officers under national criminal laws. National courts have also drawn from the jurisprudence of the Nuremberg Trials in the post WW-II period and the jurisprudence of the *ad hoc* international criminal tribunals on individual liability that has been developed by the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone.[188]

In the late 1990s, NGOs begun to rely on civil law avenues in national jurisdictions of Western 'host' States to challenge business conduct. In continental Europe, tort claims alleged 'negligence' of a parent company involving its subsidiary, 'complicity' or vicarious liability based on 'agency' in human rights abuses.[189] In the Americas, hopes were vested on the Alien Tort Claims Act (ATCA), a jurisdictional statute created in 1789 that allowed foreign nationals to sue foreign nationals for an alleged tort committed in violation of international customary law norms.[190] Unocal, Royal Dutch Shell, Coca Cola, Union Carbide, Drummond and Daimler Chrysler found themselves in court facing allegations of complicity in egregious human rights violations of governments, including torture, extra-judicial killings, kidnapping, murder, battery and assault.[191] The ATCA was rediscovered in the 1980s, after its existence having been

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[185] Foley Hoag LLP, UNEP FI, Banks and Human Rights: A Legal Analysis (2015), http://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf.

[186] *Id.* 4. *See* J. Ruggie, *Remarks by Ruggie at Business & Human Rights Seminar Old Billingsgate*, London, (Dec. 8, 2005), http://business-humanrights.org/en/doc-remarks-by-john-g-ruggie-business-human-rights-seminar-old-billingsgate-london-december-8-2005.

[187] Foley Hoag LLP & UNEP FI, *supra* note 185.

[188] *Id*.

[189] Enneking, *supra* note 92, at 45. Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and human rights: further steps toward the operationalization of the 'protect, respect and remedy' framework, A/HRC/14/27, 20 (Apr. 9, 2010) (by John Ruggie).

[190] Van Dam, *supra* note 93, at 232.

[191] As Enneking explains, NGOs resorted to the active pursuit and encouragement of foreign direct liability cases in Western home country tort systems to promote international CSR and accountability. This has been referred to as a trend towards 'transnational human rights litigation'. These strategies had several purposes: to establish

unnoticed for over a century.[192] The ATCA's ambiguity in relation to its origins and intended purpose created scope for the ATCA to take on a judicial function in providing a civil law avenue in the aforementioned scenarios. This same ambiguity contributed to the ATCA losing in functional importance later one, however, as judges became more cautious in their interpretation of the ATCA's jurisdictional scope in order to not overstep their judicial mandate by creating (extraterritorial) legal effects where none may have been intended by the US Congress. Such legal effects could furthermore create frictions in the relation with foreign nations and go against the international comity that the ATCA was set out to promote.[193]

In *Sosa*, the US Supreme Court affirmed that the ATCA extends jurisdiction only to a small category of egregious human rights abuses falling within the ambit of the law of nations, those 'accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms'.[194] Precarious was the landmark decision of *Kiobel v. Royall Dutch Petroleum* in 2013*,* in which the US Supreme Court ruled that a 'presumption against extraterritoriality' applied to the ATCA, excluding from ATCA's applicable scope those cases that do not sufficiently 'touch and concern' the US. Most cases have been dismissed or ended in a settlement. Also in light of the significant hurdles that victims face, which are jurisdictional, substantive, procedural and practical, the relevance of the ATCA in providing access to remedies for victims has been depicted as merely existential.[195]

The efforts of those supportive of the accountability movement had mixed results. The aim was to trigger legislative and policy action at the national, regional, international and global levels to advance corporate accountability.

Legal reform at the national level seemed more oriented at bridging the accountability gap through domestic laws that legally enforced CSR practices. State command control regulatory approaches paved the way for alternative 'softer' approaches as new laws, regulations and judicial practice emerged to legally encourage, permit or oblige business enterprises to discharge social responsibilities.[196] Examples include an interpretation of directors' duties of loyalty and care in company law that permit or require directors to consider social interests in managing their business enterprise[197]; the integration of social concerns into public procurement legislation;[198]

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corporate accountability for victims of adverse human rights impacts by business enterprises; to incite home states to take political or legislative action to facilitates foreign direct liability cases; and to elicit action by host countries that are unwilling or unable to effectively regulate business activities. Enneking, *supra* note 92, at 495-497.

192 *See* for example, *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *Sosa v. Alvarez Machain et al.*, 542 US 692 (Sup. Ct. 2004), *Wiwa v Royal Dutch Petroleum Co*, 226 F 3d 88 (2nd Cir 2000).

193 *Kiobel v Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), at 38.

194 Moreover, as was held in *Sosa*, only a norm that has obtained sufficient 'content and acceptance among civilized nations' can support a cause of action under US federal common law. *Id.*

195 Ruggie notes that 'the mere fact of providing a remedy for certain human rights abuses companies may have committed abroad has made a difference to corporate human rights practices' Ruggie, *supra* note 186.

196 Kerr et al., *supra* note 68.

197 Lowry, *supra* note 99, at 68.

198 McRudden, *supra* note 100.

the creation of public reporting and disclosure obligations for companies relating to social issues;[199] and legislation on unfair business practices that subjects business enterprises to liability risks for false or misleading statements in their CSR reports.[200] Such soft forms of regulations have been referred to as 'responsive regulation'[201] and 'regulated self-regulation'.[202] States advanced indirect regulation and internal corporate control systems as an adequate substitute to direct command-control regulation. 'According to this logic, the social responsibility of business may be best ensured through persuasion, education and the development of non-state voluntary codes and social standards by 'civil society' organizations'.[203]

2.4 The 2000s: The Business and Human Rights Movement and the UN Norms

The rise of the accountability movement marked the beginning of a new phase in which processes were initiated at the national, regional and international level to strengthen the law and enforcement of corporate respect for human rights, and in which also the legal business and human rights (BHR) discourse took flight. The BHR movement,[204] whose origins lie in the works of human rights legal scholars and the activities of human rights advocates, is more narrowly focused on corporate accountability for human rights. This movement centres on the victims and impaired communities and responds to their quest for corporate accountability for the prevention and mitigation of negative impacts on their human rights, and legal responsibility for actual impacts the company caused or to which it contributed. The responsibilities of business enterprises are articulated by reference to universal human rights principles codified in international human rights instruments. The rationale is that these instruments provide a clear basis for remedies and justice.[205] The BHR movement furthermore views an important role for business enterprises, States and civil societies in benchmarking the performance of business

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[199] Tinkele Elisabeth Lambooij & N Van Vliet, *Transparency on Corporate Social Responsibility in Annual Reports*, 5 European Company Law (2008).

[200] De Tienne & Lewis, *The Pragmatic and Ethical Barriers to Corporate Social Responsibility Disclosure: The Nike Case*, 60 Journal of Business Ethics (2005).

[201] Ayres & Braithwaite, Responsive regulation: transcending the deregulation debate (Oxford University Press. 1995).

[202] C. Parker, *Meta-regulation: legal accountability for corporate social responsibility?*, *in* The New Corporate Accountability: Corporate Social Responsibility and the Law (Doreen McBarnet, et al. eds., 2007). Mares, for instance, has pointed to the so-called approach of 'regulated self-regulation', meaning the application of procedural-type regulation that guides a company's discretion, without regulating CSR directly. Three main practical methods of regulating companies can be identified that fit this approach; the creation of laws that aim for sound internal management systems, social disclosure by companies and obtaining an enabling environment by supporting actors externally to companies. R. Mares, Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy, 1 Transnational Legal Theory, 240 (2010).

[203] Rohen, *supra* note 119, at 678.

[204] Ramasastry notes that the Business and Human Rights at its inception was 'not a true 'movement' but more a set of emerging crises where companies and governments scrambled to respond once their connections to human rights abuses were made public. Ramasastry, *supra* note 55, at 242.

[205] *Id.* at 238.

enterprises against 'universally recognized human rights principles embodies in a key set of treaties'.[206]

The business and human rights movement has been supportive of civil litigation before the ATCA. The movement has also been a driving force behind the initiative of the UN Norms.

2.4.1 The UN Norms

Within the UN, concerns about the influence of business enterprises operating globally propelled interest in codifying legally binding international human rights standards for business enterprises. The Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary body of the former Commission on Human Rights, created a five-member sessional Working Group in 1998 with a mandate to examine the working methods and activities of business enterprises.[207] Initially created for a three-year period, this mandate was extended in 2001 for an additional three years. The Working Group was officially tasked to compile and contribute to drafting relevant human rights norms.[208] This led to the UN Norms.[209] The UN Norms were presented as a restatement of existing international norms[210] and applying the principle that business enterprises 'within their respective spheres of activity and influence [. . .] have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups'.[211] The Sub-Commission on the Promotion and Protection of Human Rights approved the UN Norms in its Resolution 2003/16,

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[206] *Id.* at 238.

[207] More specifically, the Working Group was tasked to examine effects of these working methods and activities on the enjoyment of human rights, including the right to development, the scope of the obligations of States to regulate these activities and the compatibility of international human rights instruments with investment agreements, in particular the Multilateral Agreement on Investment. Report of the Subcommission on Prevention of Discrimination and Protection of Minorities on its 50th Sess., 3-28 Aug. 1998, U.N. Doc E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (Sept. 30, 1998).

[208] The Working Group was authorized to compile a list of human rights instruments and norms, to contribute to the drafting of relevant human rights norms, and to '[a]nalyse the possibility of establishing a monitoring mechanism in order to apply sanctions and obtain compensation for infringements committed and damage caused by transnational corporations, and contribute to the drafting of binding norms for that purpose'. U.N. Sub-Commission on the Promotion and Protection of Human Rights Res. 2001/3, The effects of the working methods and activities of transnational corporations on the enjoyment of human rights, U.N. Doc E/CN.4/Sub.2/2001/40 (2001).

[209] The UN Norms had been developed by a Working Group on business and human rights established in 1998 under the auspices of the Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary body of the former Human Rights Commission. Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights,* E/CN.4/Sub.2/2003/12/Rev.2, approved by U.N. Sub-Commission on the Promotion and Protection of Human Rights by resolution 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (Aug. 13, 2003).

[210] David Weissbrodt & Muria Kruger, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, 97 The American Journal of International Law 901, 912 (2003).

[211] Sub-Commission on the promotion and protection of human rights Res. 2003/16, Responsibilities of transnational corporations and other business enterprises with regard to human rights, U.N. Doc. E/CN.4/Sub.2/2003/L.11 (Apr.13, 2003).

13 August 2003. In the same Resolution, it transmitted the text to the former Commission on Human Rights for its 'consideration and adoption' and recommended the Commission to invite interested parties to submit comments on the draft text.[212]

The UN Norms were controversial and unsuccessful in obtaining the backing from the Members of the former UN Commission on Human Rights. States articulated objections on the basis of various considerations. There were concerns among developing states that the UN Norms might *de facto* transfer the authority for the implementation of human rights standards from States to companies.[213] The UN Norms could undermine their economic interests as host States in case the extension of foreign direct liability would cause divestment and companies to disengage from their country.[214] Developed countries emphasized the State`s role as the primary legal actor responsible for the implementation of human rights standards, and regulating the conduct of companies under domestic law. Some objected to the fact that the UN Norms may oblige transnational enterprises to adhere to treaties that did not apply or were not enforced in the countries where they operated.[215] Certain States were skeptical about the enforcement mechanisms proposed by the UN Norms, and expressed their preference for voluntary initiatives creating awareness. The OECD Guidelines and the ILO Tripartite Declaration were mentioned as successful examples in this regard.[216] The US challenged the legal status of the UN Norms, noting that they 'have no status – legal or otherwise'. It also challenged the democratic nature of the UN Norms, emphasizing how their development fell outside the mandate of the Sub-Commission, and how it 'was undertaken wholly without consideration for the views of the States'.[217] This position was reflected in the Commission's resolution stating that the UN Norms 'had not been requested by the Commission'.[218]

Also the business community's firm opposition to the UN Norms had influence in the rejection of this text by the UN Commission. The business community outlined their main concerns in a

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212 *Id.*

213 Pini Pavel Miretski & Sasha-Dominik Bachmann, *The UN 'Norms on the responsibility of transnational corporations and other business enterprises with regard to human rights': a requiem*: 17 Deakin Law Review Volume (2012).

214 *Id.*

215 Facsimile message from the Australian Mission to the United Nations, to OHCHR, *Comments by Australia in Respect of the Report Requested from the Office of the High Commissioner for Human Rights by the commission on Human Rights in its Decision 2004/116 of 20 April 2004 on Existing Initiatives and Standards Relating to the Responsibility of Transnational Corporations and Related Business Enterprises With Regard to Human Rights* (Sept. 8, 2004).

216 Australia argued that the addition of a new monitoring system, as envisaged by the UN Norms, to a treaty body system that already overstretched its capacity. Inadequate enforcement would not only undermine the effectiveness of the UN Norms, but also risks undermining the legitimacy and role of the former Commission on Human Rights, it was argued. *Id*. Letter from The Norwegian Ministry of Foreign Affairs, to OHCHR, *Decision 2004/116 - Responsibilities of transnational corporations and related business enterprises with regard to human rights* (Nov.4, 2004), *available at*: http://www2.ohchr.org/english/issues/globalization/business/docs/norway.pdf.

217 Cited in: Miretski & Bachmann, *supra* note 213.

218 Commission on Human Rights Res. 2004/116: Responsibilities of transnational corporations and related business enterprises with regard to human rights, 56th meeting, E/2004/23 – E/CN.4/2004/127 (Apr. 20, 2004).

40-page-long joint statement of the ICC and IOE. Several objections that were raised in this document related to the so-called 'privatisation of human rights'. This phrase was explained as the separation of the activities of private business from the duties of the State, the real duty-holder according to business.[219] If the draft UN Norms were to be given effect as international law, it was argued, business enterprises would be required to make balancing decisions that States should make. They would have to carry the burden for human rights protection while States could avoid theirs.[220] They would exercise the power to determine the substance of the vaguely formulated obligation of conduct, which should be incumbent on States.[221]

The joint statement furthermore noted that the artificial definition of human rights, and the draft Norm's vague provisions 'turn human rights into highly subjective, politicized claims—and this will undermine the credibility of international human rights law that so many people have worked so hard to achieve'.[222] These legal arguments are said to obscure the real intent of business enterprises behind objecting to the UN Norms, i.e. to evade regulation creating corporate legal accountability for human rights.[223]

Civil society made public statements to express their support for the UN Norms. NGOs commended the UN Norms as a 'major step forward' in arriving at a common global framework on business and human rights. The communication countered points of critique launched from the perspective of business. The contribution of the UN Norms was not to create new legal obligations, they argued, but to add coherence to existing standards. 'The Norms do not create new legal obligations, but simply codify and distil existing obligations under international law as they apply to companies'.[224] NGOs cited the provision in the UN Norms clearly referring to States as the primary duty bearers for human rights obligations.[225] They restated that the nature and scope of the responsibilities of business enterprises as defined in the UN Norms and potential contribution to favorable environments for business; '[i]ndeed the entire thrust of the Norms is to encourage the development of stable environments for investment and business, regulated by the rule of law, in which contracts are honored, corruption reduced, and where business enterprises, both foreign and domestic, have clearly defined rights and

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219 IOE & ICC, *Joint views of the IOE and ICC on the draft 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights'*, (2003), http://www.reports-and-materials.org/sites/default/files/reports-and-materials/IOE-ICC-views-UN-norms-March-2004.doc.

220 *Id*. at 4.

221 *Id.* at 22.

222 *Id*. at 2.

223 David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 45 Human Rights Law Review (2006).

224 *Id.*

225 The UN Norms also makes clear that the privatization of human rights would not diminish a State`s obligations. *See* ¶ 19 of the UN Norms; 'Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law, nor shall they be construed as diminishing, restricting, or adversely affecting more protective human rights norms, nor shall they be construed as diminishing, restricting, or adversely affecting other obligations or responsibilities of transnational corporations and other business enterprises in fields other than human rights'. Sub-Commission on the Promotion and Protection of Human Rights, *supra* note 209, at 52.

responsibilities'.[226] The communication was furthermore an attempt by civil society to preempt the Commission from acting against the UN Norms, which they argued 'to be detrimental to the notion of corporate accountability'.

The outcome was discouraging for those supportive of the accountability movement. As civil society begun to rely on the document as an authoritative interpretation of human rights law,[227] the Commission distanced itself from it. The latter noted that the UN Norms 'contain useful elements and ideas', but 'had not been requested by the Commission and, as a draft proposal, has no legal standing'.[228] The draft UN Norms never received formal legal authority.[229] The Commission requested the Office of the High Commissioner of Human Rights (OHCHR) to issue a report on human rights and corporations, which was published in February 2005.[230] As the controversies had not been resolved the following year, the Human Rights Commission requested the creation of the mandate of the SRSG.[231]

On 25 July 2005, former UN Secretary General Kofi Annan appointed Harvard Professor and former United Nations Assistant Secretary-General for Strategic Planning John Ruggie to the position.[232] The mandate of the SRSG is discussed in detail in the next section.

The following section reflects on the SRSG's response to the UN Norms. The SRSG was compelled to give an assessment of the UN Norms early in his mandate. The SRSG embarked on this examination in part out of political necessity. The controversies that had surrounded the UN Norms, which had triggered divisive debate and had contributed to its eventual demise, risked spilling over to the SRSG`s mandate and complicating his efforts to clarify standards.[233] The

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[226] Civil Society, Statement of Support for the UN Human Rights Norms for Business: To be delivered at the 60th Session of the Commission on Human Rights (15 Mar. - 23 Apr. 2004), http://business-humanrights.org/en/nearly-200-ngos-join-in-oral-statement-to-un-commission-on-human-rights-supporting-the-un-norms-on-business-human-rights-0#c39763.

[227] *See* ESCR-Net, Corporate Accountability Working Group Part I: The Mandate of the Special Representative Advocacy Guide on Business and Human Rights (2009), https://docs.escr-net.org/usr_doc/ESCRNet_BHRGuideI_Updated_Oct2009_eng_FINAL.pdf.

[228] Commission on Human Rights Res. 2004/116, *supra* note 218.

[229] Indeed, the Sub-Commission lacked the legal mandate or authority to create new international human rights obligations. If the UN Norms were to have obtained any form of authoritativeness, it would have had to derive from their acceptance by the former UN Commission on Human Rights, a subsidiary body to the ECOSOC then.

[230] Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, U.N. Doc. E/CN.4/2005/91 (2005).

[231] *See* Commission on Human Rights Res. 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises, 59th meeting, E/CN.4/RES/2005/69 (Apr. 20, 2005).

[232] Prof. Ruggie is the Berthold Beitz Professor in Human Rights and International Affairs at the Kennedy School of Government and an Affiliated Professor in International Legal Studies at Harvard Law School. Previous to his mandate, he served as UN Assistant Secretary-General for Strategic Planning and as Special Advisor of the UN Secretary General on the UNGC, of which he also was one of the main architects. For details on the bibliography of Prof. Ruggie, *see* http://www.hks.harvard.edu/m-rcbg/johnruggie/bio.html.

[233] The SRSG noted that 'it has proved exceedingly difficult to carry on a serious dialogue about standards without having it become a recapitulation of the earlier debates in and around the Commission on the [UN Norms]. *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and*

SRSG aligned himself with the position of the former Commission, highlighting that the UN Norms were 'engulfed by its own doctrinal excesses' and 'exaggerated legal claims and conceptual ambiguities'.[234] The following sections will examine the main aspects of his critique: the legal authority of the UN Norms and the principles by which the UN Norms allocated rights and responsibilities between States and firms.

2.4.2 The Legal Authority of the UN Norms

One of the main objects of the SRSG's critique of the UN Norms was the claim that 'the Norms largely reflect, restate, and refer to existing international norms, in addition to specifying some basic methods for implementation'.[235] [236] The UN Norms stipulate that international law imposes a wide range of human rights obligations directly on business enterprises, stating that:

> Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

The SRSG rejected this dual claim that the UN Norms restated international law when stipulating that international law imposes on business enterprises direct human rights obligations across the entire spectrum of human rights, and that the UN Norms were non-voluntary and thus binding on companies.

The authors of the UN Norms had derived justification for their claim in the pre-ambular language of the United Nations Declaration on Human Rights, which the UN Norms reference in their own preamble:

> Recalling that the Universal Declaration of Human Rights proclaims a common standard of achievement for all peoples and all nations, to the end that Governments, other organs of society and individuals shall strive, by teaching and education, to promote respect for human rights and freedoms, and, by progressive measures, to secure universal and effective recognition and observance, including of equal rights of women and men and the promotion of social progress and better standards of life in larger freedom.

The authors of the UN Norms inferred from this language that '*all organs of society*' include business enterprises, and that consequently, human rights obligations apply to business

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Transnational Corporations and Other Business Enterprises, ¶ 54 U.N. Doc. E/CN.4/2006/97 (Feb. 2006) [hereinafter *Interim Report*] (by John Ruggie).

234 *Id.* ¶ 59.

235 Weissbrodt & Kruger, *supra* note 210, at 912.

236 The status of the commentary to the UN Norms was to be understood as 'a useful interpretation and elaboration of the standards contained in the Norms'. *See* pre-ambule UN Norms. Sub-Commission on the promotion and protection of human rights*, supra* note 211.

enterprises like any other 'organ' in society.[237] This idea was famously articulated by Louis Henkin: '[e]very individual and every organ of society includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all'.[238]

The SRSG disagreed with the notion that the pre-ambular language of the UDHR provides an authoritative legal basis for attributing human rights obligations to companies. The UDHR was intended to be non-binding at its inception. For this reason, the SRSG did not consider the UDHR in itself to have legally binding effect. The SRSG acknowledged the possibility that moral claims and aspirational language in the UDHR could take on legal effects indirectly, through their codification in international human rights treaties or crystallisation as norms of customary international law. Certain provisions of the UDHR may have taken on legally binding effects, for instance through their elaboration in the ICCPR and the ICESCR, but these provisions did not include the language '*all organs of society*'. The SRSG noted that; '*preambles, even to binding international instruments are not themselves legally binding*'.[239]

The SRSG furthermore argued that it cannot be inferred from the pre-ambular language of the UDHR that international law treats companies as functionally equivalent to States, or to other 'organs' of society. The SRSG did not consider that, by analogy, the UDHR could be interpreted to impose on business enterprises the same human rights obligations as applicable to States. Companies as economic actors ought to be differentiated from States as 'specialized organs of society', the SRSG argued. They do not perform a general role like States, but 'a specialized function' in relation to human rights, which is economical.[240] The character and scope of the corporate responsibilities for human rights ought to reflect these special natures and function.[241]

Since corporations are not functionally equivalent to States, attributing general obligation to companies on an equal footing to States would be unfair, he argued. Companies should not shoulder all, or the same, obligations as States. The approach of the SRSG towards identifying the human rights responsibility of business enterprises reflects this stance of the SRSG, namely that human rights norms ought to correspond to the factual reality of the social role and function of business enterprises in society:

> While corporations may be considered "organs of society", they are specialized economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of States. Accordingly, the Special

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[237] Also *see* Art. 29 and 30 of the UDHR implementing this pre-ambular provision. Larissa van den Herik & Jerney Letnar Černič, *Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again*, Journal of International Criminal Justice, 733-734 (2010).

[238] Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 17 Brooklyn Journal of International Law, 25 (1999).

[239] John Gerard Ruggie, Just Business Multinational Corporations and Human Rights, 40 (W.W. Norton & Company, 2013).

[240] FIDH, *Comment on FIDH Position Paper by John Ruggie, UN Special representative on Transnational Corporations & Human Rights* (March 20, 2006), *available at*: http://www.fidh.org/IMG/article_PDF/article_a3166.pdf

[241] Interim Report*, supra* note 233, ¶ 6.

> Representative has focused on identifying the distinctive responsibilities of companies in relation to human rights.[242]

The SRSG furthermore objected to the draft Norm's approach to impose on companies an extensive, although not comprehensive list of international human rights obligations. These obligations ranged, generally speaking, from the right to equal opportunity and non-discriminatory treatment, the right to security of persons, the right of workers, right for national sovereignty and human rights, consumer protection and environmental protection.[243] The SRSG considered the assertion that international human rights law created a wide range of direct human rights obligations for companies to have 'little authoritative basis in international law - hard, soft, or otherwise'.[244] Customary law may create corporate obligations for a very limited set of grave human rights violation, the SRSG argued, but this was not the case for the entire body of human rights. International human rights treaties only addressed business enterprises indirectly through States, he argued.

The SRSG furthermore held that the UN Norms wrongly identified certain international instruments as sources of human rights obligations for companies.[245] The UN Norms upheld a broad definition of human rights and international human rights law.[246] The preamble of the UN Norms identified a wide range of treaties and soft-law documents. Some of the documents referenced were of a declaratory or soft-law nature and without general legal effects. The list of human rights contained rights that had not been recognized by States or that were still in the process of being negotiated. Examples were: 'consumer protection, the "precautionary principle" for environmental management, and the principle of "free, prior and informed consent" of indigenous peoples and communities'.[247] The SRSG could not discern a principled basis for determining why certain human rights were said to apply to business enterprises, while others not.[248] This may result in higher benchmarks being imposed on companies than on States in

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[242] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 53, U.N. doc. A/HRC/8/5 (April 7, 2008) (by John Ruggie).

[243] This was at odds with the approach commonly taken by international human rights treaties that applied to either to a certain category of human rights, right holder or type of violation. Kinley & Chambers, *supra* note 223, at 6.

[244] *Interim Report, supra* note 233, ¶ 60.

[245] Miretski & Bachmann, *supra* note 213, at 24.

[246] These terms were said to include 'civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations System'.

[247] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, at 9, A/HRC/4/35 (Feb. 19, 2007) (by John Ruggie).

[248] *Id*. at 9. The SRSG noted, '[t]he Norms do allow that some civil and political rights may not pertain to companies. But they articulate no actual principle for reaching that conclusion, or for their imposing higher obligations on corporations in several instances than states have accepted for themselves. In this critical foundational respect, then, the Norms employ a purely ad hoc procedure - perhaps reflecting their authors' analytical hunches or policy preferences, but not any principled rule that I can discern'. *Id*. at 10 (Ruggie 2007).

certain situations, the SRSG argued. Companies furthermore would be bound to human rights standards that they had not agreed to.[249] The conception of a selective list of human rights was not considered consistent with the international human rights regime that accords equal importance to all human rights.[250]

The SRSG's critique of the UN Norms seemed anchored on the claim that the UN Norms were a 'restatement' of international law. The UN Norms, however, did not reflect the status quo in international law, at least not how international law applied to business enterprises at the time.[251] The UN Norms provided an interpretation and prescription of the 'progressive' development of international human rights law. The authors of the UN Norms sought to apply international human rights principles as they applied to States as well as non-state actors in areas of international law by analogy to business enterprises. In this top-down legal approach, the UN Norms borrowed language and conceptions as applied elsewhere in international law and relied on these concepts to conceptualise the corporate human rights obligations and their attribution to business enterprises. The principle author of the UN Norms explains as follows:

> The Sub-Commission Norms, of course, do not constitute a treaty an therefore cannot bind either states or corporations in the same way that treaties are binding once they are ratified. If, however, one wanted to identify the humanitarian law principles most applicable to both state and non-state actors, the Geneva Conventions, the ICC Statute, the Code of Conduct for Law Enforcement Officials, the Basic Principles on Firearms, and the Voluntary Security Principles are the most relevant. United Nations drafters regularly follow this approach of borrowing provisions from one instrument to develop another. This approach to borrowing language is not at all uncommon. It should also be noted that the Sub-Commission carefully consulted the International Committee of the Red Cross to make sure that these provisions of the Norms were consistent with humanitarian law.[252]

The UN Norms thus embraced a conventional approach to international law-making of setting aspirational standards. These standards derived legal authority from their in-principle conformity with international human rights law. As a soft-law document that contained aspirational language, the UN Norms in themselves were not legally binding. They would derive normative force from their acceptance by States and take on binding force through their actual implementation.[253] They aimed to propel progressive reform. The drafters indicated that the UN Norms did not opt for a static approach, but an approach that would 'incorporate and encourage further evolution'.[254]

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[249] Ruggie, *supra* note 239, at 53.

[250] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *supra* note 247, at 9.

[251] David Weissbrodt, *Keynote Address: International Standard-Setting on the Human Rights Responsibilities of Business*, 26 Berkeley Journal of International Law, 16 (2008).

[252] *Id.* at 385.

[253] *Id.* at 388.

[254] Weissbrodt & Kruger, *supra* note 210, at 912.

The UN Norms, as noted by Baxi, reflected *de lege ferenda*, a view of the law as it ought to be, rather than *de lege lata*, positive law as it exists.[255] The SRSG seems to have criticized and discarded the UN Norms (wrongly) for presenting an inaccurate account of *de lege lata*. While the UN Norms were drafted in a treaty format, they did not constitute a treaty, nor were they intended as such.[256] For the UN Norms to have this status as instant international treaty law was inconceivable at that time. Having been developed by a small group of experts, the UN Norms lacked the State consent that was a prerequisite for the UN Norms to attain such status.[257]

While the UN Norms thus did not have the legally binding force of an international treaty,[258] to conceive them as strictly voluntary was not correct either. Various implementation procedures were foreseen in the draft text that required action on the part of business enterprises.[259] Actual implementation would give the UN Norms binding effects beyond those of aspirational language of voluntary instruments, it was argued.[260] The UN Norms furthermore derived legal authority from their restatement of international human rights law; '[t]he legal authority of the Norms derives principally from their sources in treaties and customary international law, as a restatement of international legal principles applicable to companies'.[261]

The UN Norms thus presented a proposition of a progressive account of international human rights law. The UN Norms were intended as a soft-law document that resembled in its non-legally binding form the OECD Guidelines and the ILO Tripartite Declaration and other existing international standards that addressed the behavior of business enterprises, at least indirectly. Their added value was their focus on human rights, their applicability to all companies and their significance derived from their approval by the UN.[262]

Rather than dispensing of the UN Norms all together, the SRSG could have built on the draft text in order to set an aspirational standard proper. While inhibiting conceptual problems, these were not insurmountable, as the SRSG and other scholars have rightly pointed out, and could have been resolved. The SRSG's decision to distance himself from the UN Norms met with disdain by NGOs, which had requested the SRSG to further build on the UN Norms as an aspirational standard from which legal obligations could follow in the future.[263]

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[255] Baxi cited in: Meretski & Bachmann, *supra* note 213, at 10.

[256] Weissbrodt & Kruger, *supra* note 210, at 913.

[257] This is because the UN Norms were developed by a small group of experts and international human rights treaties as primary sources of law derive their authority from the consent of States. For an analysis of how the UN Norms differed from international human rights treaties, *see* Kinley & Chambers, *supra* note 223, at 6.

[258] Weissbrodt, *supra* note 251, at 385.

[259] To ensure the protections in the UN Norms, business enterprises were required to adopt and implement internal rules of operation, to be subject to independent periodic monitoring and to provide adequate reparation for harm caused. Weissbrodt & Kruger, *supra* note 210, at 913.

[260] *Id*.

[261] *Id.*

[262] Weissbrodt, *supra* note 251, at 381.

[263] John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, in The UN Guiding Principles on Business and Human Rights: Foundations and Implementation, 14 (R. Mares ed. 2012).

To be noted is that the development of such an aspirational standard may have gone beyond the scope of the SRSG's initial mandate, however. This mandate merely requested the SRSG 'to identify and clarify' existing human rights related standards of corporate responsibility and accountability business enterprises, rather than to set new aspirational standards. Also with regards to the role and duties of States, the SRSG was merely tasked '[t]o elaborate', rather than to raise existing standards of international human rights law.[264] To propose a progressive account of international law that, if acceptable to States, would push the status quo in international human right law, as the UN Norms had intended to do, was outside the SRSG's official purview. The HRC appeared to have pre-empted the SRSG from going this route by framing his mandate in restricted terms.

The SRSG thus rejected the UN Norms, but not without conceding, as the former Commission on Human Rights had done previously[265], that the UN Norms contained useful elements.[266] Some of the concepts that the UN Norms recognized later appeared in the UNGPs.

2.4.2.1 The Concept of 'Business Enterprise'

The UN Norms addressed transnational corporations, which it defined in broad terms, as 'an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively',[267] and extending its scope of applicability to 'other business enterprises'. The term 'other business enterprises' was defined as including 'any business entity, regardless of the international or domestic nature of its activities, including the transnational corporation, contractor, subcontractor, supplier licensee or distributor, the corporate, partnership, or other legal form used to establish the business entity and the nature of the ownership of the entity'.[268]

While it was recognized that large transnational enterprises caused greatest public concern at that time, the drafters did not want to restrict the application of the UN Norms to include only this category of business enterprises, for several reasons.[269] The drafters believed that in principle, all business enterprises should respect the human rights standards as set in the UN Norms, and that therefore the UN Norms should apply to all.[270] The UN Norms were intended to apply to domestic and transnational business enterprises equally where the principles of the UN Norms were relevant to both. To the extent that the scope of the UN Norms pertaining only to the latter

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264 For the full mandate, *see* Commission on Human Rights Res. 2005/69, *supra* note 231.

265 Commission on Human Rights Res. 2004/116, *supra* note 218.

266 The SRSG noted that `Like the Commission, the Special Representative of the Secretary-General believes that the Norms contain useful elements: the summary of rights that may be affected by business, positively and negatively and the collation of source documents from international human rights instruments as well as voluntary initiatives have considerable utility. Any fair-minded discussion of standards inevitably will cover some of the same grounds.` Interim Report, *supra* note 233, ¶ 57.

267 *Id.* ¶ 20.

268 *Id.* ¶ 21.

269 Weissbrodt & Kruger, *supra* note 210, at 909.

270 Miretski & Bachmann, *supra* note 213, at 22.

group would have been discriminatory, it was argued. It would have furthermore provided opportunity for companies to avoid responsibility by concealing their transnational nature, by financial or other means, for the purpose of falling outside the scope of the UN Norms.[271] Accordingly, the UN Norms were 'written to include all business enterprises' and '[i]ts breath de-emphasizes the definition of transnational corporations and does not restrict the Norms' scope of application'.[272] In this regard, the draft Norm`s approach to defining transnational corporations was similar to that of the ILO Tripartite Declaration[273] and the OECD Guidelines[274].

The SRSG would later adopt a similar functional approach to defining business enterprises, arguing that because all business enterprises can have negative impacts on human rights the corporate responsibility to respect human rights applies 'full and equally to all business enterprises'.[275] GP 14 stipulates: 'The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure'.[276]

2.4.2.2 Sphere of Influence and Leverage

The UN Norms relied on the concept of '*sphere of activity and influence*' as the basis to attribute human rights obligations to companies. The underlying rational was that the international human rights law ought to reflect on the increasing power of business enterprises. The responsibility of business enterprises must be commensurate to their power and influence.[277] The UN Norms point to the relevance of the capacity of business enterprises in its pre-ambular language:

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271 Weissbrodt & Kruger, *supra* note 210, at 909.

272 *Id*. at 909.

273 The ILO Tripartite Declaration defined a multinational enterprise to include: 'enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based'. It also stipulates that '[t]o serve its purpose this Declaration does not require a precise legal definition of multinational enterprises' and that the respective definition, 'is designed to facilitate the understanding of the Declaration and not to provide such a definition'. With respect to equal treatment, the ILO Tripartite Declaration stipulate that '[t]he principles laid down in this Declaration do not aim at introducing or maintaining inequalities of treatment between multinational and national enterprises. They reflect good practice for all. Multinational and national enterprises, wherever the principles of this Declaration are relevant to both, should be subject to the same expectations in respect of their conduct in general and their social practices in particular'. ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 6-11 (MNE Declaration), International Labour Office (4th ed. 2006), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

274 The OECD Guidelines stipulate that 'A precise definition of multinational enterprises is not required for the purposes of the *Guidelines*'. They also state that [t]he *Guidelines* are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the *Guidelines* are relevant to both', OECD, *supra* note 29, ¶¶ 4-5.

275 Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.* U.N.Doc. A/HRC/17/31, Commentary to GP 14 (March 21, 2011) [hereinafter *UNGPs*] (by John Ruggie).

276 *Id.* GP 14.

277 Weissbrodt, *supra* note 251, at 901. Ruggie, *supra* note 54, at 8.

> Noting that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations.

The 'sphere of influence concept' aligns with the drafter`s vision of a system of 'relative application' that, instead of imposing absolute standards on companies, accommodates for flexibility. It would be mindful of the factors that bear on the ability of a business enterprise to affect human rights, for instance the type, size and activities of a business enterprise.[278] The larger its resources, the broader its activities and the more influence a corporation has, the greater its responsibilities to protect and promote human rights will be.[279] [280]

The SRSG considered the concept problematic, for a number of reasons. First, the concept had 'no legal pedigree'.[281] Also, its operationalisation would pose challenges in delineating the duties and responsibilities of business enterprises and States in practice. The application of the 'sphere of influence' concept would imply that, in practice, the duties of States and the sphere of influence of corporations could overlap. After all, the UN Norms recognized the same duties that applied to States, applied corporations.[282] The sphere of influence concept would make it difficult to discern the outer limits of business' responsibilities for human rights, where the duties and responsibilities of one actor would begin and end and how these duties and responsibilities would relate to one another. 'If responsibilities were entangled with State obligations, it makes it difficult if not impossible to tell who is responsible for what in practice'.[283]

Reliance on the sphere of influence concept could also result in a State evading its responsibility by simply transferring its human rights obligations to corporations. This was a possible scenario where the capacity of companies exceeded that of a State, when a State had not ratified a particular treaty, or when a State failed to implement or enforce its treaty obligations. According to the SRSG, such transfer was problematic if this would reduce the government's discretion for 'making trade-offs and balancing decisions, and especially for determining how best to "secure the fulfillment" of, precisely those economic, social, and cultural rights on which corporations have the greatest impact'.[284] In weak governance zones, it could furthermore undermine

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278 Weissbrodt & Kruger, *supra* note 210, at 911.

279 *Id.* at 912.

280 The drafter noted that 'by taking a flexible approach that holds businesses responsible according to their respective spheres of activity and influence, and by including all businesses, the Norms recognize that all can make a positive contribution through the development, adoption, and implementation of human rights principles' *Id.* at 912

281 Ruggie, *supra* note 54, at 10.

282 Ruggie, *supra* note 239, at 49.

283 Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 6, U.N. doc. A/HRC/8/5 (April 7, 2008) (by John Ruggie).

284 Ruggie, *supra* note 239, at 52.

domestic political incentives 'to make governments more responsive and responsible to their citizenry'.[285]

Overlapping obligations furthermore could result in strategic gaming, the situation where both States and companies would seek to avoid their responsibilities.[286] The SRSG viewed 'influence' as a relational concept. A government may choose not to discharge its duties 'in the hope or expectation that a company will yield to social pressures to promote or fulfill certain rights'.[287] A company can 'minimize its apparent influence by creating any number of hollow subsidiary entities, and thereby seek to diminish or duck its responsibilities'.[288] For these reasons, the SRSG was of the opinion that 'State duties and corporate responsibilities must be defined independently of one another'.[289]

In addition, attributing responsibility on the basis of the influence that a company may have had, and thus ought to have, exercised over the actor causing human rights harm was in-appropriate, according to the SRSG. This principle rests on the assumption that 'can implies ought', meaning that a company may be held responsible for harm that it is not related to. A company may also undermine its responsibility for harm to which it is related, but where 'influence' cannot be shown.[290] The SRSG furthermore considered that emphasis on 'proximity' could mislead parties into thinking that companies could have no adverse effects on human rights at far distance, which is not the case.[291] The SRSG mentioned that '[i]t is one thing to ask companies to support human rights voluntarily where they have influence, as the Global Compact does; but attributing legal obligations to them on that basis for meeting the full range of human rights duties is quit another'.[292]

The SRSG does not discard the concept of leverage completely, however. The UN Norms note that business enterprises 'shall use their influence in order to help promote and ensure respect for human rights'.[293] The UN Norms explain influence as leverage, which differs from the understanding of influence as the SRSG would later define it, namely by reference to impact. The SRSG acknowledges that leverage is a relevant factor in determining whether a company

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[285] *Id.* at 52.

[286] *Id*. at 50. Ruggie, *supra* note 54, at 12.

[287] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, §70, U.N. doc. A/HRC/8/5 (April 7, 2008) (by John Ruggie).

[288] Ruggie, *supra* note 239, at 51.

[289] The SRSG sought to overcome these problems by drawing a clear separation between the role of States and business enterprises. This is reflected in the commentary to GP 11 that stipulates that the responsibility to respect human rights '*exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations*'. UNGPs, *supra* note 275, Commentary to GP 11.

[290] Ruggie, *supra* note 239, at 50.

[291] Human Rights Council, *Clarifying the Concepts of "Sphere of influence" and "Complicity",* U.N.Doc. A/HRC/8/16 (May 15, 2008).

[292] Ruggie, *supra* note 239, at 50.

[293] Sub-Commission on the Promotion and Protection of Human Rights, *supra* norm 209, Commentary A. (b).

has taken appropriate action to address adverse impacts that it is linked to through its business relationships.[294] The UNGPs note a responsibility for undertakings to exercise their leverage to prevent or mitigate the adverse effects. '[I]f it lacks leverage there may be ways for the enterprise to increase it'.[295] Leverage entails that 'the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm'.[296] Some have argued that the provision in the UNGPs that stipulates the leverage concept may be read as a 'full endorsement' of the leverage-based approach to attributing responsibility for human rights to companies.[297] However, this does not seem to be the case, because leverage in itself does not determine responsibility pursuant to the UNGPs. The argument that the responsibility of business enterprises may take on a 'protect' nature is correct.[298]

In short, the SRSG argued that, as a general proposition, the concept of leverage is unsuited for attributing human rights responsibility to business enterprises because of the difficulties this poses for delineating the responsibilities between States and enterprises.[299] In the specific situation where human rights are linked to adverse human rights impacts through their business relationships the concept may not pose said legal or practical difficulties, however, because the responsibilities of States and business enterprises would be differentiated and mutually exclusive.

2.4.2.3 The 'Human Rights Due Diligence' Concept

The UN Norms articulated a 'due diligence' responsibility for companies `to use` due diligence in avoid involvement in human rights abuses through contribution or direct or indirect linkage;

> Transnational corporations and other business enterprises, shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware.[300]

The UN Norms thus not only specified the obligations of business enterprises in negative prohibitions, it also identified that business enterprises were obligated to undertake positive action. With respect to the right to security of persons, for instance, the UN Norms noted that

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294 *UNGPs*, *supra* note 275, Commentary to GP 19.

295 *Id.* Commentary to GP 19.

296 *Id.* Commentary to GP 19.

297 Florian Wettstein, *Making noise about silent complicity: the moral inconsistency of the `Protect, Respect and Remedy` Framework*, *in* Human Rights Obligations of Business, at 267 (Surya Deva & David Bilchitz eds., 2013).

298 Within the context of outsourcing in the supply chains, Mares indicates, this entails that a buyer company would have a responsibility 'to identify those impacts created by suppliers, independent of the buyer`s conduct, and use whatever leverage the buyer has over the supplier to prevent or remedy harms'. This has the nature of a responsibility to "protect". R. Mares, *The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments*, 79 Nordic Journal of International Law, 238 (2010).

299 Ruggie, *supra* note 54, at 10.

300 Sub-Commission on the Promotion and Protection of Human Rights, *supra* norm 209, Commentary A.(b).

companies '*shall establish policies*', '*engage with due diligence in investigations'* and ensure that their guards are '*adequately trained*' and that provisions of the UN Norms are incorporated into contracts.[301]

The element of the due diligence as identified in the UN Norms bears close resemblance to human rights due diligence that was later recognized by the UNGPs as core to the corporate responsibility to respect. The language of the UN Norms 'to use' suggests that due diligence is a process that business enterprises should employ to discharge their human rights responsibility.

In the case of the UNGPs, due diligence is applied slightly differently and, arguably, carries more weight. The UNGPs establish human rights due diligence not only as a method[302] for discharging this responsibly, but as a standard integral to the corporate responsibility to respect human rights itself. While under the UN Norms, companies were regarded as responsible for the human rights abuse in first instance, under the UNGPs companies are regarded as responsible for having human rights due diligence policies and processes in place to prevent potential human rights impact from occurring. The depiction of the UNGPs as process, rather than performance-oriented, seems accurate in this respect.[303]

The UN Norms identified a standard that resembles in various aspects the corporate responsibility to respect under the UNGPs, which essentially requires business enterprises to 'know and show' their respect for human rights.[304] The UN Norms indicate that business enterprises 'shall inform themselves' of the human rights impacts of their activities, 'so that they can further avoid complicity in human rights abuses'. This standard finds an equivalent under UNGP 17, which articulates the responsibility of business enterprises to undertake human rights risk inquiries as part of their human rights due diligence process in order to avoid contributing to human rights abuse.

The UN Norms note that business enterprises must be transparent, by 'disclosing timely, relevant, regular and reliable information regarding their activities, structure, financial situation and performance'.[305] The UNGP 17 recognizes that a responsibility to communicate is integral to the human rights due diligence process, which requires that business enterprises '*account for*' how they address their adverse human rights impacts. The human rights due diligence responsibility requires assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed.[306]

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[301] *Id.* ¶ 3(d).

[302] The Oxford Dictionary defines a method as 'A particular procedure for accomplishing or approaching something, especially a systematic or established one'. *See* http://www.oxforddictionaries.com/definition/english/method.

[303] C. Parker & J. Howe, *Ruggie`s Diplomatic Project and its Missing Regulatory Infrastructure, in* The UN Guiding Principles on Business and Human Rights Foundation and Implementation (R. Mares ed. 2011).

[304] UNGPs, *supra* note 275, Commentary to GP 15.

[305] Sub-Commission on the Promotion and Protection of Human Rights, *supra* norm 209, at 15(d).

[306] UNGPs, *supra* note 275, GP 17.

The UN Norms furthermore call on business to conduct '*periodic evaluations*' of their human rights impacts in conformity to the UN Norms.[307] Such evaluations must reflect the views of indigenous people and communities. The outcome of the assessment must be made available to stakeholders. The UNGPs require business enterprises to undertake human rights impact assessments, the purpose of which are to determine the nature of actual and potential adverse human rights impact with which a company may be involved. This will provide clarity on the specific impacts on a specific people within a particular operational context.[308] It informs subsequent steps in the human rights due diligence process,[309] as the findings must be integrated and acted upon.[310] Special attention to adverse human rights impacts on 'individuals from groups or populations that may be at heightened risk of vulnerability or marginalization' is warranted.[311]

The UN Norms established that business enterprises must undertake 'plans of action or methods of reparation and redress' in case of inadequate compliance.[312] The UNGPs also require active engagement in remediation, 'by itself or in cooperation with other actors', where business enterprises have caused or contributed to adverse impacts.[313]

The UN Norms define stakeholders as 'stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises'. [314] The concept is interpreted functionally in light of the objectives of these Norms.

2.5 Conclusion

The first initiatives to regulate the conduct of business enterprises originated in the 1970s and emerged out of the quest of developing countries to consolidate their control over the activities of large western companies in their territory and their autonomy to pursue domestic socio-economic development objectives free from external interference. These countries asserted themselves in intergovernmental fora to create international non-legally binding codes of conducts. These codes were meant to regulate the transnational operations and practices of these companies and their relations with States, and in particular host states. Attempts to develop issue-specific agreements were more successful and resulted in the adoption of, *inter alia*, the adoption of the ILO Tripartite Declaration and the OECD Guidelines on International Investment and MNEs. These successes have been attributed, in part, to the member-ship composition.[315]

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307 Sub-Commission on the Promotion and Protection of Human Rights, *supra* norm 209, ¶ 16.

308 UNGPs, *supra* note 275, GP 18 and Commentary.

309 *Id.* Commentary to GP 18.

310 *Id.* GP 17.

311 *Id.* Commentary to GP 18.

312 Sub-Commission on the Promotion and Protection of Human Rights, *supra* norm 209, §16 (g) and (h).

313 UNGPs, *supra* note 275, GP 22.

314 Sub-Commission on the Promotion and Protection of Human Rights, *supra* norm 209, at 21.

315 The OECD, whose membership consisted mainly of developed States, presented a forum more congenial to Western interest than the UN, with its universal membership. Baade, *supra* note 42, at 416.

These international codes of conduct articulate principles as applicable governments and transnational corporations in order to improve relations between each other in the areas of investment and economic development.[316] States were the primary addresses of the codes. The recommendations by States set out in these codes addressed business enterprises indirectly. The codes were an attempt to achieve greater coherency in domestic policies related to business enterprises and foreign direct investment. Where these codes were meant to regulate the responsibilities of business enterprises in relation to human rights, this was only with regards to a limited range of labour and workers' rights. Negotiated within multi-lateral settings and between States, the codes had an international-governmental and public character.[317] Business enterprises were generally excluded from participating in these law-making processes, not without consequences.[318]

The 1980s witnessed a shift toward neo-liberalist-inspired reforms of de-regulation and privatisation across countries at different stages of development. Legal instruments were developed supportive of trade liberalisation, investment and production at the international level. These initiatives contributed to environments conducive for business enterprises to grow in size, geographical spread, economic power and influence. Business enterprises came to be perceived more favourably as engines of growth and prosperity that, as sources of jobs, capital, technology and investment, could make valuable contributions to the realisation of a wide range of human rights. This was not automatic, however. These governance gaps became more apparent as NGO brought to light the involvement of corporations with high public profiles in egregious human rights abuses, exposing the true impacts of globalisation on human rights. These gaps have been partly the result of a lack of capacity and/or willingness of developing host states especially to impose and enforce human rights regulations on powerful enterprises, by reason of weak rule of law, lax regulatory frameworks or weak democratic control.

Business enterprises started to self- impose CSR responsibilities on a voluntary basis and integrate human rights demands through non-binding individual or industry-wide codes of

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316 Ramasastry, *supra* note 55, at 241.

317 According to Baade, these instruments share four major specificities: they are the attempt 'to regulate non-state actors; express reservations as to the legal nature of the instruments adopted; firm multilateral governmental pronouncements on an important subject of transnational legal relations; and last but hardly least, follow-up devises involving State action'. Baade, *supra* note 58, at 7.

318 Charney notes that lobbying efforts by business enterprises were the result of these entities not having the opportunity to formally present themselves in international organisations. States had sought to limit the role of business enterprises in international standard-setting in order to limit the influence of these entities on rules of international law. Business enterprises had been precluded from participating in the informal negotiation sessions on the TNC Code. In the OECD, structured business and labor groups were formally consulted through the Business Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC); however, these organisations did not participate in the actual OECD negotiations. Business enterprises were also excluded from the Tokyo round of the General Agreement on Tariffs and Trade (GATT). The ILO was the only organisation that allowed business and labor representatives to formally participate in the development of standards. Serving only national delegations, they had a right to speak and vote independently of the delegation's government members. The case of the ILO was exceptional and 'the result of extreme pressure placed on western, developed governments by the labor union movement and advancing socialist politics'. `It was thought that the creation of the tripartite system to develop international labor legislation would deflect the pressures on national governments`. Jonathan I Charney, *Transnational Corporations and Developing Public International Law*, Duke Law Journal 748, 750-751, 765 (1983).

conduct. These were supplemented by multi-stakeholder initiatives. The UNGC and the Kimberley Process Certification Scheme are two examples of a great diversity[319] of CSR instruments[320] [321] that emerged, ranging from corporate codes of conduct and multi-stakeholder initiatives of certification and labelling, model codes, sectorial initiatives, international frameworks, and socially responsible investment.[322] These initiatives were driven by the CSR movement, which had gained in strength as a business response to public condemnation of these irresponsible practices and as an attempt to avert legal regulation and accountability by demonstrating a capacity to self-regulate. This movement advanced many approaches to regulating the role and responsibilities of business enterprises. These drew from a rich body of theories dating back to the 1950s, which is when CSR is alleged to have emerged as a management idea.[323] These theories range from corporate citizenship and the triple-bottom-line to enterprise social responsibility, ethical responsibility and socially responsible investment.[324]

Partially because CSR responded dynamically to evolving changes in expectations and needs over time, conceptions of CSR vary.[325] CSR is generally perceived as a voluntary undertaking by business enterprises that extend beyond the law. CSR is not centred on human rights, but views human rights as an integral element of a broader CSR agenda, which covers substantive issues like environmental responsibilities, corruption, labour rights, consumer relations, workforce and community activities.[326] Narrowly focused on a selection of labour rights initially, human rights has come to be understood more expansively as encompassing a wider range of human rights, which the linkage to international human rights standards could explain.[327] The CSR discourse premises on the understanding that human rights can be best advanced through softer forms of responsibility, self-regulation and sustainability.[328] It also premises on the understanding that

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319 Diversity was reflected in the areas covered, origins and objectives of the different instruments. OECD, *Annual Report 2008*, 237 (2008), http://www.oecd.org/newsroom/40556222.pdf.

320 Deborah Leipziger, The Corporate Social Responsibility Code Book (Greenleaf Publishing. 2003).

321 Michael R. Macleod, *Emerging Investor Networks and the Construction of Corporate Social Responsibility*, The Journal of Corporate Citizenship (2009).

322 Classifications and typologies vary. This classification has been provided in the OECD 2008 Annual report. OECD, *supra* note 319, at 238-239.

323 In *Social Responsibilities of the Businessman*, Howard R. Bowen (1953) allegedly launched the modern CSR debates noting that 'we are entering an era when private business will be judged solely in terms of its demonstrable contribution to the general welfare… The acceptance of obligations to workers, consumers, and the general public is a condition for survival of the free enterprise'. Howard Bowen, Social Responsibilities of the Businessman (Harper 1953).

324 Kerr et al., *supra* note 68.

325 Enneking, *supra* note 92, at 382.

326 *Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development*, COM(2002) 347 final (Jul. 2, 2002) [hereinafter EU Commission, COM(2002) 347 final]

327 Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, 22 Business Ethics Quarterly, 742 (2012).

328 K Buhmann, et al., Corporate Social and Human Rights Responsibilities (Palgrave Macmillan. 2010).

employees, investors, consumers and the public, rather than States, should be the drivers and enforcers of CSR initiatives.[329]

The 1990s also witnessed attempts at strengthening the corporate accountability for *negative* impacts on human rights through laws and policies at national and international level. Prominent examples are the reinvigoration of the ATCA for the purpose of corporate civil liability, and the French proposal for the ICC's jurisdiction to extend to legal persons. The accountability movement and the BHR movement, which is primarily concerned with human rights, were important driving forces behind these initiatives. They had gained in strength and legitimacy as self-regulation and multi-stakeholder initiatives had lost in credibility and effectiveness. The BHR movement is more narrowly focused on the quest for corporate accountability for the negative human rights impacts through binding laws and access to remedies and justice for victims or impacted communities.[330] The presumptions of the business and human rights movement differ fundamentally from those advanced by the CSR movement, though both emerged in response to the same challenge, to address the regulatory gaps that globalisation has posed to society. Unsurprisingly, debates involving both movements often polarised and resulted in an impasse.[331]

This chapter provided a brief analysis of the UN Norms, the failure of which resulted in the appointment of John Ruggie as the 'SRSG') in 2005. The UN Norms had been developed as a soft-law document. While thus not intended to have the legally binding force of a treaty, the UN Norms were expected to derive normative force from their recognition and acceptance by States and business enterprises, and take on binding effects in law and practice as a result of their actual implementation. Their presentation as a restatement of International Human Rights Law and the language in the UN Norms indicating that a broad selection of human rights obligations applied directly to companies met with criticised, including by the SRSG, which later discarded the UN Norms as 'exaggerated legal claims and conceptual ambiguities'. This chapter reflected on the points raised by the SRSG in his critical assessment of the UN Norms. While the SRSG distanced himself from the UN Norms and decided not to build further on this initiative, some of the concept that the UN Norms recognized later re-appeared in the UNGPs, inter alia, the concept of human rights due diligence.

[329] Zerk, *supra* note 76.

[330] *Id.* at 238.

[331] EU Commission, COM(2002) 347 final, *supra* note 326, at 4.

3 The UN Guiding Principles on Business and Human Rights: Theoretical Foundations and Principled Pragmatism

3.1 Introduction

The previous chapter reflected on the context in which the need for the creation of the mandate of the SRSG was created. The previous decades saw several failed attempts to create international legal binding standards on business and human rights. A prominent example is the draft UN Norms that stranded in the Commission on Human Rights (replaced by the HRC in 2006) after the debate had turned divisive and polarized. Partially because of these political dynamics, which had not fully settled by the time the SRSG entered his mandate, it was reasonable to assume that recommending full-on negotiations on an all-encompassing treaty on business and human rights was not feasible at the time. The SRSG pursued an alternative approach of constructing the 'Protect, Respect Remedy' Framework, which was welcomed by the HRC on 18 June 2008. The SRSG subsequently developed the UNGPs, which the HRC unanimously 'endorsed' on 16 June 2011. The key stakeholders – States, civil society, business enterprises – seemed aligned and many expressed their support for the UNGPs. The SRSG describes the significance of this achievement as follows:

> The GPs are the first authoritative guidance that the Council and its predecessor body, the Commission on Human Rights, have issued for states and business enterprises on their respective obligations in relation to business and human rights; and it marked the first time that either body 'endorsed' a normative text on any subject that governments did not negotiate themselves.[1]

The purpose of this chapter is to assess the SRSG's project on its own terms, in order to uncover the UNGP's theoretical foundations. This assessment is also aimed at determining the character and function of the UNGPs. This chapter finds that the UNGPs are set out to advance a dynamic approach to institutional developments and to start a process to create a better functioning governance system for the effective prevention of, and remedy for, business-related human rights harm. The next chapter will focus on the legal status of the UNGPs as soft law and their normative potential to affect and coordinate the regulation of business behavior related to human rights. The effective implementation of the UNGPs should result in the further evolution of corporate responsibility to respect human rights into a more binding norm and, possibly, a 'hard' obligation at the national and international level.

The first part of this chapter (Section 3.2) will examine the theoretical foundations of the UNGPs. This section will provide: a synopsis of the SRSG's views on the embedded liberalism compromise, which has been of importance in framing the problem in the business and human rights domain (Section 3.2.1); the SRSG's views on the `global public domain`, which the UNGPs reflect by articulating norms that correspond with the public role of business enterprises and other non-state actors in the current human rights landscape (Section 3.2.2); the SRSG's

[1] Ruggie, J., *Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization*, 1 (Regulatory Policy Program, Working Paper RPP-2015-04, 2015).

approach of principled pragmatism, which guided the SRSG throughout his mandate (Section 3.2.3); the function of the PRR Framework and the UNGPs as a starting point and integral part of a process of advancing towards enhanced standards and practices on a global scale (Section 3.2.4); and the characteristics of the institutional approach that the UNGPs promote and that is essential for the constitution of a global business and human rights regime (Section 3.2.5).

The second part will provide a description of the UNGPs.

3.2 The SRSG's Project and Its Theoretical Foundations

3.2.1 Embedded Liberalism Compromise and the Pursuit of a Macro Agenda: Framing the Problem

This section addresses first the SRSG's understanding of today's challenges of global governance[2] and their solution, which he describes as the 'embedded liberalism compromise'. The SRSG's framing of the problem in the business and human rights domain will be discussed next. The SRSG has described business and human rights as 'a microcosm of a larger crisis in contemporary governance: the widening gaps between the scope and impacts of economic forces and actors, and the capacity of societies to manage their adverse consequences'.[3]

The SRSG developed his view on global governance in his earlier writings,[4] in which he used the term embedded liberalism as a characterization of the liberal international economic order as it had developed until the 1980s. According to Ruggie, the essence of embedded liberalism is the pursuit of an international economic liberalization agenda under the condition that States can cushion its deleterious domestic effects by means of economic and social policies. The presumption underlying this notion is that economic liberalism must be embedded in social values and principles to ensure that commitments to free trade and open markets are compatible with the requirement of domestic social and economic stability. Stability is also a prerequisite for markets to thrive and deliver optimal results. The compact between States and society to accommodate for the socially disruptive effects of economic liberalization is referred to as the embedded liberalism compromise.

Embedded liberalism is predicated on the understanding of a multi-lateral economic order that existed in a world that was *international.* Separate and distinct national economies conducted external transactions between one another, mainly at arm's length. Government could intervene to attend to adverse societal effects of free trade by employing conventional policy measures at

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[2] The SRSG notes:

> *Governance*, at whatever level of social organization it occurs, refers to the systems of authoritative norms, rules, institutions, and practices by means of which any collectivity, from local to the global, manages its common affairs. *Global Governance* is generally defined as an instance of govern*ance* in the absence of govern*ment.*

J. Ruggie, *Global Governance and "New Governance Theory": Lessons from Business and Human Rights* 20 Global Governance, 5 (2014).

[3] *Id*. at 6.

[4] J. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order* 36 International Regimes, 404 (1982).

the border in the form of tariffs, exchange rates and capital controls.[5] International order regimes helped to sustain the economic order. Such regimes played a mediating role by 'providing the permissive environment for the emergence of certain kinds of transactions, specifically transactions that are perceived to be complementary to the normative frameworks of the regimes having a bearing on them'.[6] Some of these basic premises of embedded liberalism stand challenged under the transforming forces of globalization.

The delicate balance of this embedded liberalism compromise was disrupted by the forces of globalization.[7] The SRSG links the negative impacts of globalization mainly to its economic dimension, and particular the expanding power of economic forces and actors. The operations of transnational corporations, which the SRSG refers to as globalization's 'most visible embodiment',[8] have come to have impacts on the daily lives of people across different countries as a consequence of their expanding scope[9] and changes in their modality of operation. In this regard, the SRSG draws attention to the transnational corporate networks, whose 'network-based operating models involving multiple corporate entities, spread across and within countries'.[10] The SRSG explains:

> Transnational corporate networks pose a regulatory challenge to the international legal system. To begin with, in legal terms purchasing goods and services from unrelated suppliers generally is considered an arms-length exchange, not an intra-firm transaction. Among related parties, a parent company and its subsidiaries are distinct legal entities and even large-scale projects may be incorporated separately. Any one of them may be engaged in joint ventures with other firms or governments. Due to the doctrine of limited liability, a parent company generally is not legally liable for wrongs committed by a subsidiary even where it is the sole shareholder, unless the subsidiary is under such close operational control by the parent that it can be seen as its mere agent. Each legally distinct entity is subject to the laws of the countries in which it operates, but the transnational corporate group or network as a whole is not governed directly by international law. [11]

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[5] J. Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection* 2 (2002), http://www.cid.harvard.edu/events/papers/LSE-final.pdf.; *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 10, U.N. Doc. E/CN.4/2006/97 (Feb. 2006) [hereinafter *Ruggie, 2006 Interim Report*] (by John Ruggie).

[6] Ruggie, *supra* note 4, at 404.

[7] Ruggie, J. G, *Globalization and the Embedded Liberalism Compromise: The End of an Era?* 2 *(*MPIfG Working Paper No. 97/1, 1997).

[8] J. Ruggie, *Business and Human Rights: The Evolving International Agenda* (John F. Kennedy School of Government, Corporate Social Responsibility Initiative Working Paper No. 31, 2007).

[9] The SRSG notes that the sheer increase in the number of transnational enterprises that spanned the globe then in itself illustrated this expansion, which he estimated at 'some 70,000 transnational firms, together with roughly 700,000 subsidiaries and millions of suppliers'. *Ruggie, 2006 Interim Report*, *supra* note 5, ¶ 11.

[10] Ruggie, *supra* note 8, at 7.

[11] *Id.* at 7.

The SRSG recognized the urgency of addressing these challenges, noting that the current state of affairs is unsustainable.[12] The possibility that the so-called ugly 'isms' of the post-Cold War era, 'protectionism, populism, nationalism, ethnic chauvinism, fanaticism and terrorism', might resurface unless these problems were attended was real and called for action.[13] These nationalist and fundamentalist sympathies and political agendas may revamp as economically disadvantaged but powerful segments of society demand social protection.[14] For the SRSG, the solution is a reconfiguration of the international economic order in order to restore the balance and to bring it into alignment with social values. 'Embedding global markets in shared values and institutional practices is a far better alternative; contributing to that outcome is the broadest macro objective of this mandate'.[15]

The SRSG refers to business and human rights as a microcosm of the transformations and governance challenges in the global domain, which the SRSG describes as follows:

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge. [16]

The SRSG thus advances a narrative of globalization that recognizes that economic forces and actors can make positive contributions to the realization of human rights. The SRSG notes that '[b]usiness is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources, capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights'.[17] The problem arises where activities of business enterprises and markets impacting human rights on a global scale are not embedded in an adequate regulatory framework. While globalization has created favourable environments for the expansion of economic forces and actors, these developments have not been paralleled with policies and regulations that embed these forces in social values and principles. As a consequence of this imbalance, a permissive environment exists in which the business can have negative impacts on human rights without adequate sanctioning and the rights of victims of human rights abuses to an effective remedy for these abuses are by and large ineffective. The

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[12] Ruggie*, 2006 Interim Report*, *supra* note 5, ¶ 18.

[13] Ruggie, *supra* note 5, at 3.

[14] Ruggie*, 2006 Interim Report*, *supra* note 5, ¶ 18.

[15] *Id.*

[16] Report of the Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 3, U.N. doc. A/HRC/8/5 (April 7, 2008) [hereinafter *Ruggie, 2008 Report*] (by John Ruggie).

[17] Report of the Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Draft: Guiding Principles For The Implementation Of The United Nations 'Protect, Respect and Remedy' Framework* (2010) [hereinafter *Draft UNGPs*].

fundamental challenge in business and human rights thus is framed in terms of narrowing and overcoming the so-called 'governance gaps' that globalization has posed to society.

The fundamental challenge is to resolve the institutional misalignments between individual and market forces and the governance capacity of States and other social actors. The SRSG focuses on the evolving power of business enterprises. Transnational corporations that have come to pose the main regulatory challenges in this respect for the reasons mentioned above. There is an increasing number of such companies in emerging markets, hence the North-South divide has become less clearly defined.[18] The presumption is, however, that all companies can affect all human rights, in virtually any type of operational context.[19] The SRSG also draws special attention to the regulation of companies that operate in conflict areas, because the 'worst corporate related human rights abuses, including acts that amount to international crimes, take place in areas affected by conflict, or where governments otherwise lack the capacity or will to govern in the public interest'.[20] The capacity gap is also reflected in the deficient capabilities of States to take effective action, as well as collective action problems at the international level. According to the SRSG, the strengthening of the institutional underpinnings of globalization is necessary in order to sustain globalization as a positive force in the long term.

3.2.2 The Constitutive Public Domain and Polycentric Governance

This section reflects on what the SRSG's refers to as the 'global public domain', which is described as 'an increasingly institutionalized transnational arena of discourse, contestation and action concerning the production of global public goods, involving private as well as public actors. It does not by itself determine global governance outcomes any more than its counterpart does at the domestic level. But it introduces opportunities for and constraints upon both global and national governance that did not exist in the past'.[21] The SRSG's understanding of the 'global public domain' is important, because the UNGPs incorporate this idea.[22] This section will also reflect on the related idea of 'polycentric governance' that the SRSG drew from when developing the UNGPs. This idea reflects how the behavior of business enterprises in relation to human rights is shaped by governance systems other than the State-law system and by standards and practices of States and business enterprises that correspond with the public role these actors have in the world political landscape.

In his earlier writings on the 'global public domain',[23] Ruggie draws attention to the public role that transnational enterprises and other non-state actors have come to perform and the transforming effects that their political activities are having on the world polity. Ruggie points to

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[18] Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights,* 5 (Jan. 23, 2015), *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726.

[19] *Draft UNGPs*, *supra* note 17.

[20] *Id.*

[21] Ruggie, *supra* note 18.

[22] *Id.*

[23] John Ruggie, *Reconstituting the Global Public Domain Issues, Actors, and Practices*, 10 European Journal of International Relations 500 (2004).

business involvement in articulating and enacting new expectations regarding CSR through private governance arrangements as a concrete instance of the public role in business enterprises.[24] Such practices are indicative of the public at the global level no longer being equated with States. These governance arrangements involve the creation of 'a *new* transnational world of transaction flows that did not exist previously'. Ruggie notes:

> The growth of such 'private governance' arrangements is highly significant, and it represents another building block for my own argument. But the rubric of privatization encompasses too much, thereby obscuring the fundamental fact that in many instances of 'private governance' there has been no actual shift away from public to private sectors. Instead, firms have created a new transnational world of transaction flows that did not exist previously, and they have developed and instituted novel management systems for themselves and for relations with their subsidiaries, suppliers, and distributors that they deem necessary given the scope, pace, and complexity of operating in those transactional spaces. In other words, TNCs have gone global and function in near real time, leaving behind the slower moving, state-mediated inter-national world of arm's-length economic transactions and traditional international legal mechanisms, even as they depend on that world for their licenses to operate and to protect their property rights. [25]

The SRSG notes that the creation of these new systems provides 'a historically progressive platform by creating a more inclusive institutional arena in which, and sites from which other social actors, including CSOs, international organisations and even states can graft their pursuit of broader social agendas onto the global reach and capacity of TNCs'.[26]

Ruggie also points out that these governance systems may create new opportunities for non-state actors to exercise and expand their global public role. The processes of global rulemaking and the roles of non-state actors become further institutionalized as shared practices and predictable patterns of action emerge. These practices can have transformative effects in terms of changing the incentive structures of the different actors involved and the political imbalance of power in the global public sphere. [27] These systems are constitutive to an emerging broader institutionalized arena at the global level in which these non-state actors perform their public functions. The SRSG refers to this process as 'the reconstitution of the global public domain – away from one that equated the "public" in international politics with states and interstate realm to one in which the very system of states is becoming embedded in a broader, albeit still thin and partial, institutionalized arena concerned with the production of global public goods'.[28]

According to Backer, the PPR framework represents 'a microcosm of the tectonic shifts in law and governance systems, and the organization of human collectives confronts the consequences

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[24] *Id.*

[25] *Id*. at 503.

[26] *Id.* at *503*

[27] *Id.* at 504.

[28] *Id.* at 500.

of globalization'.[29] The SRSG's furthermore departs from the existing reality that corporate conduct at the global level is shaped by multiple governance systems (national and international public law and governance, civil and corporate governance) that co-exist. The SRSG describes this idea of poly-centric governance as follows:

> It rests on the observation that corporate conduct at the global level today is shaped by three distinct governance systems. The first is the traditional system of public law and governance, domestic and international. Important as it is, by itself it has been unable to do all the heavy lifting on this and many other global policy challenges, ranging from poverty eradication to combating climate change. Indeed, formal state-based multilateralism has become harder, not easier in the past decade or so. The second is a system of civil governance involving stakeholders affected by business enterprises and employing various social compliance mechanisms, such as advocacy campaigns, law suits and other forms of pressure, but also partnering with companies to induce positive change. The third is governance by business enterprises of their own affairs, which internalizes elements of the other two. In the case of multinational corporations, corporate governance so conceived is a distinct transnational law-making system in its own right—the private law of contracts, with direct consequences that can equal and in many cases surpass the scale and effectiveness of public governance in particular issue areas.[30]

The PRR Framework and the UNGPs are a response to and reflect these changes in the business and human rights landscape. States and non-state actors and their respective governance systems have come to exercise social roles in the regulation of business conduct in relation to human rights. These roles are differentiated and complementary. The PRR Framework address these roles of States and business etnerprises and identifies, clarifies and organizes the duties and responsibilities that these actors have in a coherent template. The UNGPs elaborate on the implications of the operationalization of these principles and provide further guidance on means for their effective operationalization. The presumption is that States and business enterprises will enhance their standards and practices as they actively implement their duties and responsibilities as set out under the UNGPs.[31] A regulatory dynamic should abound as a result of the individual and combination of implementation measures that actors adopt. These should contribute to the constitution of better functioning global system. According to the SRSG:

> The Framework and GPs reflect what international relations scholars call 'polycentric governance'. This refers to an emerging regulatory dynamic under which public and private governance systems each add distinct value, compensate

[29] Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations Protect, Respect and Remedy and the Construction of Inter-Systemic Global Governance* 25 Global Business & Development Law Journal, 80 (2012).

[30] Ruggie, *supra* note 18. *See* also, Ruggie, *supra* note 1, at 2.

[31] Michael K. Addo, *The Reality of the United Nations Guiding Principles on Business and Human Rights* 14 Human Rights Law Review, 135 (2014).

for one another's weaknesses, and play mutually reinforcing roles—out of which a more comprehensive and effective global regime might emerge.[32]

3.2.3 The SRSG's Approach of Principled Pragmatism

The SRSG opted for the approach of 'principled pragmatism', which he defined as 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'.[33] This formulation reflects a dual character. The approach of principled pragmatism is both value based and strategic. The SRSG's normative concern was the promotion and protection of human rights as they relate to business, and his primary attention went to the pursuit of this overall end. To be noted is the SRSG's understanding of human rights, which was inspired by the writings of Amartya Sen. Sen views human rights as primarily articulations of significant ethical demands, the substantive content of which reflects (and assert the importance of) freedoms of human beings.[34] The recognition of these ethical demands translates into ethical requirements or 'imperfect obligations' on the part of anyone that is in a plausible position to contribute to the realization of these freedoms to be willing to consider seriously doing just that, what is reasonably expected of them to do, taking into account the parameters of the cases involved.[35] The SRSG's understanding of human rights differs from the one adhered to by the law-centric approach, which views human rights as legal demands or 'laws in waiting'.[36]

The SRSG's approach of principled pragmatism is strategic in its pursuit of the realization of human rights in relation to business. The SRSG described its main strategic objective as 'achieving the maximum reduction in corporate-related human rights harm in the shortest possible period of time'.[37] This strategic aspect of SRSG was also pragmatic in that the SRSG did not favour one particular ideological or governance approach to accomplishing this strategic objective. The SRSG did not opt for the legalistic approach that had been adhered to in the development of the draft UN Norms, nor did he choose to advance the voluntary approach that supporters of the CSR movement favoured. Instead, the SRSG steered a middle course and,

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[32] *See* Berne Declaration interview with John Ruggie (November 2011), https://business-humanrights.org/sites/default/files/media/documents/berne-declaration-interview-ruggie-nov-2011.pdf

[33] Ruggie, *2006 Interim Report*, *supra* note 5, ¶ 81.

[34] Freedom is explained as 'descriptive characteristics of the conditions of persons'. There are two aspects to freedom; 'opportunity' and 'process'. The 'opportunity' aspect of freedom is understood from a capability perspective as the actual opportunities an individual has to achieve valuable combinations of human functionings: 'what a person is able to do or be'. Sen notes that '[c]apabilities and the opportunity aspect of freedom, important as they are, have to be supplemented by considerations of fair processes and the lack of violation of the individual's right to invoke and utilize them'. Amarthya Sen, *Elements of a Theory of Human Rights*, 32 Philosophy & Public Affairs 315, 328-38 (2004).

[35] *Id.* at 315, 340-1.

[36] Sen notes that '[a]n ethical understanding of human rights goes not only against seeing [human rights] as legal demands […], but also differs from a law-centered approach to human rights that sees them as if they are basically grounds for law, almost 'laws in waithing'. *Id.* at 315, 326.

[37] John Ruggie, Address at the Royal Society for the Encouragement of Arts, Manufacturers and Commerce, Sir Geoffrey Chandler Speaker Series (Jan.11, 2011).

drawing from the perspective of polycentric governance, decided to give consideration to all the ways and means that may be relevant for enhancing the realization of human rights by making possible contribution to the reduction of corporate-related harm to human rights. The SRSG concentrated on practical measures that 'provide the best mix of effectiveness and feasibility'.[38] The SRSG elaborated in a letter issued in 2006:

> My mandate, as I read it, is not to devise new ways or grounds for regulating transnational corporations *per se*; rather, it is to strengthen the promotion and protection of human rights as they relate to transnational corporations and other business enterprises by identifying and advocating the adoption of *whatever* measures work best in creating change where it matters most: in the daily lives of people. This is the 'principled pragmatism' of which I wrote in my report. It has guided me from the moment I accepted this important assignment, and I shall abide by it through to the mandate's end.[39]

Principled pragmatism is also concerned with addressing the institutional misalignments that impede the realization of human rights in relation to business. Relevant aspects supporting these misalignments are the norm clashes that are inherent to the business and human rights domain, which are supported in some measure by the fragmentation in international law.[40] In the absence of a meta-system that can resolve these norm clashes, these misalignments must be resolved through practice. The SRSG also points to the institutional incapabilities of the key stakeholders and their misaligned incentive structures.[41] Systemic changes in the way States and business enterprises operate are necessary in order to build these competences.[42] As a consequence, the strategic aspect of principled pragmatism is concerned with the objective of realizing institution reform through a process of enhancing standards and practices of States and business enterprises that govern business responsibility and accountability.[43]

The approach of principled pragmatism finds expression in various facets of the SRSG's mandate. At an early stage, the SRSG decided to not recommend the negotiation of a treaty placing binding obligations on business enterprises. The SRSG emphasized the importance of short-term practical measures to address immediate challenges and to provide immediate relief

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[38] Backer, *supra* note 29, at 82.

[39] John G. Ruggie, Letter from John G. Ruggie, Special Representative of the UN Secretary-General for Business and Human Rights, to Olivier De Schutter, Secretary General and Antoine Bernard, Executive Director, FIDH (Mar. 20, 2006).

[40] The SRSG identified a need for 'operational and cultural changes in and among governments as well as business enterprises – to create more effective combinations of existing competencies as well as devising new ones'. Backer, *supra* note 29, at 125.

[41] *Id.* at 127.

[42] *Id.* at 127

[43] The UNGPs define their objective as 'enhancing standards and practices with regards to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalisation'. Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.* U.N.Doc. A/HRC/17/31, General Principles (March 21, 2011) [hereafter *UNGPs*] (by John Ruggie).

for human rights abuses.[44] The view of the SRSG was that a treaty-making process could take (too) long and risked 'undermining effective shorter-term measures'. The SRSG reasoned that it was in the interest of victims of human rights that results were delivered sooner rather than later, noting that '[e]ven if we were to go down the treaty route, we still need immediate solutions to the escalating challenge of corporate human rights abuses'. The former UN High Commissioner for Human Rights remarked that absent such immediate solutions, 'much damage [to victims] could be done in the meantime'.[45] [46]

Also, the fact-based foundation and consultative process that the SRSG relied on in the development and building of a consensus around the PRR Framework and the UNGPs reflect 'principled pragmatism'. The SRSG constructed a knowledge base and forged a consensus around these instruments through an extensive program of systemic research and multi-stakeholder consultations.[47] The extensive research was aimed at informing the debate, moderating excessive claims and providing a knowledge foundation that was shared across different stakeholder groups.[48] The UNGPs reflect this knowledge foundation and derive substantive legitimacy[49] from its factual underpinnings. Future debates and collaboration on business and human rights can build on and draw legitimacy from this knowledge foundation.[50]

Another feature of principled pragmatism is the inclusive multi-stakeholder consultative process that the SRSG organised throughout his mandate. The process was open to all stakeholders and highly participatory, engaging participants from the various stakeholders groups, including business enterprises, at all stages of the mandate.[51] [52] This approach was a method of garnering legitimacy[53] and support for both the development process and the UNGPs across these

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[44] John Gerard Ruggie, Just Business Multinational Corporations and Human Rights 57 (W.W. Norton & Company. 2013).

[45] *Id.*

[46] *See*, for further details on the SRSG motivations not to recommend treaty negotiations, section 4.3.

[47] *UNGPs*, *supra* note 43, Introduction, ¶ 4.

[48] Ruggie, *supra* note 37.

[49] Backer, *supra* note 29, at 96.

[50] *UNGPs*, *supra* note 43, at 4.

[51] Stakeholder engagement was part of the SRSG's mandate as set out in resolution 2005/69, which requested the SRSG to consult 'on an ongoing basis with all stakeholders'. The Commission on Human Rights provided a non-exhaustive list of relevant stakeholders, including 'States, the Global Compact, international and regional organizations such as the International Labour Organization, the United Nations Conference on Trade and Development, the United Nations Environment Programme and the Organization for Economic Co-operation and Development, transnational corporations and other business enterprises, and civil society, including employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations'. Commission on Human Rights Res. 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises, 59th meeting, E/CN.4/RES/2005/69 (Apr.20, 2005).

[52] According to the SRSG, the UNGPs furthermore were developed through the means of polycentric governance. *See* Ruggie, *supra* note 2, at 10.

[53] The approach to the stakeholder consultations by striving for the fullest and equal participation of all stakeholders created (democratic) legitimacy for the process (and the UNGPs). Stephanie Bijlmakers, *Business and human rights governance and democratic legitimacy: the UN "Protect, Respect and Remedy" Framework*, 26 Innovation: The European Journal of Social Sciences 288 (2013).

stakeholder groups more generally.[54] Appending the influence of business lobbying on derailing the negotiations on the draft UN Norms,[55] the SRSG attached considerable importance to business involvement.[56] The degree of engagement by business organisations in the process was remarkable[57] and, according to the SRSG, imperative to ensure the buy-in of business enterprises and to secure their commitment to the implementation of the UNGPs.[58]

The multi-stakeholder approach was also aimed at achieving a so-called 'thick stakeholder consensus'.[59] Pauwelyn, Wessel and Wouters describe how a normatively superior benchmark of 'thick stakeholder consensus' is emerging as a 'code of good practice' in new cooperation.[60] [61]

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[54] The participation of stakeholder individuals, groups and institutions that had contributed to the mandate had come to constitute 'a global movement of sorts in support of a successful mandate'. *UNGPs*, *supra* note 43, introduction.

[55] For an analysis of value of an expansion of business participation in international law making from the perspective of public international legal theory, as well from pragmatic political and procedural points of view, *see* Jonathan I Charney, *Transnational Corporations and Developing Public International Law*, Duke Law Journal 748, 750-51 (1983). Charney notes:

> [T]he development of international TNC codes has merely tended to convert festering disputes in the political and economic arenas into legal disputes. By failing to resolve most of these disputes before formulating normative concepts, the TNCs will be motivated to use their power and transnationality to frustrate attempts to enforce these norms. Their likely success will prejudice the credibility of the law-making process.... Permitting greater TNC participation in the current process […] may facilitate resolution of underlying disputes and minimize conflict over the resulting norms.

Id. at 776,777. Charney furthermore notes:

> Prohibiting direct business participation in the development of these rules poses certain risks: (1) that the rules may be impracticable, (2) that the developments will needlessly promote conflict between nation-states and TNCs, and (3) that the international community's current respect for the international legal system will diminish. Nevertheless, including in the rulemaking process representatives of organizations with direct interests in the rules under consideration might both minimize these risks' and maximize the positive results.

Id. at 787.

[56] The stakeholder approach was informed by the draft history of this resolution, and in particular the previous experiences in the development of the draft UN Norms. The draft UN Norms had been criticized for being opaque and insufficiently consultative. David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 Human Rights Law Review (2006). But also *see*, contra, David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law* 44 Virginia Journal of International Law 16, 959 (2004). Surya Deva, *Multinationals, Human Rights and International Law: Time to Move beyond the "State-Centric" Conception*, *in* Human Rights and Business: Direct Corporate Accountability and Human Rights 27, 37, fn 45 (Jernej Letnar Černič & Tara Van Ho eds., 2015).

[57] Karin Buhmann, *Navigating from 'train wreck' to being 'welcomed': negotiaton strategies and argumentative patterns in the development of the UN Framework*, *in* Human Rights Obligaitons of Business: Beyond the Corporate Responsibility to Respect? 29, 30 (Surya Deva & David Bilchitz eds., 2013); K Buhmann, *Regulating Corporate Social and Human Rights Responsibilities at the UN Plane: Institutionalising New Forms of Law and Law-making Approaches?* 78 Nordic Journal of International Law (2009).

[58] Ruggie, *supra* note 37.

[59] Ruggie, *supra* note 18.

[60] The authors uphold the normative threshold that 'any exercise of public authority must be kept accountable'. The authors adhere to the explanation of 'exercise of public authority' by Bogdandy and Goldmann as 'any kind

The underlying presumption is that non-binding instruments and informal modes of cooperation can be constraining in a way that traditional international law can and should therefore meet certain essential substantive requirements in order to ensure ex ante and ex-post legitimacy and generate legal effects. These criteria relate to the source (and authority) and the procedural and substantive quality of a norm.[62] The concept of 'thick stakeholder consensus' has been contrasted with 'thin state consent', which refers to the state consent that is often viewed as sufficient to justify international law.[63]

The approach of principled pragmatism also finds expression in the PRR Framework and the UNGPs. The UNGPs are presented as a set of 'universally applicable and yet practical Guiding Principles on the effective prevention of, and remedy for, business-related human rights harm'.[64] The UNGPs define their objective as 'enhancing standards and practices with regards to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby contributing to a socially sustainable globalization'.[65] The UNGPs advance an approach of institutional development, the characteristics of which will be discussed next.

3.2.4 The UNGPs as a Platform for Institutionalist Reform

The UNGPs note:

> The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved. Each Principle is accompanied by a commentary further clarifying its meaning and implications.[66]

The PRR Framework and the UNGPs serve several aims. A principle aim is to achieve clarity and convergence among existing and newly emerging standards with regards to business and

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of governance activity… [which] determines individuals; private associations; enterprises; states; or other public institutions'. Joost Pauwelyn, et al., *When structures become shackles: stagnation and dynamics in International law making* 25 The European Journal of International Law, 745 (2014).

[61] The assumption is that non-legally binding instruments like the UNGPs and informal modes of cooperation that can affect public policymaking and individual freedom should be subject to requirements of legal justification like any other form of coercion. Despite not being 'legally binding' in the strict legal sense, they can generate compliance in a way that traditional international law can and be as constraining, potentially becoming 'shackles'. *Id.* at 746.

[62] More specifically, the substantive requirements of the 'thick consensus' benchmark are: '(i) the source and authority of the norm-creating body, (ii) transparency, openness, and neutrality in the norm's procedural elaboration, and (iii) the substantive quality; consistency, and overall acceptance (consensus) of the norm'. *Id.* at 761.

[63] *Id.* at 748.

[64] *UNGPs*, *supra* note 43, ¶ 16.

[65] *Id.* General Principles.

[66] *Id.* ¶ 14.

human rights.[67] [68] The scope of this effort is not limited to the identification of existing legal standard and practices in the State-law system. The UNGPs also reflects emerging norms that have been recognized by State and non-state actors through their respective governance systems. The SRSG distilled these interpretations from intense research and stakeholder engagement through multi-stakeholder consultations.[69] To be noted is that the UNGPs thus in and by themselves do not create new standards.

Apart from providing clarity, the UNGPs reflect a framework for the interaction and re-organisation of the expected contributions of key State and non-state actors and their respective governance systems. The PRR Framework organises these in a template with view of coordinating the actions of these actors and their respective governance systems. The PRR Framework thus reflects a holistic and coherent template for a better functioning system for governing the behavior of business enterprises. This system not only affects the behavior of business enterprises, but also the preventative and remedial measures by which this behavior is governed.

The structure of the PRR Framework rests on three differentiated and complementary foundational pillars, which the SRSG described as follows:

> The Framework rests on three pillars: the State duty to protect against human rights abuses by third parties, including business; through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access for victims to effective remedy, judicial and non-judicial. Each pillar is an essential component in supporting what is intended to be a dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; an independent corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

The three pillars reflects the different components of this system. The pillars are *differentiated*, in that each component reflects on the social role that a different actor – State and business enterprises – and their respective governance systems have in regulating business conduct. The duties and responsibilities of States and business enterprises that are recognized under each pillar correlate with the social roles of these actors and exist independently of, and do not jeopardize, one another. These pillars draw from, but do not change, the rationales and discourses that reflect these social roles and that exists within the governance systems of these respective actors.[70] They

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[67] Backer, *supra* note 29, at 81.

[68] The SRSG noted, 'insofar as the overall global context itself is in transition, standards in many instances do not simply "exist" out there waiting to be recorded and implemented but are in the process of being socially constructed. Indeed, the mandate itself inevitably is a modest intervention in that larger process'. Ruggie*, 2006 Interim Report*, *supra* note 5, ¶ 54.

[69] Addo, *supra* note 31, at 135.

[70] The SRSG notes that:

are also *complementary*; the pillars are connected, interrelated and each is essential in supporting this system.[71]

The PRR Framework reflects an international consensus around this regulatory framework and serve as 'an authoritative focal point around which the expectations and actions of relevant stakeholders could converge'.[72] The UNGPs elaborate on the meaning and implications of these principles for law, policy and practice.[73] They provide 'concrete and practical recommendations' that actors can rely on for implementing the PRR Framework, and thus serve as a focal point for the *operationalization* on this framework.[74] The UNGPs thus provide a focal point for the development of a better functioning system for regulating the behavior of business. They are designed as a platform on which cumulative action can be built. Their effective implementation is expected to foster greater alignment in the interactions between social institutions and actions that cohere and generate reinforcing effects that will cumulate into progress over time.[75] The expectation is that once these actions reach a sufficient scale, they may compound into systemic change and eventually, lead to the institutionalization of a new harmonized global business and human rights regime.[76]

3.2.5 An Institutional Approach to Resolving Governance Gaps

The UNGPs thus advance an approach of institutional reform and expansion of capacities to resolve the fundamental challenges in the business and human rights domain. According to

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To foster that alignment, the GPs draw on the different discourses and rationales that reflect the different social roles these governance systems play in regulating corporate conduct. Thus, for states the emphasis is on the legal obligations they have under the international human rights regime to protect against human rights abuses by third parties, including business, as well as policy rationales that are consistent with, and supportive of, meeting those obligations. For businesses, beyond compliance with legal obligations, the GPs focus on the need to manage the risk of involvement in human rights abuses, which requires that companies act with due diligence to avoid infringing on the rights of others and address harm where it does occur. For affected individuals and communities, the GPs stipulate ways for their further empowerment to realize a right to remedy. I described this approach as principled pragmatism.

Ruggie, *supra* note 1, at 3.

71 The UNGPs indicate that '[e]ach pillar is an essential component in an inter-related and dynamic system of preventive and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse'. Report of the Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, ¶ 6, U.N.Doc. A/HRC/17/31 (March 21, 2011) (by John Ruggie).

72 *UNGPs*, *supra* note 43, Introduction, at 3.

73 Ruggie, *supra* note 18.

74 *Draft UNGPs*, *supra* note 17, ¶ 12; Backer, *supra* note 29, at 93.

75 'Lacking was an authoritative basis whereby these governance systems become better aligned in relation to business and human rights, compensate for one another's weaknesses, and play mutually reinforcing roles – out of which cumulative change can evolve over time'. Ruggie, *supra* note 1, at 2.

76 Ruggie*, 2008 Report*, *supra* note 16, § 6.

Ruggie:

> The idea that business enterprises might have human rights responsibilities independent of legal requirements in their countries of operation is relatively new, in large part a byproduct of the most recent wave of globalization.
>
> The successful expansion of the international human rights regime to encompass business enterprises must activate and mobilize the full array of rationales and institutional means that affect corporate conduct. That is what the United Nations Guiding Principles on Business and Human Rights seek to do.[77]

The following key features can characterize the SRSG's approach.

Multi-faceted: The approach advanced by the PRR Framework and the UNGPs appreciates the governance systems in all their facets and leverages the plurality of institutions, processes and actions within these systems to the extent relevant to achieving progress. The UNGPs address the social role and responsibilities of the key stakeholders and their governance systems contributing to the regime, which are examined in detail below. The approach recognizes the role of individuals and non-state actors within these systems and how their dynamic interplay and activities contribute to progress. The UNGPs, for instance, indicate that NGOs are a credible, independent expert resource that business enterprises should consider consulting when undertaking human rights impact assessments in situations where consultations with potentially affected stakeholders themselves are not possible.[78] Business enterprises are also advised to draw on the expertise of NGOs when assessing how to respect the principles of internationally recognised human rights when operating in complex country and local contexts.[79] The UNGPs also expressly addresses the roles of NHRI,[80] multilateral institutions[81] and multi-stakeholder initiatives.[82]

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[77] John Ruggie, *Opinion: Business and Human Rights* – The Next Chapter (Mar 7, 2013). To be noted is that the SRSG found inspiration in the work of Amartya Sen:

> Sen insists that human rights are much more than law`s antecedents or progeny. Indeed, he states, such a view threatens to 'incarnate' the social logics and processes other than law that drive public recognition of rights. My work, including the Guiding Principles, has sought to contribute to the freeing of human rights discourse and practice from these conceptual shackles, by drawing on the interests, capacities and engagement of states, market actors, civil society, and the intrinsic power of ideational and normative factors.

Ruggie, *supra* note 18.

[78] *UNGPs*, *supra* note 43, Commentary to GP 18.

[79] *Id.* at 23.

[80] Business enterprises are advised to consult and draw on the expertise of NHRIs in meeting their responsibility to respect human rights, for instance, when assessing how to respond to human rights issues in country and local contexts (Commentary to GP 23). NHRIs are identified as an example of a State-based grievance mechanism (Commentary to GP 25), and an important role is foreseen for NHRIs in providing effective and appropriate non-judicial grievance mechanisms (Commentary to GP 27). The GPs recognise a supporting role for NHRIs in assisting States to align with their international human rights obligations, and in providing guidance on human rights to business enterprises. (Commentary to GP 2). *UNGPs*, *supra* note 43.

Poly-centric: The PRR Framework and the UNGPs appreciate the governance systems in their own terms and do not alter but reflect their different discourses and rationales. As such, the States remain the main subject of public law systems of governance (national and international).[83] The UNGPs affirm that States have a primary duty to protect human rights against infringements by non-state actors, including business enterprises. This duty is firmly established in international human rights law. The UNGPs elaborate on the methods through which States can discharge this duty in terms of effective policies, legislation, regulations and adjudication to prevent, investigate, punish and redress human rights abuses. States are expected to ensure internal coherence. They are also expected to cooperate with other States and stakeholders to advance towards more consistent approaches to discharging their duty to protect, through multi-lateral institutions.[84]

The SRSG poly-centric governance outlook is not centered on the State and the public law system. The poly-centric governance that the UNGPs encompass recognize and draw from the social role of civil society and business enterprises and their governance systems in the regulation of business conduct.

The responsibilities of non-state actors are differentiated and complementary to the duties of the State.

Regulatory dynamic: The PRR Framework and the UNGPs foster a regulatory dynamic that draws from a wide range and diversity of methods that key stakeholders and their respective governance systems adopt in the pursuit of the common goals of reducing harm caused by corporate-related activities. This dynamic thus does not depend only on the state action to effectuate change in business conduct, but builds on the actions of all three stakeholders and their respective governance systems to affect business conduct. These actions are interrelated and mutually reinforcing, reflecting a 'smart mix of measures – national and international, mandatory and voluntary'.[85] These actions are founded on different and interlinking sources of obligation (legal, social, moral).[86] They are drawn from different types of hard and soft laws that serve as a basis to apply norms.

The regulatory dynamic and the measures from which it draws, individually and in combination, potentially affect and coordinate the regulation of the conduct of business enterprises. The UNGPs define the duties and responsibilities of State and business enterprises. The expectation

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[81] The UNGPs recognize a role for multi-lateral institutions to promote shared understandings that align with the UNGPs and advance 'international cooperation in managing business and human rights challenges'. (GP 10) *Id*.

[82] The UNGPs suggests that multi-stakeholder initiatives can contribute to tracking business responses by committing to respect for human rights-related standards and through their standard-setting function, and can help identify, elaborate and further specify expectations regarding the application of the UNGPs in specific operational contexts. Multi-stakeholder initiatives should ensure the availability of effective remediation mechanisms, at the level of individual members and/or the collaborative level. GP 30. *Id.*

[83] Addo, *supra* note 31, at 146.

[84] *UNGPs*, *supra* note 43, Commentary to GP 10.

[85] Ruggie, *supra* note 1, at 3.

[86] Backer, *supra* note 29, at 96.

is that States and business enterprises will enhance their standards and practices as they actively implement the UNGPs. The regulatory dynamic that abounds can affect the factors that explain such adherence by these actors to their duties and responsibilities (e.g. incentives, capacities and engagement). As a consequence of this regulatory dynamic, business enterprises should be exposed in an evolutionary manner to legal or normative constraints that bind business enterprises to meeting their responsibilities for human rights.[87] The UNGPs confirm that 'both voluntarism and law have relevant and reinforcing roles to play in governing business behavior'.[88] The PPR and the GPs have been described as 'a platform of guidelines by which stakeholders may define mechanisms using either compelling regulatory mechanisms or indeed voluntary initiatives'.[89]

Flexibility: The PRR Framework and the UNGPs allow for flexibility to facts and circumstances in the application of the duties and responsibilities to States and business enterprises. The PRR Framework and the UNGPs point to various incentives and opportunities that businesses have to respect human rights in practice. These incentives relate to the factual circumstances and characteristics of the company. The UNGPs allow flexibility for companies to exercise their responsibilities to respect human rights by adopting measures that are appropriate and proportionate to their circumstances.[90]

The 'smart mix' of methods that States and non-state actors employ to discharge their roles and responsibility can be of instrumental importance in fostering business respect for human rights by leveraging the afore-mentioned factors. Also, States have discretion to adopt measures that are appropriate to their capabilities and the country context. The UNGPs advance the understanding that there is not one single formula when it comes to progress in achieving the strategic goal of more effective prevention and remedy for corporate-related human rights harm. The SRSG notes:

> The Guiding Principles are not a tool kit, simply to be taken off the shelf and plugged in. While the principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, ten times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all.[91]

Participatory: Stakeholder engagement is embedded in all three pillars of the PRR Framework.[92]

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[87] *Id.* at 91.

[88] Mark B. Taylor, The Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility, 5 Etikk i praksis - Nordic Journal of Applied Ethics 1, 20 (2011).

[89] Addo, *supra* note 31, at 83.

[90] *UNGPs*, *supra* note 43, GP 17.

[91] *Draft UNGPs*, *supra* note 17, ¶ 14.

[92] ICCPR, Article. 25.

There are various reasons for the SRSG to promote such stakeholder engagement. A first reason is the intrinsic importance to right-holders of stakeholder engagement. The right to participate in political and public life is after all a human right. The new spaces and opportunities that stakeholder engagement opens up for right-holders to exercise this participation right and other human rights connected thereto, are valuable in themselves. The prerequisites of stakeholder engagement can have an empowering effect. The process creates opportunities for dialogue and communication, which stakeholders can use to form their perspectives and demands. In this regard, stakeholder engagement can articulate right-holder perspectives and demands. The right to participate is also a core aspect of the human rights approach to development.

Second, stakeholder engagement can be valuable from the view of political pragmatism and procedure. It can be of instrumental importance by providing opportunities for those affected to have a voice in the process. Meaningful stakeholder engagement creates political incentives and to respond to the views of right-holders and to respond to their demands. The process also allows right-holders to have a certain degree of control over the decision-making and measures that affect them. The process furthermore can contribute to a better understanding of expectations and priorities from a right-holder perspective. Stakeholder engagement can facilitate the formation of more-informed and more-functional concerted action between stakeholders.[93]

Third, the effective implementation of stakeholder engagement can help make the process and outcomes more democratic and more responsive to the public.[94]

The fact that stakeholder engagement is embedded in all three of these pillars above, suggests that the PRR Framework and the UNGPs promote stakeholder engagement in a systemic fashion. The effective implementation could contribute to more systemic practices of stakeholder engagement. This depends on how stakeholder engagement is operationalized in practice and the extent to which stakeholders seize the opportunities to partake in these processes. Stakeholder engagement has intrinsic and instrumental importance, as well as a constructive role in the process towards enhanced standards and practices. Stakeholder engagement is also a feature of the emerging global business and human rights regime. Its effective operationalization in practice can serve as a democratizing force that renders this regime more responsive to the public.

3.3 The UN Guiding Principles on Business and Human Rights

3.3.1 The General Principles

The first section of the UNGP, entitled 'General Principles', provides guidance on how the sections of the UNGP should be interpreted and applied generally.

> These Guiding Principles are grounded in recognition of:

[93] This paragraph corresponds to and builds on the views of Amarthya Sen on the 'intrinsic relevance, the protective role and the constructive importance of democracy'. Amartya Sen, *Development as Freedom*, 152-59 (Oxford University Press. 1999).

[94] Carnegie Council on Ethics and International Affairs, *The Impact of Corporations on Global Governance* (2004).

(a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

(b) The role of business enterprises as specialized organs of society performing specialized functions, and required to comply with all applicable laws and to respect human rights;

(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

This section suggests that the corporate responsibility to respect human rights should be read in recognition of the foundational structure that the UNGPs reflect and are set out to promote for the emerging governance regime on business and human rights. The role of business enterprises, which is cast as an essential component of this structure, is hierarchically inferior to the role of States, which are recognized as primarily responsible for the realization of human rights and fundamental freedoms.[95] The source and scope of States' obligations are determined by International Human Rights Law. The social role of business enterprises is differentiated from States' roles and reflects their nature as specialized organs of society. The responsibilities of business enterprises reflect the specialized functions they perform and are of a dual character; (i) to comply with all applicable law and (ii) to respect human rights. The need for appropriate and effective remedies is casted as a necessary consequence of a breach of human rights or obligations resulting from corporate related activities.

The General Principles furthermore note that the UNGPs 'should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization'. The UNGPs thereby specify that the UNGPs, and the corporate responsibility to respect human rights, should be interpreted to conform the circumstances and conditions that the UNGPs specify. They should furthermore be read in light of the UNGPs as a whole and their strategic objective, which the UNGPs define as the pursuit of enhanced standards and practices on business and human rights.

The General Principles note that: 'Nothing in these Guiding Principles should be read as creating new international obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights'.[96] This provision reflects the understanding that the UNGPs in and by themselves do not create any new international obligations or alter the obligations that States have under International Human Rights Law. The UNGPs instead reflect an interpretation of standards and practices of States and business enterprises as they exist, rather than as they should be, and elaborate on their meaning and implications.[97] [98]

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[95] Larry Catá Backer, *From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations Protect, Respect and Remedy and the Construction of Inter-Systemic Global Governance*, 25 Global Business & Development Law Journal 69, 86 (2012).

[96] *Id.* at 106.

[97] *UNGPs*, *supra* note 43, ¶ 14.

The General Principles also indicate that the UNGPs apply generally 'to all States and all business enterprises, both transnational and other, regardless of their size, sector, location, ownership and structure'.

The General Principles furthermore note that:

> These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

The UNGPs thereby stipulate the principle of non-discrimination under international human rights law, which entails that human rights are subject to enjoyment without distinction of any kind.[99] The General Principles specify that the UNGPs should be implemented with particular regard to the rights, needs and challenges faced by individuals who belong to groups at heightened risk of becoming vulnerable or marginalized, and that thereby due regard should be had of gender-related risks.

3.3.2 The State Duty to Protect

3.3.2.1 The State Duty to Protect Human Rights: International Law

UNGP sections 1 to 10 elaborate on the State duty to protect human rights. These Principles reaffirm[100] the primary role of States as bearers of human rights obligations, and their duty to respect, protect and fulfill human rights.[101] The State duty to protect human rights entails that States must protect against human rights infringements by third parties, including business enterprises, within a State's territory and/or jurisdiction. This duty entails that States must take appropriate measures to prevent, investigate, punish and redress corporate abuse within the States' territory or jurisdiction.

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[98] This does not automatically exclude the UNGPs from having any legal effects. The UNGPs, as will be elaborated below, can be viewed as soft law that can affect the course of legal development in the future through their potential normative affects on the behavior of States and business enterprises.

[99] This principle is contained in Art.2 of the UDHR and a number of principle international human rights treaties. Also *see*, for instance, Art. 14 ECHR and Art. 1 of Protocol No. 12 to the ECHR. Oliver de Schutter, et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Areas of Economic, Social and Cultural Rights*, 34 Human Rights Quarterly, 1087 (2012).

[100] Working Group on the issue of human rights and transnational corporations and other business enterprises, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises in Accordance with Human Rights Council resolution 17/4, transmitted by note of the Secretary General*, ¶ 6, U.N. doc. A/68/279 (Aug. 6, 2013).

[101] The tripartite terminology of the State duty to respect, protect and remedy human rights has been recognized by the Committee of Economic, Social and Cultural Rights in its General Comment 12, The Right to Adequate Food. Comm. on Economic, Social and Cultural Rights, General Comment 12, Right to adequate food (20th Sess., 1999), ¶ 15, U.N. Doc. E/C.12/1999/5 (1999), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 62 (2003).

UNGP 1 stipulates:

> 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.[102]

The State duty to protect human rights against infringements by third parties derives from International Human Rights Law and State commitments to human rights that the international community has widely recognized.[103] The commentary to UNGP 1 stipulate that the States have a duty to promote the rule of law, including 'by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency'.[104]

The State duty to protect is inherent to the State duty to 'ensure' human rights, which is codified in various human rights treaties, including the ICCPR and the ICESCR. A brief analysis follows.

Pursuant to Article 2(1) ICCPR:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant […].

Art. 2(2) ICCPR stipulates that:

> Each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[105]

In its General Comment 31, the UN Human Rights Committee held that Article 2 of the ICCPR imposes a general obligation on State parties to respect and to ensure that the rights protected by the Covenant are respected in relation to all individuals within a State's jurisdiction. More specifically, the positive obligation 'to ensure' involves that States must protect individuals not only against violations by the State's agents of their rights, but also 'against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities'. The Committee indicated that

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[102] Also *see*, Ruggie*, 2008 Report*, *supra* note 16, ¶ 18.

[103] Working Group on the issue of human rights and transnational corporations and other business enterprises, *supra* note 100, ¶ 7.

[104] *UNGPs*, *supra* note 43, Commentary to GP 1.

[105] International Covenant on Civil and Political Rights, art.2.2, *opened for signature* 16 December 1966. UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 80th Sess., 2187th meeting (Mar. 29, 2004). General Assembly resolution 2200A (XXI) (entered into force Mar. 23, 1976).

the State's obligations under Art. 2 will only be fully discharged if individuals are protected by the State against violations of their rights by these entities.[106]

The obligation of States to ensure the human rights of all individuals 'within its territory and subject to its jurisdiction' entails that States have an obligation towards all individuals within 'its power and effective control', even if the individual is not situated within the territory of the State party. The enjoyment of human rights must furthermore be available to all individuals, irrespective of nationality or statelessness. This principle also applies to individuals within the power or effective control of the forces of a State acting outside the territory[107] and in situations of armed conflict in which the rules of International Humanitarian Law apply.

A failure to ensure the rights guaranteed by the ICCPR could give rise to violations by a State of those rights 'as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[108] In this respect, as the commentary to the UNGPs also indicate, the State's duty to protect human rights is an obligation of conduct, rather than an obligation of result.[109] A State is not responsible for human rights violations by a private person or entities, unless (i) the act can be attributed to the State; or (ii) if the State has not taken adequate due diligence steps to prevent the respective abuse.[110] In addition, the existence of a State duty to undertake adequate due diligence has been confirmed by the Committee on Economic Social and Cultural Rights,[111] as well as a number of other international and regional human rights bodies and tribunals.[112]

The Inter-American Court of Human Rights (IACtHR) provided clarification to the State duty to 'ensure' human rights in the *Velasquez Rodrigues* Case (1988). Article 1 of the Inter-American Convention of Human Rights provides the following:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

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106 U.N. Human Rights Committee, *Id.* ¶ 8.

107 *Id.* ¶ 10.

108 *Id.* ¶ 8

109 *See* Working Group on the issue of human rights and transnational corporations and other business enterprises, *supra* note 100, ¶ 8. John H.Knox, The Ruggie Rules: Applying Human Rights Law to Corporations, *in* The UN Guiding Principles on Business and Human Rights: Foundations and Implementation (R. Mares ed. 2012).

110 *See UNGPs*, *supra* note 43, Commentary to GP 1.

111 U.N. Comm. on Economic, Social and Cultural Rights, General Comment No. 15 The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 23-24, U.N. doc. E/C.12/2002/11, 29th Sess. (Nov. 11-29, 2004).

112 For an overview, *see* Amnesty International, Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy, 21 (2014).

The IACtHR held that to discharge the duty 'to ensure' human rights, States must ensure 'the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction'.[113] As a result of this duty, the State must:

> prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.[114]

In addition, the Court held that acts of private individuals that violate human rights, in and of themselves, may not be directly imputable to a State, however they can trigger State responsibility 'because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention'.[115] The Court also noted that the occurrence of a violation does not automatically entail that the State has acted in breach of its duty to take preventative measures.[116]

As a consequence of the State duty to prevent, the following additional obligations arise for States:

> The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[117]
>
> This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.[118]

The UNGP 2 articulates the obligation of States to set out clearly their expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.[119] It is within this context that the SRSG addresses the obligations of States to regulate the extraterritorial activities of business enterprises.

There has been a debate for many years about the international legal obligations of States to regulate the extraterritorial activities of business enterprises to prevent human rights abuses abroad. The Commentary to UN Guiding Principle 2 states that International Human Rights Law

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[113] *Velásquez Rodríguez v. Honduras,* Inter-American Court of Human Rights, Judgment of 29 July 1988, Inter-Am Ct. H.R, (Ser C) No.4 (1988), ¶ 166.

[114] *Id.* ¶ 66.

[115] *Id*. ¶ 172.

[116] *Id.* ¶ 175.

[117] *Id*. ¶ 174.

[118] *Id.* ¶ 175.

[119] *UNGPs*, *supra* note 43, GP 2.

does not impose such legal obligations on States, but nevertheless recognizes that States are permitted to regulate extraterritorially if this does not amount to a breach of international law.

More specifically according to the said Commentary:

> At present States are *not generally required* under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.[120]

This language suggests that States are generally permitted but not required under International Human Rights Law to act to regulate the extraterritorial activities of the business enterprises domiciled in their territory and/or jurisdiction in the interest of human rights, although human rights treaty bodies 'recommend' home States to do so. For many this interpretation seems to give an inaccurate account of the legal position that a number of UN human rights treaty bodies have adopted, namely that extraterritorial obligations for States in relation to corporate-related activities arise on the basis of certain obligations set out in international human rights instruments.

Despite the preceding paragraph, there is increasing support among experts that States have at least some extraterritorial obligations, although the scope and implications of such obligations remain disputed. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles) affirm that 'all States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially'.[121] [122] Principle 8 defines extraterritorial obligations as follows:

> *8. Definition of extraterritorial obligations.*
>
> For the purposes of these Principles, extraterritorial obligations encompass:
>
> a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and

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[120] Emphasis added.

[121] De Schutter, Regulating Transnational Corporations: A Duty under International Human Rights Law, Contribution of the Special Rapporteur on the right to food, Mr. Olivier de Schutter, to the workshop 'Human Rights and Transnational corporations: Paving the way for a legally binding instrument' convened by Ecuador; 11-12 March 2014, during the 25th session of the Human Rights Council (2014).

[122] The Maastricht Principles define extraterritorial obligations as '(a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and (b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realise human rights universally`

> b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realise human rights universally.

The Commentary to this principle provides an example in the context of corporate-related conduct to demonstrate that extraterritorial obligations for the State may arise on both grounds. A State has a duty to ensure 'that a corporation domiciled within its jurisdiction does not provide loans to projects leading to forced evictions […] (a) because the state has the legal and factual power to regulate the corporation's conduct [and] (b) due to the obligation to take separate and joint action to realise human rights internationally'.[123]

Expert opinion has derived from the authoritative opinions of various UN human rights bodies that States have an obligation to control the conduct of corporations that are domiciled in a State's territory/jurisdiction, when such conduct may lead to human rights violations abroad.[124] According to De Schutter, the UNGPs do not reflect current developments in the evolving body of International Human Rights Law. These developments have witnessed a gradual strengthening of the extraterritorial duties of States to regulate the conduct of companies.[125] While the interpretations of the UN Treaty Bodies are not legally binding, they have been recognized as authoritative. The claim that, at present, international law generally does not create any extraterritorial obligations in the context of corporate activities' seems inaccurate where there is increasing acknowledgement that such extraterritorial obligations arise under International Human Rights Law. The argument according to which the SRSG adopts a somewhat regressive approach to International Human Rights Law[126] appears on point. Knox has rightly observed that the SRSG could have better characterized the interpretation of the International Covenant on Economic, Social and Cultural Rights ('ICESCR') as 'disputed or unsettled', rather than discarding the proposition of the extraterritorial State duty to protect entirely.[127]

UNGPs 3 to 10 provide the operational principles. UNGP 3 reflects on the general regulatory and policy function of the State:

> 3. In meeting their duty to protect, States should:
>
> (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
>
> (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

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123 *UNGPs*, *supra* note 43, Commentary to GP 8.

124 De Schutter, *supra* note 121.

125 *Id.*

126 Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights (Jan. 2011), https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf

127 Knox, *supra* note 109, at 81.

(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

The UNGPs stipulate that States should ensure that the laws in place that 'aim at, or have the effect of' requiring business enterprises to respect human rights, are enforced, and undergo an assessment periodically to determine their adequacy in the light of evolving circumstances. The laws and policies that govern the creation and ongoing operation of business enterprises should not pose barriers but enable business' respect for human rights. In addition, States should provide effective guidance on how business enterprises can respect human rights throughout their operations. States should adopt policies and, if appropriate, regulations that require business enterprises to communicate on their respect for human rights.

The Commentary reaffirms that States have a range of measures at their disposal to discharge their duty to protect, ranging from policies, legislation, regulations and adjudication. These measures can be voluntary or mandatory, international or national, and form part of what the UNGPs refer to as a 'smart mix' of permissible, preventative and remedial measures. States should consider such measures to foster respect for human rights by business. The commentary suggests that the laws and policies should be functional in providing an environment conducive to the business respect for human rights. In other words, States must review their legal systems and, in particular, the laws that govern the creation and conduct of business enterprises, including corporate law, to ensure that conditions are in place that make it legally possible and attractive for business enterprises to discharge their responsibility to respect human rights.[128] These conditions contribute to fostering a 'corporate culture respectful of human rights at home and abroad,' as human rights become firmly embedded in corporate structures and become a part of their standard practices.

Other aspects of the operationalization of State duty to protect relate to the State-business nexus,[129] the need to act in support of respect for human rights in conflict areas[130] and to improve policy alignment.[131]

3.3.2.2 The State-Business Nexus

The UNGP 4 to 6 addresses the State-business nexus. UNGP 4 addresses the State duty to ensure that individuals are protected from infringements of their human rights by State-owned

[128] Note, this resonates with the interpretation of Inter-American Court of Human Rights in the Velasquez case of the State duty to ensure human rights as stipulated in Art. 1 of the Inter-American Convention on Human Rights. The Court held that '[t]his obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'. *Velásquez Rodríguez v. Honduras, supra* note 113, ¶ 66.

[129] *UNGPs*, *supra* note 43, GP 4-6.

[130] *Id*. GP 7.

[131] *Id.* GP 8-10.

or -controlled business enterprises, or business enterprises that receive substantial support and services from State agencies (*e.g.* export credit agencies, official investment insurance, guarantee agencies). The UNGP recognizes that States should take additional steps to protect against human rights abuses by these types of business enterprises, including, where appropriate, by requiring human rights due diligence.

The Commentary to UNGP signals that there are strong policy rationales for States to ensure that State-owned or -controlled enterprises respect human rights. Abuse by these enterprises can give rise to a State's violation of its own human rights obligations. This policy rationale becomes stronger 'the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support'.[132] [133] Indeed, there are clear legal incentives to act more diligently with regards to State-owned or -controlled enterprises, as compared to other business enterprises. The reason is that States may incur international responsibility in case a State-owned/controlled business enterprise commits an illegal act, by act or omission, in violation of international human rights and this act can be attributed to the State.[134] The State may incur responsibility for the act where the business enterprise was an organ of the State or, if not an organ of the State, exercised elements of Government authority and acted in that capacity in that particular instance.[135] In both scenarios, State responsibility arises irrespective of whether the conduct exceeded authority or contravened instructions. State liability can also arise where a business enterprise acted under the instructions, or under the direction or control of that State in carrying out the conduct.[136] Another scenario where the State adopts or acknowledges the conduct of the business enterprise as its own, in the case of which the State can also incur international responsibility.[137]

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[132] *Id. supra* note 43, Commentary to GP 4.

[133] To be noted is that State-owned or -controlled enterprises operate in industries that are often implicated with human rights violations, in particular the extractive industries (*e.g.*, mining, forestry, oil) and the utilities and infrastructure industries (*e.g.*, energy, transport, telecommunication). Often involving large State-driven development programmes, these industries have a large local footprint in territories inhabited by minorities and individuals at high risk of marginalization, hence the high risk of human rights abuses. OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, preamble. (OECD Publishing ed., 2015), Working Group on the issue of human rights and transnational corporations and other business enterprises, *supra* note 100, §§ 12-13.

[134] The Court in *Velásquez* held that a State can incur international responsibility in case an illegal act has occurred, that is the exercise of public power by a State organ, official or public entity that violated the rights recognized in the Convention, and where this act can be attributed to the State. *Velásquez Rodríguez v. Honduras, supra* note 113, ¶ 169.

[135] ILC Articles on Responsibility of State for Internationally Wrongful Acts (2001), Article 7. *See Velásquez, Id*. ¶ 169. The court held that international State responsibility can arise 'independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law'.

[136] ILC Articles on Responsibility of State for Internationally Wrongful Acts, *Id.* Article 8. This provision may apply in situations where the corporation or its employees are 'employed as auxiliaries or are sent as "volunteers" to neighboring countries, or who are instructed to carry out particular missions abroad'. In such situations a clear possibility exists of State responsibility arising where companies violate international human rights law while performing extraterritorial military activities for the State. Robert McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 Journal of Business Ethics, 388 (2009).

[137] ILC Articles on Responsibility of State for internationally Wrongful Acts (2001), Article 11.

According to the Commentary, States have greater means within their power to ensure that relevant policies, legislation and regulations are implemented. The greater scope for scrutiny and oversight that government departments have to ensure the implementation of effective due diligence by companies is noted as an example. The UNGPs also indicate that States should 'encourage and, where appropriate, require human rights due diligence' by agencies that are linked formally or informally to the State (*e.g.* export credit agencies, official investment insurance or guarantee agencies; development agencies, development finance institutions) and by business enterprises or projects receiving their support and services. A failure on the part of these agencies to exercise due diligence in order to manage the human rights risks of beneficiary entities can expose these agencies to reputational, financial, political or legal risks.

UNGP 5 and 6 indicate that States should promote respect by business enterprises for human rights through State commercial interactions with these enterprises, including through exercising adequate oversight.[138] The Commentary to UNGP 5 notes that States do not relinquish their international human rights obligations when privatizing the delivery of service. States are responsible for setting out the expectation that business enterprises respect human rights, including through relevant service contracts and enabling legislation, and ensuring that adequate independent monitoring and accountability mechanisms are in place to oversee the enterprise's activities.

3.3.2.3 To Improve Policy Alignment

UNGPs 8 to 10 address the issue of ensuring policy alignment.[139] These UNGPs reaffirm the importance for States to address both the vertical and horizontal incoherencies at the domestic level that undermine the effective implementation of human rights obligations. UNGP 8 explains such coherences as follows:

> Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Government's human rights obligations.

In order to ensure vertical coherence, States must address the implementation gap between a State's legal human rights obligations and commitments at the international level and the policies, laws and processes to implement these at the domestic level. In order to avoid or address horizontal incoherence, States must ensure that the government departments, agencies and other State-based institutions that are responsible for policies and issues that affect business behavior, have the capacity to abide by International Human Rights Law when fulfilling their respective mandates.

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[138] *UNGPs*, *supra* note 43, GP 5.

[139] *Id.* GP 8-10.

Pursuant to the UNGPs, States must ensure coherence between a State's human rights obligations and policy objectives and its business agenda. Horizontal and vertical incoherencies are plausible where States face the difficult task of balancing conflicting social needs. For instance, a State's decision to enter into bilateral investment treaty is commonly premised on the understanding that reciprocal investment protections foster investment and economic prosperity. As is well-established, however, FDI can also have an impact on essential interests other that economic growth, including human rights. There are well-established concerns that present arrangements under FDI arbitration constrain States' exercise of national sovereignty, particularly their regulatory autonomy to design policies in the interest of human rights[140] or to adopt or commit to new international human rights obligations or evolving standards.[141]

In this regard, GP 9 establishes that States must maintain sufficient domestic policy space when pursuing economic interests through bilateral investment treaties, free-trade agreements or contracts of investment projects.[142] The Principles for Responsible Contract imply, for example, that when a host State and a business investor negotiate a contract for a large-scale investment project and consider including a contractual stabilization clause, this clause should be carefully drafted, 'so that any protections for investors against future changes in law 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'.[143]

According to UNGP10, States are furthermore encouraged to use their membership of institutions to ensure that these institutions, within their respective mandates and capacities, do not restrict but encourage and support States and business enterprises in their efforts to meet their human rights duties and responsibilities.[144] The Commentary to the UNGPs note that States retain their international human rights obligations when participating in multi-lateral institutions that deal with business related issues, *e.g.* international trade and financial institutions.

3.3.2.4 Conflict Areas

The State duty to protect imposes an obligation on States to help ensure that companies operating in conflict-affected areas are not involved in gross human rights abuses. The risk of such abuses occurring in these contexts is heightened as a result of governance gaps resulting from the host State's lack of effective control. These heightened risks trigger a more demanding duty on the part of States to engage with and provide assistance to companies, with a view to avoiding contributing to human rights harm in these areas. The UNGPs recognize that States have an obligation to engage with companies as early as possible, and to assist companies to 'identify, prevent and mitigate' human rights risks in these conflict-affected areas. States furthermore

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[140] Jeswald W Salacuse, *The Emerging Global Regime for Investment*, 51 Harvard International Law Journal (2010).

[141] Working Group on the issue of human rights and transnational corporations and other business enterprises, *supra* note 100, ¶ 16.

[142] *UNGPs*, *supra* note 43, GP 4. Also *see* UNCTAD Investment Policy Framework for Sustainable Development. (2013).

[143] *UNGPs*, *Id.* GP 9.

[144] *Id.* GP 10.

should provide 'adequate' assistance to business enterprises to assess and address the heightened risks of abuses and pay special attention to gender-based and sexual violence. Assistance should be combined with policy coordination between government agencies, host-Government actors and business enterprises. The State duty to protect imposes on States a duty to employ a smart-mix of measures[145] to ensure that businesses are not involved in gross human rights abuses in these areas. This includes establishing laws and policies that incentivise companies to be diligent by denying or withdrawing public support or services to companies that are involved in such abuses and refuse to co-operate.[146] This entails reviewing and, where necessary, adapting existing policies, legislation, regulations and enforcement measures in order to ensure their effectiveness in addressing these heightened risks, including through provision of human rights due diligence. The UNGPs note that these measures are 'in addition to States' obligations under international humanitarian law in situations of armed conflict, and under international criminal law'.[147]

3.3.3 Corporate Responsibility to Respect Human Rights

The UNGPs recognize that business enterprises have a responsibility to respect human rights, meaning 'that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[148] The corporate responsibility to respect human rights is, in and of itself, not a legally binding and enforceable standard under International Human Rights Law. It is a 'global standard of expected conduct' that is founded on international social expectations rather than on international legal obligations, and thus has a 'non-legal character'.[149]

The responsibility of business enterprises is 'to respect' human rights, rather than 'to promote' and 'to fulfil human rights'. Business enterprises may be permitted to undertake commitments or activities to promote or fulfill human rights, however such action does not contribute to the managing of *adverse* human rights impacts. Philanthropic activities thus fall outside the scope of the corporate responsibility to respect and do not *'offset a failure to respect human rights throughout their operations*'.[150]

The corporate responsibility to respect is coined as a negative responsibility, in that business enterprises must 'do no harm'. This means that business enterprises should 'avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[151] Business enterprises must be pro-active in discharging their responsibility. The

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145 Mark B. Taylor, *Human Rights Due Diligence: The Role of States, 2013 Progress Report* 11 (2013), *available at:* http://icar.ngo/wp-content/uploads/2013/11/ICAR-Human-Rights-Due-Diligence-2013-Update-FINAL1.pdf

146 *UNGPs*, *supra* note 43, GP 7.

147 *Id.* Commentary to GP 7.

148 *Id.* GP 11.

149 Nicola Jägers, *Will transnational private regulation close the governance gap? In* Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, 298 (Surya Deva & David Bilchitz eds., 2013).

150 *UNGPs*, *supra* note 43, Commentary to GP 11.

151 *Id.* GP 11.

positive prescription is that business enterprises must 'know and show'[152] their respect for human rights. The UN Guiding Principles provide that this entails the following:

> 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) A policy commitment to meet their responsibility to respect human rights;
>
> (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
>
> (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.[153]

Business enterprises are expected to exercise 'human rights due diligence', i.e., to comply with domestic laws – or, in case these are insufficient, to comply with an international framework and have policies and processes in place to manage the human rights risks of their operations in order to avoid those risks. To manage their human rights risks, business enterprises must take firm steps to identify, prevent and mitigate actual or potential adverse human rights impacts and to give account of how these are addressed. The process of human rights due diligence must contain at least the following four elements: 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.[154]

Where a business enterprise has caused or contributed to adverse human rights impact, it should actively engage in remediation, by providing remediation on its own, or in cooperation with other actors.[155]

Since business enterprises are expected to have appropriate policies and processes in place, the corporate responsibility of business enterprises appears, in first instance, to be process-oriented rather than performance oriented.[156] Similarly, the corporate responsibility to respect human rights in first instance is a standard of conduct, rather than a standard of result. The standard is however closely linked to performance. For instance, the findings of a human rights due-diligence test must be integrated and acted upon.[157]

The scope of the human rights due diligence is delimited by the adverse human rights impacts, more specifically 'the adverse human rights impacts that the business enterprise may cause or

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[152] *Id.* Commentary to GP 15.

[153] *Id.* GP 15.

[154] *Id.* GP 17.

[155] *Id.* GP 22.

[156] Parker, C. Howe, *Ruggie's Diplomatic Project and its Missing Regulatory Infrastructure, in* The UN Guiding Principles on Business and Human Rights Foundation and Implementation (R. Mares ed. 2011).

[157] *UNGPs*, *supra* note 43, GP 17.

contribute to through its own activities, or which may be directly linked to its operations, products or services by its relationships'.[158]

The responsibility of business enterprises covers adverse human rights impacts caused by a company directly through its own activities, both by *actions* and *omissions*.[159] Business enterprises are also responsible for adverse impacts they are directly linked to through their business relationships. These relationships include 'relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services'.[160]

Human rights due diligence must be ongoing in order to be responsive to changes in human rights risks over time. Continuity is important because the operations and operating context of business enterprises evolve over time.[161]

Human rights due diligence is a relative standard. Processes must thus be appropriate to the circumstances of the company and can vary in complexity depending on 'the size of the business enterprises, the risk of severe human rights impacts, and the nature and context of its operations'.[162] Business enterprises thus meet their responsibility in varying ways in terms of form, scale, degree and character.

The responsibility is broad in scope in that it applies to the entire spectrum of internationally recognized human rights that business enterprises are capable of impacting.[163] This encompasses all human rights, civil and political, as well as social, economic and cultural rights.

The International Bills of Human Rights and the principles of fundamental rights as codified in the eight ILO Labor Conventions, provide an authoritative list of international human rights standards, and serve as a main, but not an exclusive, reference for the substance of the corporate responsibility to respect human rights. Additional standards may apply depending on the circumstances.[164] These can include the international human rights treaties that elaborate on human rights that apply to particular categories of people and types of human rights, as well as International Humanitarian law.

The corporate responsibility to respect is a baseline responsibility that all business enterprises must uphold *'regardless of their size, sector, operational context, ownership and structure'*. The corporate responsibility to respect applies to companies irrespective of whether they have accepted or approved the norm. It is thus not restricted to large enterprises that most often stand accused of human rights abuses. Nor does it exempt small or medium-sized companies who

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158 *Id.* GP 17(a).

159 *Id.* Commentary to GP 13.

160 *Id.* Commentary to GP 13.

161 *Id.* GP 17.

162 *Id.* GP 17(b)

163 *Id.* Commentary to GP 12

164 *Id.* Commentary to GP 12.

might find it difficult, for reasons relating to capacity, resources and management structure, to fully respect human rights, or business enterprises that operate in conflict areas. The corporate responsibility to respect human rights applies 'fully and equally' to all business enterprises.[165] This is unrelated to the place where business enterprises operate.[166] Consequently, business enterprises must uphold the responsibility irrespective of geographical location or territorial boundaries.[167] The responsibility to respect human rights is furthermore a universal standard. This universality can be understood in two manners: (i) *first*, as universal in principle, which is reflected in the universal character of the human rights principles that inform its substance;[168] it means that it can manifest in different political, cultural or religious contexts.[169] (ii) *second*, it is also said to be universally applicable and relevant, meaning that it applies across countries, irrespective of such contexts.

3.3.4 Access to Remedies

The UNGPs furthermore present an integrated set of redress methods that both States and business enterprises should apply to ensure that victims of human rights abuse have access to remedies. The need to provide access to effective remedy epitomizes how 'the most concerted efforts cannot prevent all abuse'.[170] The State obligation to provide effective remedy in case a human rights abuse has occurred is founded in International Human Rights Law. In the case where business-related human rights abuses have occurred within a State's territory and/or jurisdiction, States must take appropriate steps 'to investigate, punish and redress' these abuses, through formal judicial mechanisms[171] and complementary administrative, legislative and other State-based non-judicial grievance mechanisms.[172]

States-based judicial complaint mechanisms are 'at the core of ensuring access to remedy'. States must ensure that they are effective. Their effectiveness depends on their 'impartiality, integrity and ability to accord due process'.[173] Consequently, States must ensure, *inter alia*, that no legal, practical or procedural barriers prevent legitimate cases from being heard by courts, especially where judicial recourse is essential for accessing a remedy or an effective remedy is not available elsewhere. State-based non-judicial complaint mechanisms assume a complementary and supplementary role by providing a remedy where judicial remedy is not required or favoured.[174] States must raise public awareness of, and facilitate support and access to State-based complaint

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165 *Id.* Commentary to GP 14.

166 *Id.* Commentary to GP 23.

167 *Id.* GP 11 and commentary.

168 As noted by Addo, *'[h]uman rights represent values that are shared by all cultures; hence the claim that they are universal'.* Addo, *supra* note 31.

169 *UNGPs*, *supra* note 43, ¶ 15.

170 *Id.* 4.

171 *Id.* 26.

172 *Id.* 27.

173 *Id.* 26.

174 *Id.* Commentary to GP 27.

mechanisms. They can assume a similar role with regard to non–State-based complaint mechanisms addressing business-related human rights harm.

State-based complaint mechanisms are integral to and should found a wider system of remedies that also encompass non–State-based complaint mechanisms. The UN Guiding Principles distinguishes between different categories of non–State-based complaint mechanisms: operational complaint mechanisms that are administered by business enterprises alone, or in collaboration with stakeholders; industry association, multi-stakeholder or other collaborative initiatives, and; international or regional human rights mechanisms. While non-judicial, these mechanisms can discharge complementary and supplementary functions by providing remedies through 'adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes'.[175] These mechanisms may provide access and remediation more speedily, at a lower cost or at greater transnational reach.[176]

UN Guiding Principles 29 stipulates that business enterprises should 'establish or participate in effective operational grievance mechanisms' in order to make early and direct remediation of grievances possible.[177] Apart from supporting business enterprises in meeting this responsibility and from 'preventing harms from compounding and grievances from escalating,' operational-level grievance mechanisms can help business enterprises to identify and respond to adverse human rights impacts, trends and systemic problems.[178]

3.4 Conclusion

The PRR Framework and the UNGPs are a response to regulatory challenges that globalization, and its economic dimension in particular, had come to pose within the specific area of business and human rights. They premise on the understanding that the problem in the business and human rights domain relates to institutional misalignments resulting in governance gaps that allow business enterprises to engage in adverse human rights abuses without having to face consequences and victims to be left without protection and access to an effective remedy.

The PRR Framework and the UNGPs are set out to provide a platform of guidance that stakeholders can rely on to overcome such misalignments. The UNGPs provide clarity on existing standards and practices related to business and human rights. They also reflect a re-organisation of the expected contributions of the stakeholders and their respective governance systems in a holistic and coherent template for a better functioning system. The main structure and features of this template, which the PRR Framework presents and the UNGPs further elaborate on, allow for the UNGPs to function as a platform for action in support of enhanced standards and practice of both States and business enterprises. Their effective implementation is expected to have an impact on coherence between actions and to generate reinforcing effects that will cumulate in progress. The expectation is that once these actions reach a sufficient scale, they

[175] *Id.* Commentary to GP 28.

[176] *Id.* Commentary to GP 28.

[177] *Id.* Commentary to GP 29.

[178] *Id.* Commentary to GP 29.

may in time compound into systemic change and lead to the institutionalization of a new harmonized global business and human rights regime.[179]

The PRR Framework and the UNGPs provide a template for an emerging global business and human rights regime. They advanced an *institutional* approach by focusing attention on the institutional misalignments that exist within and between the three governance systems in the business and human rights domain. The approach is *systemic* in that the strategic objective is to address all aspects that contribute to the problem of misalignments. This includes addressing the institutional in-capabilities of the key stakeholders and the misaligned incentive structures that are supportive of this problem. These misalignments call for systemic changes in the way that States and business enterprises operate. The solution lies in a process through which effective connectivity within and between governance systems is enhanced.[180]

The PRR Framework and the UNGPs promote an approach that is *integrative* by appreciating the existence and working of three governance systems in the regulation of business conduct on their own terms. The approach is *multi-faceted* by acknowledging and simultaneously pursuing all institutions, processes and outcomes within the three governance systems, to the extent that these are of instrumental importance to achieving progress. The approach is *interactive* by drawing attention to the connections within and between the governance systems and to fostering these in order for actions to cohere and have mutually reinforcing effects. The UNGPs furthermore promote a *regulatory dynamic* that is aimed at fostering compliance by States and business enterprises through a smart mix of measures. The approach is *flexible* in that discretion is left for the adoption of measures that are appropriate to facts and circumstances. The approach is *participatory* by promoting stakeholder engagement that empowering individuals to give direction to the decision-making that affects them and to foster action that is appropriate from a right-holder perspective.

[179] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Ruggie*, 2008 Report, supra* note 16, § 6.

[180] The SRSG elaborates on effective connectivity, noting the need for 'more robust horizontal linkages' within States (*e.g.* across governmental departments), within business enterprises (*e.g.,* across business functions), between States and businesses (*e.g.,* smart regulation), and between businesses and their external stakeholders (*e.g.,* stakeholder engagement and grievance mechanisms). Ruggie, *supra* note 37.

4 The Evolution of the Corporate Responsibility to Respect Human Rights: from a Soft into a Hard Obligation for Companies under National and International Law?

4.1 Introduction

The UNGPs differ in nature and function from the previous initiative of the UN Norms. Like the UN Norms, the UNGPs were conceived as soft-law. However, unlike the UN Norms, which are *de lege ferenda*, the content of the UNGPs reflects a shared understanding of existing and emerging standards that govern the responsibility and accountability of business enterprises for human rights. The standards derive from a variety of sources including, *inter alia*, legal, social and moral rules. In other words, the standards originate not only from the State / positive law system, but also from the (non-State based) social / civil system and the system of corporate governance. The UNGPs, in short, articulate a responsibility for business enterprises to respect human rights. This responsibility is a global standard of conduct founded in social expectations rather than in legal obligations. The UNGPs are similar to the UN Norms in their lack of legally binding effects. Both initiatives were developed with the aim of triggering processes of institutional change. The initiatives nonetheless differ in that the UN Norms promote a top-down legal approach, whereas the UNGPs advance a bottom-up transformative approach involving multiple governance systems.

The UNGPs aim at starting a process of advancing towards the emergence of a new governance system, one in which stakeholders and their respective existing governance systems become aligned in the pursuit of 'the effective prevention of, and remedy for, business-related human rights harm'. This process is ongoing and meant to promote a gradual improvement in standards and practices, as States and business enterprises actively implement their rights and duties under the UNGPs. The UNGPs thus are set out to advance a dynamic regulatory approach that encourages transformative change and a continuous and progressive evolution of corporate responsibility to respect human rights. Consequently, while corporate responsibility to respect human rights may not be legally binding in its inception, this responsibility is expected to acquire: (i) normative force, through its recognition and acceptance by State and non-State actors; and (ii) effectiveness, through the actual implementation of the UNGPs.

The aim of this chapter is to examine the legal status of corporate responsibility to respect human rights and to set out a possible future framework in order to further develop this concept. This framework is based on an interpretation of the UNGPs on their own terms and thus remains within the scope of the SRSG's original project. The second section (Section 4.2 below) will focus on the legal status of the UNGPs as soft law, because it is within this document, and with such character, that the corporate responsibility to respect human rights has been recognized. The third section (Section 4.3 below) will reflect on the SRSG's choice of soft versus hard law through an examination of the rationales of the SRSG not to opt for the, arguably more conventional, route of negotiating a treaty. The fourth section (Section 4.4 below) considers the value of soft law as a technique to foster compliance, drawing upon literature highlighting the legal relevance of soft law despite its non-legally binding character. This section identifies various factors that can explain business compliance with (i.e., actual adherence to) corporate responsibility to respect human rights in practice. The fifth section (Section 4.5 below) will set

out a possible future framework for the normative evolution of corporate responsibility to respect human rights that seats well within the boundaries of the SRSG's project.

The sixth section (Section 4.6 below) considers the extent to which States have an international law obligation to adopt rules and regulations to ensure that business enterprises respect human rights. This entails an examination of authoritative opinions by international treaty monitoring bodies that clarify the State duty to protect human rights under international human rights treaties. The seventh section (Section 4.7 below) will address the feasibility and desirability of a 'legalization' of corporate responsibility to respect human rights at the national and international level. The eight section (Section 4.8 below) will examine the activities of the WG BH in relation to promoting the implementation and diffusion of the UNGPs. The ninth section (Section 4.9 below) will briefly reflect on the creation, by the HRC, in 2013 of an inter-governmental working group, with a mandate to develop an internationally legally binding instrument on business and human rights.

4.2 The Legal Status of the UN Guiding Principles on Business and Human Rights as Soft Law

An analysis of the legal status of corporate responsibility to respect human rights requires first an assessment of the legal status of the UNGPs within which this norm was adopted. The text of the UNGPs does not address this point. A brief assessment of this status follows. This assessment will be made by reference to: (i) the sources of international law as set out in Article 38(1) of the Statute of the ICJ and (ii) definitions of soft law in the literature.

The UNGPs are not legally binding, in and of themselves, and thus clearly lack the legal effects of an international human rights treaty. States have expressed their approval of the UNGPs through their anonymous endorsement of the text in the HRC and oral statements delivered in the HRC. There is no indication, however, that States did so under the legal conviction that the UNGPs would be binding on them. By themselves, the UNGPs do not constitutive evidence of State practice or *opinion iuris sive necessitates* giving rise to new norms of customary international law.[1] Consequently, the UNGPs do not constitute instant international treaty law[2] or 'pressure-cooked' instant customary international law[3] within the meaning of Article 38(1)(a) and (b) of the Statute of the ICJ. Indeed, the UNGPs expressly provide that 'nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under

[1] The unanimous 'endorsement' of the UNGPs by the HRC evidenced the support of State for the UNGPs. The exact legal significance of this act of 'endorsement' rather than 'acceptance' is not clear. As the SRSG has often indicated, it was a first time for the HRC to have given its official approval to an instrument that had not been negotiated by States.

[2] This term 'instant international law' has been applied by Baade to characterize instruments which 'do not rise to the level of customary international law by the mere fact of their adoption or even through being observed in practice by MNEs'. Hans W. Baade, *The Legal Effects of Codes of Conduct for MNEs: Commentary*, *in* Legal Problems of Codes of Conduct for Multinational Enterprises, 13 (Horn ed. 1980).

[3] Eibe Riedel, *Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?,* 2 European Journal of International Law, 62 (1991).

international law with regard to human rights'.[4] To be noted is that, since the SRSG was acting under a special procedure of the HRC, the SRSG did not have the legal mandate to develop this type of law.

The UNGPs provide instead pronouncements of existing and newly emerging States obligations under International Human Rights law as codified in international treaties and customary international law. To the extent that the UNGPs can be considered to re-state *existing* international law, at least with regards to the State duty to protect human rights and provide an effective remedy to breaches thereof, they might have 'a certain *pro memoria* and declaratory effect'.[5] However, given that the UNGPs merely reinforce[6] such existing legal norms, the UNGPs have limited direct legal effect. With regards to these norms, the UNGPs could perhaps be regarded as auxiliary[7] evidence of international human rights law in the sense of 'the teachings of the most highly qualified publicists of the various nations'.[8]

Given that, for the aforementioned reasons, the UNGPs, do not fit into the traditional sources of international law as set out in Article 38(1) of the Statute of the ICJ,[9] the question arises whether this instrument can be characterized as soft-law, and if so, how? There is no uncontested definition of soft-law. As described by Riedel, the origins of the more traditional concept of soft-law can be traced back to the post World War II period, when the notion of soft-law was introduced to describe 'legally relevant pronouncements formulated in international organizations and amongst States'.[10] Amongst those sources characterised as soft-law were resolutions and declarations of international organizations[11], quasi-legislative actions of the UN, and non-legally binding but persuasive codes of conduct from States.[12] [13] They emerged from

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[4] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.* U.N.Doc. A/HRC/17/31, General Principles (March 21, 2011) [hereinafter *UNGPs*] (by John Ruggie).

[5] Ian Brownlie, *Legal Effects of Codes of Conduct for MNEs: Commentary*, *in* Legal Problems of Codes of Conduct for Multinational Enterprises, at 41 (Norbert Horn ed. 1980).

[6] David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 Human Rights Law Review, at 36 (2006).

[7] Riedel, *supra* note 3, at 62.

[8] Statute of the International Court of Justice, Art. 38(1)(d).

[9] Riedel, *supra* note 3, at 63.

[10] *Id.* at 59.

[11] In the 1960s, developing countries undertook an unsuccessful attempt to upgrade resolutions of the UNGA into legally binding instruments. *see* UN Charter, articles 10-14. Antonio Cassese, International Law in a Divided World, 175 (1986).

[12] The Vienna Convention on the Law of Treaties stipulates in its Art. 53 that a treaty is void if it conflicts with peremptory norms of general international law, thereby providing a definition of a jus cogens norm: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. *See* further, Art. 64 and 66(a).

[13] Riedel, *supra* note 3, at 59.

within international organizations and emanated from the authority of States, hence their strong international and public character.

According to Riedel, soft-law differs from more classic sources of international law in its intended non-legally binding effect, though this did not mean that the norms of this nature were without any effects. Non-compliance could potentially lead to ostracism at the UN. These norms were considered to have a discernible impact in the behavior of States.[14] The means through which soft law led to normative effects - for example recognition, toleration or simple acceptance - differed from traditional international law making.[15] Where soft-law gave rise to new norms of international law, its legal relevance extended beyond that of subsidiary sources of international law, i.e., judicial pronouncement and 'the teachings of the most highly qualified publicists of the various nations'. However, soft-law differed in its form, creation and intended effect from traditional sources of international law, i.e., treaties and custom.[16]

More recent conceptions of soft-law which have been commonly applied in legal scholarship define 'soft law' as 'voluntary' by its very nature, and by its intrinsically international and public character. Zerk defines soft law as 'principles and policies which have been negotiated and agreed upon between States, or promulgated by international institutions, yet which are not mandated by law or subject to any formal enforcement mechanisms'.[17] This definition characterizes instruments as soft-law by reference to their non-legally binding and non-enforceable nature, from a strict legal perspective, and the legal authority of States. According to this definition, soft-law depend on State action for its existence, and such action finds expression in the acceptance by States between themselves or through international organizations.

According to Shelton, soft-law entails 'any international instrument other than a treaty that contains principles, norms, standards, or other statement of expected behaviour'.[18] It is not clear what gives a soft-law instrument its 'international' character, whether this may be the State's consent to the instrument or the State's involvement in the process of its development. The definition seems to attach greater importance to content, rather than the formality by which the instrument has been developed and adopted. The characterisation of an instrument as soft-law thus seems to depend, in part, on the instrument's functionality in articulating statements of expected behaviour.

Chinkin provides a broader definition of soft-law, and, more precisely, one which encompasses within its scope also statements by non-State actors that have not been negotiated or formally adopted by States, but which articulate international principles:

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[14] *Id. at* 62.

[15] *Id. at* 64.

[16] *Id. at* 64.

[17] J.A. Zerk, Multinationals and corporate social responsibility: limitations and opportunities in international law, at 70 (Cambridge University Press. 2006).

[18] Dinah Shelton, *Normative Hierarchy of International Law* 100 The American Journal of International Law, at 319 (2006).

> Soft law instruments range from treaties, but which include only soft obligations ('legal soft law'), to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organisations ('non-legal soft law'), to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles.[19]

According to this definition, an instrument depends on its content for its existence as soft law, which should reflects an attempt 'to lay down international principles'. The form of the initiative, or the formality of the process by which it has been developed or adopted seems not to be of the essence. This definition also characterizes as soft law initiatives that have been developed at a micro-level,[20] hence bringing within its scope a diversity and range of CSR mechanisms (e.g., codes of conduct, private-hybrid, self or multi-stakeholder governance initiatives).

It seems that the SRSG adheres to a definition of soft-law that is similarly broad in scope. The SRSG characterizes CSR mechanisms as soft law by virtue of their non-binding nature in a strict legal sense and their reflection of norms and social expectations that derive normative force from their recognition by State and other key actors.[21] Instruments do not depend on any formal procedures for their development or acceptance in order to exist as soft law. A mechanism can be designated as soft law simply because the initiative carries within its content the potential to bind.

The UNGPs may thus be characterized as soft law on various grounds.

First, they have an 'international' character by reason of having been developed at the international level and having obtained the 'endorsement' of the HRC. While not having been negotiated by States,[22] the UNGPs have obtained the anonymous 'endorsement' by the HRC, which testifies to State support for the UNGPs. However, the exact legal implications of such an act of 'endorsement' (as opposed to the 'acceptance') of the UNGPs are far from clear.

Second, the UNGPs can be characterized as soft-law even more clearly by their content. The UNGPs recognize, clarify and elaborate existing and newly emerging standards and practices of States and business enterprises regarding the prevention and remediation of business' harm to

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[19] C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law* 38 International and Comparative Law Quarterly 850, at 851(1989).

[20] Justin Nolan, *The corporate responsibility to respect human rights: soft law or not law?*, *in* Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (Surya Deva & David Bilchitz eds., 2013).

[21] The SRSG notes that 'soft law is "soft" in the sense that it does not by itself create legally binding obligations [but] derives its normative force through recognition of social expectations by States and other key actors'. Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, §45 A/HRC/4/35 (Febr. 19, 2007) [hereinafter *Ruggie, 2007 Report*] (by John Ruggie). *See* further, Nolan, *Id*, at 140.

[22] According to the SRSG, 'The GPs are the first authoritative guidance that the Council and its predecessor body, the Commission on Human Rights, have issued for States and business enterprises on their respective obligations in relation to business and human rights; and it marked the first time that either body "endorsed" a normative text on any subject that Governments did not negotiate themselves.'

human rights. The UNGPs thus constitute soft law by reason of their ability to bind addressees to these international principles. In the words of the SRSG, '[t]hey are a soft-law instrument that prescribes minimum standards of conduct for all states and all business enterprises in relation to all human rights'.[23]

4.3 The Choice of Soft Law v. Hard Law: Why the SRSG decided not to Recommend the Negotiation of an Overarching International Treaty

The previous section established that the UNGPs can be characterized as soft-law. This section reflects on the SRSG's choice for soft law over hard law. It seems that the SRSG opted for the adoption of the UNGPs as soft law because this constituted an effective method of progress towards the ultimate goal of achieving full respect for human rights by all enterprises. As set out in detail in the previous chapter, the realization of this goal depends on the actions of key stakeholders to enhance standards and practices on business and human rights in order to meet their obligations under the UNGPs. The UNGPs are the starting point for an ongoing process of enhancing standards and practices that contributes to a regulatory dynamic and global system that binds business enterprises to respect for human rights. The underlying assumption appears to be that such a system would generate similar effects as hard law does in terms of achieving business compliance with human rights.

This section reflects on the SRSG's rationale to propose the PRR Framework and the UNGPs as an alternative to starting negotiations of an overarching international treaty placing binding obligations on business enterprises under international law. The SRSG elaborated on some of these arguments in an essay published in *Ethical Corporation*, entitled 'treaty road not travelled'.[24] Therein the SRSG expressed the following three reservations against the treaty route:

> First, treaty-making can be painfully slow, while the challenges of business and human rights are immediate and urgent. Second, and worse, a treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights. And third, even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced.

The SRSG elaborated on some of these arguments in more recent debates on the negotiation of an UN business and human rights treaty, which will also be given consideration.[25]

This section builds on the literature on the legal relevance of soft-law.[26] The next sections thus consider the SRSG's choice of soft-law in the light of this literature and concludes that this choice has been partially informed by expectations of compliance. The normative potential of the

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[23] John Ruggie, *Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization*, at 6 (Regulatory Policy Program, Working Paper RPP-2015-04, 2015).

[24] John Ruggie, *Business and Human Rights: Treaty road not travelled*, Ethical Corporation (2008).

[25] Ruggie, *supra* note 23, at 6. For further details on the treaty initiative, *see*, for more detail, section 4.8.8.

[26] Dinah Shelton, Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System, at 2 (Dinah Shelton ed., 2000).

UNGPs to generate compliance by business enterprises with the corporate responsibility to respect human rights will be examined in this section.

The reflections that follow shed light on the SRSG's rationale for creating the UNGPs as a soft-law instrument, as well as the SRSG's soft-law approach to corporate responsibility to respect human rights, which draws upon social expectations and moral obligations as a basis for the application of responsibilities to business enterprises. As noted by Nolan, 'soft law has played a prominent role in the development of the SRSG's concept of why and how a corporation might be responsible for human rights'.[27]

One of the main rationales for the SRSG not to recommend treaty negotiations was a need for 'immediate solutions to the escalating challenge of corporate human rights abuses'.[28] The process of negotiating a treaty would be lengthy and complicated, in part because of the complexity of the subject of business and human rights. According to the SRSG, this complexity would be reflected in the many facets that would need to be considered when negotiating a comprehensive treaty, especially the broad range of issues that such a treaty would need to encompass.[29] The SRSG elaborated on this point, in an issues-brief, as follows:

> It includes complex clusters of different bodies of national and international law—for starters, Human Rights law, Labour law, Anti-Discrimination law, Humanitarian law, Investment law, Trade law, Consumer Protection law, as well as Corporate law and Securities regulation. The point is not that these are unrelated, but that they embody such extensive problem diversity, institutional variations, and conflicting interests across and within States that any attempt to aggregate them into a general business and human rights treaty would have to be pitched at such a high level of abstraction that it is hard to imagine it providing a basis for meaningful legal action.

The subject of business and human rights is thus complex because of the complexity of the variety of bodies of law, the extensive problem diversity, the institutional variations and the conflicting interests of the various actors that the subject engages within and across States. This complexity posed significant obstacles to negotiating a treaty, the SRSG argued: 'The crux of the challenges is that business and human rights is not so discrete an issue-area as to lend itself to a single set of detailed treaty obligations'.[30]

In addition, the SRSG was of the view that negotiating an all-encompassing treaty would be inappropriate when the duration of such negotiations would be too long. This was the case for a comprehensive international human rights treaty. '[T]he broader the scope and the more controversial the subject, the longer the duration', he noted.[31] This consideration became particularly applicable to a treaty on the subject of business and human rights.[32] [33]

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[27] Nolan, *supra* note 20, at 139.

[28] Ruggie, *supra* note 25, at 42.

[29] John Ruggie, Just Business Multinational Corporations and Human Rights, 57 (W.W. Norton & Company. 2013).

[30] Ruggie, *supra* note 23, at 10.

[31] The SRSG referred to the Declaration on the Rights of Indigenous Peoples as an example, a soft-law instrument which took 26 years to negotiate, and was adopted only in 2007. This was despite the relatively circumscribed

The SRSG went one step further and argued that a treaty-making process could risk 'undermining effective shorter-term measures'. In the light of the previously noted complexity, deriving from the subject of business and human rights and political dynamics, the SRSG was sceptic about pursuing at the same time both an all-encompassing treaty and practical measures for more urgent relief. A dual approach would be counterproductive, he argued, because States could derive justification from a treaty-making process not to act to raise standards on business and human rights in the meantime. The SRSG thus noted that '[States] may invoke the fact of treaty negotiation as a pretext for not taking other significant steps, including changing national laws – arguing that they would not want to 'pre-empt' the ultimate outcome'.[34] Moreover, a treaty making process is resource intensive and can detract valuable attention and resources from stakeholders, resources which could be spent elsewhere, for instance on interim-innovations, the SRSG argued. By opting for soft-measures, the resources that would have been spent on lengthy negotiations could thus be redirected towards initiatives which could potentially deliver more immediate relief to victims of human rights abuses.

Where treaties can take decades to negotiate, and soft-law can deliver quicker results, the choice for soft-law thus seems like a better alternative.[35] Soft-law may have the advantage of a less complex negotiation process than a legally binding international standard, simply because soft-law is 'not constrained by a legal straight jacket'.[36] Due to its non-legally binding nature, a soft instrument can recognize and apply norms facing less resistance because these norms do not generate immediate legal effects, in and of themselves. Consequently, by turning to soft-law, the time frame for setting standards and implementation procedures can be reduced. Soft norms can obtain the support by States and business enterprises with greater ease, due to their non-legally binding nature. Soft-law can be used to respond to the need for more immediate measures to address corporate-related human rights breaches and achieve practical results, thereby reducing the number of incidents of harm caused and hence deliver short-term benefits to victims.[37]

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nature of the subject. Ruggie, *supra* note 29, xxii, 57. *See* further, John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations, in* The UN Guiding Principles on Business and Human Rights: Foundations and Implementation, at 64 (R. Mares ed. 2012).

[32] This argument was elaborated upon by the SRSG in an issues-brief posted in January 2014 in contribution to discussions on the negotiation of a UN business and human rights treaty. Ecuador and South Africa supported an initiative to start a new process of formulating a treaty to clarify the human rights obligations of business enterprises and to establish an effective mechanism for remedies. This resulted in Human Rights Council Res 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, 26th Sess., June 10 - 27, 2014, A/HRC/RES/26/9 (July 14, 2014). J. Ruggie, A UN Business and Human Rights Treaty? An Issues Brief by John G. Ruggie (2014), http://www.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf.

[33] *Id.* at 3.

[34] Ruggie, *supra* note 24, at 43.

[35] John Ruggie, *Business and Human Rights: The Evolving International Agenda, 23* (John F. Kennedy School of Government, Corporate Social Responsibility Initiative Working Paper No. 31, 2007).

[36] Nicola Jägers, *Will transnational private regulation close the governance gap?*, *in* Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, 298 (Surya Deva & David Bilchitz eds., 2013).

[37] Ruggie, *supra* note 32.

The choice of soft over hard law can be explained by the political dynamics in the former Commission on Human Rights and the lack of agreement on an effective response. By the time the SRSG's mandate was launched, there was no consensus among States on the existence of direct legal obligations for companies, or, for that matter, on the necessity or desirability of such obligations. According to the SRSG, there was no shared knowledge-base to build on, nor agreement on desirable international responses.[38] Consensus did not go far beyond a 'we need to consider doing something about the problem' approach.[39] An agreement on the existence or creation of human rights duties having hard-law effects did not seem forthcoming.

The reminiscence of previous failed attempts to create a UN document on business and human rights played a part as well, especially the previous UN Norms, which did not obtain the backing of States.[40] The political dynamics within the Commission on Human Rights (which was replaced by the HRC in 2006), which operated on a consensus basis, seemed hardly conducive to States negotiating, let alone signing and ratifying a treaty creating direct human rights obligations for companies.[41] [42] The political dynamics signalled constraints on the aspirations for an international legally binding treaty and the importance of proceeding with caution in a difficult political climate.[43] The SRSG also noted that 'greater shared understanding and consensus needed to be built from the bottom up'.[44]

It seems that the use of soft-law, precisely because of its non-binding nature, allowed the SRSG to reach a consensus among States within the HRC on corporate responsibility to respect human rights where no such consensus would have been recognized in relation to hard-law. More progressive rules on corporate responsibility to respect human rights were thus adopted than those which were more likely to be possible had hard law been chosen.[45] [46] Moreover, the SRSG

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[38] This was reflected in the terms of his mandate that called upon the SRSG to 'identify' and 'clarify' and to provide recommendations.

[39] Ruggie, *supra* note 29, at 58.

[40] *See,* section 2.4.1.

[41] The SRSG also discarded then the option of recommending a treaty of lesser complexity by stating that there was no foundation for *any* treaty negotiations at that time. Ruggie, *supra* note 29, at 56, 57.

[42] The SRSG indicated that: '[t]reaties form the bedrock of the international human rights system. Specific elements of the business and human rights agenda may become candidates for successful international legal instruments. But it is my carefully considered view that negotiations on an overarching treaty now would be unlikely to get off the ground and, even if they did, the outcome could well leave us worse off than we are today.' Ruggie, *supra* note 24, at 48.

[43] According to Knox, '[i]f Ruggie had introduced another draft of a legally binding agreement, or even a non-binding declaration, it seemed likely to meet the same fate [as the UN Norms]. Knox, *supra* note 31, at 64.

[44] Ruggie, *supra* note 29, at 58.

[45] Dinah Shelton, *Introduction: Law, Non-Law and the Problem of 'Soft Law'*, *in* Commitment and Compliance: The Role of Non-binding Norms in the International Legal System,13 (Dinah Shelton ed. 2003).

[46] The SRSG indicated that:

> '[a]ll Council members in 2011 were able to endorse the corporate responsibility to respect *all* human rights because, within the GPs' framework, that responsibility is based in a global social norm, not a legal obligation. In contrast, if the corporate responsibility to respect human rights were turned into an international treaty obligation, its applicability and the range of human rights to which it would apply would

cautioned that treaty making could restrict innovation and experimentation[47] and risked resulting in legal standards reflecting the lowest-common denominator. Treaty making could be counterproductive to raising human rights standards if it were to cement a lower standard in international law than the standards set by existing voluntary initiatives. The discretion of companies to adhere to the lower standard prescribed by international law risked undermining the social leverage of stakeholders pressuring companies to do better, the SRSG argued.

The SRSG also raised the argument that a treaty may not alleviate the problem of inadequate enforcement.

First, were States prepared to give their political consent to a treaty in the first place, such treaty would trigger few consequences for business enterprises if the treaty were to be left un-implemented and un-enforced. A treaty would have too limited an effect in constraining corporations by law or in impressing upon companies the possibility or prospect of legal liability. In the view of the SRSG, much of the treaty's legitimacy and effectiveness would thus be lost.

Second, the SRSG dismissed the enforcement of treaty-obligations by host States as 'redundant or irrelevant'.[48] According to the SRSG, it also seemed unlikely that States previously reluctant to take on new human rights obligations would ratify a new treaty on business and human rights in the future. It would also not be self-evident that those States previously unwilling or unable to discharge their obligations under human rights treaties would enforce a future treaty, he argued, although a State may feel more inclined to do so where a treaty resolves collective action problems.[49]

Third, the SRSG further discarded the option of extraterritorial enforcement of an international treaty by States other than the host State. While international law permits States to take action to regulate the human rights breaches of their corporations abroad, he argued, few have been willing to do so. Both States and business enterprises are concerned that extraterritorial jurisdiction may compromise the competitive position of companies. Developing States, on the other hand, feared extraterritorial jurisdiction impinging on their national sovereignty. In the absence of State support for new treaty obligations on extraterritorial enforcement, starting such an initiative 'could backfire and reduce the scope of existing possibilities', reasoned the SRSG.

Fourth, the SRSG discarded the possibility of establishing an international court for companies any time soon as 'unrealistic'.[50] An alternative option was to establish a new treaty body to monitor corporate compliance. However, the SRSG was of the view that this would pose insurmountable difficulties in practice. Designing selection criteria and handling cases for

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be determined by individual instances of state treaty ratification – not only involving the proposed new treaty, but also the variable human rights standards that individual states recognize as international legal obligations'.

Ruggie, *supra* note 23, at 9.

47 Ruggie, *supra* note 29, at 59.

48 *Id.* at 63.

49 *Id.* at 62.

50 *Id.* at 43.

millions of companies, in relation to all human rights of all persons adversely affected by business enterprises and their activities would be a daunting task, the SRSG argued. In the words of the SRSG:

> There are 77,000 transnational corporations, with about 800,000 subsidiaries and millions of suppliers – Wal-Mart alone has 62,000. Then there are millions of other national companies. The existing treaty bodies have difficulty keeping up with 192 member States, and each deals with only a specific set of rights or affected group. How would one such committee handle millions of millions of companies, while addressing all rights of all persons?

These arguments are consistent with the idea that compliance might often make soft-law preferable to hard law. According to Shelton, the choice may fall on soft-law in case a reasonable possibility exists that States will be unable or unwilling to comply with hard law obligations and, therefore, unwilling to agree to an instrument creating such obligations.[51] Concerns about the possibility of non-compliance can be triggered by a number of factors, including 'domestic political opposition, lack of ability or capacity to comply, uncertainty about whether compliance can be measured, or disagreement with aspects of the proposed norms'.[52] The SRSG refers to all these factors in support of his argument that a treaty would not constitute the most effective path to address the problem of inadequate enforcement in the business and human rights context.

Another argument supporting the choice of soft over hard-law relates to the opportunities that soft-law creates for non-State actors to participate in the law-making processes.[53] As set out in more detail above, the multi-stakeholder consultative approach was of essential importance to the development of the UNGPs. The participation of stakeholders in this process can be viewed as intrinsically important, but also had an instrumental value to ensure both the normative quality of the UNGPs and support for their effective implementation. As highlighted by Nolan, the SRSG may have opted for the development of corporate responsibility to respect through a soft law approach because 'the informal nature of soft law allows for a broader group of participants (including non-State actors) in both its development and enforcement'.[54] [55] The 'thick stakeholder consensus' that the SRSG strived for in the process of developing the UNGPs supports the claim that resorting to such a soft-law approach is not necessarily undesirable from

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[51] Shelton, *supra* note 45, at 12.

[52] *Id.* at 12.

[53] Shelton, *supra* note 45, at 13.

[54] Nolan, *supra* note 20, at 142.

[55] The SRSG notes that this multi-stakeholder approach endowed the UNGPs with 'what Joost Pauselyn, Ramses A Wessel, and Jan Wouters term "thick stakeholder consensus" – which , they suggest, can be normatively superior in securing compliance to the "thin state consent" validation requirement associated with traditional International law. Indeed, in this particular instance, thick stakeholder consensus helped pave the way for unanimous Human Rights Council endorsement'. John Ruggie, *Global Governance and "New Governance Theory": Lessons from Business and Human Rights* 20 Global Governance, 10 (2014).

the perspective of accountability or legitimacy, and may furthermore enhance the flexibility and quality of the resulting standards.[56]

The SRSG's decision not to recommend recourse to a classic international treaty reflected the expectation that adopting such a treaty would be difficult.[57] The SRSG examined in detail the likelihood that States would reach an agreement on an overarching treaty that would be enforceable and effective in providing an immediate response to pressing business and human rights challenges. The SRSG pointed to a variety of factors, which, at the time, supported the choice of soft-law over an overarching treaty on business and human rights. Most important among these factors were the complexity of the area of business and human rights and need for an immediate response, and the likely possibility of non-acceptance and/or non-enforcement of an international treaty and securing the acceptance of (and commitment to), by non-State actors, the implementation of the UNGPs. The political dynamics at the international level, including within the HRC, did not seem conducive to a successful negotiation of such an international treaty. It should be noted that these factors are primarily of a political and practical, rather than of a legal nature.

The SRSG's choice of the SRSG also relates to the normative and strategic objectives that the SRSG set for his mandate and constituted an exercise of retrospective principled pragmatism. The creation of an authoritative framework was cast as an alternative to the treaty route and the best hope to starting a process of enhancing standards and practices and the constitution of a system that will affect business behaviour in practice. The fact that the UNGPs were conceived as soft law enabled an approach of principled pragmatism. The extensive multi-stakeholder processes involving State and non-State actors that characterised the adoption of the UNGPs, for example, might have not been possible in the framework of treaty negotiations. The choice of soft-law may also reflect the expectation that soft-law would be a more suitable method for the operation of the governance system that the UNGPs intended to advance. It may be precisely because of the UNGP's nature as soft law and, thus, without direct legal effect, that the UNGPs may be applied and interpreted as a (self-referential) framework across governance systems without directly affecting or being affected by existing law and authority structures.[58]

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[56] '[T]he expertise of a large pool of regulators and other actors can lead to more dynamic regulation, sensitive to global and regional changes and evolution'. Joost Pauwelyn, et al., *When structures become shackles: stagnation and dynamics in International law making*, 25 The European Journal of International Law (2014).

[57] These arguments correspond with findings in the literature on the legal relevance of soft-law, which point to soft-law as a method to foster acceptance and compliance by States with international norms. As articulated by Shelton, the underlying assumption is that States adopt, accept and comply with international norms when it is in their interest to do so. The assumption is that soft-law can accomplish compliance in a different way from hard-law. More precisely, soft law can achieve compliance by way of managing incentives, rather than by coercion. Shelton notes that 'soft law may be used precisely because compliance is expected to be difficult: it begins a dynamic process over time that may lead to hard law or the norm may remain soft at the international level but become hard law internally'. Shelton, *supra* note 26, at 17.

[58] *See* a similar argument by Backer in the context of the NCPs, noting that, precisely because the proceedings of NCPs are not binding, the flexibility of these NCPs allows the application of procedures that are detached from municipal law. Backer suggests that the OECD Guidelines on MNEs 'serve as something like an autonomous transnational system, subject principally to its own substantive rules that incidentally draw on an aggregated and generalized municipal and International law as a basis for the application of its norms'. Larry Catá Backer, *Rights and Accountability in Development ('Raid') v DAS AIR and Global Witness v Afrimex: Small Steps*

In conclusion, the resort to soft law by the SRSG appears to have been informed by considerations of compliance. The assumption underpinning the UNGPs is thus that soft-law can be a method that is as useful as hard law in generate legal effects in terms of fostering compliance by business enterprises and the effective application of human rights. The section will reflect on the normative potential of the UNGPs to generate compliance and affect the evolution of corporate responsibility to respect human rights, which may acquire normative force or binding effect through the exposure to and restatement in, of the UNGPs, soft and hard law provisions. The underlying assumption is, in short, that the dynamic interaction between soft and hard law obligations in the emerging governance system and their cumulative binding effects will foster business efforts to respecting human rights.

4.4 A Soft-Law Approach to Corporate Responsibility to Respect Human Rights and Expectations of Compliance

This section reflects on (i) the UNGP's soft-law approach to formulating the duty of corporate respect for human rights and (ii) the expectation that the UNGPs will affect compliance (i.e., actual adherence) by business enterprises to the rules the UNGPs contain. The UNGPs recognize that business enterprises have a responsibility to respect human rights. This responsibility is a social / moral norm founded in global social expectations rather than a legal obligation founded in international human rights obligations. Consequently, corporate responsibility to respect human rights, as soft law, does not generate, in and of itself, legally binding effects. Such responsibility nonetheless includes within its normative scope the capability to affect the behaviour of business enterprises by virtue of its potential acceptance and recognition by State and non-State actors alike.[59]

The section draws from the literature on the social relevance of soft law more generally, in order to explore the factors that explain compliance by business enterprises with corporate responsibility to respect human rights in practice. The potential normative force or binding effect of the corporate responsibility to respect human rights and potential effect on business compliance, can be explained by the following three factors: (i) context (see Section 4.4.1 below); (ii) content (see Section 4.4.2 below), and (iii) institutional setting (see Section 4.4.3 below).[60]

The assumption is that the UNGPs intend to promote a system that affects and coordinates the regulation of corporate responsibility to respect human rights through the factors that explain compliance by business enterprises with this norm in practice. While the aim is to consider these factors that explain business compliance in certain detail, the following sections will also elaborate on how the UNGPs echo these factors.

Towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations, 10 Melbourne Journal of International Law (2009).

[59] Nolan, *supra* note 20, at 144.

[60] These factors are not entirely dissimilar from those explaining potential compliance by *States* with international norms, and relate to 'the form or process of adoption, the content of the instrument, the institutional setting, and the follow-up procedures envisaged'. Shelton, *supra* note 26, at 17.

4.4.1 Context

The legal relevance of corporate responsibility to respect human rights as soft law may first be appraised by reference to its context. This context relates to the mandate of the SRSG and the HRC, within which the UNGPs were developed and adopted.[61] The normative force of such responsibility can be assessed in relation to the authoritativeness of the UNGPs within which the responsibility has been recognized. This authoritativeness, which may be related to the norm's perceived legitimacy,[62] can result from the SRSG's official UN mandate, his independent nature, and his stature as a renowned expert in the field of business and human rights.[63] Also, the consensus that exists around the UNGPs and their formal endorsement by the HRC can affect the normative potential of the UNGPs. Finally, the multi-stakeholder approach to developing the UNGPs as relevant factors that potentially foster compliance by business enterprises is also to be considered.

The normative force of the corporate responsibility to respect human rights can also be appreciated in terms of the broader context, that is the newly emerging global business and human rights regime, and the combination and dynamic interplay between hard and soft norms within this regime.[64] [65] Attention may be paid to soft and hard law instruments that create corresponding norms of different types of obligations, which complement and interact with one another in a joint effort to advance towards the overall goal of a reduction of business harm to human rights.

Shelton has noted how 'soft law rarely stands in isolation; instead; it is used most frequently either as a precursor to hard law or as a supplement to hard-law instruments'.[66] The SRSG's recourse to soft law approach to corporate responsibility to respect human rights, as was indicated in certain detail above, can be viewed as a method to address gaps and generating normative effects where the adoption of hard law was difficult. States were unlikely to reach a consensus on the existence or need to create hard law international legal obligations for companies. The soft-law approach was thus preferred as a timely alternative that was more likely to receive agreement from States.

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[61] Nolan, *supra* note 20, at 158.

[62] Legitimacy is here understood in descriptive terms, that is, the belief of having the right to rule. Daniel Bodansky, *The legitimacy and international governance: a coming challenge for international environmental law?*, 93 The American Journal of International Law (1999). Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 Ethics & International Affairs (2006).

[63] Stéphanie Bijlmakers, *Business and human rights governance and democratic legitimacy: the UN "Protect, Respect and Remedy" Framework*, 26 Innovation: the European Journal of Social Sciences 288, (2013).

[64] The SRSG has noted that States may turn to soft law for several reasons: (i) to chart possible future directions for, and fill gaps in, the international legal order when they are not yet able or willing to take firmer measures; where they (ii) conclude that legally binding mechanisms are not the best tool to address a particular issue; or (iii) in certain instances, to avoid having more binding measures gain political momentum.

[65] Shelton notes how 'soft law instruments often serve as an authoritative way to allow treaty parties to resolve ambiguities in a binding text or fill in gaps. This function is part of an increasingly complex international system with variations in forms of instruments, means, and standards of measurement that interact intensely and frequently, with the common purpose of regulating behavior within a rule-of-law framework'. Shelton, *supra* note 18, at 320.

[66] *Id.* at 320.

The SRSG casts the corporate responsibility to respect as soft law having its sources in social expectations rather than international law and being founded on social/moral, rather than legal obligation. As a consequence of the SRSG's avoidance of hard law, Nolan argues, the responsibility was decoupled from binding law, in terms of both its source of obligation and enforcements mechanisms, which had the effect of 'reducing its normative value and making it softer and more inchoate than might be required'.[67] As a consequence, the corporate responsibility to respect human rights primarily derives normative force from the expectation that companies may be exposed to the 'court of public opinion' and 'occasionally to charges in actual courts'.[68]

The binding force and normative effects of a rule of soft law are not static, however, but can change and fluctuate over time. The rule can thus acquire or lose in normative force. Corporate responsibility to respect human rights may take on binding force for example, when exposed to enforcement processes, restated into soft law rules of other type and, ultimately, when transposed into 'hard' law.[69] As will be set out in detail below, it is reasonable to assume that the governance system that the UNGPs are set out to promote, while not of a legally binding nature, may affect the evolution of corporate responsibility to respect human rights into more binding rules under various hard and soft law sources at a variety of levels. To be noted is that the prospect that corporate responsibility to respect human rights might or will harden into a binding obligation at the national and/or international level in time, in and of itself, may be relevant also for explaining compliance by business enterprises.[70]

4.4.2 Content of the Norm

The content of corporate responsibility to respect human rights can also affect compliance by business enterprises. The level of detail with which corporate responsibility to respect human rights is formulated thus becomes of significance. The normative force and binding effects of a rule of soft law become greater where the rule is articulated in more precise language. There is a degree of open-endedness in corporate responsibility to respect human rights, which leaves discretion to companies on how to exercise it. This flexibility may be viewed negatively as reducing the responsibility's normative potential by allowing 'for too much wiggle room [and including] too many "should" in place of "shalls"'[71] According to Nolan, 'looseness of the language is perhaps more likely to invite inaction and a business-as-usual approach from companies that remain hesitant about their responsibility to act'.[72]

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[67] Nolan, *supra* note 20, at 159.

[68] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 54, U.N. doc. A/HRC/8/5 (April 7, 2008) [hereinafter *Ruggie, 2008 Report*] (by John Ruggie). *See* section 4.4.3.6.

[69] As a recent report notes, in relation to the UNGPs, 'national court systems might draw upon them to support their legal reasoning; parliaments might incorporate elements of them into regulations; they might become the basis for an international treaty; and they can be included as binding clauses in private party contracts'. Foley Hoag LLP & UNEP FI, Banks and Human Rights: A Legal Analysis (December 2015), http://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf.

[70] *Id.*

[71] Nolan, *supra* note 20, at 159.

[72] *Id*.

Others view the flexibility of the said responsibility as having a positive impact and increasing its normative potential by allowing room for responses tailored to the concrete circumstances of the company. Compliance with substantive requirements may require measures of a different complexity and scale. A degree of flexibility is built into the human rights due diligence concept, which allows companies to meet their responsibility by adopting measures that are appropriate to their circumstances. From this point of view, it could be argued that flexibility fosters greater compliance because the required standard is commensurate to the context and capabilities of the company.

The content of corporate responsibility to respect may have a variety of implications for companies, depending on a number of different factors. These factors relate to the factual circumstances of the company, and include awareness (e.g., the company's understanding of the UNGPs), the company's capabilities (e.g., the resources the company has at its disposal), and country specific conditions creating an environment conducive to respect for human rights. Factors that relate to the characteristics of the company include its size (*e.g.*, small or large) and ownership/nature (e.g., public or private). These factors relate to the opportunity and incentives of business enterprises to respect human rights and can be important when it comes to explaining compliance by business enterprises, both on their own and in combination with other factors. The importance of individual factors for explaining compliance may differ depending on the factual circumstances or type of business enterprises.[73] Furthermore, the combination of these factors and their interaction is important for explaining actual business compliance.[74] A brief analysis of factors explaining compliance follows.

Deficient compliance by individual companies may reflect a lack of *awareness* of the company about the UNGPs and/or the corporate responsibility to respect, or a lack of understanding by the company of this responsibility, the manner in which this responsibility applies to the company and the consequences that the effective implementation of this responsibility has for the company. The assumption is that, the more the company has engaged with the work of the SRSG and is familiar with the UNGPs, the greater the degree of compliance will be. Greater compliance is expected, for example, from companies that have an understanding about how to acquire knowledge about their potential and actual impacts,[75] the extent of human rights due diligence that is required from in relation to these impacts[76] and how to engage with stakeholders.

Consideration should also be paid to the commercial rationales that create incentives for companies to comply, also referred to as the *business case*. Such rationales may range from 'it is

[73] For example, the business case is contested and the different commercial rationales that drive business responses may not apply at all times. The business case may not be sufficient, in and of itself, to ensure respect for human rights, IHBR, State of Play Human Rights in the Political Economy of States: Avenues for Application, 20-21 (2014).

[74] *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Addendum: Uptake of the Guiding Principles on Business and Human Rights: findings from a 2013 questionnaire for corporations*, 14, figure 7, Human Rights Council, U.N. doc. A/HRC/26/25/Add.1 (Apr. 28, 2014) [hereinafter *UN Working Group, Corporate Survey 2013*] .

[75] IHBR, *supra* note 73, at 5.

[76] *Id.* at. 5

the right thing to do' to 'human rights are part of effective risks management', and 'commitment to human rights our code of conduct', 'our employees expect it of us', 'it gives us a competitive advantage' and 'engagement with civil society organizations'.[77] [78] The corporate responsibility to respect varies in the impact that it is likely to have on the business case of a company. It is reasonable to assume that the norm will acquire enhanced normative force if consistent with the commercial incentives of the company.

Compliance furthermore depends on the *capacity* of a company, meaning the capabilities that a company has to engage in the desired behaviour and the opportunity to use these capabilities for implementing its responsibility. The perceived costs of compliance are therefore a relevant factor. The corporate responsibility to respect human rights varies in the costs that it is expected to impose on companies. Where capacity is an issue, the opportunities for companies to comply may expand as the company obtains access to resources and credible information[79] and frameworks or methodologies in order to understand the company's human rights impacts,[80] and to good practice case studies and public guidance on how to implement the UNGPs.[81] [82]

The *form* of a company, i.e., the organizational and ownership-related characteristics of the company *(*e.g., whether it is structured as a corporation, partnership, joint venture, etc.) is relevant to expectations of compliance. The corporate responsibility to respect human rights varies in its implications for companies of different legal natures. The opportunities to comply may be affected by the business model (e.g., cooperative and partnerships), or whether a business enterprise is a publicly listed company or a private company.[83] For private enterprises that do not face similar constraints, other factors may be more determinant of compliance, e.g., business opportunities or legal constraints.[84]

The *size* of the company is also a relevant factor. Research suggests that the awareness,[85] the priorities,[86] capabilities[87] and opportunities to use its capabilities[88] as well as the commercial incentives[89] to implement the UNGPs may differ between companies depending on their sizes.

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[77] *UN Working Group, Corporate Survey 2013, supra* note 74, at 14, figure 5.

[78] Also *see* Shift and Mazars, The UN Guiding Principles Reporting Framework, 16 (2015).

[79] *Id.* at 3-4, 5

[80] *Id.* at 3-4

[81] *Id.* at 3-4.

[82] For instance, business enterprises have identified a lack of guidance on how to build leverage in operating context where human rights are not part of local law or applied in practice as a key obstacle in meeting their responsibility to respect human rights.

[83] *Id.* at 20

[84] *Id.* at 20

[85] IHBR, *supra* note 73, at 20.

[86] For instance, research points to a greater tendency among larger entities than among SMEs to focus on mapping high-risk operations as a priority . Also, smaller entities tend to focus more on improving complaints/grievance mechanisms as a priority than large entities. *UN Working Group, Corporate Survey 2013, supra* note 74, at 12.

[87] European Commission, An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles, 9 (2013).

There are also *country* specific factors, i.e., the conditions in the company's country of origin[90] and the country in which the company operates, should be considered. The corporate responsibility to respect varies in its implications for companies that operate in different country contexts. Compliance may be explained by the extent to which conditions in these countries favour such compliance. For instance, compliance may be greater for companies that operate in contexts where local laws are enforced and multi-stakeholder initiatives are in place[91] or whose country of origin enforces mandatory reporting requirements on companies in high-risk countries and imposes legal requirements to conduct human rights due diligence.[92]

Sector specific factors are also relevant. The challenges that corporate responsibility to respect pose may vary between companies that belong to different sectors.[93]

4.4.3 The Institutional Setting

The normative force of corporate responsibility to respect human rights may be appraised not only by reference to the substantive content of this norm, but also by the institutions that, through their standards and practices, bind business enterprises to implementing this responsibility. The SRSG distinguishes five types of such standards and practices: (i) the 'State duty to Protect'; (ii) 'Corporate responsibility and accountability for international crimes'; (iii) 'Corporate responsibility for other human rights violations under international law'; (iv) 'Soft law mechanisms'; and (v) 'self-regulation'.[94] The assumption holds that States and business enterprises will enhance their standards and practices in order to actively implement their rights and duties under the UNGPs. Corporate responsibility to respect is expected take ground as a

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[88] The corporate responsibility to respect human rights applies equally to SMEs. SMEs facing severe risks that call for an elevated response and more dedicated resources may be constrained in their response by lack of resources. However, resource constraints need not be issue, in and of themselves, because the human rights due diligence is a relative concept and responsive to *inter alia* the resource constraint of SMEs. 'Human rights due diligence is not an absolute, it is finite and limited by resources, time and context'. *Id.* at 20.

[89] *Id.* at 14, § 42.

[90] European Commission, *supra* note 87, at 6, 10.

[91] *UN Working Group, Corporate Survey 2013, supra* note 74, at 15.

[92] *Id.* at 16, § 46-47.

[93] A study suggests that disclosure on stakeholder engagement processes varied between companies active in different sectors. More precisely, according to the study, companies belonging to the extractive sector – 'where engagement centers on communities around their operations' – tend to show stronger disclosure on stakeholder engagement in their human rights impact assessments process. The study also suggests that companies in the apparel and the food, beverage, and agriculture sectors - 'where many companies have long-established audit programs that incorporate interviews with local stakeholders' – are more likely to disclose information on stakeholder engagement within their supply chains. Shift, Evidence of Corporate Disclosure relevant to the UN Guiding Principles on Business and Human Rights (2014), http://shiftproject.org/sites/default/files/Evidence%20of%20Corporate%20Disclosure%20Relevant%20to%20the%20UN%20Guiding%20Principles%20on%20Business%20and%20Human%20Rights.pdf

[94] The SRSG notes, 'soft law is "soft" in the sense that it does not by itself create legally binding obligations [but] derives its normative force through recognition of social expectations by states and other key actors'. Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Ruggie, 2007 Report, supra* note 21, §6.

result of the restatement and enactment of the UNGPs through soft and hard law instruments that affect business conduct.

It should be noted that compliance by business enterprises can be explained not only by reference to laws and policies emanating from the State and law (national and International) system, but also to other governance systems that shape business conduct (i.e., the corporate governance system and civil governance systems). Corporate responsibility to respect human rights may thus derive normative force, for example, from the standard setting activities of international multilateral institutions (e.g., the OECD, ISO 26000, FIFA), the authoritative opinions of treaty monitoring bodies that help to clarify expectations regarding business' responsibility, the exposure of corporations to the monitoring activities of NGOs, the integration of corporate responsibility into self-regulatory practices of business enterprises, etc. These standard and practices of the institutions can constitute the foundations of CSR and affect and may be affected by the effective implementation of the UNGPs.

4.4.3.1 State Duty to Protect

International Human Rights law imposes a generalized obligation on States to conduct human rights due diligence in order to ensure that the human rights of individuals within their jurisdiction are protected against infringements by third actors, including business enterprises. This obligation has extraterritorial effects.[95] States may, for instance, decide to enact laws, regulations and foster judicial practices that legally encourage, permit or require business enterprises to respect human rights or to conduct human rights due diligence.[96] States that fail to do so may risk acting in breach of their international human rights obligations in certain circumstances.[97] Consequently, it may be appropriate for States to establish regulation through legislation that requires companies to respect human rights, including human rights due diligence, in order for States to fulfil their international obligations. Indeed, the SRSG has indicated that certain elements of corporate responsibility to respect human rights can be an object of legal regulation under domestic law, and create legal duties for corporations.[98]

By adopting such measures, States can foster compliance by business enterprises through leveraging on the factors outlined above. Examples of such measures that can induce companies to comply, which are also echoed in the UNGPs, are interpretations of directors' duties of loyalty and care under Company law permitting or requiring directors to consider human rights when managing their business enterprise.[99] Public procurement legislation can create economic

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[95] *See*, for details, sections 3.3.2. and 4.6.

[96] Michael Kerr, et al., Corporate Social Responsibility: A Legal Analysis (LexisNexis. 2009). Doreen McBarnet, et al., The New Corporate Accountability: Corporate Social Responsibility and the Law (Cambridge University Press 2009).

[97] *Ruggie, 2007 Report, supra* note 21, §18.

[98] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and human rights: further steps toward the operationalization of the "protect, respect and remedy" framework, §66, A/HRC/14/27 (Apr. 9, 2010) [hereinafter *Ruggie, 2008 Report*] (by John Ruggie).

[99] J. Lowry, *The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure* 68 The Cambridge Law Journal (2009).

incentives for companies to act responsibly where award criteria include social considerations.[100] Public reporting and disclosure obligations relating to social issues can require business enterprises to be transparent and hence enhance their accountability and responsiveness to the public.[101]

4.4.3.2 Corporate Responsibility and Accountability for International Crimes

There are certain rules that fall within the category of norms of *jus cogens* (*e.g.*, the prohibition of slavery and forced labor, genocide, torture, and crimes against humanity), which by definition apply to all actors, including companies.[102] Only the most serious crimes are covered by these norms. The International Criminal Court lacks jurisdiction over legal persons. Partially because of the prevailing complementarity principle,[103] the enforcement of these norms on companies is primarily a matter for domestic courts. States have the option to establish causes of action allowing individuals to bring civil or criminal proceedings against companies for violations of such international crimes. The US has been an important venue in this regard. Foreign nationals can rely on the US Alien Torts Claim Act ('ATCA')[104] to sue companies for alleged violations of customary international law.[105] Interpretations of corporate liability for international crimes have been drawn from standards on individual liability. Companies may incur liability for 'aiding and abetting' a crime, or for engaging in a 'common purpose' or 'joint criminal enterprise'.[106]

Adherence to the law, including International Human Rights law, is integral to corporate responsibility to respect human rights. Compliance with this norm may also be explained in relation to the efforts of business enterprises to avoid the involvement in such human rights violations. The possibility exists that appropriate due diligence may successfully be invoked as a defence against legal liability once violations have occurred, an expectation which can result in compliance. Courts may give weight in judicial proceedings to compliance with due diligence. Courts may, for instance, refer to due diligence in their consideration of the element of knowledge in a test for negligence complicity.[107] The corporate responsibility to respect human rights can acquire normative force as a result of it being referred to as an authoritative standard

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[100] McRudden, Corporate Social Responsibility and Public Procurement (DJ McBarnet, et al. eds., 2007).

[101] Tineke Lambooij & N Van Vliet, Transparency on Corporate Social Responsibility in Annual Reports, 5 European Company Law (2008).

[102] Kamminga & S Zia-Zarifi, Liability of Multinational Enterprises under International Law, 8 (Kluwer Law International. 2000).

[103] As the Court of Appeals of the Second Circuit noted in its 2010 *Kiobel v Royal Dutch Petroleum Co* decision, '"Complementarity" is the principle, embodied in the Rome Statue, by which the ICC declines to exercise jurisdiction over a case that is simultaneously being investigated or prosecuted by a State having jurisdiction over it.' *Kiobel v Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), at 33.

[104] 28 U.S.C. § 1350.

[105] Under present conditions, the *Kiobel* ruling should be mentioned, since its impact on the scope of the ATCA diminished the appeal of this legal venue to victims seeking redress for violations of their human rights resulting from corporate activity. Cees van Dam, Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights, 3 Journal of European Tort Law, 223, 232 (2011).

[106] *Ruggie, 2007 Report, supra* note 21, § 23.

[107] *See*, for further details, section 6.2.4.3.1.

of conduct in judicial proceedings and interaction with existing legal standards for corporate liability for international crimes.

4.4.3.3 Corporate Responsibility for other Human Rights Violations under International law

There appears to be a consensus that international human rights law does not currently impose obligations on companies to abide by human rights more generally.[108] Companies can bound indirectly by way of national laws. There is nothing that prevents States from imposing such obligations on companies, however.

4.4.3.4 Soft Law Mechanisms

Soft law mechanisms can also affect the normative force of the corporate responsibility to respect human rights through their reflection and enactment of this norm. As indicated above, the SRSG characterizes arrangements as soft law by virtue of their non-binding nature in a strict legal sense and their reflection of international norms and social expectations that derive normative force from their recognition by state and other key actors.[109] The SRSG has recognized three types of such soft law arrangements, i.e., international standard setting bodies and the accountability mechanisms linked thereto and a multi-stakeholder forum.[110] Consideration may also be paid to business involvement in these processes, which, by itself, can affect compliance.

4.4.3.4.1 International Standard-Setting and Accountability Mechanisms

International organizations can foster compliance by promulgating standards that reflect the corporate responsibility to respect human rights. The OECD, for instance, has updated the OECD Guidelines for MNEs in 2011 by adding, *inter alia*, a chapter on human rights that sets out the recommendation that companies respect human rights and conduct human rights due diligence[111], developments which, as the Commentary expressly notes, are in line with the UNGPs.[112] The OECD has also adopted a number of other documents that provide guidance on the human rights due diligence principle consistently with the UNGPs.[113] The SRSG notes that

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[108] *Ruggie, 2007 Report, supra* note 21, § 44.

[109] Id. § 45. Also *see*, Nolan, *supra* note 20, at 140.

[110] These practices give expression to the governance of 'corporate "responsibility" (the legal, social, or moral obligations imposed on companies) and "accountability" (the mechanisms holding them to these obligations)'. Id. § 6.

[111] Chapter IV. Human Rights notes that enterprises should 'avoid infringing on the human rights of others' and should 'address adverse human rights impacts with which they are involved' and 'carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of risks of adverse human rights impacts'. OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 31 (2011), http://dx.doi.org/10.1787/9789264115415-en.

[112] *Also see*, Peter Muchlinski, The 2011 Revision of the OECD Guidelines for Multinational Enterprises: Human Rights, Supply Chains and the 'Due Diligence' Standards for Responsible Business (2011). Winand Quaedvlieg, *Herziening van de OESO-Richtlijnen voor Multinationale Ondernemingen*, 65 Internationale Spectator (2011).

[113] The OECD Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas (OECD Due Diligence Guidance) and its twin supplements on Tin, Tantalum and Tungsten (3T`s)

the OECD Guidelines for MNEs and the ILO-Tripartite Declaration instruments are 'widely referenced by governments and business enterprises and may, in due course, crystallize into harder forms' and have thus become, 'essential to elaborating and further developing standards of corporate responsibility'.[114]

The accountability mechanisms that these international organizations have in place may create normative force. While not legally binding, such mechanisms can foster compliance by business enterprises because they verify, reveal and attach consequences to non-compliance. Compliance may relate to the effectiveness of these mechanisms in enforcing compliance more generally. Such effectiveness may be assessed on the basis of the UNGP's eight effectiveness criteria for grievance mechanisms.[115] Compliance may relate to the specificity and clarity that is added to the norm through their authoritative interpretations. Compliance may also relate to the enforcement actions by societal actors that a finding of non-compliance may give rise to (see Section 4.4.3.6). The OECD, for instance, have called adhering States to set up quasi-judicial mechanisms in the form of National Contact Points ('NCPs') through which compliance with the OECD Guidelines for MNEs can be enforced.[116]

4.4.3.4.2 Multi-Stakeholder Initiatives

Multi-stakeholder initiatives can affect compliance by committing companies to respect for human rights-related standards.[117] These initiatives through their standard-setting function can help identify, elaborate and further specify expectations regarding the application of the UNGPs in specific operational contexts. Compliance may result from the recognition of a need to assume a shared responsibility and cooperate in order to reap specific opportunities or to provide solutions to specific regulatory challenges that actors may not be able to solve individually, often in specific operational contexts. Compliance may also relate to the level of credibility that is associated with governance structures of the soft-law initiatives. This credibility is build-up of at least three factors: participation, transparency, and ongoing status reviews.[118] Compliance can be explained by the effectiveness of such initiatives, which may be assessed on the basis of their

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and Gold provides guidance on how companies can meet their human rights due diligence responsibility throughout their mineral supply chains. *See*, Bijlmakers, et al., Report on tracking CSR responses FRAME Deliverable 7.4 (Nov. 2015, 2014), Bijlmakers, et al., Report on tracking CSR responses FRAME Deliverable 7.4 (Nov. 2015, 2014), http://www.fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-7.4.pdf.

[114] *Ruggie, 2007 Report, supra* note 21, at 15.

[115] The UNGPs note that grievance mechanisms be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue. *See* UNGPs, *supra* note 4, GP 31.

[116] The NCPs are meant to `further the effectiveness of the *Guidelines* by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances`. OECD, *supra* note 111, at 68.

[117] A multi-stakeholder initiative entail a collaborative effort that engages business enterprises along with States, NGOs and other actors to set standards and implementation systems. Compliance may be fostered by companies' engagement in this process. Scott Jerby, *Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda*, 94 International Review of the Red Cross (2012).

[118] *Ruggie, 2007 Report, supra* note 21, § 56-58.

impact on the ground and potential to inspire efforts in related fields.[119] Compliance also relates to the remediation mechanisms that multi-stakeholder initiatives have in place, at the level of individual members and/or the collaborative level, and their effectiveness.[120]

States have the option to adopt regulatory measures that enforce soft-law arrangements (international standards and their accountability mechanisms or multi-stakeholder initiatives) that reflect and enact the corporate responsibility to respect, as part of their regulatory smart-mix.[121] The formal adoption of such soft-law standards or requirements by legislature or administrative agencies is one means.[122] Multi-stakeholder initiatives have been referenced in domestic legislation,[123] in supply contracts,[124] and loan agreements for project financing.[125] Also the standards or requirements of soft law initiatives have been rendered mandatory under domestic legislation.[126] These soft-law arrangements are not legally binding. The regulatory dynamic that abounds can prompt companies to join soft-law arrangements and, once in, to comply therewith. Business enterprises may take their responsibilities more seriously, where State regulation and soft law combined may mobilize, influence and amplify social and economic forces and pressures that bear on companies to comply.

4.4.3.5 Self-Regulatory Initiatives

Business enterprises can foster compliance through self-regulation processes. Such self-regulatory processes can elicit 'normative force' and bind companies by virtue of their standards reflecting business respect for human rights.[127] Compliance may result from a commitment of the company to the corporate responsibility to respect human rights, and the embedding by this norm within their policies and practices. The human rights due-diligence process serves as a means

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[119] *Id.* § 56-58.

[120] *UNGPs*, *supra* note 4, GP 30.

[121] Meidinger recognizes that incorporation into the legal system can amplify the effect of the Forest Steward Ship Council program: The environmental effects of the FSC as a free standing voluntary system are likely to be positive but modest. [Other] dynamics, however, have the capacity to amplify the effects of the FSC program. The first is incorporation into traditional legal systems. Although this could occur through the formal adoption of FSC standards or requirements by either legislatures or administrative agencies, not many legal systems seem likely to take this route in the near term. However, incorporation can also occur through the informal, often almost invisible adoption of FSC requirements into existing legal regimes. These include the definition of best management practices in administrative regulation, tort law, financial reporting, and so on. Meidinger cited in, R. Mares, *Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy*, 1 Transnational Legal Theory, at 257 (2010).

[122] *Id.* at 257.

[123] For example, it is mandatory for Swedish State-owned companies to present a sustainability report in accordance with the GRI Guidelines. Regeringskanseliet, *Guidelines for External Reporting by State-Owned Companies* (2007).

[124] McBarnet & Kurkchiyan, Corporate Social Responsibility through Contractual Control? Global Supply Chains and 'Other-Regulation' (DJ McBarnet, et al. eds., Cambridge University Press 2007).

[125] Equator Principles (2006).

[126] A case in point is the due diligence requirement established by Section 1502 of the US Dodd-Frank Act.

[127] *Ruggie, 2007 Report, supra* note 21, § 63.

and an object of governance. The corporate responsibility to respect imposes on companies the requirement to carry out human rights due diligence; thus whether business enterprises have a human rights due diligence process in place is an important measure of compliance. Compliance by business enterprises may depend on this human rights due diligence process. The minimum requirements that human rights due diligence imposes on companies may result in more effective self-regulatory processes that expand the capabilities of business enterprises to meet their responsibility to respect human rights. Compliance may also relate to the credibility of voluntary accountability mechanisms, which, similar to multi-stakeholder initiatives, relates to the factors of participation, transparency, and ongoing status reviews.[128]

4.4.3.6 Courts of Public Opinion

Compliance may also relate to actions by civil society that benchmark and monitor the conduct of companies. Social actors, through their decision-making and activities, can foster compliance by exerting pressure on business enterprises. Companies may be induced to comply as a result of the costs and benefits that these external forces may inflict on them for compliance or non-compliance.[129] [130] These costs can range from consumer boycotts to divestment, expulsion, negative publicity, pressure on stock markets, and etc. The repercussions for a company can be grave.[131] The SRSG refers to such externally driven social pressures as enforcement by 'the courts of public opinion', and is comprise of 'employees, communities, consumers, civil society, as well as investors'.[132] Non-compliance may also lead to formal charges in actual courts.[133] Companies are induced to comply 'in order to maintain what is sometimes called their social license to operate or suffer the consequences'.[134]

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[128] *Id.* § 79-90.

[129] *UN Working Group, Corporate Survey 2013, supra* note 74, at 46.

[130] John G. Ruggie, Keynote Remarks at Annual Plenary Voluntary Principles on Security & Human Rights Ministry of Foreign Affairs, The Hague, Netherlands, 3 (Mar. 13, 2013).

[131] A study by Kobrin describes how Talisman Energy, a Canadian independent oil company, experienced this first-hand. Talisman Energy saw its share price and enterprise value tumble a result of, amongst other factors, massive campaigning by NGOs against Talisman. NGO`s linked its share in the Greater Nile Petroleum Operating Company (GNPOC) in Sudan to brutal human rights violations committed in the civil war waging in Sudan at that time. A large divestment campaign, spearheaded by the American Anti-Slavery Group, pressured investors to sell the stock they held in the company, with success. In 2001, Talisman also found itself in court accused of complicity in human rights abuses against non-Muslim Sudanese amounting to genocide, by a member of the American Anti-Slavery Group, on behalf of the Presbyterian Church of Sudan and individual plaintiffs, which had filed a 1 billion class action lawsuit against it on the basis of the Alien Tort Claims Act (ATCA). This resulted in Talisman Energy selling its share in GNPOC in March 2003, and withdrawing from Sudan, despite the fact that its oil operations there where flourishing and described as `exceeding expectation. Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 International Law and Politics (2004).

[132] *Ruggie, 2008 Report*, § 54.

[133] *Id.* § 54.

[134] Ruggie, *supra* note 130, at 3.

4.4.3.7 Idealist Institutionalism

The presumption is that the UNGPs are set out to promote a system that can affect and coordinate the institutional factors that explain compliance by business enterprises with this corporate responsibility to respect in practice. That what explains compliance by business enterprises in practice however, relates to the internalisation of business respect for human rights within corporate culture and practices.[135]

Melish and Meidinger suggest that the SRSG's thought-process can be traced back to his earlier writings on social constructivism and argue that the SRSG found inspiration in the theoretical perspective of 'idealist institutionalism'.[136] This perspective premises on the understanding that social norms emerge and crystalize, and that change in behavior occur through processes of socialization and acculturation. Change in behavior is effectuated through ideational factors, i.e., 'intersubjective beliefs' that are 'widely shared across world cultures', and acculturation processes. According to this theoretical perspective, normative, institutional and behavioral change cannot be attributed to the material self-interests of actors alone, or coercion and persuasion through formal legal regulations.

The compliance by business enterprises, Melish and Meidinger point out, relates to the socialization processes and the internalization of shared norms in corporate cultures and state practices. The corporate responsibility to respect takes on binding force when interests and identities of these actors are reconstructed and brought into alignment with human rights. According to the authors, the UNGPs can be perceived as a global script for human rights compliance systems. Once this script is widely accepted by relevant parties and diffuses globally, the authors argue, a new set of constitutive rules can emerge that define and pre-structure socially acceptable corporate conduct. Such constitutive rules can emerge once the norms contained in the UNGPs have passed through stages of 'persuasion, socialization and ultimately internationalization' and have assumed a '[t]aken-for-granted quality'.[137]

The presumption is that the UNGP's as soft law thus potentially affects human rights-compliant behavior by promoting acculturation and socialization processes among State and non-state actors. Compliance results primarily from the internalization of respect for human rights within corporate cultures, rather than the coercion or persuasion through law.

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[135] Backer makes this argument in relation to the OECD, noting that: `Ultimately, under the guise of `soft` law, the OECD may be able to construct a system of customary law and practice as binding as any hard law system. What makes this soft law `hard` *in effect* is precisely its naturalization of behavioural norms *within* entities that incorporate those practices in corporate culture, rather than its imposition from *outside* the community of actors by the formal fiat of positive legal command`. Backer, *supra* note 58. Hill and Jones define culture as 'the specific collection of values and norms that are shared by people and ground in an organization and that control the way they interact with each other and with stakeholders outside the organisation'. Robert G. Eccles, et al. The Impact of a Corporate Culture of Sustainability on Corporate Behaviour and Performance, at 2 (Harvard Business School, Working Paper 12-035, 2011)

[136] Melish & Meidinger, *Protect, Respect, Remedy and Participate: 'New Governance' Lessons for the Ruggie Framework*, *in* The UN Guiding Principles on Business and Human Rights: Foundations and Implementation (R. Mares ed. 2011).

[137] *Id.*

4.4.4 Preliminary Considerations

The UNGPs are thus an attempt at promoting an institutional approach to creating a system that affects and coordinates the regulation of the afore mentioned factors that explain business compliance with human rights in practice. These factors relate to the 'the interests, capacities and engagement of states, market actors, civil society, and the intrinsic power of ideational and normative factors'.[138] With regards to context, the UNGPs are set out to promote a regulatory dynamic within a global system that can progressively bind business enterprises to respect for human rights. This dynamic can potentially affect the evolution of this responsibility from a soft into a 'harder' norm. The content of the corporate responsibility to respect human rights provides flexibility for companies to meet a minimum human rights due diligence standard by adopting measures that are commensurate to their capabilities and appropriate to their circumstances. The UNGPs furthermore promote a better organization of the regulatory contributions of different institutional actors and their governance systems in a systematic and comprehensive manner. The presumption is that the corporate responsibility to respect human rights will take on normative force and 'binding-ness' when States and business enterprises enhance their standards and practices in order to actively implement their duties and responsibilities as defined in the UNGPs. The role and responsibilities of States, business enterprises and NGOs correlates with, and is commensurate to the public role that these actors have in the human rights land-scape.

Arguably, the UNGPs advance a system for the further crystallization of the corporate responsibility to respect human rights into norms of different types of obligation, and their potential transition into 'hard norms' under national, sub-international (i.e., EU), and international law. The corporate responsibility to respect should take on normative effect if the duties and responsibilities of States and business enterprises are given full effect to the normative objective of ensuring human rights and fundamental freedoms. The realization of this objective affects and is affected by the extent to which the corporate responsibility to respect human rights is regulated through laws at national and international law. I argue that the transposition of the corporate responsibility to respect human rights into a hard norm under national or international law as appropriate is a necessary consequence of the realization of the normative objective.

4.5 A Scenario for an Emerging Regulatory Regime on Business and Human Rights

The previous section reflects on the normative potential of the UNGPs to foster compliance by business enterprises with the corporate responsibility to respect human rights. This section focuses on the presumption that the UNGP's are expected to affect the evolution of the corporate responsibility to respect human rights from a soft law norm into a more binding, and their potential transposion into a hard law norm at the national and international level. The UNGPs in and of themselves may affect compliance by recognizing the existence of the corporate responsibility to respect human rights as a consensus-based global standard of conduct for companies, and by clarifying and elaborating on the content of this norm and its implications. The UNGPs furthermore serve as a platform for the creation of a system that features a regulatory dynamic through which this social norm may acquire additional 'binding-ness' and

[138] Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* (Jan. 23, 2015), *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726.

normative force.[139] An expansion of such normative force should results from State and business enterprises enhancing their standards and practices and a better coordination of the regulation of all factors affecting such business conduct. Compliance by business enterprises in practice can be explained in relation to the 'socialization' and 'acculturation' processes that abound, contributing to the internalization of the respect for human rights within corporate cultures and practices.

I am of the view that the UNGPs thus serves as a platform for the operationalization of a system that is meant to serve as a crystallization point for the corporate responsibility to respect human rights to evolve from a soft-norm into a more binding and possibly, its transposition into a 'hard' obligation over time. The presumption is that the norm can and should acquire additional normative force as existing duties and responsibilities of States and business enterprises, as defined in the UNGPs, are given full effect to the normative objective of ensuring human rights and fundamental freedoms. The UNGPs may by themselves be non-legally binding, however, they provide a platform for a system within which the corporate responsibility to respect should evolve and eventually be transposed into hard law at the national, sub-International (e.g., EU) or International level.[140]

The UNGPs recognize that the corporate responsibility to respect human rights exists as a norm in and by itself independent from legal liability and enforcement.[141] This does not mean that the norm exists independent of the law. Compliance with all applicable laws wherever companies operate, is an integral part of the corporate responsibility to respect human rights.[142] The standard does not operate in 'a law-free zone'.[143] The corporate responsibility to respect human rights can take on hardening effects where States expect compliance and codify the corporate responsibility to respect human rights into legally binding norms. States thus can harden the corporate responsibility to respect by transposing the norm into regulation at the domestic level.[144] Certain elements of the corporate responsibility for human rights, as the SRSG has pointed out, can be

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[139] The Thun Group refers to the UNGPs as an example of 'hardening' soft law in the sense that they act as a catalyst to spark new policy requirements or binding regulation and are being multiplied by other international organisations and national legislators`. UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16-21, 4 (2013), http://business-humanrights.org/sites/default/files/media/documents/thun-group-discussion-paper-final-2-oct-2013.pdf.

[140] *Ruggie, 2008 Report*, *supra* note 98, § 66. Casey & Scott define 'crystallization' as 'the process through which fluids are solidified, starting from a nucleus and then growing in a fashion which assumes a regular pattern in a very marked contrast to the boundaries from which it emerged. A process of crystallization thus gives shape to what was previously shapeless, defining and giving significance to elements of the structure. Drawing on this process, our particular understanding of the crystallization of norms suggests a process by which norms take on regulatory effect'. Casey & Scott, cited in Jan Eijsbouts, Corporate responsibility, beyond voluntarism: Regulatory options to reinforce the licence to operate, ftn 51, (2011) (Inaugural Lecture, Maastricht University).

[141] The UN Guiding Principles indicate that the responsibility of business enterprises is '*distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions*'. UNGPs, *supra* note 4, GP 12.

[142] *Id.*, GP 23(c).

[143] *Ruggie, 2008 Report*, *supra* note 98, § 66.

[144] *Id.* § 66.

object of legal regulation under domestic law and create legal duties for corporations.[145] [146] The SRSG is said to have clearly envisioned a process through which the norm of human rights due diligence would make such a transition.[147]

The UNGPs expressly recommend that States consider regulatory measures as part of a smart mix to promote business respect for human rights in practice.[148] In doing so, the UNGPs recognise that States can and should rely on such regulatory measures to discharge their State duty to protect as appropriate. The UNGPs provide that where States have laws in place that are intended or have the effect of requiring business to respect human rights, these laws should be enforced effectively, their adequacy assessed periodically, and any gaps should be addressed.[149] This entails that States must establish new laws and/or enforce existing laws that set out such requirements, including in the area of corporate law, and subject these laws to a review in order to ensure their adequacy to foster business respect for human rights in practice. States furthermore should provide effective guidance and, where appropriate, require communication from business enterprises on their respect for human rights.[150]

The interaction between Pillar 1 and 2 of UNGPs suggests that conditions may require that States adopt such regulatory measures as appropriate. The State duty to protect human rights is founded on International Human Rights Law. States can, and where appropriate should, regulate the corporate responsibility to respect human rights, or human rights due diligence elements, under domestic law. As will be addressed below, States already have obligations under International Human Rights law to protect against human rights violations by regulating business respect for human rights, and in requiring human rights due diligence in certain conditions, e.g., contexts of heightened risks to human rights.

The State duty to protect thus requires States to legally enforce the corporate responsibility to respect, or relevant aspects of the human rights due diligence process where necessary and appropriate in order to ensure business respect for human rights in practice. Such reading also corresponds with the object and purpose of the UNGPs that elaborate on the State duty to protect, which the UNGPs define as 'enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization'.[151]

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[145] *Id.* § 66.

[146] This corresponds with the view by Eijsbouts that a substantive social norm can find its way in various types of regulation; '(individual or collective) self-regulation, soft law, civil law, administrative law and, finally, criminal law'. Eijsbouts also notes that 'a substantive social norm can leave the territory of non-codified social norms and migrate back and forth among different forms of regulation and even return to the territory of non-codified social norms'. Jan Eijsbouts, *supra* note 140, at 32.

[147] R. Mares, *supra* note 122, at 256.

[148] *UNGPs*, *supra* note 4, GP 3.

[149] *Id.* GP 3.

[150] *Id.* GP 3.

[151] *Id.* General Principles.

The concept of the corporate responsibility to respect has some unique qualities that lends itself for usage as a regulatory concept in different areas of law. As will be elaborated at a later point, there are a number of characteristics relating to their design that explain this. First, the corporate responsibility to respect human rights is universally applicable and formulated in open-ended language.[152] Second, the concept has legal pedigree in legal systems across the world.[153] Third, the conduct of business enterprises is benchmarked against international human rights standards. And lastly, the corporate responsibility to respect human rights is central to the emerging global business and human rights regime.

The due diligence concept on which the corporate responsibility to respect human rights is anchored has legal pedigree in national laws in various areas. One study shows that the due diligence concept is widely used across legal systems in States around the world to ensure that businesses respect established standards.[154] While these standards often do not explicitly reference human rights, their use provides evidence that due diligence 'is not a foreign legal or regulatory concept in most countries' and that there is scope for States to 'make far greater use of legal tools to ensure business respects human rights in general, and that companies implement due diligence for human rights in particular'.[155] The same study illustrates that the human rights due diligence concept is suitable for enactment and enforcement in national laws should States decide to adopt measures to this effect.[156]

International human rights law provides the benchmark that business enterprises and relevant stakeholders should assess corporate conduct against. As noted previously, the corporate responsibility to respect human rights is divorced from hard law in terms of its source of obligation and consequences. The norm derives its obligation from social expectations, rather than international law, and primarily depends for its enforcement on civil society. The content of the corporate responsibility to respect human rights, and the due diligence standards that applies to companies, however, directly relates to international human rights Law. The corporate responsibility to respect human rights requires that companies abide by their legal obligations, including national and international human rights obligations. Beyond compliance with the law, companies are required to be pro-active by undertaking human rights due diligence in order to meet their responsibility. The nature and extent of human rights due diligence that is required

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[152] *See*, for more detail, Chapter 5.

[153] O. De Schutter et al., Human Rights Due Diligence: the Role of States (2012).

[154] The study indicated four ways in which States can use human rights due diligence in regulation: (1) as a means for companies to comply with laws and regulations (e.g. as a direct legal obligation or a as a defense against charges of criminal, civil or administrative violations); (2) as a means to provide incentives and benefits to companies for demonstrating human rights due diligence practice (e.g. through public procurement law or export credit policies); (3) through transparency and disclosure (disclosure requirements in securities laws, consumer protection laws and mandatory disclosure regulations); and (4) a combination of the above. *Id.*

[155] Mark B. Taylor, *Human Rights Due Diligence: The Role of States, 2013 Progress Report,* 4 (2013), *available at:* http://icar.ngo/wp-content/uploads/2013/11/ICAR-Human-Rights-Due-Diligence-2013-Update-FINAL1.pdf.

[156] Mark B. Taylor, The Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility, 5 Etikk i praksis - Nordic Journal of Applied Ethics 1, 27 (2011).

from companies should be evaluated on the basis of principles of international human rights law.[157]

It could be stated in this regard that the corporate responsibility to respect human rights derives normative authority and content from international human rights law, though it depends for its effectiveness on its enactment and enforcement through existing governance systems. The link with international human rights law furthermore seems to ensure that the corporate responsibility to respect is applied to companies in a manner that empowers victims and enables access to remedies. As indicated by Ramasastry, it is important that conduct is benchmarked against 'universally recognized human rights principles embodied in a key set of treaties', because this allow right-holders to articulate their concerns in terms of international human rights law and providing a basis for remedies and justice.[158] The human rights due diligence concept thus enables the assessment of business conduct against international human rights standards by victims of human rights abuse and civil society.

The corporate responsibility to respect human rights requires that business enterprises are pro-active and conduct a human rights due diligence process in order to 'identify, prevent, mitigate and account for how they address their impacts on human rights'. This responsibility and its human rights due diligence component may be viewed in two different manners. It may be viewed as a forward-looking management process that aims for the prevention of adverse impacts to human rights. Another way to view the human rights due diligence requirement is as a standard of conduct that is expected from business enterprises in order to 'know and show that they respect human rights'.[159] In terms of the latter usage, companies would be expected to abide by this human rights due diligence standard, a breach of which runs counter to their responsibility.

The SRSG appears to support the view that the human rights due diligence concept can be used in both the former and latter sense. The 2009 report of the SRSG notes the following:

> Due diligence is commonly defined as 'diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation'. Some have viewed this in strictly transactional terms what an investor or buyer does to assess a target asset or venture. The Special Representative uses this term in its broader sense: a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life

[157] The concept of the corporate responsibility to respect already reflects certain well-established human rights principles in certain aspects. The concept reflects that all business enterprises can breach all human rights, which corresponds with the principle in international human rights law that all human rights are indivisible and interdependent. The requirement that corporate responsibility to respect human rights be implemented in a non-discriminatory manner corresponds with the human rights principle of non-discrimination (General Principles). The UNGPs recognizes that business enterprises should involve meaning-full consultation with relevant stakeholders at different stages of the human rights due diligence process. The concept reflects how human rights imposes certain process demands on the due diligence process, in terms of meaningful stakeholder engagement and human rights expertise. *UNGPs, supra* note 4, GP 18(b), GP 20 (b).

[158] A. Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 238, 14 Journal of Human Rights (2015).

[159] *UNGPs, supra* note 4, Commentary to GP 15.

> cycle of a project or business activity, with the aim of avoiding and mitigating those risks.

According to this paragraph, human rights due diligence may be understood as a business practice aimed at identifying human rights risks that may be attached to a project or business activity in order to avoid or mitigate this risk. It may be used by business enterprises as a method to identify and avoid risks of acting in breach of national laws. Due diligence may also be a requirement or obligation under existing law however. In this context, abiding by the human rights due diligence standard is a matter of legal compliance for companies.

Currently, the human rights due diligence standard in and by itself is not a legal standard of performance.[160] Due to this norm having its source of obligation in social expectations, a breach of this norm will expose a company to condemnation by societal forces and occasionally, to charges in court. As noted by the SRSG:

> [V]iolations of this social norm are routinely brought to public attention globally through mobilized local communities, networks of civil society, the media including blogs, complaints procedures such as the OECD NCPs, and if they involve alleged violations of the law, then possibly through the courts. This transnational normative regime reaches not only Western multinationals, which have long experienced its effects, but also emerging economy companies operating abroad, and even large national firms.[161]

The SRSG indicates that the norm 'exists independently of State duties and variations in national law'.[162] It is not inconceivable that in time States will restate and integrate the human rights due diligence standard into national laws, including corporate or civil law. In this regard, the relevance of human rights due diligence concept as a standard of conduct may vary according to whether this concept has been restated as a legal requirement or obligation under public laws (national and international).

The human rights due diligence concept may be applied to assess business conduct in a way that is similar to how legal due diligence standard is used under national laws and International Human Rights law. The human rights due diligence standard entails a judgement and a test whether the company has exercised due diligence as appropriate. In this regard, the human rights due diligence requirement reflects a typical due diligence test, 'which asks whether "a more active and more efficient course of procedure might have been pursued" to avoid a particular

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[160] Emphasis added. The UNGPs expressly note that the corporate responsibility to exists independent of the duty of States and 'over and above compliance with national laws and regulations protecting human rights', *Id.* Commentary to GPs 11.

[161] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework*, § 47, U.N. doc. A/HRC/11/13 (April 22, 2009) (by John Ruggie).

[162] *Id.* § 47.

type of harm'.[163] It could be argued that the human rights due diligence concept can be used in a functionally similar way as international law and national law have used due diligence as a standard of behaviour.[164] While thus distinct in character and source of obligation, the due diligence standard resembles existing due diligence principles. The due diligence requirement thus could potentially serve as a blue print for a future legal standard at national and international level, though more exacting language of its content is necessary before conduct can be assessed against this standard.

The UNGPs promote the further evolution of the corporate responsibility to respect human rights and its normative force or 'binding-ness' by placing the concept at the heart of the emerging business and human rights regime. As outlined above, while in itself a soft-norm with limited normative force, the corporate responsibility to respect human rights may take on normative force and be 'hardened' through the emerging governance system. 'Soft-law increases in power: it is formally non-existent, yet can become a powerful and effective force of substantive behavioural regulation'.[165] These assumptions are part of the SRSG's overall project and relevant for understanding the scenario for future legal developments that the UNGPs set out and the role that the concept of the corporate responsibility to respect human rights has in it.

The SRSG has noted that the UNGPs reflect an attempt at articulating 'a more precise and commonly accepted definition of the corporate responsibility to respect human rights, what specific measures it entails, and how it can be linked more effectively with the public-law construction of internationally recognized rights'.[166] This definition furthermore reflects a responsibility on the part of the company to abide by the requirements that are imposed on company by the two external governance systems that the company is subject to. These systems are 'the system of public law and authority, and a non-state-based social and civil system grounded in the relations between corporations and their external stakeholders'.[167] The requirements that originate from these systems may apply to companies in varying degrees, depending on circumstances.

The definition of the corporate responsibility to respect human rights is placed at the center of policies and practices within the different governance systems. Taylor notes the following:

> The Ruggie Framework brings together social expectations and law into an emerging regulatory framework for business and government that in effect defines the nature of business compliance with human rights standards. In so doing, the Framework lays the foundation for the further development of business responsibility, as a coherent area of policy and regulation in its own right. As an arena of activity and debate, CSR has contributed to this regulatory dynamic. The

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[163] Bonita Meyersfeld, *Business, human rights and gender: a legal approach to external and internal considerations*, *in* Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect, at 207 (Cambridge ed. 2013).

[164] *See*, for further detail, Chapter 5.

[165] Backer, *supra* note 58.

[166] Ruggie, *supra* note 29, at 91.

[167] *Id.*

> challenge for the field of CSR will be to adapt to an emerging reality in which business responsibility for 'the social' is increasingly a question of both compliance and beyond.

The UNGPs by promoting a new regulatory dynamic in the emerging business and human rights regime thus potentially affects the evolution of the corporate responsibility to respect human rights as a soft norm. The implementation of the UNGPs should result in actions that contribute to the further clarification, shaping and crystallization of the corporate responsibility to respect human rights through hard law and soft law. The normative force of the corporate respect for human rights is expanded by their increased recognition and acceptance by States and other non-state actors through their respective governance systems. Progress can be evaluated in terms of greater acceptance and recognition of the norm by relevant actors. Effectiveness can be assessed by the operational impact on the ground (i.e., the behaviour of business enterprises that reflect actual acceptance and compliance) and their uptake by other initiatives (i.e., inspiration to and recognition by other initiatives).[168]

The integration of corporate respect for human rights in national laws and regulations can add legal clarity to the corporate responsibility to respect human rights in a particular country context. The interpretations by judicial bodies can contribute to the further development of the concept through national jurisprudence.[169] The consistent integration of human rights due diligence may contribute to the re-configuration of the laws themselves. The concept may be understood as reformatory potential that can drives conceptual changes within existing laws in order to resolve tensions. The simultaneous integration of the human rights due diligence concept across different areas of law and policy could have the effect of strengthening the connections between these different areas of law and drive greater convergence between them.

4.6 The State Duty to Protect and Regulatory Action to Ensure Business Respect for Human Rights

As has been elaborated above and the UNGPs affirm, States have a positive duty to ensure that the human rights of individuals within their territory and/or jurisdiction are protected against infringements by business enterprises. The duty to protect imposes on States a positive obligation to take appropriate measures or exercise human rights due diligence 'to prevent, investigate, punish or redress' such abuses. A State may incur responsibility if it has failed to take the appropriate due diligence measures to prevent or respond to human rights abuse resulting from corporate activity. Non-compliance with this duty can arise by act or omission. International human rights law thus imposes a due diligence standard of performance on the State. However, there exists no exact definition of the conduct that is expected of States to meet this due diligence standard with regards to the activities of business enterprises. The nature and scope of this standard is amendable to facts and circumstances, hence it 'can be restrictively or expansively

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[168] *Ruggie, 2007 Report, supra* note 21, at 17.

[169] For instance, the UNGPs note that States could adopt laws setting out requirements for business enterprises to communicate on their respect for human rights and include provisions to 'give weight to such self-reporting in the event of a judicial or administrative proceeding'. *UNGPs, supra* note 4, Commentary to GP 3.

interpreted, as the particular facts and circumstances require'.[170] [171] The standard's indeterminacy means that a breach by a State of its due diligence obligation cannot be assessed easily.[172] Conditions will determine whether a State's act or omission amounts to a breach of the States' due diligence obligations in the context of business and human rights. The standard of due diligence furthermore relates to the objects and purpose of the international treaties giving rise to this duty of human rights due diligence.

UN treaty monitoring bodies through recent authoritative interpretations of the human rights treaty they supervise have shed further clarity on the due diligence standard of performance for States in the context of corporate related activities. Of particular relevance are two documents, one statement by the Committee on Economic, Social and Cultural Rights (CtESCR), adopted in May 2011, and the other is the General Comment No. 16 of the UN Committee on the Rights of the Child (CtRC), adopted in 2013.[173] These interpretations articulate the State duty to protect human rights in more exacting language than the UNGPs, affirming that International Human Rights law has evolved and imposes a more demanding duty on States than before. More specifically, the interpretations support the view that States may act in breach of their due diligence obligations under International Human Rights Law if they fail to ensure that the human rights of individuals are adequately protected from infringements by corporate activity by adopting regulatory measures that require, as appropriate, business enterprises to respect human rights, including by requiring human rights due diligence in certain operational contexts that pose heightened risks to human rights.

The following three developments can be identified.

First, the interpretations recognize that companies have a responsibility to respect human right and to undertake human rights due diligence. *Second*, the State duty to exercise due diligence is framed in terms of an obligation to adopt regulatory measures where 'necessary, appropriate and reasonable' to ensure compliance by companies with this societal norm in order to prevent infringements of human rights by corporate activity. *Third*, the standard of due diligence is adaptable to circumstances and the adoption of mandatory and prescriptive requirements for companies to exercise human rights due diligence is appropriate in contexts that pose heightened risks to human rights, which may be combined with other means that encourage and support business enterprises to respect human rights. A brief analysis of these authoritative interpretations follows.

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[170] Robert P. Barnidge, *The due diligence principle under international law* International Community Law Review 81, 81-82 (2006).

[171] States being best positioned to assess these facts and circumstances have a certain discretion to determine what due diligence measures are adequate to prevent and respond to human rights abuses by companies. Consequently, the due diligence standard allows States to rely on their circumstances as a defense precluding wrongfulness. Robert P. Barnidge, *The due diligence principle under international law* International Community Law Review 81, 83 (2006).

[172] Meyersfeld, *supra* note 163, at 207.

[173] U.N. Comm. on the Rights of the Child, General Comment No. 16 on State obligations regarding the impact of business sector on children`s rights, U.N. doc. CRC/C/GC/16, 62nd Sess. (Jan. 14-Febr.1, 2013).

4.6.1 The 2011 Statement by the Committee on Economic, Social and Cultural Rights

The CtESCR, in a statement adopted in May 2011, clarifies the State's obligations under ICESCR in the context of the corporate activities.[174] The Statement affirms the primary obligation of States under Article 2(1) of the ICESCR to respect, protect and fulfill the rights of all persons under their jurisdiction in this context. The CtESCR interprets the State duty to respect as placing a duty on States to ensure that the laws and policies regarding corporate activities conform with the rights set forth under the ICESCR, thus ensuring that companies 'demonstrate due diligence to make certain that they do not impede the enjoyment of the Covenant rights by those who depend on or are negatively affected by their activities'.[175] This interpretation affirms the societal expectation that companies exercise due diligence in order to manage their negative impacts on human rights and frames the obligation of States to respect human rights in terms of ensuring that companies demonstrate their compliance with this societal standard of behaviour.

The statement furthermore articulates a positive duty for States to take adequate measures or 'due diligence' to ensure that rights holders are effectively safeguarded against infringements of their ESCR rights by corporate actors. States should discharge this duty by establishing regulatory measures, more specifically 'appropriate law and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations'. This State duty extends extraterritorially by imposing on States an obligation to take steps to prevent human rights violations abroad by companies that have their main offices under their jurisdiction 'without infringing the sovereignty or diminishing the obligations of the host States under the Covenant'.[176] The scope of this duty is partly defined in relation to the ability of States to influence the company by legal or political means, in accordance with the UN Charter and applicable international law. The duty to protect furthermore entails that States should 'ensure access to effective remedies to victims of corporate abuse of [ESCR] through judicial, administrative; legislative or other appropriate means'.[177]

The CtESCR furthermore recognizes an obligation on the part of the States to fulfil human rights by undertaking to obtain the corporate sector's support for the realization of the ESCR. This entails that the home States shall encourage companies to assist host states 'as appropriate, including in situations of armed conflict and natural disaster, in building the capacities needed to address the corporate responsibility for the observance of [ESCR]'.[178]

The statement of the ICESCR affirms that International Human Rights law imposes a positive duty on States to undertake 'due diligence' by adopting appropriate regulatory measures to

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[174] U.N. Comm. on Economic, Social and Cultural Rights, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights,* U.N. doc. E/C.12/2011/1, 46th Sess. (July 12, 2011) [hereinafter *ICESCR*].

[175] *Id.* § 4.

[176] *Id.* § 5

[177] *Id.* § 5

[178] *Id.* § 6

protect against, and to ensure access to effective remedies for, infringements of the rights set out under the ICESCR by corporate related activity. This duty has an extraterritorial dimension and imposes on States to adopt 'adequate' measures to regulate the conduct of companies in order to prevent adverse human rights abroad. The CtESCR also recognizes that business enterprises have a responsibility to respect and an obligation of the States to ensure that they do. The CtESCR does not define the substantive content of the responsibility to respect human rights or indicate that this responsibility should be construed in line with the expectations set out in the UNGPs. Nevertheless, the CtESCR affirms the relevance to the General Comment of the UNGPs and the ILO Tripartite Declaration and indicates that other instruments, inter alia the OECD Guidelines, the UNGC, the UN Study on Violence against Children and the Children's Rights and Business Principles served as useful reference for the Committee.

4.6.2 General Comment No. 16 of the Committee on the Rights of the Child

The CtRC adopted General Comment No.16 in 2013, titled 'State obligations regarding the impact of the business sector on children's rights'.[179] In this General Comment, the CtRC clarifies the obligation of States in relation to the impact of business activities and operations on children's rights under the Convention on the Rights of the Child (CRC) and the Operational Protocols thereto.[180] The CtRC recognizes that 'it is necessary for States to have adequate legal and institutional frameworks to respect, protect and fulfil children's rights, and to provide remedies in case of violations in the context of business activities and operations'.[181] The CtRC recognizes that States should:

> (a) Ensure that the activities and operations of business enterprises do not adversely impact on children's rights;
>
> (b) Create an enabling and supportive environment for business enterprises to respect children's rights, including across any business relationships linked to their operations, products or services and across their global operations;
>
> (c) Ensure access to effective remedy for children whose rights have been infringed by a business enterprise acting as a private party or as a State agent.[182]

The CtRC expressly refers to the PRR Framework and the UNGPs, the ILO Tripartite Declaration of Principles, the OECD Guidelines for Multinational Enterprises and the Children's Rights and Business Principles as relevant to the General Comment, amongst other 'existing and evolving national and international norms, standards and policy guidance on business and human rights'.[183] The CtRC recognizes that the responsibilities to respect the rights of 'children extend in practice beyond the State and State-controlled services and institutions and apply to private

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[179] U.N. Comm. on the Rights of the Child, *supra* note 173.

[180] The Optional Protocol on the sale of children, child prostitution and child pornography and the Optional Protocol on the involvement of children in armed conflict.

[181] U.N. Comm. on the Rights of the Child, *supra* note 173, § 4.

[182] *Id.* § 5.

[183] *Id*. § 7.

actors and business enterprises […] therefore, all business enterprises must meet their responsibilities regarding children's rights and States must ensure that they do'.[184] The General Comment thus frames the State's obligations with regards to children's rights and the business sector in terms of ensuring that business enterprises meet their responsibility to respect human rights.

The CtRC re-affirm the obligation of States under Article 4 of the CRC:

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

The provision gives rise to an obligation for State parties to respect, protect and fulfil children's rights in relation to business activities and operations that impact children's rights. The CtRC interprets the State duty to respect as imposing an obligation on States to 'not directly or indirectly facilitate, aid and abet any infringement of children's rights' and 'ensure that all actors respect children's rights, including in the context of business activities and operations'. This entails that a State should 'not engage in; support or condone abuses of children's rights when it has a business role itself or conducts business with private enterprises'.[185]

The CtRC notes that States have an obligation to protect the rights of each child subject to the States' jurisdiction from infringements by third parties. This duty extends to infringements caused by or contributed to by companies. A State can incur responsibility for such an infringements if the State failed to take 'necessary, appropriate and reasonable measures to prevent and remedy such infringements or otherwise collaborated with or tolerated the infringements'.[186] Appropriate measures can take the form of 'the passing of law and regulation, their monitoring and enforcement, and policy adoption that frame how business enterprises can impact on children's rights'.[187] The CtRC notes that it is appropriate to require business enterprises operating in conflict areas or other contexts that pose a heightened risk of rights abuses 'to undertake stringent child-rights due diligence tailored to their size and activities'.[188] Additionally, home States should inform businesses that are operating or planning to operate in such areas about the local children's rights context, emphasizing that companies have 'identical responsibilities to respect children's rights in such setting as they do elsewhere'.[189]

The State duty to protect children's rights extends extraterritorially to all children subject to the State's jurisdiction. Home States have extraterritorial obligations to ensure children's rights in the context of business' extraterritorial activities and operations, including by enabling access to

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[184] *Id.* § 8.

[185] *Id.* § 26-27.

[186] *Id.* § 28.

[187] *Id.* § 28.

[188] *Id.* § 50.

[189] *Id.* § 51.

remedies for children whose rights have been violated by such extraterritorial activities, provided there is 'a reasonable link between the State and the conduct concerned'.[190] The Optional Protocol on the sale of children, child prostitution and child pornography requires that State Parties establish liability for business enterprises for these offences (criminal, civil or administrative) no matter where such offences are committed. CtRC affirms the duty of States to engage in international cooperation for the realization of children's rights beyond their territorial boundaries,[191] including through their membership in international organizations (e.g., international development, finance and trade institutions).[192]

The CtRC furthermore interprets the duty of States to fulfil children's rights as a positive obligation to implement 'legislative, administrative; budgetary, judicial, promotional and other measures' in order to 'facilitate, promote and provide for the enjoyment of children's rights'.[193] The duty to fulfil imposes an obligation on States to provide 'stable and predictable legal and regulatory environments which enable business enterprises to respect children's rights, [which] includes clear and well-enforced laws and standards on labour, employment, health and safety, environment, anti-corruption, land use and taxation'.[194]

The CtRC affirms the obligation of States to provide effective remedies and reparations for violations of the rights of the child by business enterprises. This obligation entails 'having in place child-sensitive mechanisms – criminal, civil and administrative – that are known by children and their representatives, that are prompt, genuinely available and accessible and that provide adequate reparation for harm suffered'.[195]

The interpretation of the treaty monitoring bodies affirm that international human rights law imposes obligations on States to establish, implement and enforce appropriate legislative and regulatory measures to ensure that companies abide by their responsibility to respect human rights and exercise due diligence, including when operating abroad. States can incur responsibility if they fail to regulate and enforce this responsibility as appropriate, including by requiring human rights due diligence where the operating context poses heightened risks to human rights. Further clarification of the application of this duty to protect human rights by exercising due diligence in requiring business enterprises to abide by their responsibility to respect in order to ensure that their activities do not have adverse human rights impacts at home or abroad is desirable.

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[190] The General Comment indicates that 'a reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned'. *Id.* § 43.

[191] *Id.* § 41.

[192] The CtR notes that this should be 'of major and equal concern to both host and home States of business enterprises` because the CRC has been `nearly universally ratified`. *Id.* § 47

[193] *Id.* § 29.

[194] *Id.* § 29.

[195] *Id.* § 30.

4.6.3 The 2016 Recommendation by the Committee of Ministers of the Council of Europe on Human Rights and Business

The Committee of Ministers of the Council of Europe adopted a Recommendation on human rights and business on 2 March 2016.[196] The Recommendation is addressed to Member States of the Council of Europe ('Member States'). In it the Committee of Member States ('Committee') expresses 'its commitment to contribute to the effective implementation of the UN Guiding Principles on Business and Human Rights at the European level'.[197] The Recommendation is not a legally binding document, and thus in and of itself, does not alter or create new legal obligations. The instruments that the Member States of the Council of Europe have ratified determine the extent to which Members are bound.[198] The Committee recommends Member States, *inter alia,* to 'review their national legislation and practice to ensure that they comply with the recommendations, principles and further guidance set out in the appendix'.[199]

An Appendix[200] has been attached to the Recommendation, which clarifies the implications of the State duty to protect human rights (Pillar 1 and 3 of the UNGPs) in the European context. The ECHR as interpreted and applied by the European Court of Human Rights (the 'ECtHR') and the European Social Charter (revised) and corresponding conclusions and decisions by the European Committee on Social Rights, are referred to as of particular relevance.[201] While recognizing that all three pillars of the UNGPs are of 'equal value and importance',[202] the Recommendation addresses the second pillar of the UNGPs indirectly, by making recommendations about the measures that Members should implement to enable corporate respect for human rights.[203]

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196 Committee of Ministers, Council of Europe, *Recommendation CM/Rec (2016)3 of the Committee of Ministers to member States on business and human rights*, 1249th meeting, CM/Rec(2016)3, (Mar. 2, 2016).

197 *Id.*

198 Steering Committee for Human Rights, *Explanatory memorandum to Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business*, 1249th meeting, CM(2016)18-addfinal (Mar. 2, 2016).

199 Committee of Ministers, *supra* note 196.

200 *Id*.

201 The Recommendation also draws inspiration from Parliamentary Assembly Resolution 1757(2010) and Recommendation 1936(2010), which were both adopted on 6 October 2010. *Id.* § 9. For a discussion on the evolution of business and human rights and the reception of the UNGPs in the Council of Europe, *see* Augenstein et. all, Business and Human Rights Law in the Council of Europe: Noblesse oblige (February 10, 2014), http://www.ejiltalk.org/business-and-human-rights-law-in-the-council-of-europe-noblesse-oblige/.

202 Explanatory Memorandum, *Id.* § 12.

203 The Committee of Ministers by Art. 15b of the Statute of the Council of Europe can only provide recommendations to Member States, not to private entities. *Id.* § 10.

The Recommendation specifies that State duty to protect entails that (own emphasis added):

> 13. Member States should:
>
> - apply such measures *as may be necessary* to require business enterprises operating within their territorial jurisdiction to respect human rights;
>
> - apply such measures *as may be necessary* to require, *as appropriate*, business enterprises domiciled in their jurisdiction to respect human rights throughout their operations abroad;
>
> - encourage and support these business enterprises by other means so that they respect human rights throughout their operations.

This paragraph specifies the duty of States to protect human rights against infringements by business enterprises by taking prescriptive or mandatory measures to require business enterprises as may be necessary. The paragraph distinguishes between two scenarios. The first bullet point concerns the regulation of business enterprises that operate in the territory of the State, but that may have their domicile[204] elsewhere. States should adopt regulatory measures as may be necessary to require these business enterprises to respect human rights. The second bullet point concerns the regulation of business enterprises that have their domicile in a Member State but operate outside of Europe. States should adopt regulatory measures as may be necessary to require these business enterprises 'as appropriate' (e.g., to the size, nature or context of the operations) to respect human rights throughout its operations abroad. According to the third bullet point, States furthermore should encourage or support business enterprises to respect human rights through other means (e.g., incentive measures)[205], which seems applicable to both afore-mentioned scenarios.

The Recommendation furthermore indicates 'that everyone within their jurisdiction may easily have access to information about existing human rights in the context of corporate responsibility in a language which they can understand'.[206] As the commentary explains, this paragraph places emphasis on the right of individuals to have access to information. The underlying reason is that 'persons cannot claim their rights if they do not know about them'.[207]

The Recommendation further specifies the actions that State should take to enable corporate responsibility to respect human rights:

> 20. Member States should apply such measures as may be necessary to encourage or, where appropriate, require that:

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[204] For the purpose of the Recommendation, domicile is defined within the meaning of the EU Brussels (No.1215/2012) and Rome II (no.864/2007) Regulations, *i.e.*, 'as being the business's "statutory seat", "central administration" or "principle place of business"'. *Id.* § 8.

[205] *Id.* § 28.

[206] *Id.* § 14.

[207] *Id.* § 29.

- business enterprises domiciled within their jurisdiction apply human rights due diligence throughout their operations;

- business enterprises conducting substantial activities within their jurisdiction carry out human rights due diligence in respect of such activities;

including project-specific human rights impact assessments, as appropriate to the size of the business enterprise and the nature and context of the operation.

This paragraph indicates that States should apply regulatory measures as may be necessary, where appropriate, to require that business enterprises apply human rights due diligence, including human rights impact assessments as appropriate to the size of the business enterprise and the nature and context of the operation. The Commentary notes that introducing requirements would seem appropriate, for instance, where 'the nature and context of a business enterprises relate to sectors with particular human rights risks, instances in which the human rights impacts of business activities can be severe, where companies operate in conflict-affected or high risk areas or other contexts which pose significant risks to human rights'.[208]

The application of such requirements differ depending on whether the company is domiciled in the jurisdiction of a Member State, or whether the business merely conducts substantial activities within this jurisdiction. In case of the former, the requirements should apply throughout the operations of the company. In case of the latter, the requirements only should apply in relation to activities within its jurisdiction.[209]

Important to note is the caveat in the Commentary indicating that the Recommendation 'neither seeks to define human rights due diligence, nor does it specify whether, in the event that member States take legislative measures to require human rights due diligence under certain circumstances, such measures should be specifically developed or integrated into corporate or civil law'.[210] This provision most likely reflects the fact that the corporate responsibility to respect human rights, and the human rights due diligence concept has not been recognized as a legally binding concept at the international level.

The Recommendation further stipulates that States should 'encourage, and where appropriate, require business enterprises referred to in paragraph 20 to display greater transparency' and 'to provide regularly, or as needed, information on their efforts on corporate responsibility to respect human rights'.[211]

The Recommendation indicates that additional measures are required from Member States when a particular business nexus exists. As indicated by the Commentary, the fact that States have more means at their disposal to ensure respect for human rights in the presence of such a State-

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[208] *Id.* § 36.

[209] *Id.* § 36.

[210] *Id.* § 36.

[211] Committee of Ministers, *supra* note 196, § 21.

nexus may in and of itself be a sufficient justification for such additional measures.[212] 'States should apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence'. [213] The Recommendation identifies in which situations a business nexus exists: 'own or control business enterprises'; 'grant substantial support or deliver services through agencies'; 'grant export licenses to business enterprises'; 'conduct commercial transactions with business enterprises, including through the conclusion of public procurement contracts'; 'privatize the delivery of services'.[214] The measures that a State has taken must be evaluated and findings must be met with a response, *inter alia*, consequences for non-compliance with respect for human rights (e.g., the termination of a public procurement contract).[215]

The Recommendation thus specifies that the State should adopt legislative measures where necessary and appropriate to require business enterprises to apply human rights due diligence. The applicability of such requirements to companies may differ depending on whether business enterprise is domiciled within the jurisdiction of the Member State, or only conducts substantial activities within this jurisdiction. More may be expected of States in the presence of a business nexus. There is discretion for Member States to define human rights due diligence and there is not obligation for Member States to develop or integrate human rights due diligence into corporate or civil law.[216]

4.7 The Feasibility and Desirability of a Legalization of the Corporate Responsibility to Respect at National and International level

These interpretations of the State duty to protect human rights in the context of corporate related activities affirm that the effective operationalization of the UNGPs entails that States should adopt regulatory measures as necessary and appropriate to require business enterprises to apply human rights due diligence standard, including project specific human rights impact assessments.[217] There is a reasonable probability of further legalization of human rights due diligence under national law in the short term. I am of the view that the transposition of the human rights due diligence standard into a 'hard' legal obligation at the international level is also desirable and feasible in the longer term, as is the creation of an international monitoring mechanism to enforce compliance by business enterprises with this standard. This proposition of a further legalization of human rights due diligence standard at national and international level keeps within the thrust of the UNGPs.

The corporate responsibility to respect human rights may be transposed into legally binding form through conventional law-making processes at the national, regional and international level. One may consider the possibility that the norm could be codified or progressively develop into a

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[212] Steering Committee for Human Rights, *supra* note 198, § 39.

[213] Committee of Ministers, *supra* note 196, § 21.

[214] *Id.* § 22.

[215] Steering Committee for Human Rights, *supra* note 198, § 40.

[216] *Id.* § 36.

[217] Bonita Meyersfeld, *supra* note 163, at 193.

legally binding norm, as part of international treaty law or customary law. Customary international law, which is one of the main sources of international law, requires State practice. This is not only as a result of a belief that there is an obligation to act (opinion juris), but also 'as a constitutive, essential part of the process by which the law is formed'.[218] Evidence of an emerging norm of customary international law can be derived from, *inter alia*, the consistent implementation and compliance with soft-law instrument or provisions thereof by and across States.[219]

Where the UNGPs are implemented and States were to give full effect to their duty to protect human rights and consistently embed the human rights due diligence standard into national legislations, this could contribute to building State acceptance and consensus on the corporate responsibility to respect as a legal norm. This in itself would not provide evidence for State practice as far as direct human rights obligations for business enterprises under international law is concerned. As emphasized by Knox, the corporate responsibility to respect human rights after all would not be based on international law, but derive from the State duty to protect. Thus, the implementation of the UNGPs by States in itself 'would be consistent with human rights law as it already is, and would not be evidence of a change in human rights law to make corporations directly obligated by it'.[220]

The internalization of the corporate responsibility to respect human rights into standard practices of companies may nevertheless serve as a foundation for the creation of future customary international law or an international treaty on business and human rights. In the context of the OECD NCPs, Backer notes:

> behaviour thus naturalised within the community of multinational corporations might serve either as a basis for deriving the contours of customary international law or the basis for articulating a less controversial set of binding international laws. Indeed, it might be possible to consider the NCP cases as important markers in the production of a stream of semi-public pronouncements that could lead to the discovery (or evolution) of what, as customary international law, might then be imposed on host and home states. This is an 'alternative mechanism for global legislation', so that 'custom may serve as a pathfinder for later established more specific treaty rules'. These cases promote the substance of the project inherent in the UN Norms by institutionalizing soft power mechanisms that affect a governance regime different from that of the home or host state law.

The presumption is that behavioural changes and the internalization of the corporate responsibility to respect human rights into business standard practices could create conditions that are more conducive to the possibility of successfully establishing legally binding norms at international level, through customary international law or an international treaty.

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[218] Malcolm D. Evans, International Law, 161 (Oxford University Press 4th ed. 2014).

[219] *Id.*

[220] Knox, *supra* note 31, at 68.

The SRSG's initial opposition against going to the treaty route was playing a role in retrospective principled pragmatism. The creation of international legal obligations was casted as a less feasible alternative and the creation of a consensus based authoritative framework in soft law as the best hope to start process of creating a better functioning governance system that binds companies to the implementation of their responsibility to respect human rights. One commentator argues that the SRSG's motivations against negotiating an international treaty reinforced the practical and political objectives to imposing international legal obligations on private actors more generally, and that the SRSG proposed the PRR Framework and the UNGPs as 'an alternative to, rather than a prototype for, direct corporate legal obligations'.[221] I agree that the PRR Framework and the UNGPs were presented as an alternative to the regulatory approach of creating direct obligations for business enterprises, a choice that seemed dictated in part by the fact that obtaining the acceptance by States and legally enforcing such obligations would be difficult.[222]

The argument that the SRSG's decision to not go the treaty route was primarily informed by political, not legal imperatives finds support in a statement by the SRSG in his 2006 interim report. The report notes that 'there are no inherent conceptual barriers to states deciding to hold corporations directly responsible, either by extraterritorial application of domestic law to the operations of their own firm, or by establishing some form of international jurisdiction'.[223] The SRSG supported his claim by pointing to trends in national jurisdictions. Courts extend the responsibility for international crimes to corporations and thereby draw on interpretations of individual responsibility for international crimes, as developed by international ad hoc criminal tribunals and the ICC statute.[224] The SRSG also noted how the ICC lacked jurisdiction over legal persons not because corporate responsibility for international crimes was inconceivable per se, but because there was significant divergence in national approaches at the time the Rome Statute was being negotiated. '[I]t does not preclude the emergence of corporate responsibility today', the SRSG noted.

The SRSG's decision did not discredit future efforts at advancing towards the creation of direct legal obligation per se. The SRSG did not view direct corporate legal obligations as inconceivable, nor did he exclude the possibility that such direct obligations could be imposed on companies in the future.[225] Indeed, the PPR Framework and the UNGPs appear not to preclude the possibility or desirability of creating direct human rights obligations for business

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221 *Id.* § 69.

222 The SRSG's decision not to propose to go the treaty route can also be explained in part by the SRSG's mandate, which focused on clarifying existing standards, not on exploring the possibility of creating new one.

223 *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, § 12, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter *Interim Report*] (by John Ruggie).

224 *Ruggie, 2007 Report, supra* note 21, § 21-22.

225 In his 2006 interim report, the SRSG stipulates that 'there are no inherent conceptual barriers to states deciding to hold corporations directly responsible, either by extraterritorial application of domestic law to the operations of their own firm, or by establishing some form of international jurisdiction' *Interim report, supra* note 223, § 12.

enterprises.[226] The SRSG acknowledged that international law can have a role in the emerging regime on business and human rights. 'Principled pragmatism views international law as a tool for collective problem solving, not an end in itself'.[227] The SRSG seems to be of the opinion that the desirability of pursuing direct obligations for companies should be evaluated in terms of their instrumental importance to progressing towards enhancing the standards and practices regarding business and human rights and the realization of 'the effective prevention of, and remedy for, business-related human rights harm'.[228]

4.8 The Implementation of the UNGPs: the UN Working Group on Business and Human Rights

The PRR Framework and the UNGPs are in themselves not the solution, but a platform for future action that can cumulate into systemic change over time.[229] Since they are a voluntary document, their effectiveness depends on their effective implementation, which, as the UNGPs reflect, requires the involvement of all relevant actors, and States and business enterprises in particular.[230] The SRSG had already begun an active engagement effort to foster convergence and around the UNGPs shortly after the HRC had accepted the PRR Framework in 2008.[231] Partially because of this effort, the UNGPs already found practical application in various instruments in 2011.[232] Nonetheless, the unanimous endorsement of the UNGPs by the HRC on 16 June 2011 created regulatory and political momentum for this implementation to take flight. The UNGPs received wide recognition and support across the different stakeholder groups. The HRC by same Resolution 17/4 created the WG BH with a mandate '[t]o promote the effective and comprehensive dissemination and implementation of the Guiding Principles'.[233]

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[226] According to the SRSG, the most likely scenario for further international legalization is in the form of 'precision instruments within a far broader array of policy measures, social strictures and best practices, built from the ground up'. John Ruggie, Address at the Royal Society for the Encouragement of Arts, Manufacturers and Commerce, Sir Geoffrey Chandler Speaker Series, 3 (Jan.11, 2011).

[227] Ruggie, *supra* note 23, at 12.

[228] *UNGPs, supra* note 4, Introduction, § 16.

[229] The UNGPs state that 'Council endorsement of the [UNGPs], by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments'. *UNGPs, supra* note 4, Introduction, § 13.

[230] The wide support for the UNGPs ascribed to their perceived legitimacy, which was derived in part from the moral authority and credibility of the SRSG's mandate, see Stephanie Bijlmakers, *Business and human rights governance and democratic legitimacy: the UN "Protect, Respect and Remedy" Framework*, 26 Innovation: the European Journal of Social Sciences 288 (2013).

[231] The SRSG has noted; `[…] they illustrate the desirability of engaging intermediaries to achieve greater normative and regulatory coherence, large –scale effects, and more robust outcomes – intermediaries that, in this particular case, have more direct links to and influence over corporate conduct than the UN alone.` Ruggie, *supra* note 55, at 12.

[232] The SRSG provided a document identifying various instances of practical applications of the PRR Framework at that point in time, *see* Special Representative of the United Nations Secretary-General for business & human rights, Applications of the U.N. "Protect, Respect and Remedy" Framework (Jun. 30, 2011), http://business-humanrights.org/sites/default/files/media/documents/applications-of-framework-jun-2011.pdf.

[233] *Id.* § 6(a).

The purpose of present section is to assess through the activities of the WG BH's approach to implementing the UNGPs, as well as the degree and intensity of such efforts. The following section will examine the WG BH's mandate, strategic priorities, projects and activities. The aim is to analyse how the WG BH seeks to promote the uptake and dissemination of the UNGPs, despite not having a mandate to monitor, verify or enforce implementation or compliance. The mandate of the WG BH recognizes and builds on the thrust of the UNGPs. The WG BH's efforts may be described as a variant of 'orchestration', which was at the heart of the GPs implementation strategy according to Ruggie.[234]

4.8.1 Mandate

The HRC created the WG BH by Resolution 17/4 on 16 June 2011 for an initial term of three years.[235] Apart from promoting the dissemination and implementation of the UNGPs,[236] the WG BH is encouraged by the HRC 'to identify, exchange and promote good practices and lessons learned' and 'to assess and make recommendations thereon and, in that context, to seek and receive information from all relevant sources'.[237] The Resolution tasks the WG BH to support capacity building efforts, affirming the importance of such efforts,[238] as well as to provide advice and recommendations related to national legislation and policies upon request.[239] In addition, the WG BH is mandated to explore options and make recommendations for improving access to remedies.[240] The WG BH should embed a gender perspective throughout its work and 'give special attention to persons living in vulnerable situations, in particular children'.[241]

The WG BH is authorized '[t]o develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors'. A non-exhaustive list identifies business enterprises as relevant stakeholders the WG BH can interact with, as well as other actors that can take up key roles in the emerging business and human rights regime.[242] Such dialogues allow the WG BH to retrieve input from stakeholders, and 'solicit information, documentation, good practice, challenges and lessons learned' related to business uptake on a regular basis.[243] The

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234 Ruggie, *supra* note 55, at 11.

235 Human Rights Council Res. 17/4, 17th Sess., July 19, 2011, U.N. Doc A/HRC/RES/17/4 (July 17, 2007).

236 *Id.* § 6(a).

237 *Id.* § 6(b).

238 *Id.*

239 *Id.* § 6(c).

240 *Id.*

241 *Id.* § 6(f).

242 *Id.* § 6(h). The UN Working group has undertaken structured engagement with 'States, human rights mechanisms, intergovernmental bodies, relevant United Nations entities, regional and national human rights institutions, representatives of business, civil society organizations, representative of indigenous peoples […] and representatives of impacted communities'. U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Outcome of the third session of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, Human Rights Council, U.N. doc. A/HRC/WG.12/3/1, § 4.11. (Jan. 25, 2013) [hereinafter *UN Working Group, 3rd Session*].

243 *Id.*

WG BH is also tasked to 'work in close cooperation and coordination with other relevant special procedures of the HRC, relevant United Nations and other international bodies, the treaty bodies and regional human rights organisations'.[244]

The WG BH is tasked 'to undertake country visits'.[245] Official country visits provide opportunities to disseminate the UNGPs and to support their implementation at national level.[246] The country visits facilitate 'promoting constructive dialogue' and allow for direct engagement with relevant stakeholders, *inter alia*, business enterprises and associations. Country visits are also conducted with the intention 'to identify, exchange and promote good practices and lessons learned'.[247] Evidence of practical and operational relations in the respective country may be obtained that can inform its decision-making. To obtain such information, the WG BH also undertakes next to official visits and visits to Member States, field visits.[248]

The WG BH can receive information on specific cases of human right abuse or violation and, where appropriate, respond through a communication, i.e., an urgent appeal or an allegation letter, to make the State or business enterprises aware of the facts of the allegations and corresponding duties and responsibilities.[249] While the communications are sent confidentially, summaries of the communications are made public through the 'Communications Report of the Special Procedures' three times per year.[250] The WG BH is not allowed to 'address individual cases of alleged business-related human rights abuse',[251] however it can 'raise specific allegations that it determines to be particularly emblematic with relevant State authorities and companies, and request clarification or additional information as appropriate'.[252]

The WG BH reports annually to the HRC and the UN GA. In these reports, it can addresses questions that have been brought to its attention, provide clarification on salient issues regarding the application of the UNGPs in specific areas and contexts of actual practice and provide

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[244] *Id.* § 6(g).

[245] *Id.* § 6(d).

[246] *Id.* § 4.

[247] *Id.* § 6.

[248] *Id.* § 3.9.

[249] The communications are a means to encourage States and business enterprises to respond to concerns by taking preventative, investigatory or remedial measures conform the UNGPs. They raise concerns related to specific cases of actual or potential abuses or general trends that signal structural problems. The communications procedures provide opportunities for the UN Working Group to clarify concepts, expectations and obligations set out in UNGPs, to create awareness and opportunities for cooperation. The UN Working Group relies on the information to develop its own understanding of challenges and gaps in implementation and to inform its work, strategy and recommendations. *UN Working Group, 3rd Session*, *supra* note 242, § 5.15.

[250] The most recent Communications report (Sept. 2015) notes that the UN Working Group sent a total of 28 communications and that the response rate was 57%. *See* http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx.

[251] *Id.* § 5.16.

[252] *Id.* § 5.17.

recommendations for the effective operationalization of the UNGPs.[253] Such clarity can support and facilitate the implementation of the UNGPs by States, business enterprises and other relevant actors in practical contexts.

4.8.2 Strategic Considerations and Work Streams

The WG BH defined its strategy, including strategic considerations and specific work-streams, in its first report to the HRC in 2012. The WG BH indicates that it pursues three work streams: global dissemination, promoting implementation and embedding global governance frameworks'.[254] The three strategic considerations underlying these work-streams are: (a) the UNGPs as a common reference point in a diverse and rapidly evolving field; (b) enhancing access by victims of business-related human rights abuse to effective remedies, and; (c) building an environment receptive for the UNGP. The strategic focus of the WG BH has shifted over time in response to the changes in the continuously evolving business and human rights field.[255]

The WG BH also picks up and builds on the pioneering work of the SRSG by committing itself to the key principles of work and engagement that founded the UNGP. The evidence-based, consultative and pragmatic approach of the SRSG is seen as key in instilling legitimacy in the mandate and enabling it to move forward. The WG BH indicates that it places the principle of multi-stakeholder consultation and input at the core of its philosophy. The underlying rational is that the success of the mandate depends on whether the UNGP become 'business-as-usual' for all stakeholders in business activities, 'whether they influence, lead or participate in, or are affected by the same'.[256] Apart from its recognized value and effectiveness, pursuing these principles is also consistent with the essence of a 'right-based approach', the WG BH notes.[257]

4.8.3 National Action Plans

The WG BH has itself initiated projects, *inter alia*, NAPs. States to consider developing National Action Plans ('NAPs') on business and human rights.[258] The WG BH describes NAPs as 'evolving policy strategies developed by States to prevent and protect against human rights abuses by business enterprises in conformity with the Guiding Principles', [259] 'through an

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[253] U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Human Rights Council, § 60, U.N. doc. A/HRC/20/29 (Apr. 10, 2012) [hereinafter *UN Working Group, 2012 Report*] (by Margaret Jungk).

[254] *Id.*

[255] Michael K. Addo, *The Reality of the United Nations Guiding Principles on Business and Human Rights*, 14 Human Rights Law Review, 137 (2014).

[256] *Id.*

[257] *UN Working Group, 2012 Report*, *supra* note 253, § 40.

[258] The UN Working Group's mandate to do so is stipulated in Human Rights Council Res. 17/4, *supra* note 235, § 6(c).

[259] U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, U.N. General Assembly, § 6, U.N. doc. A/69/263 (Aug 5, 2014) [hereinafter: *UN Working Group, UNGA Report 2014*].

inclusive process of identifying needs and gaps and practical and actionable policy measures and goals'.[260] NAPs can be of instrumental importance to assist States in advancing their implementation of the UNGP.[261] NAPs can potentially accelerate and scale up implementation by both States and business enterprises,[262] *inter alia*, by serving as a vehicle through which their disincentives and incentives affecting their performance can be aligned towards the goals of implementing the UNGPs.[263]

The WG BH prioritized NAPs in its strategy after 7th session, and drew up a roadmap outlining it activities to promote the uptake of effective NAPs.[264] Pursuant to this roadmap, the WG BH launched an online repository of NAPs and organized a State survey to solicit information on existing policies, legislation, initiatives and plans.[265] Apart from reflecting on these activities in its annual reports to the HRC,[266] it focused on the issue of NAPs in its thematic report to the UN GA in September 2014.[267] The WG BH embarked on a process to create guidance for the development and effective implementation on NAPs, in support of which it solicited views through an Open Consultation on the strategic elements of NAPs[268] and an expert workshop organized on 5 May 2014.[269] The HRC through Resolution 26/22 expressed its political support for the WG BH's activities, encouraged States to develop NAPs and States and all stakeholders to engage with the WG BH in the development of guidance on NAPs.[270]

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[260] *Id.* § 2.

[261] U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Outcome of the seventh session of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, § 8, Human Rights Council, U.N. doc. A/HRC/WG.12/7/1 (Mar. 25, 2014) [hereinafter: *UN Working Group, 7th Session*] .

[262] *UN Working Group, UNGA Report 2014, supra* note 259, § 1-2.

[263] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Human Rights Council, U.N. doc. A/HRC/26/25 (May 5, 2014) [hereinafter *UN Working Group, 2014 Report*].

[264] *UN Working Group, 7th Session*, *supra* note 261, § 4.

[265] OHCHR, Questionnaire for States: National Action Plans on Business and Human Rights (2014), http://www.ohchr.org/EN/Issues/Business/Pages/ImplementationGP.aspx.

[266] *UN Working Group, 2014 Report, supra* note 263.

[267] *UN Working Group, UNGA Report 2014, supra* note 259.

[268] The Open Consultation was aimed at soliciting information and exploring views on the strategic elements of the NAP, in particular related to process and stakeholder engagement, substantive elements of the NAPs, implementation and periodicity of review, and importance and challenges of developing NAPs in the global south. OHCHR, Open Consultation on the strategic elements of National Action Plans in the implementation of the UNGPs on Business and Human Rights (2014), http://www.ohchr.org/Documents/Issues/Business/Session7/CNOpenConsultation20Feb2014.pdf.

[269] The Expert Workshop joined some 40 individual experts from diverse backgrounds to discuss the state of play in the implementation of the Guiding Principles, as well as process and substantive elements of NAPs. U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Outcome of the eighth session of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, Human Rights Council, U.N. doc. A/HRC/WG.12/8/1 (Sep. 3, 2014).

[270] The HRC in resolution 26/22 welcomed the UN Working Group's efforts to build a database of NAPs and other relevant data on progress achieved in the implementation of the UNGPs, to develop guidance on NAPs and to

By July 2015, the WG BH identified that 25 NAPs were on their way.[271] This is a relatively low number. This is despite States having been repeatedly called upon to develop such NAPs. There are no legal requirements obliging States to develop a map, or dictating the substance of these NAPs. There also are no legal requirements for States to monitor, verify or report on their progress on implementing the NAPs or outcomes achieved. The WG BH has developed a Guidance Document aimed at promoting effective NAP processes and encouraging stakeholders to develop and support such NAP processes.[272] The guidance furthermore recommends that stakeholders consider using the National Baseline Assessment (NBA) template developed by the Danish Institute for Human Rights (DIHR) and ICAR in cooperation with the WG BH.[273]

4.8.4 Measurement

The WG BH gave greater strategic importance to measuring of the implementation of the UNGPs in 2015.[274] The impetus was the finding of a lack of systemic, comprehensive data to measure progress in the implementation of the UNGPs. This was despite the many relevant measurement initiatives by States, companies and NGOs producing data. The WG BH noted how the effective implementation of the UNGPs is impossible without this data- as the business adage says, 'if you can't measure it, you can't manage it'.[275] [276]

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identify and promote best practices in the national implementation of the UNGPs. Human Rights Council Res 26/22, Human rights and transnational corporations and other business enterprises, 26th Sess., June 10-27, 2014, A/HRC/RES/26/22 (Jul. 15, 2014).

[271] Working Group on the issue of human rights and transnational corporations and other business enterprises, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, § 22, U.N. General Assembly, U.N. Doc A/70/216 (Jul. 30, 2015) [hereinafter *UN Working Group, 2015 Report*].

[272] Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guidance on National Action Plans on Business and Human Rights, Version 1.0, 1-2 (December 2014), http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.

[273] The NBA template contains a set of concrete criteria, indicators and scoping questions that quis a State on its laws, policies and other measures to meet its duty to protect as defined by the UNGPs and other international standards related to business and human rights. Stakeholders can use this template to conduct a baseline assessment, and to systematically monitor and evaluate State's commitments and progress in implementing the UNGP based on an inclusive and transparent process. The template is part of a toolkit to develop, implement and review of NAPs, which was developed by DIHR and ICAR in collaboration with the UN Working Group and launched in August 2013. DIHR and ICAR, National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks, viii (June 2014), http://accountabilityroundtable.org/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf.

[274] Statement by Ms. Margaret Jungk, Chairperson, UN Working Group on the issue of human rights and transnational corporations and other business enterprises at the 70th session of the General Assembly, Third Committee, Item 72 (b & c), (Oct. 17, 2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16660&LangID=E.

[275] This has prompted the UN Working Group to issue a report on this issue, the Working Group found, *inter alia*, that '[m]any existing initiatives focus overwhelmingly on the commitments of companies and States to implementing the Guiding Principles and, to some extent, on the processes needed to implement them' but that this did not reflect 'whether those abuses are being reduced in practice.' *UN Working Group, 2015 Report*, *supra* note 271, § 87.

The WG BH itself organized a pilot survey in 2012[277] and a questionnaire in 2013[278] in order to solicit information from business enterprises on their implementation of the corporate responsibility to respect human rights under the UNGPs (pillar 2).[279] [280] The vision of the WG BH was 'to gather a solid baseline of credible and complete data' on business' implementation of their responsibility to respect human rights.[281] The information solicited could help the WG BH 'to track business awareness of and progress' and 'to identify the common obstacles' in business' implementation of the UNGPs,[282] and in the longer term, 'to track systemic progress'.[283] More generally, the information was intended to inform and complement the activities of the WG BH,[284] as well as those of other UN bodies and actors, as they progressed in their work 'to disseminate, implement and embed the UNGP globally'.[285]

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[276] During the 2014 Forum 'a recurrent recommendation was the need to establish a regular and systematic process for measuring and reporting on progress made by States and business enterprises in implementing the Guiding Principles.' *Summary of discussions of the Forum on Business and Human Rights, prepared by the Chair, Mo Ibrahim*, Human Rights Council, U.N. Doc. A/HRC/FBHR/2014/3 (Feb. 5, 2015).

[277] The 2012 survey was created and carried by the UN Working Group between October and December 2012 in cooperation with the Global Business Initiative on Human Rights, the International Chamber of Commerce, the International Organization of employers and the Corporations and Human Rights Project at the University of Denver.

[278] The 2013 survey was carried out for the UN Working Group by the International Chamber of Commerce (ICC), the International Organisation of Employers (IOE), the Global Business Initiative on Business and Human Rights (GBI) and the University of Denver during the period of 29 October 2013 to 31 January 2014.

[279] The 2012 pilot survey was conducted in parallel to a survey on government action under the State duty to protect under the Guiding Principles (pillar 1). The aim of the States-survey was 'to identify State trends and innovations in the implementation of the Guiding principles and to foster a culture of reporting and communication by States in a manner consistent with the concepts and intent of the Guiding Principles. Working Group on the issue of human rights and transnational corporations and other business enterprises, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Addendum, Uptake of the Guiding Principles on Business and Human Rights: practices and results from pilot surveys of Governments and corporations*, § 6, U.N. doc. A/HRC/23/32/Add.2 (Aug. 16, 2013) [hereinafter *UN Working Group, Pilot Surveys 2013*].

[280] The report of the findings was made available in draft form and discussed at the first UN Annual Forum on Business and Human Rights on 4-5 December 2012. The UN Working Group succinctly reported on the results of both pilot surveys in its March 2013 report to the HRC. Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, Human Rights Council, § 14-38, U.N. doc. A/HRC/23/32 (Mar. 14, 2013). Also *see* Addendum to this report, *Id*.

[281] Human Rights Council, Report of Pilot Business Survey on Implementation of the Corporate Responsibility to Respect Human Rights, Initiated by the United Nations Working Group on Business and Human Rights, and drafted for the first UN Annual Forum on Business and Human Rights, 1 (2012), http://www.ohchr.org/Documents/Issues/Business/ForumSession1/Report_UNWGBusinessSurvey_Dec2012.pdf.

[282] *UN Working Group, Corporate Survey 2013, supra* note 74, at 4.

[283] *UN Working Group, Pilot Surveys 2013, supra* note *279.*

[284] *Id.* § 3-4.

[285] Human Rights Council, *supra* note 281, at 7.

The 2012 and 2013 surveys were inspired by and picked up on the survey of Fortune 500 Global Firms that the former SRSG carried out in 2006/7.[286] [287] The WG BH noted that surveys were anchored in their 'concepts, intent and wording', and that the overlap in items covered by the surveys allowed for some comparison of results, although the purpose and context of the 2012 and 2013 surveys differed now that the UNGP had been accepted.[288]

The 2012 pilot study received a total of 117 responses from a diversity of business enterprises. The diversity in responses was said to point to 'a new, more global and diverse dialogue on business and human rights in the private sector'.[289] It quizzed business enterprises on their awareness of the UNGP, their human rights priorities, policy commitments, engagement, motivations, and challenges in implementing respect for human rights in practice.[290] The follow-up 2013 questionnaire aimed to obtain a better understanding of progress achieved, meaning the way business enterprises were approaching the UNGP, and where the WG BH could best assist implementation efforts.[291] [292]

Apart from assessing progress in business implementation, an important objective of the WG BH in undertaking the surveys was to establish the methodological foundation for a new tracking tool in the form of annual surveys. These surveys could add value by maximizing 'the utility of comparative data gathered through longitudinal research'.[293] It could be used 'to identify global uptake, trends, enablers and challenges of implementation, as well as existing practices and innovations'.[294] The annual surveys were meant 'to inform the annual Forum discussions'; 'to disseminate information about the UNGP globally'; 'to raise awareness among States and business enterprises while signalling the Working Group's expectations in regard to implementation of the Guiding Principles'.[295] In 2014, the WG BH reported to the HRC that

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[286] *Id.* at 1. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms, U.N. doc A/HRC/4/35/Add.3. (Feb 28, 2007) [hereinafter *Ruggie, Questionnaire surveys 2007*] (by John Ruggie).

[287] The survey of Fortune 500 Global Firms elicited information from global companies about the uptake and content of business policies, international instruments referenced, stakeholder engagement and accountability mechanisms. The results were obtained through an online questionnaire, which received a total number of 102 responses. The survey identified patterns, most notably that the responding global companies had human rights principles and management practices in place already. An important observation was divergence in the spectrum of human rights considered by business enterprises, which 'underscored the need for clearer and commonly accepted human rights standards for firms'. The survey also pointed to the limitations to the study that made that no robust conclusions could be drawn from the results. *Id.* § 99, 101.

[288] Human Rights Council, *supra* note 281, at 1.

[289] Human Rights Council, *supra* note 280, § 31.

[290] Human Rights Council, *supra* note 281, at 8.

[291] *UN Working Group, Corporate Survey 2013, supra* note 74, § 17, 6.

[292] Conducting an in-depth assessment of business's actual implementation was not the purpose of the survey. *Id.* at 4, § 3.

[293] *Ruggie, Questionnaire surveys 2007*, *supra* note 286, § 3-4.

[294] *Id.* at 3-4.

[295] *UN Working Group, Pilot Surveys 2013*, *supra* note 279, § 4.

enhancing the survey methodology was its medium-term goal. It also signalled its intention 'to conduct a more extensive survey and build an authoritative repository of information that can help measure progress, both in quantitative and qualitative terms, in business implementation of the Guiding Principles'.[296]

4.8.5 Support for External Initiatives

The WG BH also engages with and supports a selection of external initiatives. A strategic consideration of the WG BH in its engagement with these initiatives is to seek consistency, convergence, coordination and clarity in the interpretations and understandings of the UNGPs advanced by different actors through different tools and initiatives in order to promote business uptake.[297] The WG BH has recognized the significance of emerging reporting frameworks as a tool for assessing business performance.[298] It 'firmly supports'[299] the UNGPs Reporting Framework (UN Reporting Framework), and collaborated with the GRI,[300] a non-profit organization that has pioneered sustainability reporting.[301]

The WG BH in its reports has referred to various initiatives that aligned their work with the UNGPs, including the Fair Labour Association and the Global Network Initiative.[302] States are recommended to consider becoming party of the Montreux Document On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (Montreux Document), and join the International Code of Conduct for Private Security Providers (ICoC), including its Association (ICoCA). Other initiatives are the Thun Group of banks and the International Council on Mining and Metals, Voluntary Principles on Security and Human Rights and the Extractive Industries Transparency Initiative.

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296 *UN Working Group, 2014 Report*, *supra* note 263, § 30.

297 Relevant imperatives are to ensure that the UNGPs continue to serve as the authoritative reference point around which expectations converge, and that interpretations do not undermine the integrity of the UNGPs but support their implementation. Clarity and brevity of dissemination tools is said to be key to their success. Coordination in the efforts of existing and new initiatives is promoted to ensure that efforts are not repetitive, fragmented or digressive but complementary and faceted. *UN Working Group, 2012 Report*, *supra* note 253, § 49-55.

298 *UN Working Group, 2014 Report*, *supra* note 263, § 30.

299 The UN Working Group issued a statement on its support for the Reporting and Assurance Framework Initiative led by Shift, Mazars and the Human Rights Resource Centre for ASEAN, *see* http://shiftproject.org/sites/default/files/UN%20Working%20Group%20Support%20for%20RAFI.pdf.

300 Working Group on the issue of human rights and transnational corporations and other business enterprises, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, § 29, U.N. General Assembly, U.N. doc. A/67/285 (Aug. 10, 2012) [hereinafter *UN Working Group, 2012 Report*].

301 With a total of 7,959 reporting organizations (as per August 2015), it is the largest of its kind. The GRI released its fourth generation of Sustainability Guidelines, entitled the GRI G4 Sustainability Guidelines (GRI G4) in May 2013. The GRI G4 fully aligns with, and allows for reporting performance against the UNGP, amongst other global frameworks. The aim of the GRI G4 is 'to help reporters prepare sustainability reports that matter, contain valuable information about the organization's most critical sustainability-related issues, and make such sustainability reporting standard practice'. GRI, G4 Sustainability Reporting Guidelines (2013), https://www.globalreporting.org/standards/g4/Pages/default.aspx.

302 *UN Working Group, 2012 report*, § 28-29.

4.8.5.1 UN Reporting Framework

The UN Reporting Framework is the first of a twin-set of guidance frameworks that the organisations Shift and Mazars have undertaken to develop through a joint project titled the 'Human Rights Reporting and Assurance Frameworks Initiative' ('RAFI'). Launched in 2015, the UN Reporting Framework 'provides clarity, for the first time, on how companies can report in a meaningful and coherent way on their progress in implementing their responsibility to respect human rights'.[303] This framework is aligned with the UNGPs and guides business enterprises on how to best disclose on their human rights policies, processes and performance in a manner that is feasible and can help them improve management systems.[304] To achieve this, it provides a set of overarching questions on how the company respects human rights and supporting guidance on how to answer the respective question.[305] Business enterprises are guided towards providing a balanced representation of its performance, in which the most 'salient' issues that impact human rights most severely are prioritized. They can rely on the UN Framework not only to improve their disclosure, but also to discharge and track progress regarding their responsibility (UNGP 20), as well as to review and improve their internal management (UNGP 19) and engage with stakeholders (essential to assessing risks and tracking progress). By setting a minimum benchmark, the UN Framework facilitates assessment and comparison of business' disclosure and performance by relevant actors, including investors and States.

The success of the UN Framework will depend on the support and uptake by relevant stakeholders. Uptake should be encouraged by the transparent and participatory nature of the UN Reporting Framework, having been developed through a consultative process that engaged over 200 diverse stakeholders from all regions of the world.[306] So far, at least five large companies - Unilever, Ericsson, H&M, Nestlé and Newmont – have adopted the UN Framework and have begun to apply it to their reporting, working in collaboration with Shift. A coalition of 77 investor groups representing almost USD 4 trillion assets under management affirmed its relevance as a tool 'to review companies understanding and management of human rights risks'.[307] Civil society voices have expressed their support for the UN Framework, while States have indicated to be considering ways to integrate the UN Reporting Framework into their policies, including through their NAPs.[308]

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303 Shift and Mazars, *supra* note 78. The second set – the Assurance Framework – should be ready early 2016 and will provide guidance to assurance providers and internal auditors on the verification of reporting in line with the UN Reporting Framework. *Id.* at 2.

304 *Id.* at 14.

305 *Id.* at 21.

306 *Id.* at 2.

307 Shift and Mazars, First Comprehensive Guidance for Companies on Human Rights Reporting Launches in London, (UNGP Reporting Framework, 24 February 2015), http://www.ungpreporting.org/first-comprehensive-guidance-for-companies-on-human-rights-reporting-launches-in-london/. In the meantime, 82 investors representing US 4.8 trillion have expressed their support for the UNGPs by signing an investor statement, *see* http://www.ungpreporting.org/early-adopters/investor-statement/.

308 UN Reporting Framework, UNGP Reporting Framework Update: Catalyzing and Accelerating Conversations, (undated), http://us7.campaign-archive1.com/?u=a193892aee5a224fa16269dcd&id=49896c6ce8&e=75f84b5d72.

4.8.6 The UN Human Rights System

The WG BH seeks to promote an active role for the UN bodies as part of its efforts to embed the UNGPs into global governance frameworks, which it has recognised can play a significant role in encouraging or requiring business enterprises and States to implement the UNGPs.[309] These activities can contribute to building key strategic building blocks of a global business and human rights regime.[310]

4.8.6.1 Office of the High Commissioner for Human Rights

The OHCHR serves as the focal point within the UN system for advancing the business and human rights agenda and for providing uniform guidance and clarification on issues relating the implementation of the UNGPs.[311] The OHCHR furthermore has an important role in the building of capacity on the business and human rights agenda within the UN and stakeholders, including business enterprises, in support of the implementation of the UNGPs.[312] In this role, it has engaged with business organisations and networks to enhance awareness and implementation of the UNGPs.[313]

4.8.6.2 Accountability and Remedy Project

In November 2014, the OHCHR launched the Accountability and Remedy Project. The project aims 'to develop recommendations and guidance for States on how to achieve a fairer and more effective system of domestic law remedies in cases of business-related human rights abuses, particularly in cases of severe abuses'.[314] The project is organised around six distinct, but interrelated components: domestic law tests for corporate accountability (good practices and guidance for States on assessing corporate legal liability for serious human rights abuses); the roles and responsibilities of interested States (good practices to guide States in managing cross-border cases and exploring models of international and bilateral cooperation); overcoming financial obstacles to legal claims (minimum steps and good-practice option for States to ensure

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309 *UN Working Group, 2012 Report*, *supra* note 253, § 72.

310 *UN Working Group, 7th Session*, *supra* note 261, § 2.

311 In this role, the OHCHR has developed an interpretative guide on corporate responsibility to respect human rights as set out in the UN UNGPs, a comprehensive training package and a publication with frequently asked questions. Report of the Secretary-General on the challenges, strategies and developments with regard to the implementation of the resolution 21/5 by the United Nations system, including programs, funds and agencies, § 19, Human Rights Council, U.N. doc. A/HRC/26/20 (Apr. 1, 2014).

312 Capacity building activities have been undertaken at country level and directed at government officials, stakeholders upon request and the UN's own staff in country offices. *Report of the Secretary-General on the contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights*, § 23, UN Doc A/HRC/21/21 (Jul. 2, 2012).

313 *Id*. § 23. Capacity building efforts have also been directed at national human rights institutions, NGOs, trade unions, human rights defenders, academics and other stakeholders. *Id.* § 68.

314 *Progress report of the United Nations High Commissioner for Human Rights on legal options and practical measures to improve access to remedy for victims of business-related human rights abuses*, Human Rights Council, § 6, U.N. Doc. A/HRC/29/39 (May. 7, 2015).

that claimants are not prevented from bringing cases due to legal costs); criminal sanctions ('good-practice models' for States on criminal sanctioning of corporations for serious human rights abuses); civil law remedies ('good-practice models' for States in relation to civil law damages in cases of serious corporate human rights harm); practices and policies of domestic prosecution bodies (recommendations to States on addressing challenges faced by domestic prosecutors).[315]

4.8.6.3 UN Fund

The HRC mandated the WG BH to support the promotion of capacity building and usage of the UNGPs by businesses.[316] Such capacity building of all stakeholders can help 'to better prevent business-related human rights abuses, provide effective remedy and manage challenges in the area of business and human rights'.[317] A feasibility study was conducted on the possibility of establishing a global fund to enhance the capacity of stakeholders to advance the implementation of the UNGPs. The SRSG found that 'stakeholders across categories expressed support' for the fund, but that further consultation with stakeholders was still needed. He proposed that the OHCHR should lead the consultation process.[318] Based on the this process, the OHCHR recommended, *inter alia*, that the OHCHR should be mandated to undertake a pilot project to test the viability of a capacity-building fund in collaboration with the WG BH and other relevant UN system partners and then report to the HRC in three years.[319]

4.8.6.4 Special Procedures of the Human Rights Council

Special procedures mandates can address business-related human rights situations and topics, and apply the UNGPs in their analysis.[320] Greater attention by the special procedures can contribute to the further exploration of challenges that business encounter in their implementation of the UNGPs, which may be issue-, group- or sector- specific.[321] A significant number of special procedures mandates has responded to the call and has taken up the UNGPs in

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[315] *Id.* § 13.

[316] Human Rights Council Res. 17/4, *supra* note 235, § 6(c).

[317] Human Rights Council Res. 26/22, *supra* note 270, Preamble.

[318] Report of the Secretary-General on the challenges, strategies and developments with regard to the implementation of the resolution 21/5 by the United Nations system, including programmes, funds and agencies: Addendum 1 – Study on the feasibility of a global fund to enhance the capacity of stakeholders to implement the Guiding Principles on Business and Human Rights, U.N. doc. A/HRC/26/20/Add.1 (Apr.1, 2014).

[319] *Report of the United Nations High Commissioner for Human Rights, Feasibility of a global fund to enhance the capacity of stakeholders to implement the Guiding Principles on Business and Human Rights*, Human Rights Council, § 22(a)-(b), U.N. Doc. A/HRC/29/18, (Apr. 29, 2015).

[320] `Other special procedures mandate holders frequently address business-related human rights situations and topics, and several have applied the Guiding Principles and the Framework in their analyses. Human rights treaty bodies are also increasingly addressing the impact of business enterprises through the lens of the treaty obligations of State parties`. *Report of the Secretary-General on the contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights*, *supra* note 312, § 19.

[321] *Id.* § 35.

their reports.[322] For instance, the Special Rapporteur on the situation of human rights defenders urged non-State actors, *inter alia* business enterprises, 'to respect, and ideally support, the activities of human rights defenders' and noted that they should 'refrain from infringing upon the rights of defenders and should use the UNGPs on Business and Human Rights to ensure their compliance with international human rights law and standards'.[323]

4.8.6.5 UN Treaty Monitoring Bodies

As noted above, UN treaty monitoring bodies (e.g. the Committee on the Rights of the Child (CtRC) and the Committee on the Elimination of Discrimination against Women ('CEDAW')) can address and clarify States' obligations within the context of business-related human rights issues as they apply to States under the international human rights treaties they have ratified.[324] Clarification can be provided through, among other things, reporting procedures, individual complaints procedures, general comments, statements and concluding observations.[325] General Comments inform and facilitate the efforts of treaty monitoring bodies in their monitoring and follow-up of State's implementation of their duty to protect. The reporting procedures present opportunities for advocacy and dialogue on State and business implementation of the UNGPs,[326] as well as for the systematic and comprehensive collection and analysis of information on business and human rights.[327]

4.8.7 UN Forum on Business and Human Rights and Regional Forums

Another important responsibility of the WG BH is to guide the UN Forum on Business and Human Rights, which the HRC created by the same Resolution 17/4.[328] The UN Forum serves as a platform for multi-stakeholder dialogue and cooperation. The main purpose of the Forum is 'to discuss trends and challenges in the implementation of the UNGPs and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices'.[329] The UN Forum permits the WG BH as well as all other

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[322] *Id.* § 19. *See* specifically footnote 8 to the Report.

[323] *Report of the Special Rapporteur on the situation of human rights defenders*, Human Rights Council, § 106, UN Doc A/HRC/25/55 (Dec. 2, 2013) (by Margaret Sekaggy).

[324] *Report of the Secretary-General on the contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights*, *supra* note 312, § 36.

[325] Id, § 19 and 36.

[326] For instance, NGOs raised the issue of privatisation in education on children's right to education in Morocco and Ghana and relied on the UN General Comment No. 16 in support of their argument. International Service for Human Rights, *Fertile ground for corporate accountability advocates: CRC General Comment on business and children's rights*, (Nov. 19, 2014), http://www.ishr.ch/news/fertile-ground-corporate-accountability-advocates-crc-general-comment-business-and-childrens.

[327] Report of the Secretary-General on the challenges, strategies and developments with regard to the implementation of the resolution 21/5 by the United Nations system, including programs, funds and agencies, *supra note* 311, § 29.

[328] Human Rights Council Res. 17/4, *supra* note 235.

[329] *Id.* § 12.

stakeholders to solicit information and achieve a common understanding of progress achieved, trends, gaps and challenges in the implementation of the UNGPs. The Forum contributes to building capacity and awareness through information sharing on lessons learned on implementation practices and challenges. The UN Forum also serves as a catalyst for new initiatives. The Forum has grown not only in coverage of issues and scope, but also in terms of the number of participants. Approximately 2000 participants attended the Forum in 2014. This number reflected a great diversity of stakeholder perspectives.[330] Measurement was a priority theme at the fourth Forum on Business and Human Rights, in November 2015.

The WG BH has sought collaboration with regional organisations, recognising their importance as multipliers in efforts to disseminate the UNGPs at regional level. In 2012, the WG BH encouraged 'increased cross-regional exchange and dialogue, and coherent messaging to business enterprises between regions, given the transnational nature of business operations and relationships'.[331] It also recommended that '[i]nternational organizations, including regional bodies, should include business and human rights and the implementation of the UNGPs in the agenda of their institutions, and support dissemination, capacity-building and implementation efforts at the regional level, with all stakeholders'.[332]

In support of its efforts to promote the UNGPs at regional level, the WG BH initiated the regional forums on business and human rights in 2012, which are aimed at enabling discussion on challenges and lessons learned from the implementation of the UNGPs with actors and relevant stakeholders in the regional context.[333] The forums create transparency on the current situation, progress made and challenges and opportunities faced.[334] In addition, they facilitate stakeholder engagement and the creation of knowledge on key business and human rights issues. The regional forums also provide capacity building opportunities through training on the UNGPs

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330 The Forum counted, *inter alia*, 168 business enterprises, 67 business/industry associations and 848 civil society organisations (ECOSOC and non-ECOSOC accredited). *Summary of discussions of the Forum on Business and Human Rights, supra* note 276, § 7. Business participation is seen as insufficient, however, when compared to NGO attendance, and it has been noted that private-sector participation should be broadened to include, *inter alia*, SMEs. *Id.* § 9. Meanwhile, it has been argued (and criticised) that the Forum's structure does not allow NGOs to confront and criticise the private sector, possibly to keep business engaged. Conectas Human Rights, *Forum ends with no substantial progress* (Nov.12, 2013), http://conectas.org/en/actions/business-and-human-rights/news/10527-forum-ends-with-no-substantial-progress.

331 *UN Working Group, 2012 Report*, *supra* note 300, § 33.

332 *Id.* § 78.

333 *UN Working Group, 3rd Session*, *supra* note 242, § 17. The first regional forum was convened in Medellin, Colombia in 2013, and the second in Addis Ababa, Ethiopia in 2014. The 2015 regional forum will take place in Asia. *See* further Human Rights Council, *Addendum – Report of the Regional Forum on Business and Human Rights for Latin America and the Caribbean*, Human Rights Council, U.N. doc. A/HRC/26/25/Add.2 (Apr. 24, 2014) and Working Group on the issue of human rights and transnational corporations and other business enterprises, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: Addendum: Report on the First African Regional Forum on Business and Human Rights*, U.N. doc. A/HRC/29/28/Add.2 (Aug. 2, 2015).

334 For instance, in the African region, the lack of awareness about the UNGPs among most of the SMEs, which make up 80 pct. of African companies, was identified as a key challenge. Other challenges were the 'complexity of supply chains, a lack of senior management buy-in and the costs related to human rights due diligence processes'. *Id.* § 51(b) and 53.

and a venue for informing stakeholders about relevant tools, mechanisms, methodologies, initiatives and resources.[335] Finally, the regional forums complement and inform discussions at the annual UN Forum on Business and Human Rights.[336]

4.9 The Treaty Initiative

On 26 June 2014, the HRC adopted Resolution 26/9, creating an 'open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[337] This resolution had been tabled by Ecuador and South Africa.[338]

The initiative received firm support by a coalition of 600+ civil society organization. The HRC adopted the Resolution by a divided vote of 20 to 14, with 13 abstentions, however.[339] An important concern of States opposing the Resolution was that the initiative might risk sucking the debate back into the polarized and divisive discussions that had prevailed when the UN Norms were under construction.[340] The WG BH also had cautioned about 'the risk of reversing or undermining the clarity and the regulatory and political momentum gained so far by the Protect Respect Remedy Framework and the UNGPs`.[341] While there are real concerns that the treaty initiative may weaken the project of the UNGPs as a result of de-alignment by key stakeholder groups from the UNGPs, the support for the UNGPs remains solid. Countries expressed their continued commitment to the implementation of the UNGPs through a unanimous adoption of a counter resolution tabled by Norway, which also renewed the mandate of the WG BH.[342]

It were the sentiments within the NGO community that sowed the seeds from which the initiative to create a legally binding treaty sprung. The NGO community expressed the view that the UNGPs did not provide an adequate response to governance gaps. They openly expressed their

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335 *See* in relation to the African region, *Id.* § 2 and 5.

336 *See* section II.A.4 below.

337 Human Rights Council Res 26/9, *supra* note 32, § 1.

338 This resolution was co-sponsored by Algeria, Bolivia, Cuba, El Salvador, Senegal and Venezuela.

339 *In favour:* Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Viet Nam. *Against:* Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America. *Abstaining:* Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates.

340 Friends of the Earth Europe, EU standing up for corporate interests instead of human rights at the UN (Jun. 25, 2014), http://www.foei.org/news/blogs/eu-standing-up-for-corporate-interests-instead-of-human-rights-at-the-un.

341 *UN Working Group, 2014 Report*, *supra* note 263, ¶ 50.

342 Human Rights Council Res 26/22, *supra* note 270.

opposition to the UNGP's in statements issued at the time the UNGPs were adopted.[343] The critique was founded on the conviction that the enhancement of the international legal framework, including international judicial remedies, is needed in order to address the ongoing corporate abuses and violation on the ground and to ensure access to justice and remedies for victims of such abuse. NGOs expressed their concerns about a draft of the UNGPs in a joint statement. The statement notes that the UNGPs are 'not a statement of the law' and in certain areas take a more 'regressive approach' than 'authoritative interpretations of international human rights law and current practices'.[344]

This critique relates to the SRSG's interpretation of existing international human rights law and suggests the UNGPs do not reflect recent legal developments, most notably the increasing international recognition, including by international human rights treaty bodies, of the need for home States to take regulatory action to prevent abuse by their companies overseas. In the same statement, NGOs call for the UNGPs to provide recommendations on how States should regulate and remediate corporate conduct causing or contributing to human rights abuses abroad, as well as more specific guidance on protecting and respecting the rights of particular vulnerable groups and more robust language on the access to remedies pillar.[345] Subsequent revision of the draft UNGPs did not alleviate these concerns. HRW noted that the UNGPs did not set a 'global standard', but represented 'the status quo' where corporate human rights obligations remain an anomaly.[346]

NGOs called upon the HRC to not adopt the UNGPs because they were deemed unsuited for tackling global governance gaps effectively. A commentator notes that this critique reflects a rejection[347] of the UNGPs' foundational premises and the institutional approach that it promotes as a solution to resolving governance gaps.[348] Ecuador, which had not voted against the Resolution 17/4 in which the HRC 'endorsed' the UNGPs, also expressed its reservations about how the resolution side-lined issues that were significant for the establishment of a binding legal framework, including the establishment of a complaint mechanism for affected people. [349] After Res 17/4 had been adopted and the implementation of the UNGPs was in motion, a large number NGOs, though not all the important ones, joined forces in a movement called the 'Treaty

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343 For an analysis of the critique by civil society actors of the UNGPs, *see* Lara Catá Backer, *And a Treaty to Bind them All—On Prospects and Obstacles to Moving from the GPs to a Multilateral Treaty Framework, a Preliminary Assessment* (Jul. 3, 2014, 10:33 PM), http://lcbackerblog.blogspot.nl/2014/07/and-treaty-to-bind-them-allon-prospects.html.

344 Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights (May 8, 2011), https://www.escr-net.org/docs/i/1473602

345 *Id.*

346 Human Rights Watch. UN Human Rights Council: Weak Stance on Business Standards: Global Rules Needed, Not Just Guidance (June 16, 2011), http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards.

347 Backer, *supra* note 343.

348 FIAN International. Statement to the Delegations on the Human Rights Council 2011; Final Report of the SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises` (2011), http://www.ibfan.org/art/Statement-to-UN-HRC-on-HR-TNC-and-other-business_2_.pdf. Backer, *Id.*

349 *See* Bijlmakers, *supra* note 230.

Alliance' that further developed its views and demands through joint statements. These statements further built on the idea that international law should impose legal obligations on business enterprises, through an international treaty on corporate liability or extraterritorial obligations.

Ecuador delivered a statement on behalf of a group of countries, expressing the commitment of these countries to work towards the elaboration of a legally binding instrument. While welcoming the work of the SRSG, the statement noted that endorsement by the HRC of the UNGPs was only viewed as a 'first step' and a need to 'move beyond' the UNGPs towards creating a legally binding framework.[350] The countries viewed the creation of such framework as essential for resolving the legal accountability vacuum that leaves victims of human rights abuses by transnational corporations without an adequate legal remedy. The UNGPs as a soft-law document was seen as only providing a partial solution, because the UNGPs in themselves do not provide a legal basis for commanding conformity or imposing consequences for non-conformity. The value of the UNGPs as providing a basis for accountability is limited because of it a non-legally binding nature.

The UN Resolution did not elaborate on the treaty that is to be developed, hence many options remain open.[351] In July 2015, the open-ended intergovernmental working group held its first session. The purpose was 'conducting constructive deliberations about the content, scope, nature and form of the future international instrument'.[352] At the beginning of the session, the UN High Commissioner affirmed that the process of the UNGPs and the intergovernmental process are not mutually exclusive initiatives and can be pursued simultaneously, noting that it 'welcomed the intergovernmental process as a complementary step, and stresses that there was no conflict between advocating for both measures as a means to enhance protection and accountability in the business context'.[353]

A more critical perspective points to the ideological and practical agenda of those supportive of the Treaty initiative, and indicates that the Resolution appears to be embedded in a world view that is antagonistic to the UNGP's key foundations.[354] The most prominent aspect in the Resolution supporting this understanding is the applicable scope of the international treaty, which is narrowly defined in a footnote of the Resolution as encompassing only 'transnational

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[350] Countries noted 'the necessity of moving forward towards a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other businesses enterprises. Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council, General Debate – Item 3 Transnational Corporations and Human Rights (Sept. 2013), http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf.

[351] For an overview of illustrative options, *see* D. Cassel, A. Ramasastry, White Paper: Options for a Treaty on Business and Human Rights (2015).

[352] 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, § 1, Human Rights Council, U.N. Doc A/HRC/31/50 (Feb. 5, 2016).

[353] *Id.* § 3.

[354] John G. Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty* (July 8, 2014), http://www.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf.

corporations and other business enterprises'. The 'other business enterprises' is explained as 'all business enterprises that have a transnational character in their operational activities'. It is also noted that this definition does not apply to 'local businesses registered in terms of relevant domestic law'. The UNGPs make no such distinction and applies to all business enterprises, also those that do not operate transnationally. The SRSG has been critical of this applicability of the new treaty to transnational corporations only; '[t]hus, to illustrate, the language of the proposed treaty would have covered international brands sourcing garments from the factories housed in the collapsed Rana Plaza building, but not the local factory owners'.[355]

The Treaty initiatives also raises practical concerns that are similar to those the SRSG identified at the beginning of his mandate when considering the possibility of recommending treaty-negotiations. According to Backer:

> For the objective (mandate) is to establish an international legally binding instrument to regulate in international law the activities specified. But consider the constraints inherent in that mandate: the treaty will produce international law, law that is binding on those states acceding to it to the extent not otherwise reserved. But it will have no internal domestic effect, except and to the extent that states domesticate these international obligations, under the principles of legality and state sovereignty that provides the framework for this resolution. Thus while it might serve to harden domestic law in some states, it does not guarantee transposition into domestic law. Yet this is precisely the condition one finds oneself with the GPs which point to a framework that might well be transposed to domestic law, at the instance of the state, but which otherwise remains 'soft' and binding only on the state (and not those resident or transient within it). Thus the greatest irony of the Resolution is that it is geared to do little but create potential law (in the sense that it is binding on individuals) and otherwise will produce nothing more than a framework for soft law from which custom may develop from the bottom up; functionally the equivalent position as the GPs. Here one vaunts symbolism and gesture over substance.[356]

The international treaty initiative can be powerful instrument to address regulatory gaps at the international level. The prospect of such an international treaty in and of itself could serve as a stick that motivates States and business enterprises to keep their efforts to implement the UNGPs on track. Some concrete options will be explored in the next chapters.

4.10 Conclusion

This chapter examines the legal status of the UNGPs as soft law. No direct legal consequences flow from the UNGPs. Nevertheless, the UNGPs in and by themselves can foster compliance by recognizing the existence of a global standard of conduct for companies to respect human rights and clarifying and elaborating on the content of this standard and their implications. The

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[355] Ruggie, *supra* note 23, at 8.

[356] Larry Cata Backer, *Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Mind Bind Them All*, 38 Fordham International Law Journal (2015).

corporate responsibility to respect is a soft/moral norm founded in global social expectations, hence it is non-legally binding in a strict legal sense. The corporate responsibility to respect carries within its normative content the force to pull compliance. The UNGPs furthermore serves as a platform for further actions through which this social norm is potentially acquires additional normative force. The expectation is that this norm can and should acquire additional normative force as existing duties and responsibilities of States and business enterprises as set out in the UNGPs are given full effect to the normative objective of ensuring human rights and fundamental freedoms. An expansion of such normative force can result from the increased recognition and clarification of this norm by States and non-state actors through collaborative engagement within the different governance systems. Progress can be assessed in relation to enhanced standards and practices on business and human rights reflecting such increased recognition.

The corporate responsibility to respect human rights as a soft/moral norm lies at the heart of this emerging global regime on business and human rights. Its nature and legal relevance should be understood within this context. The UNGPs by recognizing and clarifying this responsibility and by providing a platform of action, has the potential to affect the evolution of this concept soft norm into a harder obligation. The design of the corporate responsibility to respect is key in this respect, allowing for its transposition into legal form at the national level and usage across different areas of law. That this transposition is feasible is evidenced by the due diligence concept already having been incorporated into national laws as an applicable standard. It is not inconceivable that the SRSG chose the concept of human rights due diligence in order to enable the incorporation of a generally applicable standard of conduct into different areas of national and international law.

Recent interpretations by treaty monitoring bodies articulated the State duty to conduct human rights due diligence not only in more exacting language, but have also framed this duty in terms of ensuring that business enterprises abide by their responsibility to respect human rights. These interpretation support the view that the duty of States to conduct due diligence in order to ensure the protection of human rights from infringements by business enterprises requires that States adopt regulatory measures to ensure business respect for human rights, including requirements of due diligence from companies that operate in context of heightened human rights risks. State practices that integrate the corporate responsibility to respect in laws and policies can be constitutive of an international legal regime on business and human rights. Such regime would be integral to the emerging global business and human rights regime in which the three governance systems progress in a coordinated manner in the pursuit of reduced harm by business enterprises to human rights.[357]

The UNGPs depends for their effectiveness on their actual implementation. The following section through an examination of the strategic priorities, projects and activities of the WG BH explored the degree and intensity of implementation efforts. The treaty initiative can serve as a powerfull instruments that, in the shorter term, motivates States and business enterprises to keep their implementation options on track, and in the longer term, can address regulatory gaps at the international level.

[357] Taylor, *supra* note 156, at 27.

5 Human Rights Due Diligence as a Legal Concept: its Characteristics and Reformatory Potential

5.1 Introduction

This chapter argues that the human rights due diligence concept should be assessed in its ability to drive conceptual improvements in, and facilitate convergence across, national laws that affect business behavior. It is a reformatory concept that is bound to redefine fruitfully the standards of due diligence that different areas of the legal order currently set out for business enterprises. The purpose is to construe an institutional framework that supports business respect for human rights.

The human rights due diligence concept will be explained *first* (see Section 5.2) by comparison with existing approaches to due diligence in other areas of law. More precisely, the substantive and procedural aspects of human rights due diligence will be explained in relation to due diligence under corporate law and securities law. The human rights due diligence concept can be understood as a forward-looking management process that is aimed at the prevention of adverse human rights impacts.[1] The human rights due diligence concept as defined by the UNGPs in itself may not exist as a legal standard.[2] However, as will be set out in detail below, the diligence concept can be used and, as I argue below, should be used as a legal standard of conduct.[3]

The human rights due diligence will be explained *second* (see Section 5.3) as a standard of conduct which entails a judgment about whether a company exercises or has exercised reasonable care and a balancing exercise. The nature of this balancing exercise is similar and can be understood in reference to the duty of care concept which currently exists under certain national (tort) laws of non-contractual obligations. This legal duty of care concept requires companies to exercise reasonable care, the legal definition of which is determined by reference to legal and non-legal standards. The human rights due diligence can inform the *indicia* that factor into a determination of whether a company has struck the right balance between risk and care in meeting its legal obligations under these laws.[4]

The human rights due diligence concept will be explained *third* (see Section 5.4) from the perspective of international human rights law. The human rights concept will be compared to the due diligence concept to which international human rights law has resorted to in order to define

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[1] Sabine Michalowski, *Due diligence and complicity: a relationship in need of clarification*, in Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, 218-242, 231 (Cambridge University Press ed. 2013).

[2] Mark B. Taylor, The Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility, 5 Etikk i praksis – Nordic Journal of Applied Ethics 1, 25 (2011).

[3] Jonathan Bonnitcha & Robert McCorquodale, *Is the concept of `due diligence` in the Guiding Principles coherent?* (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208588.

[4] *See* Cees van Dam, *Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights*, 2 Journal of European Tort Law 3, 221, 244 (2011).

the requirement that States ensure an adequate protection of human rights.[5] [6] The UNGPs' premise on the understanding that the duties and responsibilities of States and business enterprises are differentiated and mutually reinforcing. The section will compare the balancing exercise that underpins the human rights due diligence concept to the one that courts apply in their assessment of qualified human rights under international human rights law. The section will reflect also on the open-ended character of the human rights due diligence concept. The concept is clearly defined in that it provides for concrete parameters as to how business enterprises should respect human rights, but it is also articulated at a certain level of abstraction. This open nature of the concept should not necessarily be problematic. In fact, such open-ended character may be intentional since it allows the details as to what human rights due diligence requires or entails within a particular contexts or issue area to be further tailored to that specific scenario. As the SRSG appears to agree, States should provide further details and clarity through guidance on how business enterprises should respect human rights.[7]

The openness of the due diligence concept allows for flexibility in the application of the due diligence concept, and can therefore maximize the transformational potential of the human rights due diligence concept. The importance of the reformatory potential of the human rights due diligence concept can be explained in relation to legal norm-creation at the national and international level. The human rights due diligence concept lends itself to implementation in different areas of law (some of which will be studied in detail in Chapters 6, 7 and 8, which facilitates its further crystallisation into legal obligations at the national (or even supranational, i.e., EU) level. The further 'hardening' of the human rights due diligence concept into a legal obligation under different national laws is not only desirable to foster corporate cultures respectful of human rights. States have a legal obligation to adopt such regulatory measures in order to ensure that business enterprises meet their responsibility to respect human rights in practice.[8]

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[5] For an analysis of due diligence in human rights law, *see* Tineke Lambooij, Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting CSR, 293-309 (2010) (Ph.D. dissertation, University of Leiden).

[6] The concept of due diligence was not entirely new to the discourse of business and human rights. For instance, the UN Norms recognized a due diligence responsibility for corporations 'in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or out to have been aware'. *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003), at Commentary A. (b).

[7] Tara van Ho, *"Due Diligence" in "Transitional Justice States": An Obligation for Greater Transparency?*, in Human Rights and Business: Direct Corporate Accountability for Human Rights, 242 (Jernej Letnar Černič & Tara Van Ho eds., 2015). Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* U.N.Doc. A/HRC/17/31, UNGP 3(c), GP 7 (March 21, 2011) [hereinafter *UNGPs*] (by John Ruggie).

[8] Olivier de Schutter makes this argument:

> Potentially most important of all, however, is the fact that the 'business case' for CSR produces, at the rhetorical level, a powerful consequence: it serves to create the impression that the development of CSR will make natural progress, in a sort of evolutionary growth driven by market mechanisms, without such progress having to be encouraged or artificially produced by an intervention of public authorities. There is a very thin line between the idea that 'CSR is profitable for business' and the idea that 'CSR may take care of itself'. This consequence should be avoided at all costs. There is a need, clearly identifiable, for a

5.2 The Human Rights Due Diligence Concept

5.2.1 Preliminary Considerations

The human rights due diligence concept as defined in the UNGPs can be understood in relation to the traditional due diligence concept under Corporate law, from which it originates.[9] Indeed, when framing the human rights due diligence concept, the SRSG drew on heavily well-established due diligence and risk assessments practices in the areas of mergers and acquisitions and securities.[10] These practices respond, at least to some extent, to domestic laws that require companies to have information disclosure and control systems in place to assess and manage financial and related risks.[11] The American 'Securities Art of 1933' is an early example of such laws. Sections 11[12] and 12[13] of this Act created a standard of due diligence and care that could give rise to civil liability in case the information disclosed in relation to a security is inaccurate or misleading.

The construction of the human rights due diligence on the basis of the due diligence concept in corporate law aimed at establishing a relationship between Corporate law and International Human Rights law, two areas of law that hitherto were often considered disconnected.[14] The establishment of a clear link between Corporate law and International Human Rights law through the human rights due diligence concept brings business approaches to risk management to a closer relation with internationally recognized human rights standards and principles. It

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regulatory framework to be established, if CSR is to work. This is not in contradiction with the voluntary character of CSR. On the contrary, it attaches its meaning to voluntary commitments.

Olivier de Schutter, *Corporate Social Responsibility: European Style*, 14 European Law Journal, 219 (2008).

[9] Lambooij, *supra* note 5, at 278.

[10] John Gerard Ruggie, Just Business Multinational Corporations and Human Rights, 100-101 (W.W. Norton & Company. 2013).

[11] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. doc. A/HRC/8/5, ¶ 57 (April 7, 2008) [hereinafter Ruggie*, 2008 Report*] (by John Ruggie).

[12] Section 11 provided that any person who had acquired a security could sue the defendant specified if the respective security 'contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading'. There would, however, be no liability if the defendant had met a standard of care. As stipulated in section 11 (b) (3), this standard of care required that the defendant had undertaken 'reasonable investigation' that provided 'reasonable ground to believe and did believe' that the registration statements 'were true and that there was no omission'. Sect. 11.(a) of the Securities Act of 1933.

[13] Section 12 provided that a person could sue the defendant who sold or offered a security by means of a prospectus or oral communication that contained 'an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements […] not misleading'. The section created a standard of reasonable care, stipulating that the defendant should not be held liable if 'he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission'. Sect. 12.(a)(2)(a) of the Securities Act of 1933.

[14] It has been highlighted, in this regard, that 'traditional American corporate law speaks the language of economics and perhaps politics. It generally does not speak the language of human rights'. Lucien J. Dhooge, *Due Diligence as a defense to corporate liability pursuant to the alien tort statute*, 22 Emory International Law Review 455, 437 (2009).

facilitates the acceptance of, and has the potential to incite, compliance by companies with their human rights responsibilities. Moreover, the concept of due diligence has the advantage of being readily understood by business enterprises: corporations could thus build on existing due diligence practices to integrate successfully human rights into their corporate practices. Doing so could also increase the capacity of business enterprises in risk management and incite compliance with the standards set by both systems. The nexus furthermore allowed for the integration of international human rights standards into risk management and related business practices, and for business enterprises to articulate their human rights concerns by reference to International Human Rights law. The human rights due diligence concept was a means to have companies accept a concept of corporate responsibility that is linked in substance to international human rights instruments.[15]

In short, the concept of due diligence was considered more resonant to business enterprises than compliance with international human rights norms, the applicability of which to business activities was, moreover, uncertain.[16]

5.2.2 Human Rights Due Diligence: Substantive Measures Required

According to UNGP 17-24, an adequate human rights due diligence process requires the successful adoption of the following measures: (i) to investigate and take measures (see, for more detail, Section 5.2.2.1.); (ii) to communicate that the measures have been adopted (see, for more detail, Section 5.2.2.2); (iii) to enable inclusive decision-making and participation (see, for more detail, Section 5.2.2.2.1); and (iv) to gather relevant human rights expertise (see, for more detail, Section 5.2.2.2.2).

5.2.2.1 To Investigate and Take Measures (to know).

This requirement is threefold: (i) to carry out human rights impact assessments (see, for more detail, Section 5.2.2.1.1); (ii) to integrate the findings of these human rights assessments in the relevant process of the company (see, for more detail, Section 5.2.2.1.2); and (iii) to track responses (see, for more detail, Section 5.2.2.1.3).

5.2.2.1.1 Human rights impact assessments

One of the elements of the human rights due diligence process is to undertake human rights risk assessments.[17] The main purpose of human rights impact assessments is to ascertain the nature of the impact the activities of a company have in human rights. Unlike the traditional approaches to risk assessments in corporations, these assessments have an external, rather than an internal, focus.[18] They are not only (or, for that matter, mainly) aimed at identifying the material risks to and liabilities of the corporation from a financial viewpoint. The purpose is to identify the human rights risks of a company to right-holders, and from a right-holder perspective.

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[15] Ruggie, *supra* note 10, at 101.

[16] Dhooge, *supra* note 14, at 473.

[17] *UNGPs*, *supra* note 7, GP 8.

[18] Van Ho, *supra* note 7, at 243.

The UNGPs note that human rights impact assessment may be included within broader enterprise risk management systems; however, these assessments must extend beyond 'simply identifying and managing material risks to the company itself, to include risks to right-holders'.[19]

The human rights assessments thus differ in purpose from traditional approaches to risk management in that they aim at analysing the risks that a company' operations pose to human rights, rather than the reverse.[20] These assessments must be undertaken in the interest of the right-holders whose risks might be adversely affected by the operations of the company, rather than in the interest of shareholders and investors.

The aim of human rights impacts assessments is for companies and stakeholders to gain an understanding of the specific adverse human rights impacts on people, within the specific contexts of an operation. Special attention should be paid to 'particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the risk that may be faced by women and men'.[21]

In order to obtain an understanding of the human rights risk from a stakeholder perspective, the process should involve meaningful consultation with potentially affected groups and relevant stakeholders. This understanding serves to guide a company's decision-making on what due diligence steps are appropriate to manage these risks in the interest of right-holders.

The scope of the assessments mirrors that of corporate responsibility to respect more generally. The assessments are aimed at identifying both actual and potential human rights impacts that the company's activities and business relationships may lead to.

This process can be integrated into other risk assessments, provided that these assessments are undertaken by reference to international human rights. Human rights impact assessments must 'include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights'.[22]

For human rights impact assessments to conform to the human rights due diligence concept, such assessments should include references to international human rights. The UNGPs refer to the International Bill of Human Rights and the fundamental principles set out in the ILO Declaration on Fundamental Principles and Rights at Work as authoritative enumerations of human rights and a global minimum benchmark against which to assess performance.[23] These instruments provide a list of 'core internationally recognized human rights' standards.[24] While business

[19] *UNGPs*, *supra* note 7, Commentary to GP 17.

[20] Van Ho, *supra* note 7, at 246.

[21] *UNGPs*, *supra* note 7, Commentary to GP 18.

[22] *UNGPs*, *supra* note 7, Commentary to GP 18.

[23] *Id,* GP 12.

[24] *Id.* Commentary to GP 12.

enterprises must always consider the list of core rights[25], they may also need to consider additional international human rights standards in certain specific scenarios.[26]

The human rights due diligence concept requires that business enterprises assess the actual and potential adverse human rights impacts under *all* internationally recognized human rights. The reason is that *business enterprises can potentially impact virtually any of* these rights.[27] Business enterprises should consequently opt for a comprehensive and non-selective approach to human rights and systematically identify relevant policies and practices accordingly.

This challenges certain practices of business enterprises of identifying and addressing adverse human rights impacts in a targeted partial manner, focusing only on those human rights impacts that are of direct importance to the company from a financial perspective. By contrast, human rights due diligence requires companies to take into consideration all human rights, including those human rights they previously did not deal with, or even avoided: these are often those at greatest risk of being adversely affected. 'Cherry-picking' and selectively choosing at convenience a particular international framework and then focusing on the subset of human rights contained therein is, therefore, no longer acceptable.

Human rights impact assessment must be undertaken at 'regular intervals' in order to be responsive to the changes in human rights situations that are 'dynamic'. The UNGPs identify three intervals: (i) 'prior to a new activity or relationship; priori to major decisions or changes in the operation (e.g., market entry, product launch, policy change, or wider changes to the business)'; (ii) 'in response to or anticipation of changes in the operating environment (e.g., rising social tensions)'; and (iii) 'periodically throughout the life of an activity or relationship'.[28]

This requirement that business enterprises consider human rights in a comprehensive manner is consistent with the requirement of 'objectivity and non-selectivity of the consideration of human rights issues' as recognised by the Vienna Plan of Action.[29] The Program of Action indicated that human rights globally must be treated 'in a fair and equal manner, on the same footing, and with the same emphasis'.[30] The Preamble to the Universal Declaration for Development also recognises that the promotion of development requires equal attention and urgent consideration

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[25] *Id.* Commentary to GP 12.

[26] *Id.* Commentary to GP 12 reflects this:

> Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.

[27] *Id.* Commentary to GP 18.

[28] *Id*. Commentary to GP 18.

[29] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna, Jun. 25, 1993, ¶ 32.

[30] *Id.* ¶ 5.

to all human rights and that, accordingly, 'the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms'.[31]

5.2.2.1.2 Integrating the Findings

The finding of the human rights impacts assessments must be horizontally integrated across relevant internal functions and processes of the company, and the company must take appropriate action.[32] The aim is for companies to ensure that the findings of the assessment 'are properly understood, given due weight, and acted upon' in order to prevent and mitigate potential human rights impacts.[33] Since human rights considerations are often isolated throughout the company, this element may constitute the biggest challenge for companies according to the SRSG.[34]

The UNGPs note the responsibility of companies to embed policy commitments into all relevant business functions.[35] This embedding is aimed at 'ensuring that all personnel are aware of the enterprise's human rights policy commitment, understand its implications for how they conduct their work, are trained, empowered and incentivized to act in ways that support the commitment, and regard it as intrinsic to the core values of the work place'.[36] This embedding is 'a macro process' that can enable the 'successful integration of findings and timely and sustainable responses'.[37]

The 'integration' of findings entails a 'micro process of taking the findings about a potential impact, identifying who in the enterprise needs to be involved in addressing it and ensuring effective action'.[38] All those who are relevant for the identification and implementation of solutions should be identified and engaged. This includes those responsible for assessing adverse human rights impacts and those in control of decision-making and action to manage these impacts.[39] The responsibility for effectively addressing human rights impact should be allocated to the appropriate level and function within the company.[40]

The UNGPs note that internal decision-making, budget allocations and oversight processes should be in place to enable effective responses.[41] Companies should adopt measures that are

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[31] The Declaration on the Right to Development, Annex to U.N. G.A. Res 41/128, 97th Sess. Preambule (Dec. 4, 1986).

[32] *UNGPs*, *supra* note 7, GP 19.

[33] *Id.* GP 19.

[34] Ruggie, *2008 Report*, *supra* note 11, ¶ 62.

[35] *UNGPs*, *supra* note 7, Commentary to GP 19.

[36] OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012).

[37] *Id.* at 46-47.

[38] *Id.* at 46-47 (emphasis added).

[39] *Id.* at 19.

[40] *UNGPs*, *supra* note 7, GP 19(a)(i).

[41] *Id.* GP 19(a)(ii).

appropriate and proportionate to its capabilities. Large companies thus will likely be required to adopt a more systematized approach to ensure that findings are integrated effectively. A systemized approach may also be expected of smaller entities in the presence of potentially severe human rights impacts or a high probability of particular human rights impacts.[42]

In the case of a need to prioritise action, which might be due to resource constraints, the company should focus on preventing and mitigating those potential human rights impacts that are most severe[43] or likely to occur. Severity should be assessed in terms of the risks posed to human rights rather than to the company.

The UNGPs make a distinction in this context to the way the company is involved in the adverse human rights impact (i.e., causation, contribution or direct linkage) and the extent of leverage by the company over the entity causing the harm. The conduct that is required from companies varies accordingly.

In the case a company 'causes or may cause' an adverse human rights impact, a responsibility applies to the company to 'take the necessary steps to cease or prevent the impact'.[44]

In the alternative scenario where a company 'contributes or may contribute' to an adverse impact that are caused by another entity, the nature and extent of measures that a company should take to effectively integrate human rights can be determined less easily. A similar responsibility applies in that companies should adopt appropriate measures 'to cease or prevent its contribution'. Where the company does not control the other entity that causes the impact, the company should 'use its leverage to mitigate any remaining impact to the greatest extent possible'.[45] The UNGPs define leverage as 'the ability to effect change in the wrongful practices of an entity that causes a harm'.[46]

In the presence of potential adverse human rights impacts that are 'directly linked' to the operations, products or services of the company, and because the business relationship with another entity connects the company to the adverse human rights impact, a responsibility arises for the company to take appropriate action. In this scenario of 'direct linkage', appropriate action should be determined in relation to the following factors: 'the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights impacts'.[47]

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[42] Appropriate action might require that large companies create cross-functional decision-making groups that engage experts and staff from relevant functions or departments. Companies may combine these with internal reporting requirement. Senior management may need to be involved in decision-making and oversight in the presence of high-risk context or severe impacts. European Commission, Employment & Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights,45 (2013), http://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/E&RA/EC-Guide_E&RA.pdf.

[43] *UNGPs*, *supra* note 7, GP 24.

[44] *Id.* Commentary to GP 19.

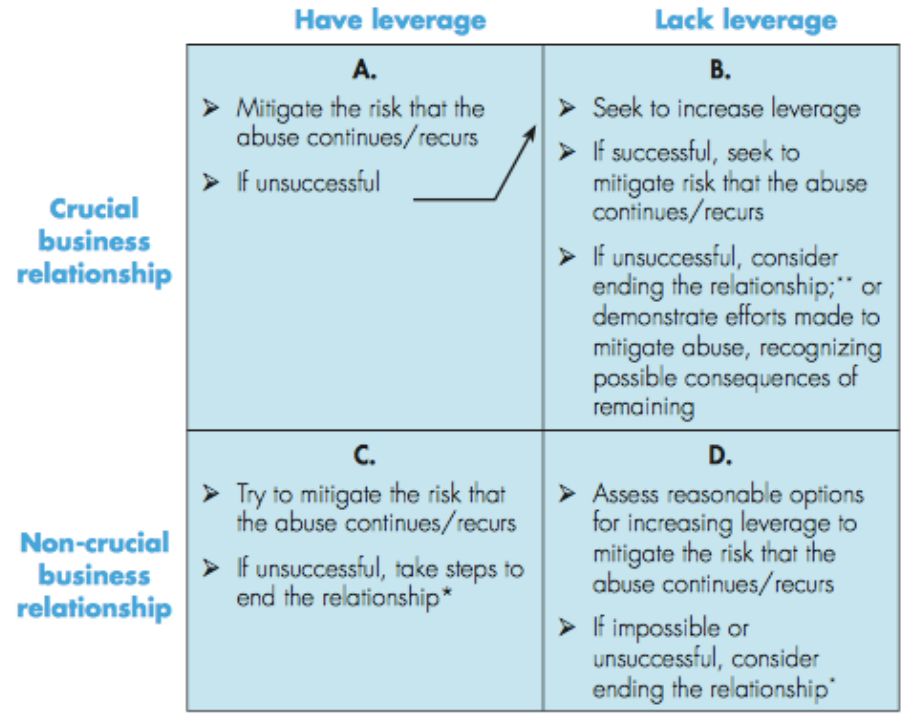
[45] *Id.* Commentary to GP 19.

[46] *Id.* Commentary to GP 19.

[47] *Id.* Commentary to GP 19.

The nature and extent of conduct that is expected from companies to exercise leverage in situations where the company is involved in adverse human rights impacts through causation or direct linkage is not exactly defined. The UNGPs note that the company should exercise the leverage that it has to prevent or mitigate the adverse human rights impact. In the case the company lacks leverage, it should find ways to increase it (e.g., by 'offering capacity building or other incentives to the related entity, or collaborating with other actors').[48] The company should consider ending the relationship, where increasing the leverage is not possible. The potential human rights impacts of such withdrawal should be taken into account. Where the company decides to maintain the relationship and the abuse continues, the company 'should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal- of the continuing connection'.[49]

Figure 1:[50]



* Decisions on ending the relationship should take into account credible assessments of any potential adverse human rights impact of doing so.

** If the relationship is deemed crucial, the severity of the impact should also be considered when assessing the appropriate course of action.

5.2.2.1.3 Tracking Responses

Another important element of the human rights due diligence process is the tracking of the effectiveness of businesses' responses. The purpose of tracking is aimed at verifying the

[48] *Id.* Commentary to GP 19.

[49] *Id.* Commentary to GP 19.

[50] OHCHR, *supra* note 36, at 50.

effectiveness of companies' responses in addressing their human rights impacts. More specifically, the commentary to UNGP 20 notes that tracking 'is necessary to know if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement'.[51]

The information that companies acquire through tracking can enable companies to improve the accountability for their human rights performance, both internally to management and communicating externally to shareholders and stakeholders.[52] Indicators can further assist companies in communicating more effectively.[53]

Tracking can be of instrumental importance for companies to drive continued improvements in their human rights performance. The information that is acquired through tracking can be used 'to identify trends and patterns' and to highlight 'repeated problems that may require more systemic changes to policies and process' and 'it brings out best practices that can be disseminated across the enterprise to further reduce risk and improve performance'.[54]

The UNGP notes that special efforts should go out to tracking the effectiveness of responses 'to impacts on individuals from groups or populations that may be at heightened risk of vulnerability and marginalization'.[55]

Processes for tracking responses may be integrated within other tracking systems; however, these systems should allow for qualitative feedback, including from right-holders.[56] Such integration can contribute to 'normalizing' attention to human rights.[57]

Companies are advised to undertake a root cause analysis, which can 'help pinpoint what actions by which parts of the enterprise, or by which other parties related to the enterprise, played a role in generating the impact, and how'.[58]

Business enterprises are required to rely on appropriate indicators[59] in tracking the effectiveness of its responses.[60] [61] Both quantitative and qualitative indictors should be used. Qualitative

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[51] *Id.* Commentary to GP 20.

[52] OHCHR, *supra* note 36, at 52.

[53] *UNGPs*, *supra* note 7, GP 20.

[54] OHCHR, *supra* note 36, at 53.

[55] *UNGPs*, *supra* note 7, Commentary to GP 20.

[56] OHCHR, *supra* note 36, at 53.

[57] *Id.* at 53.

[58] *Id.* at 54.

[59] There is no uncontested definition of indicators. De Felice has defined a business and human rights indicator as 'a "named collection of rank-ordered data that purports to represent the past or projected [human rights] performance" of a corporation and whose results are conveyed through a self-contained verbal or numerical expression, such as a count (257), a percentage (15 percent), or a verb (agree/not agree)'. Damiano De Felice, *Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities*, 37 Human rights Quarterly, 518 (2015). One of the defining features of indicators is that they can be used 'to evaluate' the performance of, *inter alia*, corporations 'by reference to one or more standards'.

indicators can be important to verify that a company's own assessment about its human rights performance is accurate from the perspective of affected stakeholder groups. Companies may have arrived at this assessment on the basis of quantitative indicators.[62]

Businesses draw on relevant internal and external perspectives, in particular the perspectives of potentially affected stakeholders.[63] Such engagement is important to verify the accuracy of companies' responses to human rights. The process also creates opportunities for affected individuals to have a voice in the process and to contribute the formation of an understanding based on the assessment of the performance of the company from a right-holder perspective.[64]

The UNGPs affirm that operational-level grievance mechanisms can be relevant for tracking business responses, for at least two reasons. First, they can support business enterprises in the identification of their adverse human rights impacts as part of their ongoing human rights due diligence, and in addressing systemic problems that trends and patterns in complaints may reveal. Second, they can enable the early and direct handling and remediation of adverse impacts, thereby 'preventing harms from compounding and grievances from escalating'.[65]

5.2.2.2 To Communicate (to Show)

One of the steps that business enterprises must undertake as part of the human rights due diligence process is communication. As stipulated by UNGP 17, business enterprises must 'account for' how the company goes about managing its human rights by 'communicating' this externally.[66] The purpose of such disclosure is for companies to 'show' their respect for human rights in practice. Companies should have reporting policies and processes in place by which they can provide transparency and accountability for their human rights due diligence. This responsibility to disclose is further elaborated in UNGP 21.

For companies to disclose in conformity to the UNGPs, certain modifications to current approaches to company disclosure should be undertaken. These changes relate to the type of information that should be disclosed, the nature and form of disclosure, and the audience companies should address their disclosure to and who is entitled to the information.

Kevin E. Davis, et al, *Introduction*, *in* Governance by Indicators: Global Power through Quantification and Rankings, 6 (Kevin E. Davis, et al. eds., 2012).

60 *UNGPs*, *supra* note 7, GP 20(a).

61 Indicators have the potential to serve as measurement tools. For a detailed assessment of existing human rights indicator systems, *see* Starl, K. et al., Human Rights Indicators in the Context of the European Union, FRAME Deliverable 13.1, (Dec. 24, 2014), available at http://www.fp7-frame.eu/wp-content/materiale/reports/12-Deliverable-13.1.pdf.

62 OHCHR, *supra* note 36, at 55.

63 *UNGPs*, *supra* note 7, Commentary to GP 20.

64 OHCHR, *supra* note 36, at 55.

65 *Id.* Commentary to GP 29. *See* Bijlmakers, et al., Report on tracking CSR responses FRAME Deliverable 7.4 (Nov. 2015, 2014), Bijlmakers, et al., Report on tracking CSR responses FRAME Deliverable 7.4 (Nov. 2015, 2014), http://www.fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-7.4.pdf.

66 *UNGPs*, *supra* note 7, GP 17.

Communications should meet a minimum standard in all instances. This minimum standard relates to both the content and process of disclosure. As previously indicated, unlike traditional disclosure under corporate law, the focus should be on both external and internal disclosure.[67] [68] The purpose of disclosure is to improve business respect for human rights. The focus of disclosure should therefore not only 'be the corporation's risk and liability, but the risks towards third parties'.[69]

The responsibility to disclose is based on human rights risks. The scope for disclosure mirrors the scope of the corporate responsibility to respect more generally. Business enterprises must disclose on their potential and actual adverse human rights impacts. The disclosure should reflect the human rights risks that a company causes by its own activities, contributes to or is directly linked to through the business relationships it enters into.

The occurrence of adverse human rights impacts that a company is involved in gives rise to the responsibility to communicate. When stakeholders bring human rights issues to the attention of business enterprises, the need to communicate becomes apparent.

Disclosure must include anything relevant for human rights. Since human rights impacts involve right-holders and affected stakeholders, disclosure must provide an adequate depiction of these impacts and a company's response thereto, and one focusing on the perspective of the right-holder.

Unlike in traditional disclosure, this information is not primarily owed to shareholders[70] or investors[71] but to all affected stakeholders, and most importantly, to individuals and groups whose human rights may be adversely impacted by the activities of the company.

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[67] Van Ho, *supra* note 7, at 246.

[68] It is true that companies already disclose externally under securities legislation; however, this disclosure is of a somewhat different character and serves a different function. The purpose of mandatory disclosure at a stage of the public offering of shares is to address the information asymmetry between inside and outside investors and to ensure that investors are protected when purchasing securities from an issuer. The purpose of mandatory disclosure on the secondary market is to maximise the information efficiency of the market. Louise Gullifer & Jennifer Payne, Corporate Finance Law: Principles and Policy, 524 (2nd ed., Hart Publishing. 2015).

[69] Van Ho, *supra* note 7, at 247.

[70] For instance, the requirements as to annual reports and accounts set out in the UK 2006 Company Act are primarily oriented towards the disclosure of information to shareholders. (*see* Section 7.9.1) Gullifer & Payne, *supra* note 68, 547-548.

[71] For instance, Art. 5 of Directive 2004/109/EC (Transparency Directive) notes that issuers of shares or debt securities shall make public a half yearly financial report that covers a condensed set of financial statements and an interim report. This disclosure requirement has been implemented by EU Member States through securities legislation and aims primarily at the disclosure of information to the market. Directive 2004/109/EC, of the European Parliament and the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, art. 5(1) 2004 O.J. (L 390) 38, Art. 5(1). Directive 2013/50/EU, of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonsiation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. Directive 2003/71/EC, of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the

Since disclosure is owed to affected stakeholders, and, in particular, to right-holders, the responsibility to communicate requires that business enterprises disclose the type of information that is useful for these right-holders. Consequently, companies must be transparent and account for their human rights due diligence in a manner that is meaningful to these stakeholders.

The purpose of disclosure is not only to inform the company's own conduct, but also to inform the conduct of these stakeholders (and, in particular, right-holders), in relation to business conduct.[72] This requires that disclosure must be of a type and form that allows right-holders to obtain an accurate depiction of a company's human rights due diligence.

Partly also for this reason, business enterprises must be responsive to the concerns raised by or on behalf of these stakeholders. Disclosure must be timely in order to be responsive to changes in human rights situations, which are often dynamic and evolving.

For right-holders to fully understand the impact and responses of a company, the latter may need to establish a dialogue with the former.[73] [74] It has been argued that communication must be useful for right-holders in order to meaningfully participate and respond in consultations and to serve as a basis for an exchange of information between stakeholders.

The UNGP 21 further elaborates on the implications of the responsibility to communicate information from a right-holder perspective for business enterprises, noting that communications should:

> (a) Be of a *form* and *frequency* that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;
>
> (b) Provide information that is *sufficient* to evaluate the adequacy of an enterprise's response to the particular human rights impact involved.

This principle indicates that disclosure must be of a form that is accessible to its intended audiences. Since the responsibility to disclose is also owed to right-holders, companies must ensure that right-holders can access the information on their human rights risks and responses. Doing so would give effect to the right to information, which is itself, of course, a human right.[75]

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implementation of certain provisions of Directive 2004/109/EC, art. 1(4) amending art. 5(1), 2013 O.J. (L 294) 13. Gullifer & Payne, *supra* note 68, 547-548.

[72] Van Ho, *supra* note 7, at 246.

[73] *Id*. at 248.

[74] For instance, Van Ho notes that, in transitional justice States that face a higher likelihood of recidivism to conflict, there is a need for a heightened level of transparency in order 'to assess unusual impacts on the economic, political and social inequalities between identified ethnic and social groups'. *See* Van Ho, *supra* note 7, at 248.

[75] See, *e.g.*, Article 19(2) International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

As is the case for the human rights due diligence process more generally, the responsibility is pragmatic in that discretion is left to companies to communicate through means that are appropriate to the circumstances of the company. These means can take on various forms, including 'in-person' meetings, online dialogues, consultation with affected stakeholders, and formal public reports'.[76]

The responsibility to disclose shifts from pragmatic means of disclosure to more technical means when the adverse human rights impacts reach a certain threshold of severity. Severe human rights impacts prompt a responsibility to report formally on how companies address these adverse human rights impacts.[77] Such formal reporting can range from 'traditional annual reports and corporate responsibility/sustainability reports, to include on-line updates and integrated financial and non-financial reports'.[78]

The responsibility to disclose under the UNGPs is often more demanding than the transparency that is commonly expected under a Corporate law / Financial regulation regime.[79] The UNGPs suggest that companies should disclose information on human rights risks and responses, even when such disclosure goes beyond what is perceived as materially relevant for the company from a financial viewpoint.

A restriction is built into the responsibility to disclose in the sense that disclosure should not pose 'risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality'.[80] Thus the responsibility to disclose entails in practice a balancing exercise, between disclosing information in a manner that provides the most optimal representation of a business' respect for human rights while minimizing the potential adverse impacts that such disclosure may have on the human rights of individuals.

In short, the communications of business enterprises must be frequent,[81] accessible,[82] sufficient,[83] balanced and informed in order to provide an adequate measure of transparency and accountability for respect for human rights.[84]

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[76] *UNGPs*, *supra* note 7, Commentary to GP 21.

[77] Absent an element of severity, the form of disclosure is discretionary and business enterprises may communicate through alternative, informal forms of communications. Examples of informal forms of disclosure are 'in-person meetings, online dialogues, consultation with affected stakeholders'. *Id*. Commentary to GP 21.

[78] *Id.* Commentary to GP 21.

[79] Van Ho, *supra* note 7, at 247.

[80] *UNGPs*, *supra* note 7, Commentary to GP 21.

[81] *Id.* GP 21 (a).

[82] *Id.* GP 21 (a).

[83] *Id.* GP 21 (b).

[84] *Id.* Commentary to GP 21.

5.2.2.2.1 To Enable Inclusive Decision-Making and Participation

Human rights due diligence requires that business enterprises involve in meaningful consultations with relevant stakeholders, at different stages of the due diligence process. The decision of business enterprises should be made in an inclusive and participatory manner that allows for the evaluation of potential risks to human rights.

The reason is that human rights due diligence does not relate only to the risks to a company's economic interests[85], but to the interests of stakeholders more generally, and right-holders in particular. In this regard, the human rights due diligence challenges the presumption under corporate law that business enterprises should manage only those risks that are material to the company. Human rights due diligence entails that companies should manage the risks that their activities and relationships may pose to the rights of affected individuals and communities.[86] Understanding these risks and the appropriate care that a company should take from a right-holder perspective requires engagement with these right-holders or those who may legitimately represent them.

The meaningful consultation with potentially affected groups and other relevant stakeholders is expected at various stages of the human rights due diligence process. A company should 'involve in meaningful consultation' when undertaking a human rights impact assessment in order to identify and assess the nature of human rights impacts. The assessment is aimed at obtaining an accurate account of the 'specific impacts on specific people, given a specific context of operations'.[87] This entails that companies should consult affected stakeholders directly for the purpose of understanding their concerns.[88] Special attention must be paid to the human rights impacts on individuals from groups or populations at heightened risk of vulnerability and marginalization, and gender-sensitive human risks.

Companies should furthermore draw on feedback from affected stakeholders when tracking the effectiveness of their responses to verify whether their adverse human rights impacts are addressed.[89] The purpose is for business enterprises to develop an understanding of the nature of the human rights impacts to inform their human rights due diligence processes and policies and to consider the stakeholder experiences.

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[85] It should be noted, however, that the failure to identify and manage and human rights risks can result in significant financial costs, including 'opportunity costs, financial costs, legal costs and reputational costs'. [Interview with Ruggie.] *Also see* a study by Davis and Franks re: the potential costs that arise for extractive companies due to company-community conflicts. Rachel Davis & Daniel M. Franks, *The costs of conflict with local communities in the extractive industry*, SRMining2011 (Oct. 21, 2011), *available at:* http://shiftproject.org/sites/default/files/ Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf.

[86] Commentary to GP 17. Ruggie, *supra* note 10, at 99. Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation*, 22 Business Ethics Quarterly 145, 145-177, 149 (2012).

[87] *UNGPs*, *supra* note 7, Commentary to GP 18.

[88] *Id.* GP 18 and Commentary.

[89] *Id*. GP 20.

Whether stakeholders can meaningfully participate in consultations with business enterprises and respond to the assessments of risks and care by a company will depend on the information that is available to them. The UNGPs have been criticized in relation thereto. More specifically, it has been rightly argued that the UNGPs recognize as the main function of corporate disclosure providing information that demonstrates human rights due diligence and that limits liability for the company. The disclosure of information that is useful for right-holders in order to meaningfully participate and respond in consultations and can serve as a basis for an exchange of information between stakeholders appears to be of less importance to the UNGP. The UNGPs do not expressly note that business enterprises should have such an information exchange with stakeholders. Only in relation to 'severe' risks do the UNGPs recognize a responsibility for business enterprises to report formally. In the absence of mandatory disclosure obligations, there is no guarantee that companies will provide the necessary degree of transparency, and in a timely manner for right-holders to be able to meaningfully participate in consultations.[90]

The introduction of meaningful stakeholder consultation as an integral part of the human rights due diligence process aligns due diligence by companies with the considerations that underlie the human rights principles of participation and democracy. The enjoyment of human rights is tied to the requirements that individuals can participate in decision-making that affects their lives. The right to participate is in itself a human right, and stakeholder consultations are an important means to realize this right. Participation is also an important foundational element of democracy, and a means to achieve it.[91] Promoting participation in decision-making through consultations can potentially empower individuals, which is particularly relevant for persons from groups or populations at heightened risk of vulnerability or marginalization, or facing gender-specific risks.[92]

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[90] Van Ho, *supra* note 7, at 244.

[91] Democracy is widely considered as one of the general principles of human rights governance that sustains its legitimacy, *see* J. O. McGinnis & I. Somin, *Democracy and International Human Rights Law 84 Notre Dame Law Review* (2009). It is founded on 'the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'. Human Rights Council Res. 19/36, Human rights, democracy and the rule of law, 19th Sess., April 19, 2012, U.N. A/HRC/RES/19/36 (Apr. 19, 2012). The consent of the people is recognised as a writ for the legitimate right to govern. Article 23(1) of the UDHR states, '[T]he will of the people shall be the basis of authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret voting or by equivalent free voting procedures.' Article 25 of the International Covenant on Civil and Political Rights (ICCPR) furthermore enunciates the democratic values of political equality and control as anchors of democratic governance, outlining equal rights, opportunities for citizens to participate in public affairs 'directly or through freely chosen representatives', to vote and to be elected and to have access to public service without discrimination. Scholarship has advanced the view that democracy is not only a prerequisite for legitimate governance, but it may in fact be a legal entitlement. T. M. Frank, The emerging right to democratic governance, 86 *The American Journal of International Law*, 46-91 (1992).

[92] The UNDRIP recognizes that indigenous people have the right to participate in decision-making in matters that would affect their human rights. This entails that States must consult with indigenous peoples in order to obtain their free and informed consent prior to the adoption and implementation of legislative and administrative measures that may affect them, or the approval of any project affecting their lands, territories or other resources. Free, prior and informed consent is an expression of indigenous peoples right to self-determination, by virtue of which they 'freely determine their political status and freely pursue their economic, social and cultural development'. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. 61/295, Art.3,18, 19, 32.2. (Sept. 13, 2007). Working Group on the issue of human rights and transnational

Business enterprises are invited to exercise discretion to right-holders when interpreting their human rights due diligence.[93] Since business enterprises must consult with relevant stakeholders, there is less room for companies to avoid critical views. Stakeholder consultations can enhance the credibility of interpretations of due diligence. Such consultations constitute a method to clear up ambiguities, identify and address potentially conflicting understandings of how business enterprises ought to satisfy their human rights due diligence requirements and to arrive at a common understanding. Dialogue can facilitate relationships of trust that are essential for the effectiveness of the measures. Consultations thus provide incentives for companies to comply. Business performance will be subject to review, hence companies will seek to avoid being identified by stakeholders as non-compliant. Involvement of stakeholders in the tracking and measurement of compliance makes non-compliance more difficult to conceal. In this regard, stakeholder consultations can serve to distinguish genuine implementation of human rights responsibility from public relations exercises.

5.2.2.2.2 To Consult Human Rights Expertise

Business enterprises should be adequately informed by relevant human rights expertise. Business enterprises are expected to draw from internal and/or external expertise in formulating their human rights policy.[94] As a company's operations become more complex, the reliance on such expertise becomes more important to an assessment of how to best respond.[95] When operating in intricate countries or local contexts that complicate efforts to respect for human rights, business enterprises should also rely on expertise to determine how best to meet their responsibility. Business enterprises should draw on human rights expertise as part of their human rights impact assessment process.[96] Sources of expertise may be written or non-written, internal or external to the company. When facing complex operating environments, companies are advised to consult not only expertise internal to the enterprises, but also 'to consult externally with credible, independent experts, including from governments, civil society, national human rights institutions ('NHRIs') and relevant multi-stakeholder initiatives'.[97]

The decision of business enterprises should be made in a manner that is objective and credible and that allows for optimal responses to the corporate responsibility to respect.[98] The concept challenges the practices of business enterprises of practically self-re-defined existing standards by applying an interpretation of human rights of their own, one that is most convenient for

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corporations and other business enterprises, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises in Accordance with Human Rights Council resolution 17/4, transmitted by note of the Secretary General*, U.N. doc. A/68/279, ¶ 10 (Aug. 6, 2013). International Covenant on Civil and Political Rights, Art. 4.1, Dec. 16, 1966, G.A. Res. 2200A (XXI). The Declaration on the Right to Development, Annex to U.N. G.A. Res 41/128, 97th Sess. (Dec. 4, 1986), Preambule.

93 Ruggie, *supra* note 10, at 99.

94 *UNGPs*, *supra* note 7, at GP 16.

95 *Id.* Commentary to GP 16.

96 *Id.* GP 18 (a).

97 *Id.* Commentary to GP 23.

98 *Id.* GP 16.

corporate interests. Business enterprises have sometimes referenced international human rights instruments, extracted certain provisions, and then interpreted the standards codified therein in a manner that altered their meaning and protection as intended by the respective instrument.[99] Reliance on relevant expertise can result in a more objective assessment of appropriate business responses in complex environments. It can promote greater consistency and coherence in interpretations of human rights standards across business enterprises.[100]

5.3 Human Rights Due Diligence as a Standard of Conduct: a Balancing Exercise

The human rights due diligence concept entails a judgment as to whether the policies and processes that business enterprises must have in place to meet their responsibility to respect are sufficient and appropriate, having regard to the circumstances of the company.[101] This entails a balancing act in practice.

The balancing exercise that is integral to human rights due diligence differs from the one that is characteristic to the due diligence concept under corporate law. The concept as it has been applied to define the scope of director's duties of care in corporate law is traditionally oriented towards finding a balance between the company's economic risks and opportunities.[102] In many jurisdictions, corporate law adopts a 'shareholder approach', in the case of which the balancing act centers around the impact of decision-making on the best interest of the company, which is equivalent to the maximization of shareholder's value as owners. The factors that are determinate for striking this balance are often private interests that are of concern to the corporation only.

Corporate law may opt for 'enlightened shareholder value approach'. This approach permits or, in limited cases, requires directors to have regard to a wider range of stakeholder interests. Then human rights may be among the non-shareholder interests that inform the balancing act, provided doing so keeps within the director's duty to act in the company's best interest.[103] Depending on the jurisdiction, the company's best interest may be understood in a broader sense as encapsulating the combined interests of society at large. This seems to be a recent trend, however, and in the most common scenario the directors may have regard for these broader interests, but ultimately owe their duty of care to the company's shareholders.[104]

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[99] Bob Hepple, *A race to the top? International Investment Guidelines and Corporate Codes of Conduct* 20 Comparative Labor Law & Policy Journal, 358 (1999).

[100] The importance of consistency was signaled by the 1993 Vienna Declaration and Program of Action that recognized 'the need to maintain consistency with the high quality of existing international standards'. Vienna Declaration and Programme of Action, *supra* note 29, ¶ 6.

[101] *UNGPs*, *supra* note 7, GP 15.

[102] Tara Van Ho, *Operationalizing Human Rights in the Business Context,* University of Essex (March 31, 2015), http://blogs.essex.ac.uk/hrc/2015/03/31/operationalizing-human-rights-in-the-business-context/.

[103] According to Mushlinski, the acting to promote the success of the company entail in practice to strike a balance between 'the needs of the company and its members to be protected from incompetent management and the need to give directors flexibility and freedom to engage in entrepreneurial activity'. Muchlinski, *supra note 86,* at 161.

[104] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum: Human Rights and Corporate Law: Trends and

The balancing exercise that is at the core of the human rights due diligence concept more closely resembles the balancing act that courts undertake under civil tort law, more specifically in their normative judgement as to whether a company has committed a tort of negligence by having failed to meet a legal duty of care under national tort law.[105] Before arriving at a verdict as to whether a company is liable for having acted negligently, the court undertakes a balancing act in order to determine whether the company has taken the measures that it was reasonably expected to take in order to prevent foreseeable harm to legal interest from materializing. More exactly, the court's balancing act 'boils down to an assessment of whether the parent company has exercised due care towards the foreseeable and legally protected interests of the host country plaintiffs, in light of the potential risks inherent in the multinational corporation's host country activities'.[106] This balancing act centers around the impact of corporate decision-making on human rights, rather than the company.

It is similar to the balancing act related to the human rights due diligence concept in that it seeks to find a balance between care of the company and risks to human rights. The human rights due diligence concept as set out in the UNGPs reflects that a balance should be struck between taking sufficient due diligence measures and the actual and potential human rights impacts that a company is involved through its own activities and business relationships. The nature of this balancing exercise is pragmatic in that it revolves around the aim of avoiding and mitigating the adverse human rights impacts and the means by which this is achieved. These must commensurate to the capabilities of the company in terms of their scale and complexity.[107]

The following factors are determinant for striking the right balance: the severity of the adverse human rights impacts, the likelihoods of adverse human rights impacts occurring (operating context and sector) and the ability of the company (size, ownership and structure).[108] These resemble the four factors that are balanced by a court in a tort liability case under civil tort law, namely; 'the probability that the risk will materialize; the seriousness of the expected damage; the character and benefit of the activities in question; and the burden of taking precautionary measures'.[109]

The UNGPs suggest that a proportionality test applies, in that the company acts in accordance with its due diligence responsibility if it adopts measures that are sufficient to manage human rights risks that it is involved in. These measures should be suitable to their objective and, provided they are indeed sufficient, should be commensurate to the capabilities of the company. As small and medium size enterprises have lesser capacity and more informal processes and management structures, their responsibility might be limited to measures of lesser complexity

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Observations from a Cross-National Study Conducted by the Special Representative, at 15-18, A/HRC/17/31/Add.2. (May 23, 2011) (by John Ruggie). Tara Van Ho, *supra* note 102.

105 *See* section, 6.3.2.

106 Liesbeth F.H. Enneking, Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability, 232-233 (Eleven International Publishing, 2012).

107 *Id.* at 232-233.

108 *Id.* at 232-233.

109 *Id.* at 233.

and scale.[110] The means by which a company can discharge its responsibility can also vary according to whether a company conducts its business through a corporate group or individually.[111] In case of the presence of a more significant probability of adverse human rights occurring, which may be explained in relation to the particular industry or operational contexts of the company, business enterprises may need to take measures of greater scale and complexity.[112]

The responsibility of companies requires more of companies if the operations of a company or the operating context give rise to human rights risks of a more serious nature. If the human rights risks reach a threshold of severity, which is judged in relation to 'scale, scope and irremediable character of the impact', the responsibility to respect requires corresponding measures.[113] The responsibility will be less contingent on practical considerations of what means suit the economic interests of the company and more on technical considerations of what measures are needed to effectively mitigate or avoid the adverse human rights impacts.[114] The due diligence concept would require companies to adopt technical measures, thereby removing the scope of discretion of companies by imposing a requirement on companies to act in a certain manner. Since certain measures would be required regardless of economic considerations, the responsibility to respect would be more oriented towards achieving the desired result of effectively avoiding or prioritizing adverse human rights impact.[115]

Upon identification of human rights situations and risks, a company must begin to take action to address those human rights impacts that are 'most severe' or 'where delayed response would make them irremediable'. It is further stipulated that '[s]everity is not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified'.[116] A company must also prioritize those areas where the risks of adverse human rights impacts occurring are greatest.[117]

5.4 The Human Rights Due Diligence Concept from an International Human Rights Perspective

International Human Rights law prescribes certain limitations to the exercise of human rights, which are premised on the understanding that the realization of human rights is not only an

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110 *UNGPs*, *supra* note 7, Commentary to GP 14.

111 *Id.* Commentary to GP 14.

112 *Id.* Commentary to GP 12.

113 *Id.* Commentary to GP 14.

114 Note the resemblance with: Enneking, *supra* note 106, at 232-233.

115 For similar argument, *see*, *Id.* at 233-234.

116 *UNGPs*, *supra* note 7, Commentary to GP 24.

117 This is for instance the case where the value chains of a business enterprise comprises of such a large number of entities that the conduct of human rights due diligence across all entities in the chain is unreasonably difficult. In such cases, 'business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence' *Id.* Commentary to GP 17.

individual rights, but also a community interest and commitment. Courts have commonly applied the method of a balancing exercise in their interpretation of 'qualified' human rights.[118] States are required to strike a balance between securing the rights and freedoms of individuals and the interests of a community, e.g., national security, public safety, or public order.[119] In their evaluation of this balancing act, courts often apply the principle of proportionality, meaning that 'the objective of the communal aim or interest has to be sufficiently important to limit the right; the measure of the limitation has to be suitable and no more than necessary to defend the communal interest in question'.[120]

Overall, these provisions of international human rights treaties or international instruments that contain such 'qualified' human rights have to be interpreted strictly.[121] [122] For instance, the ICCPR under Art. 18 (3) stipulates that the freedom to manifest one's religion or beliefs 'may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.[123] The Human UN Rights Committee in its General Comment 22 states that this provision must be interpreted strictly, meaning that restrictions are not allowed on grounds not specified in the provision, may only be applied for the purpose prescribed, must be 'directly related and proportionate to the specific need on which they are predicated', must not be 'imposed for discriminatory purposes or applied in a discriminatory manner' and if based for the purpose of protecting morals, the restriction 'must be based on principles not deriving exclusively from a single tradition'.[124] [125]

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[118] The act of balancing is a method that has been employed by the ECtHR, the CJEU and many national Constitutional Courts for the interpretation and implementation of qualified human rights. This balancing exercise entails the identifying, qualifying and weighing of the interests of the individual and the community/public interest, to ultimately decide on the most optimal outcome. Başak Çali, *Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions*, 259 Human Rights Quarterly 251, 253 (2007).

[119] Working Group on the issue of human rights and transnational corporations and other business enterprises, *supra* note 92, ¶ 7, ftn 18.

[120] Çali, *supra* note 118, at 253.

[121] Working Group on the issue of human rights and transnational corporations and other business enterprises, *supra* note 92, ¶ 7, ftn 18. Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4 (1985).

[122] For instance, limitations on human rights must be avoided, community interests cannot justify the wholesale violation of human rights, and must be in conformity with the objective of respective human rights instrument. Bertrand G. Ramcharan, The Fundamentals of International Human Rights Treaty Law, 15 (Martinus Nijhoff Publishers. 2011). Ramcharan refers to Article 9(2) of the African Charter on Human and People`s Rights that stipulates: 'Every individual shall have the right to express and disseminate his opinions within the law'. The Commission held that national law could not offset the right to express and disseminate one's opinions; 'To allow national law to have precedence over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter'.

[123] International Covenant on Civil and Political Rights, Art 18.3, Dec. 16, 1966, G.A. Res. 2200A (XXI).

[124] U.N. Human Rights Committee, General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add. 4, 48th Sess. (Jul. 30, 1993).

This means that 'the objective of the communal aim or interest has to be sufficiently important to limit the right; the measure of the limitation has to be suitable and no more than necessary to defend the communal interest in question'.[126]

The balancing exercise that is integral to International Human Rights law differs in several aspects from the one that underpins the human rights due diligence concept under the UNGPs. The due diligence concept in international human rights law attempts to strike a balance between the communal interest and the human right of the individual. The balancing exercise that relates to the human rights due diligence concept is aimed at finding a balance between the private interests of the company and individual and/or community interests. The factors that are determinate for finding this balance are private interest factors related to risk to human rights and care by the company.

The balancing of economic interests against individual/communal interests may not be controversial from a human rights perspective. One could argue that the realization of human rights is not only the prerogative of the human rights of individuals, but also that of the community in promoting economic development. The relation between international peace and security, the creation of conditions of economic and social progress and development, and the promotion and protection of human rights is recognized in Art. 55 of the UN Charter. The positive impacts that business enterprises and markets can have on the realization of human rights are well known. These can entail achieving concrete outcomes for the realization of human rights, for instance by providing access to credit, education, food and water through private service delivery. Business enterprises can also contribute to improvement of social conditions or economic development.

The significance of the positive contribution of business enterprises to human rights was acknowledged in HRC Resolution 17/4. The Resolution signaled next to the importance of effectively mitigating the negative, also the significance of fully realizing the positive impacts of globalization and of deriving maximally the benefits of the activities of business enterprises.[127] The HRC also recognized that proper regulation, including through national legislation, of business enterprises can assist in channeling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms.[128] [129]

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[125] Another example can be found in the context of indigenous people's rights. The Declaration on the Rights of Indigenous People (UNDRIP) stipulates in Art. 46 that the exercise of the human rights set forth in the Declaration:

> Shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

United Nations Declaration on the Rights of Indigenous Peoples, Art. 46, G.A. Res. 61/295, U.N. Doc.61/295, Annex (Sept. 13, 2007) (UN General Assembly 2007).

[126] Çali, *supra* note 118.

[127] Human Rights Council Res. 17/4, Human rights and transnational corporations and other business enterprises, 17th Sess., May 30 - June 17, 2011, U.N. Doc A/HRC/RES/17/4 (July 17, 2007).

[128] *Id.*

The balancing exercise that underpins the human rights due diligence concept as set out in the UNGPs thus could be justified from a human rights perspective. The due diligence concept seems to require companies to adopt measures that are sufficient to prevent and mitigate their potential and actual adverse human rights impacts without interrupting companies in their pursuit of economic objectives more than necessary, with the aim of achieving the most optimal outcome for human rights. This seems to align with the objective of the UNGPs, which is 'enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization'.

When comparing the human rights due diligence concept as defined by the UNGPs with the due diligence concept as it exists in international human rights law, however, several concerns arise. These can be explained in relation to the fact that the human rights due diligence concept builds on the language of corporate law and is not human rights-based.

The balancing exercise is oriented towards the business enterprise and whether it acted to the best of its abilities, in view of its capabilities and circumstances. The interests of individuals are balanced against the economic/business interests of a company to take action that is sufficient and commensurate to the capabilities of the company. Depending on one's viewpoint, the corporate responsibility to respect human rights may encourage a 'good enough' due diligence[130] or does not allow companies to get away lightly. The former viewpoint suggests that the focus is not on achieving the maximum level of outcome in its objective of managing the adverse human rights risk, but on achieving the minimal constraints possible on business enterprises while managing adverse human rights impacts. The human rights due diligence that is sufficient and the least burdensome on the company ought to be chosen. The corporate responsibility to respect human rights may also be understood as an assessment of whether all measures that are within the companies' capabilities have been taken to manage risk to human rights. The human rights due diligence concept appears to supply arguments that point into the direction of business enterprises and their interests. Both interpretations reflect that the due diligence concept originates from corporate law and the human rights due diligence concept is business-oriented.

Consequently, business interests in managing adverse human rights impacts seem to be at the center of the balance act. If human rights risks had been at the center, the balancing exercise would have been oriented towards strengthening and reinforcing the processes and policies of companies to achieve full respect for human rights, rather than finding the most practical and economically efficient solution for business enterprises.[131] Only when the risk of adverse human

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[129] In a draft of the UNGP, the SRSG noted the following: 'Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources, capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights.' Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Draft: Guiding Principles For The Implementation Of The United Nations `Protect, Respect and Remedy` Framework,* ¶ 1 (2010).

[130] Van Ho, *supra* note 7, at 245.

[131] *See e.g.,* the following provisions that contain language that endorses a human rights approach: Human Rights Council Res. 11/3, Trafficking in persons, especially women and children, 27th Sess., June 17, 2009, A/HRC/RES/11/3, ¶ 1 (Jun. 17, 2009) and 3(f), Trafficking in women and girls, Resolution adopted by the General Assembly on 18 December 2008, G.A. Res. 63/156, A/RES/63/156, ¶ 18. (Jun. 2-18, 2009).

rights impacts meets a threshold of severity, the focus of responsibility shifts towards the technical measures that are necessary to achieve the objective of effectively avoiding and mitigating adverse human rights impacts, and the practical economic/business interests of the company become of lesser importance.

The balancing exercise is also corporate-centric in that the company is the broker, and will ultimately be responsible for finding the appropriate balance.[132] This is in part because the balancing exercise evolves around what constitutes 'appropriate' policies and processes. To the extent that what constitutes as 'appropriate' depends on the circumstances of the company, which the company is in the best position to assess, the company seems best positioned to determine what policies and policies are 'appropriate' to discharge its responsibility. This is more so because the balancing exercise is determined by factors that are not only related to human rights but also to the economic/business interests (e.g., size and structure of the company). The requirement for meaningful engagement and consultation of expertise in order to obtain a proper understanding of the adverse human rights risks from a right-holder perspective may expose the decision-making of the company to external scrutiny and influence, the ultimate decision falls to the company.

Business enterprises thus seem to be in the driver seat. Insofar that human rights due diligence allows for discretion to companies to determine by what policies and practices to manage adverse human rights risks, companies may want to influence the balancing act to their advantage, as a function of the company's pursuit of economic objectives. Business enterprises may exercise influence over this balancing act not only to safeguard their own commercial interests within particular situations, but also to ensure that interpretations of human rights due diligence keep within their convenience. This is in part because the activities of business enterprises are conditioned by their legal and incentive structures that are coupled to economic normative frameworks. While the human rights due diligence concept is intended to revolutionize existing approaches to due diligence in the interest of human rights, the question arises whether this can be achieved in practice. Can these economic legal and incentive structures be reconciled with the human rights due diligence concept?

One may also consider the complexities involved in the balancing exercise where human rights interests are concerned.[133] The balancing exercise is complicated by the different and possibly conflicting interests that decision-making by the company can give rise to and the possible conflicting priorities that call for choices and trade-offs between human rights interests. The prerogative to conduct a balancing exercise between human rights interests commonly falls to the State and within the public national and international state/law system. The human rights due diligence concept entails that business enterprises may also need to consider and make difficult trade-offs in relation to conflicting human rights interests, which is something that business enterprises are commonly not familiar with. This raises the question whether undemocratic private corporations should exercise the ample discretion that comes with such policy decisions and balancing acts.[134]

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[132] Van Ho, *supra* note 7, at 246.

[133] Van Ho, *supra* note 7, at 240.

[134] Larissa van den Herik & Jernej Letnar Černič, *Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again*, Journal of International Criminal Justice, 742 (2010).

Depending on the situation, resolving conflicting interests can involve complexity in terms of the diversity and range of interest that need to be considered, and competing priorities and trade-offs. Conflicting interests may arise over competing human rights risks or issues, competing human rights claims of different social groups or communities, long-term v. short-term interests in considering human rights impacts, human rights that are enjoyed in the community (e.g., freedom of association, rights of members of minorities, the freedom to manifest one's religion or belief) and those enjoyed by individuals, the human rights interests of a more disadvantaged group and a more advantaged group, and the community interests of long-term economic success of business enterprises and short-term human rights interests.

5.5 Human Rights Due Diligence as an Open-Ended and Adaptable Concept

The human right due diligence concept as formulated in the UNGPs is undefined to a certain degree. The fact that it is articulated at a level of abstraction can be explained by its nature as a principle. The concept is a baseline normative standard that reflects an interpretation of existing international social expectations. The SRSG derived this concept by a process of interpretation of existing standards and practices, which involved fact-based research projects and extensive consultations. The corporate responsibility to respect and the human rights due diligence concept enjoy acceptance by business enterprises. As a result of the anonymous consensus reached on the UNGPs within the HRC, the concept also enjoys certain recognition among States. The corporate responsibility to respect reflects a core concept, the elements and parameters of which, as outlined above, are not supposed to be challenged.[135]

Beyond this core however, there is discretion to business enterprises and other actors to translate the human rights due diligence concept to practice. There is discretion for companies to decide the type and scope of the measures business enterprises seek to meet their responsibility. Its effective implementation may require means of different scale and complexity depending on the circumstances of the company, in terms of the size of a company, its nature and operational context, and the severity of its adverse human rights impacts.[136] The human rights due diligence concept supplies arguments that point to the direction of striking an appropriate balance between risks and care, without prescribing a particular outcome.

The ambiguity and openness of the human rights due diligence concept may not be desirable to the extent that it reduces the clarity that the UNGPs in themselves were set out to provide. It can lead to uncertainty about what conduct is required from companies for the effective implementation of their responsibilities. Uncertainty can incite non-compliance or diverging compliance between companies. It can also complicate efforts to monitor compliance and to

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[135] The same applies for the interpretation of the State duty to protect, which has not been without criticism. The UNGPs have been criticized for 'locking-in' an interpretation of international human rights law where this core cannot be challenged. This may impede the development of alternative regulatory approaches to business and human rights, and thus, restrict innovation, Lopez argues. '[T]he supposed comprehensiveness and authority of [the Guiding Principles] leaves nearly no room for improvement or further development of additional standards and norms'. This position is '*contrary to the evolving nature of international law standards'*. *See* Carlos Lopéz, *The 'Ruggie process': from legal obligations to corporate social responsibility?*, *in* Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, 60 (Surya Deva & David Bilchitz eds., 2013).

[136] *UNGPs*, *supra* note 7, GP 14, 17(b).

holding business enterprises to account. The vague language of the UNGPs was a major point of critique by civil society organizations.[137]

Where the State duty to protect is concerned, the lack of specificity seems less of an issue. The State duty to protect reflects the existing legal standards established in international human rights law. If the State duty to protect had been specified in greater detail, this may have introduced a standard that would go beyond the existing standard. The normative contribution of the UNGPs was not to create any new legal obligations or to affect the human rights obligations of States as existed.

Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.[138]

While raising legal standards for States is desirable and morally justifiable from a human rights viewpoint, doing so would have undermined the SRSG's claim that the UNGPs did not create new legal obligations. To the extent that the UNGPs were intended to reflect international human rights law as it exists, rather than, as it should be, openness in language can be considered on point.

International human rights law does not prescribe how States should legislate in order to prevent and remedy human rights abuses within their jurisdictions. The SRSG acknowledged that *'[w]ithin these parameters, States have discretion as to how to fulfill their duty*', while noting that *'[t]he human rights treaties generally contemplate legislative, administrative and judicial measures'*.[139] The discretion left to States is intended and justified by various considerations.

First, if international human rights were to prescribe State action, this may result in States being obligated to adopt measures that are inappropriate to conditions and situations in a respective State. Discretion is left to State to identify and design the measures that best correspond to the conditions and factors in domestic jurisdictions, in order to deliver the most optimal results in protecting human rights in practice. It is not uncommon, as Kinley and Chambers have pointed out, that international human rights instruments are formulated in open-ended language and accommodate for flexibility in their interpretation.[140] [141] While more detailed language can reduce

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[137] In a joint statement, civil society notes: 'In Principles 1, 5, 6, 8, 10, 13, 14, 17, 23, 24, and 25, the draft refers to "appropriate steps," "appropriate actions," and steps that should be taken "where appropriate" when referring to State regulation of business activity. However, the draft UNGPs provide little guidance as to what is or is not appropriate and, in so doing, fail to provide concrete recommendations for enhanced protection of human rights against abuse involving business.' Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights (Jan. 2011), https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf.

[138] *UNGPs*, *supra* note 7, General principles.

[139] J. Ruggie, *Building on a 'landmark year' and thinking ahead,* Institute for Human Rights and Business, para. 14 (Jan. 12, 2012). http://www.ihrb.org/commentary/board/building_on_landmark_year_and_thinking_ahead.html.

[140] David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 20 Human Rights Law Review (2006).

[141] The 'margin of appreciation' granted to States in the fulfillment of their obligations under the European Convention of Human Rights, is one example. The doctrine has been applied by the Court in cases were

ambiguity, some level of abstraction seems necessary to facilitate interpretations of substantive treaty provisions that are in conformity with the object and purpose of international human rights law and evolving circumstances. International human rights treaties are 'living instruments' that must be interpreted in light of present-day conditions.[142] Since the object and purpose of international human rights law is to protect individual human beings, its provisions must 'be interpreted and applied so as to make its safeguards practical and effective'.[143]

Second, discretion also gives States a degree of flexibility to adopt measures in proportion to their capacities. The ICESCR appreciates this when considering that States enjoy certain discretion when adopting measures to discharge their international legal duties under the ICESCR. The economic, social and cultural rights in this convention are to be achieved progressively. It follows that States have an obligation to take appropriate measures towards the full realization of these human rights, to the maximum of their available resources.[144] That what constitutes 'appropriate' measures is relative to the resources that a State has at its disposal. States are free to decide what means are most appropriate in light of circumstances with respect to each right.[145] Means can include, but are not limited to administrative, financial, educational and social measures.[146] The Committee on Economic, Social and Cultural Rights has held that legal measures may be indispensable in certain purposes.[147] The discretion of States to choose 'appropriate' measures allows States to adopt legislation, or other measures, that are right for achieving the most optimal protection of human rights under prevailing circumstances.

The jurisprudence of the ECHR shows that courts generally exercise restraint in reviewing State's practices in implementing their international human rights obligations under domestic legislation.[148] In cases where the ECHR was asked to review the necessity of restrictive measures

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differences and disparities among legal situations of Member States make it difficult to identify a uniform human rights standard. It rests on the understanding that in certain contexts, States are considered to be in a better position than judges to assess their national circumstances. Social conditions and developments must be taken into account in function of the special object and purpose of human rights treaties, which call for an objective and dynamic reading. Clare Ovey & Robin C.A. White, Jacobs And White: European Convention on Human Rights, 52-55 (2006).

142 Tyrer v. the United Kingdom, App. No. 5856/72, 2 Eur. H.R. Rep. 1, 15-16 (1978). Lozidou v. Turkey, App. No. 15318/89, 20 Eur. H.R. Rep. 99, ¶ 71, (1995).

143 Lozidou v. Turkey, *Id.* ¶ 72. Soering v The United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439, at 34 (1989). Artico v. Italy, App. 6694/74, Eur. H.R. Rep. 4, at 16 (1980).

144 The ICESCR states in Art. 2: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' International Covenant on Economic, Social and Cultural Rights, art. 2, Dec. 16, 1966, General Assembly resolution 2200A (XXI).

145 U.N. Committee on Economic, Social and Cultural Rights General Comment No.3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), E/1991/23, 5th Sess. (Dec.14, 1990).

146 *Id.* ¶ 7.

147 *Id.* ¶ 3.

148 Christian Tomuschat, *Democracy and the Rule of Law, in* Oxford Handbooks of International Human Rights Law, 14 (Dinah Shelton ed. 2013).

State adopted in protection of the public interest, the court upheld the doctrine of the 'margin of appreciation'. The ECHR has left a margin to the State and its legislative and judicial bodies charged with interpreting and applying the laws.[149] The difficulty of discerning the existence of uniform human rights standards in the case of disparities among legal situations in Member States due to the rapid evolution of opinions on a subject has served as a justification for upholding this doctrine. States are better positioned than judges to assess the national circumstances in this context, because they are in more direct and continuous contact with the vital forces in their country, the argument holds.[150] The Court also has pointed to its subsidiary role in safeguarding human rights, hence showing deference to States whose authority derives from its democratic mandate and who is first in line to secure the protection of rights of the ECHR.[151]

What could explain the openness in the language of the UNGPs in relation to corporate responsibility to respect? The openness seems to provide companies with a measure of discretion to design their human rights policy and human rights due diligence processes in a manner that is mindful of the contextual factors external and internal to the business, while keeping within the parameters set by the UNGPs. The UNGPs thus do not prescribe means that would be inappropriate or ineffective in factual situations.[152] Rather than assuming that certain means are appropriate *a priori*, the suitability of measures is to be determined on a case-by-case basis. The UNGPs suggest that business responses are to be determined inductively and in consultation with stakeholders and expertise.

The lack of specificity allows for responsiveness to contextual changes and for business enterprises to adjust their means over time. This is important, for instance, where evolving operations and operating contexts of a company create changes in human rights risks and calls for different responses.[153] The UNGPs emphasis that human rights due diligence should be 'ongoing' testifies to the importance of being responsive to changing business challenges.[154] Arguably, if human rights due diligence would have been formulated in more strict terms, this may have impeded companies from responding most optimally to such changing challenges posed by changing context. If more specific language had inhibited an optimal response, this may have incentivized non-compliance by companies.

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149 Handyside v The United Kingdom, App. No. 5493/72, 1 Eur. H.R. Rep. 737, ¶ 48 (1976).

150 *Id.* ¶ 48.

151 *Id.* ¶ 48.

152 Hence, the UN Guiding Prinicples reference to *'one size does not fit all*'. *See* UNGPs, introduction, para. 15. The leeway left by the UNGPs can be seen as a deliberate step by the SRSG to respond to critique of the business community about a 'one-size-fits-all approach' not being able to accommodate for the diversity in factors that affect the capacity of a company to impact on human rights. David Weissbrodt & Muria Kruger, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* 97 *The American Journal of International Law* 901, 911(2003).

153 *UNGPs*, *supra* note 7, GP 17 (c).

154 *Id.* GP 17 (c).

To the extent that it cannot be determined *a priori* what measures will be most appropriate in light of diverging contexts, distinct challenges, evolving social expectations and conditions,[155] openness in language seems suited. Openness serves the function of achieving the objective of the UNGPs in a most optimal manner, which may require different conduct and combination of measures by States and companies.[156] The introduction to the UNGPs stipulates;

> While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small- and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all.[157]

Greater specificity in the UNGPs could have undermined the global and universal applicability of the corporate responsibility to respect human rights. The SRSG noted, 'situational variations will always exist, but they cannot and should not become the basis for general and universally applicable principles'.[158] The corporate responsibility to respect human rights was intended to reflect a globally applicable social norm. Specifying this norm in further detail may have been premature, in part because of the complexity involved.[159]

The vague wording of the corporate responsibility to respect human rights can be said to reflect the indeterminate nature of international social expectations, and the extent to which a more detailed norm may not grasp acceptance of these social expectations globally. This does not negate the in-principle universal nature of a more detailed social norm, or the justification of such a norm from a moral viewpoint.[160] The social expectations of business enterprises may be difficult to discern where they are unwritten, and in the process of formation.

If the UNGPs had been drafted in greater detail, global support and acceptance for the UNGPs furthermore may not have been forthcoming. Founding the corporate responsibility to respect on social expectations rather than legal obligations lifted certain legal and political constraints from the development of norms. The political and legal constraints that applied to the mandate were

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[155] The SRSG seems to deliberately frame this responsibility in vague wording to accommodate business concerns about a 'one-size-fits-all' approach that would not provide companies with the flexibility they deemed necessary to address unique human rights challenges faced in their operations and operating contexts.

[156] *UNGPs*, *supra* note 7, at 1.

[157] *Id.* Introduction, ¶ 15.

[158] J. Ruggie, Note on ISO 26000 Guidance Draft Document, 3 (Nov. 2009), http://www.business-humanrights.org/media/bhr/files/Ruggie-note-re-ISO-26000-Nov-2009.PDF

[159] A company survey by the German Global Compact Network and ecosense on the usage of tools to implement the UNGPs found that a high degree of abstraction of the UNGPs was illustrative of the complexity of the topic of business and human rights.

[160] From a moral viewpoint, there is widespread support for argument that the need to protect human dignity demands that both states and non-state actors observe fundamental rights. Business enterprises are no exception. Peter Muchlinski, *Corporate Social Responsibility*, *in* The Oxford Handbook of International Investment Law, 655 (Peter Muchlinski, et al. eds., 2008). *See* Philip Alston, *Non-State Actors and Human Rights* (Oxford University Press. 2005) and A. Clapham, Human Rights Obligations of Non-State Actors (Oxford University Press. 2006).

hardly conducive to opting for a progressive interpretation on the corporate responsibility to respect human rights. Knox notes that the SRSG felt the need to underspecify some aspects of the corporate responsibility to avert criticism and build political support for his project.[161]

According to some who adopt a more critical stance, stakeholders were prepared to support the UNGPs because they lacked detail. This was despite the different agendas of these stakeholders. Openness in the language of the UNGPs thus seemed to have facilitated consensus building. Kinley and Chambers make a similar observation in relation to the vague wording of the UN Norms; 'the fact that they are open-ended is not only unexceptional, it is also necessary to achieve international consensus on the subject and to enable all parties to relate to the initiative'.[162] Mares goes further by pointing to the human rights due diligence as an instrumental concept that, because of its match to business operations, was uniquely able to facilitate this process of securing convergence between stakeholders and to set in motion a governance regime evolution.[163]

5.6 Conclusion

This chapter focused on human rights due diligence as a standard of performance. The UNGPs define the corporate responsibility as a negative obligation that business enterprises 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[164] [165] This responsibility imposes on companies a requirement to be pro-active in order to avoid and address human rights impacts. Companies are responsible for undertaking a human rights due diligence process to 'identify, prevent, mitigate and account for how they address their impacts on human rights'. This process should, at a minimum, encompass the following elements; 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.[166] This chapter reflected on the implications of the effective operationalization of this human rights due diligence requirement by comparison with existing approaches to due diligence in corporate law.

The SRSG articulates the human rights due diligence concept in open-ended language, hence the exact conduct that is expected from business enterprises is not exactly clear. This quality allows for flexibility of facts and circumstances in the application of the human rights due diligence

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[161] John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, *in* The UN Guiding Principles on Business and Human Rights: Foundations and Implementation, 66 (R. Mares ed. 2012).

[162] David Kinley & Rachel Chambers, *supra* note 140, at 20.

[163] R. Mares, "Respect" Human Rights: Concept and Convergence, p. 53-4 (forthcoming in Law, Business and Human Rights: Bridging the Gap (Robert C. Bird, Daniel R. Cahoy, & Jamie Darin Prenkert, eds., Elgar Publishing Ltd., forthcoming 2014).

[164] *UNGPs*, *supra* note 7, at 11.

[165] The linkage of the responsibility to respect human rights to the human rights due diligence concept is a departure from the 'sphere of influence' concept that had been adhered to until then to apply human rights responsibilities to business enterprises. The scope of this obligation is delineated on the basis of the potential and actual impacts that a company's operations or business relationships have on internationally recognized human rights and that the company is involved in by way of causation, contribution or direct linkage.

[166] *UNGPs*, *supra* note 7, GP 17.

concept to companies. The due diligence standard entails a judgement of whether the policies and processes that a company has in place are sufficient and appropriate to avoid and address adverse human rights impacts. This test and corresponding balancing exercise resembles the duty of care standard that exists under national (tort) law of non-contractual obligations.

This flexibility furthermore makes the human rights due diligence concept adaptable, capable of transcending different areas of law and lends the concept for effective implementation and enforcement in different areas of national law. This openness allows for further clarification, which should be provided by States through the integration of the human rights due diligence concept into law. The legitimacy and authority that derives from their democratic mandate entails that the clarifications by States carry authoritative weight, and more weight than those provided by private voluntary initiatives, for instance. While the UNGPs view a role for private/hybrid voluntary initiatives in the further crystallization of the human rights due diligence concept, their interpretations cannot be treated as equivalent or be given the same recognition as the definition of public institutions, mainly for this reason. The human rights due diligence concept would furthermore need to be defined in line with constitutional and human rights provisions that bind the State under national and international law. States may contribute to the clarification of the due diligence concept through the implementation of the concept in domestic legislation and regulation, or as a result of domestic adjudication.[167]

National authorities can refer to the human rights due diligence concept to address gaps in human rights protection. This concept can give direction to national authorities when revisiting rules and regulations for the purpose of realigning them with the expectation that business enterprises ensure the respect for human rights by reference to universally recognized human rights standards and principles. It provides minimum substantive content and parameters around which conflicting concepts in these law can be resolved and convergence created. At the same time, the exact definition and implications of the concept may be further defined by reference to the respective objectives of these laws and regulations. The exact definition of human rights due diligence would thus be the result of the interaction between the International Human Rights law that provides the benchmark that business conduct should be assessed against, the national laws and regulations that give rise to the human rights due diligence obligation and their object and purpose, and the conditions identified in the UNGPs and their strategic objective.

[167] Humberto Fernando Cantú Rivera, *Business & Human Rights: From a "Responsibility to Respect" to Legal Obligations and Enforcement*, in Human Rights and Business: Direct Corporate Accountability for Human Rights, 320 (Jernej Letnar Černič & Tara Van Ho eds., 2015).

6 The Role of Tort Law and Private International Law in Operationalizing the Human Rights Due Diligence Concept: Towards a Presumption of a Legal Duty of Human Rights Due Diligence

6.1 Introduction

This chapter will examine the legal implications of effectively operationalizing the human rights due diligence as defined in the UNGPs through tort law and EU and national private international law. The chapter is structured according to the following four sections:

The *first* section (Section 6.2.) will examine the intertwinement of private international law with human rights in general and, more specifically, with human rights due diligence. Connections will also be explored in relation to jurisdiction and the applicable law in the context of tort liability cases. The section finds that the human rights due diligence concept can have a role in court's decisions on jurisdiction and which country's substantive law to apply to the underlying dispute.

The *second* section (Section 6.3) explores in detail the three main approaches to establishing civil liability of a parent entity for human rights breaches that are the result of the activities of its subsidiary when the latter, as it is often the case, enters into a business relationship outside the EU. These three approaches are: (i) negligence; (ii) complicity; and (iii) piercing the corporate veil. The purpose is to determine which role, if any, human rights due diligence has in courts' consideration of the liability issue. It is concluded that the human rights due diligence concept can and, arguably, should have a role in court's decisions on how to construe a legal duty of care standard and when to attribute liability to a parent company.

This section (Section 6.3.5.) also examines the extent to which the three approaches to parent liability referred to in the preceding paragraph are challenged by and can be reconciled with the concept of human rights due diligence. It is found that these approaches are grounded in the underlying notion of 'sphere of influence'. This concept is not the most adequate basis for assigning responsibility to a company.[1] It will be argued that, if the human rights due diligence concept is to be operationalized in an optimal manner, a rebuttable presumption of a legal duty of care as the standard for liability should be established. Such presumption should be construed on the basis of the human rights due diligence as defined by the UNGPs.

The *third* Section (Section 6.4) will set out how the human rights due diligence concept can (and should) define the elements of substantive liability. Inherent to this concept are actors, factors and relationships that companies should consider in order to prevent adverse human rights impacts. The possibility of creating a legal duty of care through statute will be discussed next. Finally, a reference will be made to the proposed French law creating a legal duty of vigilance, since it constitutes a particularly illustrative example of how such duty of care can work in practice. Amendments to EU private international law will also be suggested. These would allow

[1] Human Rights Council, *Clarifying the Concepts of "Sphere of influence" and "Complicity"*, ¶ 30 U.N.Doc. A/HRC/8/16 (May 15, 2008).

individuals seeking justice to proceed to the substantive liability stage more expediently and to ensure that the legal duty of care is defined by the highest standard.

The conclusion is that, if existing doctrines and approaches were to be revisited and applied in order to accommodate the human rights due diligence concept, some of the barriers that victims currently face, in order to obtain redress from human rights violations would be lifted and the feasibility of direct foreign liability claims enhanced. Moreover, the connexions between the current approaches and the human rights due diligence concept are sufficient to support the view that these approaches can be reconciled with human rights due diligence.

6.2 Private International Law, Human Rights and Human Rights Due Diligence

This section will set out the key considerations governing the intertwinement between (mainly, but not exclusively, EU) private international law and human rights, and human rights due diligence. As it is customary in the domain of private international law, I will separately analyse jurisdiction (see Section 6.2.1) from choice of law (see Section 6.2.2).

6.2.1 Jurisdiction: the Brussels I Regulation / Brussels Recast

6.2.1.1 Preliminary Considerations

One of the first hurdles that victims face when starting civil proceedings before certain Western jurisdictions in tort liability cases is finding access to courts. In this section I will set out how, while access to courts for tort liability cases deriving from human right breaches is relatively straightforward if the human rights violation has been committed by an EU domiciled entity, that is far from being the case in relation to non EU domiciled entities (even if, as it is often the case these are the subsidiaries of EU domiciled entities). Given that the latter scenario is often the most common in foreign direct liability cases related to human rights, one cannot but wonder which has been the influence in this field of the Union being founded on the respect of human rights, as required by Article 2 Treaty on the European Union (TEU).[2]

6.2.1.2 Brussels I Regulation and Brussels Recast and Human Rights: Main Provisions

Accessing courts for tort-liability claims brought against a parent company domiciled in the EU has not posed a major obstacle in European civil law countries and countries that belong to the so-called Brussels I Regime. Victims have been able to rely on the 2001 Brussels I Regulation, *Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters* (Brussels I Regulation) that governs the jurisdiction and enforcement of judgments in the main civil and commercial matters[3], including foreign direct liability cases related to human rights. The Brussels I Regulation[4] is directly applicable[5] and, under the doctrine

[2] Consolidated Version of the Treaty on the European Union, 13-46, October 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TEU].

[3] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Recital 10, 2012 O.J. (L351) 1 [hereinafter *Brussels Recast*].

[4] The Brussels I Regulation replaced the Brussels Convention of 1968. 'The Convention continues to apply with respect to those territories of EU countries that fall within its territorial scope and that are excluded from the

of Primacy of EU law,[6] takes precedence over national law in the EU Member States. Changes to this text were adopted in the form of a re-cast version of this Regulation ('Brussels Recast') in 2012, which entered into force and superseded the 2001 Brussels I Regulation in January 2015. Brussels Recast applies 'to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015'.[7]

Both Brussels I Regulation / Brussels Recast facilitate access to courts for individuals in a limited and well defined number of tort liability cases. A court in an EU Member States cannot decline jurisdiction over a corporate defendant if this defendant is domiciled in that EU Member State. Pursuant to Article 4 Brussels Recast, 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.[8] The jurisdiction of the national courts of an EU Member State is thus determined on the basis of the domicile of the defendant, which constitutes the necessary connection between the case and the territory of the EU Member State. Consequently, criteria other than domicile, e.g., the nationality of the plaintiff or the locus of the alleged tort, do not pre-empt the application of the Brussels I Regulation to foreign direct liability claims brought against a parent company domiciled in the EU.[9]

Brussels Recast identifies three factors on the basis of which the domicile of a company can be established for the purpose of this Regulation.[10] Article 63 Brussels Recast provides that a company is domiciled at the place where it has its: (a) a statutory seat; (b) central administration or; (c) principal place of business.[11] [12] Brussels Recast upholds a broad definition of domicile, which enables courts to assert jurisdiction over suits against a wide range of companies, provided that there is a 'real connection' between the defendant and the Member State.[13] This includes companies that have their statutory seat elsewhere, but whose 'principal place of business' is located in an EU Member State.

Regulation pursuant to Article 299 of the Treaty establishing the European Community (now Article 355 of the Treaty on the Functioning of the European Union).` Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play, SWD(2015) 144 final, 24-25 (Jul. 14, 2015) [hereinafter *Commission Staff Working Document*].

[5] Consolidated Version of the Treaty on the Functioning of the European Union, art. 288, October 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TFEU]. According to Article 288 TFEU, 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.'

[6] Case 6/64 *Costa v. ENEL* [1964] ECR 585, 593.

[7] *Brussels Recast*, *supra* note 3, art. 66.

[8] *Id.* art 4.

[9] Jan Wouters & Cedric Ryngaerts, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 The George Washington International Law Review 939, 7 (2009). Case C-412/98, Societe Group Josi Reinsurance Company SA v Compagnie d' Assurances Universal General Insurance Company, 2000 E.C.R. I-5925, ¶¶ 57, 59.

[10] *Commission Staff Working Document*, *supra* note 4, at 24.

[11] *Brussels Recast*, *supra* note 3, art. 63.

[12] The court applies its rules of Private International Law to determine the seat of the company. *Id.* art. 24(2).

[13] Young v Anglo American South Africa Limited & Ors [2014] EWCA Civ 1130. [39]

The UK Court of Appeal clarified in *Young v Anglo American South Africa Limited & Ors* the interpretation of then Article 60(1) Brussels 1 Regulation (now Article 63 Brussels Recast) in relation to where a company has its domicile for the purpose of the Brussels I Regulation, and more specifically where it has its 'central administration'. The court indicated that the 'central administration' is the place 'where the company concerned, through its relevant organs according to its own constitutional provisions, takes the decisions that are essential for that company's operations', that is 'the place where the company, through its relevant organs, conducts its entrepreneurial management'.[14] The court distinguished 'central administration' from 'the place of incorporation' and 'the principal place of business', noting that:

> the first is the domicile for the purpose of the internal laws of the state where the company is incorporated. It will usually be identified in its Memorandum and Articles of Association or equivalent. The third is the place where the company does its principal 'business'. Where that is must be a question of fact in each case.[15]

While the rules provided for by the Brussels I Regulation apply not only to EU Member States, but also to the EFTA countries that acceded to the 2007 Lugano Convention,[16] this is not the case for Brussels Recast. The 2007 Lugano Convention has not yet been adapted to Brussels Recast. As a result, the rules governing jurisdiction in the EFTA countries may be similar to those in EU Member States, however, they are not exactly identical to those provided under Brussels Recast.

Brussels Recast does not contain a sweeping rule governing jurisdiction in relation to defendants that are not domiciled in an EU Member State, along the lines of the rules on jurisdiction described in the preceding paragraphs. Consequently, that Regulation does not ensure that the courts of EU Member States will have jurisdiction in tort liability cases over third-country (parent) companies or business relationships (e.g., subsidiaries, contractors or suppliers) that do not qualify as 'domiciled' pursuant to Articles 4 and 63 Brussels Recast.

The existence of jurisdiction in relation to these defendants will be determined by the domestic rules of the EU Member State in which the court seized is located. The rules on whether a court may assert jurisdiction over a defendant or not, and the role of human right considerations play in these scenarios, if any, may vary according to these domestic laws.[17]

However jurisdiction in direct tort-liability cases involving such defendants may still be asserted under Brussels Recast. More specifically, the provisions that may be relevant in tort-liability cases relate to the prorogation of jurisdiction (Article 25), and consumer contracts (Article 17-

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[14] *Id.* at 45.

[15] *Id.* at 39. Also *see* Geert van Calster, Anglo American: The Court of Appeal on 'Central Administration' in Brussels-I, GAVC LAW (Sept. 16, 2014, 7:07 AM), http://gavclaw.com/2014/09/16/anglo-american-the-court-of-appeal-on-central-administration-in-brussels-i/.

[16] Recital 9 of the recast Regulation notes that 'the 1968 Brussels Convention continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU'. Brussels Recast, *supra* note 3, Recital 9.

[17] Geert van Calster, *L`EEX nouveau (ofte: Brussel Ibis) est arrivé. De hervorming van de moeder van het Europees Internationaal Privaatrecht*, Rechtskundig Weekblad, 1443, 1450 (2015).

18) or employment contracts (Article 21). It should be stressed that these rules have remained largely unchanged from the original Brussels I Regulation.

The court in an EU Member State has jurisdiction over a third-country defendant if the parties to the dispute have agreed to confer jurisdiction on the court over the legal relationship involved in the dispute, provided that such agreement is valid under the law of the EU Member State of the court seized.[18] In the context of foreign tort liabilities, it seems unlikely that the defendant will agree to confer jurisdiction to the court of an EU Member State since doing so is often unfavourable to its interests.

Brussels Recast contains rules that provide alternative grounds of jurisdiction for courts in disputes to which such defendant may be a party and the subject matter is a consumer or employment contracts. These rules also require a nexus between the proceedings and the territory of an EU Member State.[19] The existence of these requirements underpins the problematic application of the EU rules on jurisdiction in relation to foreign direct liability cases.

Article 18(1) Brussels Recast establishes jurisdiction over a defendant that is not domiciled in the EU where the party instigating the proceedings is a consumer bringing a suit before a court in the EU Member State where the consumer is domiciled.[20] The requirement that the claimant is a consumer and domiciled in an EU Member State is usually not satisfied in tort liability cases deriving from breaches of human rights. Indeed, these cases are typically brought by an individual that is not domiciled in an EU Member State.

Article 17(2) Brussels Recast treats a defendant that has its domicile outside the EU as domiciled in an EU Member State if it has entered into a consumer contract and its branch, agency or other establishment that gives rise to the dispute is situated in this EU Member State. The connecting factor, that is the location of the establishment that gives rise to the dispute on the territory of the EU Member State, is usually not there in a typical foreign tort liability case.

Pursuant to Articles 21(1) an (2) Brussels Recast, a court in an EU Member State may not reject jurisdiction over a defendant that is not domiciled in the EU if the defendant is an employer and the employee habitually carries out or last carried out work in or from the EU Member State where the employee brings the proceedings.[21] The connecting factors are the activities of the employee, or alternatively the presence of the business engaging the employee in these activities, on the territory of an EU Member State.

A court may thus find a legal basis for jurisdiction under this rule in tort liability cases where the claimant is an employee of a subsidiary entity that does not have its domicile in the EU but where the employee habitually carries or carried out work in one or more EU Member States. However, this scenario is not common in tort liability cases.

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[18] Brussels Recast, *supra* note 3, art. 25.

[19] In order for a court to accept jurisdiction over a third-country party to the claim, there must be a connecting factor. *Id.* art.13.

[20] *Id.* art. 18(1).

[21] *Id.* art. 21(2).

The rules in Brussels Recast that provide alternative grounds for jurisdiction do not typically apply in tort liability cases involving human rights: as set out in the preceding paragraphs, the necessary connection for the Court of a EU Member State to be in a position to assert jurisdiction is simply not there. An explanation for the inability of these EU rules on jurisdiction to meaningfully enhance access to justice in direct tort liability cases deriving from human rights breaches may be that human rights considerations did not figure prominently among the objectives of the original 1968 Brussels Convention, the Brussels 1 Regulation and the review process which resulted in the adoption of the Brussels Recast in 2012.

Indeed, the aim of the European Commission with Brussels Recast was to facilitate equal access to court for claimants and defendants domiciled in the EU. The main rationale for the rules under Brussels Recast creating jurisdiction regardless of the defendant's domicile was to 'ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties'.[22] The amendments were partly aimed to guarantee through jurisdictional rules the enforcement of the rights of 'weaker parties' guaranteed by EU law.[23] Recital 15 notes that exceptions to the general rule of jurisdiction are justified in 'a few well-defined situations'.[24] Additional protection may be afforded to weaker parties depending on the subject matter of the dispute and the autonomy of the parties.[25] The weaker parties to which the rules in Brussels Recast afford enhanced protection do not include victims of human rights abuse, but only those who are party to an insurance, consumer or employment contract.[26] Neither does Brussels Recast expressly refer to human rights as a subject area that warrants additional protections to the parties in the disputes.

6.2.1.3 The Forum Necessitatis Doctrine

Human rights consideration did underpin an alternative proposal by the EU Commission to integrate the *forum necessitatis* doctrine into the Brussels I Regime. The forum *necessitati*s doctrine enables a court to accept jurisdiction in a dispute if there is no other forum available to the plaintiffs. The doctrine is commonly used to ensure the right of an EU claimant to a fair trial or access to justice. The EU Commission explored the possibility of introducing a *forum necessitatis* rule in Brussels Recast in its 2009 Green Paper on Jurisdiction in Civil and Commercial Matters. This suggestion made it into in the legislative proposal that was issued in 2010, which included the following Article 26:

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[22] Brussels Recast, *supra* note 3, Recital 14.

[23] Commission Staff Working Paper, Summary of the Impact Assessment, Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), at 10, SEC(2010) 1548 final (Dec. 14, 2010).

[24] Brussels Recast, *supra* note 3*,* Recital 15.

[25] *Id.* Recital 15.

[26] *Id.* Recital 18.

Article 26

Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular:

(a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or

(b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seized under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied;

and the dispute has a sufficient connection with the Member State of the court seized.

The provision set out two requirements for a court in an EU Member State to be able accept jurisdiction on the basis of the *forum necessitatis* doctrine. First, jurisdiction would need to be necessary to ensure the right of the plaintiff to access to justice or to a fair trial. Second, there would need to be a sufficient connection between the dispute and the Member State of the forum seized.[27]

The *forum necessitatis* rule is not controversial. The majority of jurisdictions in the EU permits a court to hear a case against a third-party defendant on the basis the *forum necessitatis* doctrine.[28] The doctrine has also been established under another EC Regulation.[29] However, the *forum necessitatis* doctrine never made it to the final text of Brussels Recast.[30] [31]

6.2.1.4 The Forum Connexitatis Doctrine

Article 8(1) Brussels Recast recognizes the doctrine of *forum connexitatis*. A court in an EU Member State may assume jurisdiction over a defendant that is involved in a dispute brought before it, provided that this defendant has a domicile in another EU Member State and there is a sufficiently close connection between the two claims. Article 8(1) stipulates:

[27] The purpose of the *forum necessitatis* rule was to create incentives for investing in countries with legal system affording insufficient protections. Van Calster, *supra* note 17, at 1450.

[28] The *forum necessitatis* doctrine has been implemented, in amongst other countries, France, Germany, the Netherlands, Ireland, Portugal, Switzerland, Argentina, Austria, Belgium, Poland, Romania, Spain, Estonia, Finland, Iceland, Lithuania, Luxembourg and the UK. Stephanie Redfield, *Searching for Justice: The Use of Forum Necessitatis* 45 Georgetown Journal of International Law 893 (2014).

[29] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, art. 7, 2009 O.J. (L7)1.

[30] Geert van Calster, Private International Law, Corporate Social Responsibility and Extraterritoriality, 238 (Hart Publishing 2013). Commission Staff Working Document, *supra* note 4, at 25.

[31] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, ¶ 3.1.2, COM(2010) 748 final (Dec 14, 2010).

A person domiciled in a Member State may also be sued:

> (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings

The rule applies only to situations where the defendant has its domicile in an EU Member State. This reduces the rule's relevance in foreign direct liability cases related to human rights in which, as discussed, one of the defendants is usually an entity that is not domiciled in the EU.

A national equivalent to the *forum connexitatis* rule can be found in Dutch law, more specifically under Article 7(1) of the Dutch Code of Civil Procedure (DCCP). Article 7(1) DCCP reads as follows:

> In the event that the Dutch court has jurisdiction over one of the defendants in matters that must be initiated by a writ of summons, the Dutch court also has jurisdiction over other defendants involved in the same proceedings, provided the claims against the various defendants are connected to such an extent that reasons of efficiency justify a joint hearing.[32]

This provision permits a court to accept jurisdiction over a foreign defendant if this defendant has jurisdiction over another defendant and there is a connection between the claims that is sufficient to justify a joint hearing for reasons of efficiency. Unlike its EU equivalent, Article 7(1) DCCP does not require that one or both of the defendants is domiciled in an EU Member State, hence its scope of applicability in tort liability cases is broader.

Article 7(1) DCCP became the focus of contention after a Dutch court (more precisely, a District Court of The Hague) recognized in *Milieudefensie v Shell* the existence of a legal basis for it to assert jurisdiction over the claims against an entity not domiciled in an EU Member State. Three Nigerian farmers and the international NGO Milieudefensie had sued the parent company Royal Dutch Shell (RDS) and its Nigerian subsidiary company Shell Petroleum Development Company of Nigeria LTD (SPDC) for environmental damages resulting from oil-spills in three villages in the Niger Delta. The court allowed the case to proceed since the two requirements under Article 7(1) DCCP were met, namely: (i) international jurisdiction over the parent company RDS, which the The Hague court derived from Articles 2 and 60(1) of the Brussels 1 Regulation,[33] and (ii) a sufficient connection between the cases justifying a joint hearing of the claims for reason of efficiency. The Dutch court held that there was a sufficient connection between the claims against RDS and SPDC because both defendants were allegedly liable for the same damage.[34] Finally, the court was of the view that treating the claims jointly was expedient since addressing

[32] Court of the Hague, 30 December 2009, 2009, 330891/ HA ZA 09-579, (Vereniging Milieudefensie/Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD) (Neth.), § 3.4.

[33] *Id.* § 3.1.

[34] *Id.* § 3.6.

these claims separately would have required an assessment of the same complex facts in Nigeria.[35]

The claimants thus successfully relied on Article 7(1) DCCP to initiate joint proceedings against RDS and SPDC and to have a court assert jurisdiction over the claims against SPDC, despite the fact that SPDC did not have its domicile in an EU Member State. The defendant Shell claimed that this move by Milieudefensie amounted to an abuse of Dutch procedural law. According to the Shell, Milieudefensie had instigated proceedings against RDS for the sole purpose of facilitating jurisdiction against the subsidiary entity SPDC. Shell relied on the argument that it was evident beforehand that, under Nigerian law, it was impossible to hold RDS liable for a tort of negligence in relation to harm deriving from the activities of a subsidiary entity. According to Shell, the claims against RDS could not provide a legal basis for jurisdiction in relation to the claims against SPDC. The Dutch district court disagreed, noting that previous legal practice showed that it was not impossible, under Nigerian law, for a parent company to incur liability for harm resulting from the activities of a subsidiary. Consequently, there had been no abuse of process. The court referred to the ruling in *Chandler v. Cape* as an illustrative example for these purposes.[36]

On appeal before the The Hague Court of Appeals, the defendant Shell expressed strong objection to the court's decision to recognize international jurisdiction in relation to SPDC on the basis of Article 7(1) DCCP. Shell argued that it would be 'inefficient' ('*ondoelmatig*') for a Dutch court to accept jurisdiction in relation to SPDC, *inter alia* because it would be too difficult for this court to determine the facts and evidence related to activities that occurred exclusively in Nigeria. Shell also argued that Nigerian law applied to the case and that the claims against SPDC relied on legal rules that had never been accepted before under Nigerian tort law. According to Shell there was no precedent under Nigerian law establishing liability of a company for failing to take measures to prevent sabotage. According to Shell, the Nigerian case *SPDC v Otoko* did not constitute an authority for these purposes.[37] In addition, Shell argued that the Dutch court was not suited to develop Nigerian law. This was the more so because this court was unfamiliar with Nigerian law and there was no possibility for judicial review of points of dispute by the highest court in the Netherlands or the Nigerian Supreme Court.

The court rejected this argument, as well as certain arguments that Shell advanced in support of the view that asserting jurisdiction over the claims against SPDC would amount to an abuse of process. Shell noted that the rule of *forum connexitatis* under Article 7(1) DCCP should be applied by analogy to Article 6(1) Brussels 1 Regulation (now Article 8(1) Brussels Recast) and that the jurisprudence relating this Article 6(1) was decisive for the case. More specifically, Shell argued that the requirements related to Article 6(1) Brussels Regulation as developed through the

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[35] *Id.*

[36] Court of the Hague, 30 January 2013, 2013, C/09/337058 / HA ZA 09-1581 (Barizaa Manson Tete Dooh/ Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria LTD) (Neth.), § 4.3. Also *see*, Liesbeth Enneking, et al., *Zorgplichten van Nederlandse ondernemingen inzake international maatschappelijk verantwoord ondernemen: Een rechtsvergelijkend and empirisch onderzoek naar de stand van het Nederlandse recht in licht van de UN Guiding Principles,* 613-614 (Boom Juridisch, 2016).

[37] Memorie van fase 1 (in zaak F) tevens memorie van grieven in incidenteel appel fase 1(In Zaken A tot en met E), De Brauw Blackstone Westbroek, Gerechtshof Den Haag, ¶ 24 (Oct. 7, 2014) [hereinafter *Memorie*].

jurisprudence, set a minimum benchmark for the application of Article 7(1) DCCP.[38] According to Shell, given that Article 7(1) DCCP was more broadly applicable than Article 6(1) Brussels 1 Regulation, for the reason mentioned above, and a defendant may be drawn into the proceedings if the court established anchor jurisdiction over another defendant on any legal basis and the requirement of a sufficient connection is satisfied, greater precaution against abuse was warranted under the Article 7(1) DCCP.[39]

In its appeal judgment, the Dutch court held that legislative history indeed supported the existence of a connection between Article 7(1) DCCP and its European equivalent, and noted that interpretations of Article 7(1) DCCP should not depart from Article 6 Brussels 1 Regulation, at least when it came to the joint treatment for reasons of efficiency. The court thus held that the relevant jurisprudence under the equivalent European provision should be considered when deciding on the jurisdictional issue under Article 7(1) DCCP. The decision of the court was that the requirements of a sufficient connection under Article 7(1) DCCP were met in the circumstances of the case. The Court considered the business relationship between the parent and the subsidiary and the importance of the activities of the latter in any assessment of parental liability. The court also held that the claims against the defendants where similar and shared the same factual basis, i.e., the damages that occurred in Nigeria, and gave rise to similar questions relating the origin, prevention and remedy of the damages. There was a possibility that these questions required further research, which may be best assessed by one judge in order to avoid contradictory findings and rulings, the court noted.[40] The court also ruled that additional precaution against abuse of process in the application of Article 7(1) of the DCCP was not warranted given that anchor jurisdiction was established on the basis of the domicile of RDS in the Netherlands.[41]

Shell argued that there was abuse of process because it was evident beforehand that the claims against RDS were impossible and for this reason could not serve as a legal anchor for the court to take jurisdiction over SPDC. If the court had assessed the possibility of creating parent liability of RDS in the circumstances of the case, according to Shell, it would have arrived at the conclusion that the claims against RDS had no chance of success. Under Nigerian law, the legal principles of separate legal personality and limited liability shield RDS from liability. The conditions under which the veil between the RDS and SPDC may be pierced (fraud, illegality, façade, agency) were not applicable in the situation of the case. Shell also argued that tort law may recognize a legal duty of care in UK and the US, however there was no legal basis in Nigerian tort law for the claim that a legal duty of care attached to a parent company, while Nigerian law was the law governing the liability issue in the case. If the Dutch court had

[38] The requirements are that the provisions should be interpreted strictly because it entails an exception to the rule of forum rei. All circumstances in the case must be considered. The defendant must have reasonably foreseen that it would be sued before the Dutch court. A close connection between the cases requires sufficient factual and legal coherence between the claims. The burden to demonstrate this connection falls on the claimant. Also, the aim of the provision is to avoid irreconcilable judgments on the same issue. *Id.* ¶ 28.

[39] *Memorie, supra* note 37, ¶ 32. Also *see,* blog post by GVC, http://gavclaw.com/2015/12/03/royal-dutch-shell-watch-those-stockings-nigeria-rds-judgment-on-appeal-expected-end-december/.

[40] *See* Gerechtshof Den Haag, 18 December 2015, 2015, ECLI:NL:GHDHA:2015:3587, (Friday Alfred Akpan / Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria LTD.) (Neth.), § 2.4.

[41] *Id.* § 2.7.

recognized that a legal duty of care attached to RDS in the circumstances of the case, which differed from those recognized in *Chandler v Cape*, it would have created a legal duty of care in a novel situation.[42] The court on appeal disagreed, noting that it was not per definition inconceivable that there were approaches ("*aanknopingspunten*") in Nigerian law allowing for the imposition of a legal duty of care on the parent company in the circumstances of the case. Such approaches may be found in the jurisprudence of UK common law that serves as an important source of reference for the Nigerian legal system.[43]

Shell also argued that the claims against RDS and SPDC had a different legal basis and that SPDC could not have reasonably foreseen that it would be sued together with RDS before a Dutch court in relation to the oil leakages in Nigeria specifically. Shell referred to the Painer-arrest in which the CJEU had ruled that a sufficiently close connection between the claims can exist if the claims are based on different causes of actions, provided that there is a high degree of predictability that the defendant would be sued before the court seized. According to jurisprudence, this requirement should always be met under Article 7(1) of the DCCP in relation to both factual and legal coherence between the claims.[44] According to Shell, the fact that SPDC and RDS were both alleged liable for the same damage was in itself not sufficient to establish predictability.[45] SPDC furthermore acted independently from RDS, and RDS was not familiar with relevant operational activities of SPDC, hence SPDC could not have reasonably foreseen that it would be sued together with RDS before a Dutch court specifically in relation to the oil leakages in Nigeria.[46]

The court rejected these arguments, noting that in light of the developments in relation to direct liability claims, the many oil spills in Nigeria, the legal proceedings relating these spills, the problems these spills caused to people and the environment, as well as the increased attention for these problems, it was reasonable foreseeable that the subsidiary entity SPDC might be sued before a court with jurisdiction over RDS.[47] The court on appeal held that for the reasons mentioned the requirement of sufficient connection under Article 7(1) was satisfied, also in so far the requirement for alignment with Article 6(1) Brussels Recast was concerned. The court furthermore rejected the argument by Shell that Article 7(1) of the DCCP would cease to create a jurisdictional basis for the proceedings against SPDC if the claims against RDS would be rejected.[48]

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[42] *Memorie, supra* note 37, ¶ 32.

[43] *See* Gerechtshof Den Haag, *supra* note 40, § 2.2.

[44] *Memorie, supra* note 37, ¶ 67.

[45] *Id.* ¶ 70

[46] *Id.* ¶ 89.

[47] *See* Gerechtshof Den Haag, *supra* note 40, § 2.6.

[48] Akpan did not file for an appeal against the rejection by the court of the claims against RDS, which meant that this issue has been decided. Shell argued that for this reason any connections between the claims against RDS and SPDC ceased to exist. The case is between two Nigerian parties, concerning events that occurred in Nigeria only, and that will be determined according to Nigerian law. *Memorie*, *supra* note 37, ¶ 56.

6.2.1.5 The Forum non Conveniens Doctrine

The courts in the US and the UK have relied on the common law doctrine of *forum non conveniens* to move cases to another forum that is considered more appropriate to hear the case. The doctrine has come to pose greater obstacles to and affect the feasibility of tort liability claims in the US than in the EU. Indeed, in the EU, it clearly follows from the Brussels 1 Regulation that, if a company is domiciled in the EU Member State in which it is being sued, a claim based on the *forum non conveniens* doctrine cannot be upheld.[49] The doctrine of *forum rei* is said to apply, meaning that the court of the State in which the company is domiciled has jurisdiction.

There was uncertainty for some time as to whether Article 2 Brussels I Regulation (now Article 4 Brussels Recast) was all pervading and precluded a stay in all cases where this was not expressly required or permitted by the convention.[50] More specifically, the UK had applied the doctrine despite it being a member of the Brussels I Regime.[51] The CJEU provided clarity in its ruling in *Owosu v. Jackson*,[52] confirming that courts may not apply the *forum non conveniens* doctrine under the Brussels 1 Regime.[53] The CJEU noted in subsequent cases that a court may not decline jurisdiction, even if the harm occurred outside the EU and the claimant was not an EU resident or national.[54] The ruling by the CJEU in *Owosu v Jackson* suggests that, under the Brussels I Regulation, defendants that are domiciled in the EU Member State in which they are sued can no longer rely on the *forum non conveniens* doctrine to have their case moved to another forum.

This may no longer be the case under Brussels Recast, however. Indeed, Article 33 Brussels Recast codifies a modification of this doctrine.[55] The new provision sets out a *forum non*

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[49] Article 2 of the Brussels 1 Regulation (now Article 4 of the Brussels Recast) stipulated that 'subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'. Brussels Recast, *supra* note 3, art 4.

[50] Lubbe & Ors v Cape Plc, [1998], CLC 1559,[1998] EWCA Civ 1351**.** [35].

[51] Re Harrods (Buenos Aires) [1992] Ch. 72.

[52] Owosu v. Jackson, 2005 E. C.R. I-3481, ¶ 46. The CJEU held that the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters "precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State." Muzaffer Eroglu, Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination 98 (Edward Elgar, 2008).

[53] The rationale put forth by the court was that the doctrine of *forum non conveniens* undermined the principle of legal certainty because it left a too wide discretion to the court with regard to the question of what would be the more appropriate forum. *Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises operating Outside the European Union,* 214*,* (October 2010), available at http://www.corporatejustice.org/study-of-the-legal-framework-on.html. [hereinafter *EU Study of the Legal Framework on Human Rights*]

[54] International Commission of Jurists, *Corporate Complicity and Legal Accountability - Volume 3: Civil Remedies,* 51 (2008), http://icj2.wpengine.com/wp-content/uploads/2012/06/Vol.3-Corporate-legal-accountability-thematic-report-2008.pdf.

[55] Van Calster, *supra* note 17, at 1453.

conveniens rule allowing a court to stay proceedings provided certain requirements are met. The scope of applicability of Article 33 Brussels Recast is restrictive in that the provision requires that the court has jurisdiction on the basis of Article 4 or 7, 8, 9 of the Brussels Recast. At the time when the court in an EU Member State has been seized, proceedings between the same parties must be pending before a court in a third-state and involve the same cause of action. Then, a court may stay proceedings, provided the following criteria apply:

> (a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

The stay may be granted when the judgment of the court in the third state can be recognized and, where applicable, enforced in the EU Member State, and if the proper administration of justice requires such a stay.

It is not clear whether human rights considerations will play a role in the application of the *forum non conveniens* rule under this provision. They probably should, in the light of the role which the Treaties recognise to fundamental rights (see Articles 2 and 6 TEU, which will be discussed in more detail below). If they do, this will most likely be in relation to a court's assessment of the necessity of granting a stay in the interest of the proper administration of justice. Recital 24 Brussels Recast stipulates that the proper administration of justice will be determined on the factual circumstances of the case, which may include 'connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time'.[56]

In any event, the doctrine of *forum non conveniens* has not lost its relevance. A court in an EU Member State may stay proceedings on the basis of the *forum non conveniens* doctrine in disputes that are not governed by the rules of Brussels Recast (i.e., under domestic law). The doctrine is also applied in common law jurisdictions outside the EU, e.g., Australia, Canada, New Zealand and the US. The following section focuses on the common law system of the UK and examines to what extent human rights due diligence has a role to play in the application of the *forum non conveniens* doctrine.

In the common law system of the UK, the *forum non conveniens* doctrine was considered in *Lubbe v Cape Industries,* an asbestos case brought by 3000 plaintiffs against a parent company, Cape PLC, for damages resulting from harm caused by asbestos related activities in South Africa. The central issues in the proceedings were (i) whether Cape PLC owed a duty of care to the employees of its overseas subsidiary and other persons living in the area to protect them from foreseeable risks to health by reason of the *de facto* control exercised by Cape PLC over and the advise given to the subsidiary company; and (ii) if so, whether Cape PLC had breached this duty by not taking the proper steps to ensure proper working practices and safety precautions

[56] Brussels Recast, *supra* note 3, Recital 24.

throughout the group.[57] The UK court had personal jurisdiction over the Cape PLC by reason of its incorporation and domicile in the UK.[58] The case hinged on whether the foreign forum (South Africa) was the more appropriate forum to hear the case, and if so whether the court should stay proceedings on the ground of the *forum non conveniens* doctrine.

The High Court identified that the relevant test to be applied to the question was set out in *Spiliada Maritime Corporation v Cansulex Ltd:*

> The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e., in which the case may be tried more suitably for the interests of all parties and the ends of justice. [59]

The *Spiliada* test consists of two steps. The first entails an assessment of whether there is another forum available to the claimants that is *prima facie* more appropriate to entertain the case, by reason of this forum being more suited for the private interest of the parties and the end of justice.[60] The burden falls on the defendant to prove that an appropriate forum is available to the plaintiffs, which have sued the defendant as of right before the court in the UK. The second stage entails an assessment of the factors that connect the proceedings to one forum or the other and whether plaintiffs can obtain substantive justice in the foreign forum. The court must stay proceedings, except if in the particular circumstances of the case no substantial justice can be done in the foreign forum. The burden of demonstrating this element falls on the plaintiff.[61]

The High Court's ruling in *Lubbe v Cape Industries,* which was the leading decision in the case, focused on the substantial justice aspect of *Spiliada*, and considered whether the trial should proceed in the UK because no substantial justice could be attained in South Africa. The court focused on the lack of both funding and legal representation in the forum of South Africa and held that these factual circumstances provided sufficient support for the conclusion that justice could not be done in the foreign jurisdiction of South Africa if the trial were to proceed there.[62] [63]

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[57] The first Court of Appeal phrased the issue as follows: "Whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?" Lubbe and Others and Cape Plc. and Related Appeals [2000], UKHL 41[6], [2000] 1 WLR 1545.

[58] Lubbe & Ors v Cape Plc, [1998], CLC 1559,[1998] EWCA Civ 1351**.** [1].

[59] Spiliada Maritime Corp v Cansulex Ltd [1986] UKHL 10 (19 November 1986).

[60] Lubbe and Others and Cape Plc. and Related Appeals [2000], UKHL 41[16], [2000] 1 WLR 1545.

[61] Lubbe & Ors v Cape Plc, [1998], CLC 1559,[1998] EWCA Civ 1351**.** [17].

[62] *Id.* at 32.

[63] Factors that weighted into the decision-making were the large scale of funding needed for the litigation, given the huge complexity and magnitude of the factual and legal issues needed to be addressed. Also it was considered that the absence of developed procedures for funding could create dis-incentives for the South African legal system to make funds available to the plaintiffs. Unless related to the private interests or the ends

The court held that the case should not be stayed in favour of proceedings in the South African forum.

The High Court also indicated that international or domestic policy considerations other than those expressly mentioned had no role to play in the *Spiliada* test. It held that 'public interests considerations not related to the private interests of the parties and the ends of justice have no bearing on the decision which the court has to make'. The court also recalled the statement of Lord Kinnear: 'in applying this principle questions of judicial armour proper and political interest or responsibility have no part to play'. [64] The High Court thus did not give consideration to human rights due diligence in its determination of the *forum non conveniens* issue.

The decision of the Court of Appeals in same case of *Lubbe v Cape Industries* is more relevant for our hypothesis. The court recognized that the liability issue of a duty of care can be a relevant fact in the application of the *Spiliada* test. The court accepted the plaintiffs' submission that the defendant Cape was alleged liable for a direct duty of care that it owed to the individuals, rather than a breach of a duty by the South African companies in the form of vicarious liability, as a lower court's judgment had suggested. It noted the importance of this difference because 'the alleged breaches of an independent duty of care owed by the defendant took place in England rather than in South Africa'.[65]

The court agreed with the plaintiffs that the factual allegations connected the case more closely to the jurisdiction of the UK than to that of South Africa. The court noted that 'it is an issue of law which can be decided in either South Africa or England, although prima facie the allegation of a common law duty of care owed by an English defendant, albeit to a class of persons situated overseas, should more appropriately be decided by English Courts'.[66]

The court thus affirmed that the factual allegations of liability based on a duty of care standard against the parent company Cape was a relevant private interest factor for the *Spiliada* test and that the location of the alleged breach of the duty of care pointed to the UK as the more appropriate forum. The High Court in the leading judgment did not provide a definite answer as to whether the balance of private interests tipped in favor of trying personal injury issues in the South African forum or the parent responsibility issue in the forum of the UK.[67] Since it did not overrule the decision of the Court of Appeals on this issue however, the authority still stands.

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of justice, public interest factors do not weigh into the decision-making of the court, and neither did questions of political interest or responsibility.

[64] Lubbe and Others and Cape Plc. and Related Appeals [2000], UKHL 41[33], [2000] 1 WLR 1545.

[65] The plaintiffs thus had successfully argued that the 'duty arose under English law and in England, and the breaches of it for which the defendant is responsible, whether by its directors or senior personnel, occurred for the most part in England, where board meetings were held, policy decisions made and instructions given'.

[66] Lubbe & Ors v Cape Plc, [1998], CLC 1559,[1998] EWCA Civ 1351.

[67] Peter Muchlinski, *Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases*, 50 International and Comparative Law Quarterly 1, 15 (2001).

6.2.1.6 The Loci Delicti Rule

Courts have asserted jurisdiction over a third-party defendant on the basis of the so-called *loci delicti* rule. Like other approaches, this rule requires a territorial nexus with the EU Member State where the court is seized. The relevant connecting factor is not the domicile of the company however, but the *locus* of the act or omission causing the alleged harm. The rule implies that victims can bring a claim against a non-EU domiciled company in an EU Member State if the event causing the harm occurred or may occur in the EU Member State. Article 7(2) of the Brussels Recast recognizes this rule, noting that:

> A person domiciled in a Member State may be sued in another Member State
>
> > (2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

In the case *Bier,* the Court considered that the term 'place where the harmful event occurred' was to be understood as intended to cover *both* 'the place where the damage occurred and the place of the event giving rise to it'.[68]

It should be noted, however, that the rule applies to the intra-EU context only: the domicile of the defendant in an EU Member State is a necessary condition. This condition is typically not satisfied in these direct-tort liability cases in which the defendant is domiciled outside the EU.[69]

6.2.2 Applicable law: the Rome II Regulation

6.2.2.1 Preliminary Considerations: Lex Loci Damni v Lex Loci Delicti

Once jurisdiction over the defendant is established, the hurdle that victims have to overcome next in their pursuit of civil liability is the choice of law point, that is the court's determination of the substantive law that will be applied to the claims in the dispute and, thus, to determine the existence of liability. In tort liability cases brought in the EU context and on the basis of general tort laws, the choice is usually one between the laws of national legal systems.[70] The applicable law question is decided on the basis of the EU and domestic private international law ('conflict of laws') rules that apply in the country in which the court was seized. The Rome II Regulation on non-contractual obligations in civil and commercial matters unifies certain national rules governing conflict of laws in the EU.[71]

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[68] Case 21/76 Bier v Mines de Potasse d' Alsace, 1976, E.C.R. 1735.

[69] Brussels Recast, *supra* note 3, art. 7(2).

[70] Liesbeth H. Enneking, Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability, 225 (Eleven International Publishing. 2012).

[71] The Rome II Regulation applies to events that occurred since 11 January 2009, which is the date that the Regulation entered into force. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), art 31, 32, Recital 17, O.J. (L 199) 40 [hereinafter *Rome II Regulation*].

Pursuant to the Rome II Regulation, the general rule that determines non-contractual obligations in the dispute is the *lex loci damni* rule, i.e., the law of the country in which the damage occurred applies. Article 4(1) describes this rule as follows:

> Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.[72]

In tort-liability cases, the *lex locus damni* usually corresponds with the law of the third country, and not the law of the EU forum in which the court was seized. This is often also the place where the victim has its residence.[73]

The rationale of the EU Commission to opt for the application of the *lex loci damni* as the general rule, instead of the *lex loci delicti,* (i.e., the law of the place where the tort was committed) is that the *lex locus damni* is more favourable to the victim.[74] It should be stressed, however, that *lex loci delicti*, was the general conflict-of-law principle in most domestic systems before the Rome II Regulation.[75] To apply the law that is more favorable to the victim corresponds with the view of the European Commission to redirect the objective of tort law away from regulating the conduct (fault liability) towards compensating those residents affected by the conduct of others.[76] [77] To note is that the *lex locus damni* rule benefits the EU Member States' own residents that enjoy the increased protection that the law of the EU Member States affords to them as the injured party. The general rule is not ideal in tort-liability cases for victims that reside in a third country, however, who might shy away from pursuing a case on the basis of the law of a country that is not an EU Member State.[78]

The interests of victims that reside outside the EU in tort liability cases would be better served by a rule creating an option for plaintiffs to choose the *lex loci delicti* similar to that which exists in relation to jurisdiction under the *Bier* case-law referred to in the preceding section. The *lex loci*

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[72] *See* Article 4(1) Rome II Regulation: 'Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur'. *Id.* art. 4(1), Recital 17.

[73] Andrew Dickinson, *The Rome II Regulation The Law Applicable to Non-Contractual Obligations,* 308 (Oxford University Press. 2008).

[74] *Id.* at 310.

[75] Liesbeth F.H. Enneking, *The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and The Rome Regulation. An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law*, 2 European Review of Private Law, 283, 296 (2008).

[76] Dickinson, *supra* note 73*,* at 7. Enneking, *id*. at 296.

[77] The rule of *lex loci damni* was also considered to strike a fair balance between the interests of person claimed to be liable and the person sustaining the damage. *Rome II Regulation*, *supra* note 71, Recital 16.

[78] Geert Van Calster, *The Role of Private International Law in Corporate Social Responsibility*, 3 Erasmus Law Review, 30 (2014). Van Calster, *supra* note 30, at 239.

delicti rule would strengthen the protection of the rights of the victims outside the EU. The EU Commission did not opt for applying the *lex loci delicti* rule more generally. The arguments of the EU Commission were that this 'would go beyond the victim's legitimate expectations and would reintroduce uncertainty in the law'.[79] The EU Commission also held the view that the rule would run counter to advancing one of the main objectives for unifying the choice of law rules, which is to enhance the foreseeability of court decisions.[80] However, by way of exception, Article 7 Rome II Regulation awards the option for the claimant to choose to base their claim on the *lex loci delicti*, where obligations arise out of environmental damages.

6.2.2.2 Escape Clauses

Currently, the Rome II Regulation allows a court to displace the general rule under Article 4(1) and apply the so-called 'escape clause' under Article 4(3), allowing a court to apply the *lex locus delicti* and apply the law of another country when it is clear from the circumstances of the case that the tort/delict is manifestly more closely connected with another EU Member State. Art. 4(3) stipulates the following:

> where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

The court may apply the *lex locus delicti* provided that this law is 'manifestly more closely connected' with the case.[81] There is limited guidance as to what constitutes a manifestly closer connection pursuant to Article 4(3), however,[82] apart from that this connection may be based on the existence of a 'pre-existing relationship between the parties'. In foreign direct liability cases, however, the victims usually do not have a contractual relationship with the defendant, nor is the victim in any other way linked to the defendant other than by the damage suffered.[83]

In a tort liability case, a connection between the tort and the EU Member State can exist in situations where the alleged tort amounts to a breach of a legal duty of care, elements of which occurred on the territory of the EU Member State. The issue is whether the occurrence of elements of the tort on the territory of the EU Member State would be sufficient, in and of itself, to meet the threshold requirement of a *manifestly* closer connection in accordance with Article 4(3).[84] It follows from the nature of the Rome II Regulation as an EU Regulation[85] that its

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[79] Enneking, *supra* note 75, at 297.

[80] Another objective is to ensure 'a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage'. *Rome II Regulation*, *supra* note 71, art. 31-32, Recital 16.

[81] Dickinson, *supra* note 73, at 310.

[82] Enneking, *supra* note 70, at 215.

[83] Enneking, *supra* note 75, at 300.

[84] This is the more so because the decision of the court as to whether the general rule under Article 4.1 can be displaced depends in part on the nexus between the facts of the case and the *lex loci damni*. The court may apply the escape clause only if the country of the *lex loci delicti* is manifestly *more closely* connected to the case than the country of the *lex loci damni*.

provisions should be interpreted in accordance with the general principles of EU law and, more specifically, EU-protected fundamental rights. An interpretation of this provision in light of the general principles of EU law, and, more specifically, EU-protected fundamental rights should arguably provide justification for a court to invoke the 'escape clause' and to apply the law of the EU Member State in a tort liability case.

EU law thus arguably supports a progressive interpretation of Art. 4(3), one which would allow individuals to invoke this escape clause in more typical tort liability scenarios. The argument underlying such progressive interpretation of Art. 4(3) is that Community legislation must ensure, *inter alia*, respect for the right to an effective remedy and to a fair trial, which is an EU fundamental right recognized by Art. 47 Charter of Fundamental Rights of the European Union (the 'CFREU').[86] It should be highlighted, in this regard, that according to Article 6(1) TEU, '[t]he Union recognises the rights, freedoms and principles set out in the [CFREU] of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.

6.2.2.3 Overriding Mandatory Provisions

Article 16 of the Rome II Regulation establishes the 'overriding mandatory provisions' reservation. This provision creates an exception to the general rule that may be triggered in cases where the application of the *lex loci damni* would constitute a breach of mandatory provisions of the domestic law in the EU Member State where the court was seized.[87] The article reads as follows:

> Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

The mandatory rules of the *lex fori* apply automatically, irrespective of the content of the law otherwise applicable to the dispute.[88] According to Recital 32 Rome II Regulation, 'considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions'. Since these are public law regulations, their scope of applicability is usually confined to the territory of a EU Member State, however.[89] A mandatory rule may override the application of the law of the third country, provided that there is a factor connecting

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[85] Cf. Article 288 TFEU.

[86] Charter of Fundamental Rights of the European Union, Oct. 26, 2012, O.J. (C 326), 391–407.

[87] The CJEU has explained mandatory provisions of domestic law as 'national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State'. CJEU, Arblade Joint Cases C/369/96 and C-376/96 (23 November 1999), ¶ 30. *EU Study of the Legal Framework on Human Rights*, *supra* note 53, ¶ 223.

[88] Enneking, *supra* note 75, at 304.

[89] *Id.* at 283, 304.

the victim to the forum state. In foreign direct liability cases, given that the claimant is usually a foreign national, this requirement is rarely satisfied.[90]

In the case of mandatory rules in an EU Member State aiming to regulate the conduct of a company in the public interest of human rights, the exception under Article 16 may be evoked more easily in tort liability cases. Then the domicile of the defendant in the EU Member State may provide for the necessary link with the territory of the EU Member State.

6.2.2.4 Ordre Public

The public policy exception under Article 26 Rome II Regulation allows for the application of the *lex fori* rule if the application of the foreign law would be contrary to the public order. The Article 26 stipulates the following:

> The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

This provision sets a threshold requirement in that it allows a court to refuse the application of a law if this would be 'manifestly incompatible' with the public policy of the forum in which the court was seized. Pursuant to Recital 32 of the Rome II Regulation, this reservation of *ordre public* may be applied in exceptional circumstances only.[91] [92] It is not entirely clear what amounts to 'manifestly incompatible' and therefore is sufficient to invoke this Article 26 in direct tort liability cases.[93] Case law suggests that the rule may be applied if the law of the third country would undermine human rights, for example, if it were to allow child labour.[94]

6.2.2.5 Environmental damage

A court may determine the choice of law issue under Article 7, entitled 'Environmental damage', which applies to cases in which the non-contractual obligations arise out of environmental damage, or damage sustained by persons or property as a result of such damage. Where the damage results from human rights violations, the article may usually not be invoked. A court

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[90] *EU Study of the Legal Framework on Human Rights*, *supra* note 53, ¶ 223.

[91] The Recital 32 indicates that 'the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum'. *Rome II Regulation*, *supra* note 71, Recital 32.

[92] The CJEU has furthermore held that States may apply this reservation and refuse the enforcement of a judgment in 'exceptional cases' of a 'manifest breach' of human rights. *EU Study of the Legal Framework on Human Rights*, *supra* note 53, at 224.

[93] Enneking notes that under Dutch law, 'there has to be a conflict with fundamental legal principles for the court seized of the matter to be allowed to refuse to apply a host country regulation on the basis of the public policy exception, and apply its own law instead'. Enneking, *supra* note 70, at 223.

[94] Cees Van Dam, *Human Rights Obligations of Transnational Corporations in Domestic Tort Law*, *in* Human Rights and Business: Direct Corporate Accountability for Human Rights, 489 (Jernej Letnar Černič & Tara Van Ho eds., 2015).

may apply the *lex loci delicti* rule to disputes that fall within the scope of Article 7, that is the law of the place where the delict/tort was committed, if the claimant so chooses. Article 7 stipulates that:

> The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

The considerations underlying this provision of the Rome II Regulations are to ensure the legitimate interest of victims to enjoy the higher level of protection that may be available in other countries.[95] The provision also contributes to the public interest of greater environmental protection.[96] It is somewhat surprising that the Rome II Regulation provides greater protection to victims of environmental damage than to victims of human rights breaches. The disparity of treatment is hard to reconcile with Article 2 TEU, according to which, '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.

6.2.3 Human Rights, EU law and EU Private International law

As can be gathered from the preceding two sections, EU private international law arguably allows little room to human rights considerations. This situation contrasts with the clear preeminence EU law awards to human rights. Indeed, according to Article 2 TEU: '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'. Moreover, according to Article 6(1) TEU:

> 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.

In addition, according to Article 6(3) TEU:

> 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

Article 6(3) TEU codifies the status that EU law has awarded to fundamental rights as general principles of EU law since the CJEU's seminal judgements *Stauder v City of Ulm*[97] and *Internationale Handelsgesellschaft*.[98] According to Lenaerts and Van Nuffel, 'the recognition of

[95] Enneking, *supra* note 70, at 302-303.

[96] *Id.*

[97] Case 29/69, Stander v City of Ulm, 1969 E.C.R. 419.

[98] Case 11/77, Internationale Handelsgesellschaft, 1970, E.C.R. 1125.

"the law" as a source of [EU] law (see Article 19(1) TEU) has enabled the Court of Justice to have recourse to general principles when interpreting and applying [EU] law'.[99]

EU-guaranteed human rights thus have binding force, with the consequences that EU secondary legislation, such as the Rome and Brussels Regulations, should be interpreted in the light of general principles of EU law, including EU-protected human rights.[100] In the words of Tridimas, 'where a Community measure falls to be interpreted, reference must be given as far as possible, to the interpretation which renders it compatible with the [Treaties] and the general principles of law'.[101] To the extent that provisions in the Brussels I Regulation / Brussels Recast or the Rome I Regulation are incompatible with these general principles of EU law (and, in particular, EU-protected human rights) the Regulations should be set aside. These principles form part of the EU legal order and hence, their infringement by EU secondary legislation (including the Rome and Brussels Regulations) constitutes an 'infringement of the Treaties or any rule of law relating to their application' within the meaning of the second paragraph article 263 TFEU (action on annulment of EU secondary legislation).[102] According to Hartley 'the phrase 'any rule of law relating to their application' must refer to something other than the Treaties themselves and it has been used by the Court as the basis for the doctrine that an EU act may be quashed for the infringement of a general principle of EU law'.[103]

Consequently, it could be argued that the provisions of the Rome II Regulation that establish the escape clause (Art. 4(3)), and 'the mandatory rule of the lex fori' (Art. 16) and the public policy exception (Art. 26) should be interpreted in accordance with the general principles of EU law, including EU guaranteed human rights. An interpretation of these provisions in line with human rights, supports an interpretation of 'a manifestly close connection' under the escape clause (Art. 4(3)), of the mandatory rule of the *lex fori* (Art. 16) and public policy exception (Art. 26) that is most favourable to giving effect to the rights of victims to an effective remedy. Until and if the CJEU draws these consequences from the status of fundamental rights under general EU law, the current state of EU private international law in this field sits uneasily with Article 2 of the Treaty on the European Union, according to which 'the Union is founded on the values of respect for […] human rights'.

6.3 Substantive Liability

6.3.1 Preliminary Considerations

The law of torts and non-contractual obligations can create liability for parent companies in situations where harm has been caused to legally protected interests. This section sets out the different legal bases for establishing civil liability of a parent entity for adverse human rights impacts that are the result of the activities of a subsidiary or business relationship outside the EU.

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[99] K Lenaerts & P Van Nuffel, European Union Law, at ¶ 22-036 (Sweet & Maxwell, 3rd ed. 2011).

[100] *See* Case 218/82, Commission v Council, 1983 E.C.R. 4063, ¶ 15 and, in relation to fundamental rights, Joined Cases 46/87 and 227/8, Hoechst v Commission, 1989 E.C.R. 2859, ¶ 12.

[101] Takis Tridimas, The General Principles of EU Law, at 29 (Oxford University Press 2nd ed. 2006).

[102] *See*, for an example, Case 112/7 Töpfer v Commission*,* 1978 E.C.R. 1010, ¶ 19.

[103] T. Hartley, The Foundations of European Union Law, at 146 (Oxford University Press 8th ed. 2014).

The purpose is to determine whether human rights due diligence has a role to play, if any, in courts consideration of the substantive liability issue.

The following three grounds of liability will be discussed in detail:

i. Direct parent liability on the basis of general principles of tort of negligence (legal duty of care)(see Section 6.3.2).

ii. Complicity liability (see Section 6.3.3).

iii. Piercing the corporate veil (see Section 6.3.4).

The sections referred to above will analyze each concept separately.

The most common legal grounds on which victims have sought to establish parent liability are direct parent liability on the basis of general principles of tort of negligence, i.e., liability resulting from conduct in the form of a breach of a duty of care that causes harm to a third person, and complicity liability, i.e., liability for 'aiding and abetting' in wrongdoing causing harm to a third person. These grounds provide distinct legal bases that can give rise to liability for harm resulting from different types of conduct and in different situations, and will therefore be discussed separately.

Certain common characteristics can be discerned between the two, however.[104] *First*, they provide liability in situations where the parent entity is involved in the human rights abuses that are committed by another State or non-State actor. *Second*, the liability of the parent company that can arise in these situations is *direct* in that the company is liable for its own wrong-full conduct. In this respect, these legal grounds can be distinguished from the piercing the corporate veil doctrine, which is an example of *indirect or secondary* liability; a company is held liable for the wrongful conduct of another entity to which it is affiliated.[105]

Third, direct parent liability is commonly based on *fault* liability. In order for victims to succeed in establishing liability, they would typically have to demonstrate, apart from harm and causation, an act of fault on the part of the company, in terms of intentional or negligence conduct.[106] Parent liability is typically not based on *strict* liability, although this form of liability may apply in exceptional situations. Strict liability differs from fault liability in that, under strict liability, there is no requirement to prove fault, negligence or intention. Since these requirements are not necessary for a finding of liability, strict liability is usually easier to establish than fault liability. However, strict liability is unlikely to arise in typical tort liability cases however, in

[104] International Commission of Jurists, *supra* note 54, at 10.

[105] Three types of secondary parent liability have been identified: '*vicarious*' liability (the liability of a party for the conduct of those deemed to have been acting on its behalf), '*secondary*' liability (the liability of a party for its participation in, or a contribution towards, a tort committed by another, and finally (and most controversially), '*enterprise*' liability (the liability of a party for the activities of another on the basis that together they are involved in a single commercial enterprise). J.A. Zerk, Multinationals and corporate social responsibility: limitations and opportunities in international law, at 216 (Cambridge University Press. 2006) (emphasis added).

[106] International Commission of Jurists, *supra* note 54, at 10.

which the link between the parent and the activities or damage is more indirect and carried out by subsidiary entities having a legal personality of their own.[107]

Fourth, the test that is applied to determine liability share certain elements. This section will highlight two of these elements that are especially relevant to our hypothesis: knowledge (see Section 6.3.3.1) and precautionary measures (see Section 6.3.3.2).

6.3.2 Primary Liability for Negligence and the Legal Duty of Care: Chandler v. Cape

The primary basis on which tort liability claims have been brought is direct parent company liability or primary liability. Direct parent liability claims are based on the general tort principle of negligence and a legal duty of care. Direct parent liability requires a legal duty of care to attach to the parent company, which the law creates in particular situations. The company stands accused of fault through negligence by not having taken the reasonable care that was required by law to prevent foreseeable harm to third parties.[108] The claims arise out of harm resulting from the activities of a subsidiary entity. The parent company is not held liable for the wrongful acts of a subsidiary entity, but rather for negligent conduct of its own that can be reasonably attributed to it. Parent liability can arise irrespective of any liability on the part of the subsidiary entity.[109]

Claims based on direct parent liability in tort liability cases have been brought in both common law and civil law systems. As explained by Enneking, even though the tort law systems may differ in their analytical approaches to foreign direct liability cases, they nonetheless operate similarly in practice. In common law systems, victims have been able to rely on a limited number of specific causes of action that have been created through case-law and that relate to particular factual situations. The alleged tortious behavior and required elements for these torts vary according to these specific causes of action. In European civil law systems, causes of actions find their legal basis in the statutory provisions on Tort law.[110] The allegations can relate to any type of tortious behavior that is contrary to that what is generally considered as proper societal conduct and that causes damages. This approach is said to be informed by Grotius' natural law concept 'that *every* act that is contrary to that which people in general, or considering their special qualities, ought to do or ought to not do, and that causes damage, potentially gives rise to an obligation under civil law to compensate such damage'.[111]

In the common law system of the UK, direct parent liability may arise on the basis of general tort principles and the 'imposition or assumption' of responsibility. The assumption of a legal duty involves an exception to the general rules of Tort law, which holds that companies in general

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[107] Enneking, *supra* note 70, at 245. International Commission of Jurists, *supra* note 54, at 245.

[108] *Id.* at 16.

[109] *Chandler v Cape PLC*, [2012] PIQR P17, [2012] 3 All ER 640, [2012] 1 WLR 3111, [2012] ICR 1293, [2012] EWCA Civ 525, [69].

[110] *E.g.* Code Civil art. 1382 ff (France) or Código Civil art.1902 ff (Spain).

[111] Enneking, *supra* note 70, at 170-171.

have no legal duty to prevent parties from causing harm to another.[112] The court may recognize in specific situations that the law imposes on a parent company a legal duty of care that is owed to the employees of a subsidiary entity. This was first accepted in *Connely v Rio Tinto Zinc Corporation*[113] and *Ngcobo v Thor Chemicals Holdings Ltd v others.*[114] The case law suggests that the following four requirements must be satisfied for a company to be held liable for negligence, that is: '(i) he/she owes a duty of care to the victim, (ii) he/she has breached that duty, (iii) the victim's damage is not so unforeseeable as to be too remote, and (iv) there is a causal link between the negligent conduct and the damage'.[115]

The UK Court of Appeals in *Chandler v Cape* was the first to establish liability on the basis of a breach of a legal duty of care in a direct tort liability case. In its ruling, the Court of Appeals addressed a claim brought by Mr. Chandler against Cape plc, the parent company of his former employer, Cape Building Products Ltd after having caught asbestosis as a result of his employment at Cape Building Product Ltd around 50 years earlier.[116] The central question was 'whether Cape owed a direct duty of care to the employees of its subsidiary to advise on, or ensure, a safe system of work for them'.[117] More specifically, the court examined whether: (i) the circumstances in Cape were such that Cape had assumed responsibility for the safety of Cape Building Product Ltd's employees; (ii) whether, consequently, Cape owed a duty of care to Mr. Chandler to prevent his exposure to asbestos; and (iii) if such duty were to exist whether Cape had breached it.

The Court answered affirmatively to the three questions. The Court reached its conclusion on the basis of the application of the three-stage test developed in *Caparo industries plc v Dickman*. This test involves an assessment of: (a) the foreseeability of the harm; (b) the existence of a relationship characterized by law as one of 'proximity' or 'neighborhood' between the party owing the duty and the party to whom the duty is owed; and (c) whether the situation is one in which it is fair, just or reasonable that the law should impose a duty of care.[118]

The *first* part of the *Capo* test, the foreseeability for the purpose of determining whether a duty of care attached to the parent company involved ascertaining whether harm to the plaintiff could have been foreseen. The Court established this element without difficulty. Facts pointed to Cape plc. being fully aware of the existence of a 'systemic failure' at Cape Building Products resulting from the escape of dust from the factory with no sides into the atmosphere. Cape plc. had furthermore issued a statement in which it conceded that it was aware of the risk of asbestosis

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[112] Chandler v Cape PLC, [2012] PIQR P17, [2012] 3 All ER 640, [2012] 1 WLR 3111, [2012] ICR 1293, [2012] EWCA Civ 525, [63].

[113] Connelly v. RTZ Corporation Plc and Others [1997] UKHL 30.

[114] Ngcobo et al v. Thor Chemicals Holdings [1995] TLR 579.

[115] Siel Demeyere, *Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law*, 3 European Review of Private Law 315, at 402 (2015).

[116] Chandler v Cape PLC, [2012] PIQR P17, [2012] 3 All ER 640, [2012] 1 WLR 3111, [2012] ICR 1293, [2012] EWCA Civ 525, [66].

[117] *Id.* at 81.

[118] *Id.* at 32.

caused by asbestos exposure.[119] On the basis of the facts and this statement by Cape plc., the Court established that Cape plc. knew that the operations at Cape Building Products created risks to the health and safety of others working at Uxbridge Cape.[120]

The Court focused then on the *second* and *third* limbs of the *Caparo* test, which it addressed jointly. The Court considered whether the relevant facts pointed to circumstances in which there was a sufficient degree of 'proximity' that gave rise to a legal duty of care that Cape owed to the employees of Cape products to protect them from harm from the asbestos atmosphere and whether it was fair, just and reasonable to impose liability in these circumstances.

The Court considered, based on the evidence, the fact that Cape plc was involved in the asbestos business and had superior knowledge about aspects of health and safety in this industry. There was a 'systemic failure' at Cape Products, the occurrence and risk of which for the health and safety of others working at Uxbridge, Cape plc was fully aware. Cape plc exercised a certain level of control over the asbestos business carried on at Uxbridge, which was evidenced by Cape's direction and practice of intervening in relation to various matters, for instance product development. The research conducted by Dr. Smither, who was employed as the group's medical advisor, on the link between asbestos-production and asbestosis evidenced the involvement by Cape plc. in questions relevant to health and safety policy at Cape Products. In order to demonstrate a certain level of control, it sufficed for the parent entity to have a practice of intervening in the trading operations of the subsidiary, for instance in relation to production and funding issues. There was no need to demonstrate that the company actually intervened in the health and safety policies of the subsidiary, however.

On the basis of these facts, the court established that there was a sufficient degree of 'proximity' between Cape plc. and Mr. Chandler, and that it was appropriate to find that Cape had assumed a legal duty of care. This duty entailed that Cape was required by law 'to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken'.[121] The judge found that Cape had breached this duty of care by omission to take precautionary measures. The court indicated that 'what Cape accepted was that Cape Products had breached its duty to its employee and that if it, Cape, had assumed a duty to Cape Products' employees to advise on, or to ensure, that they had a safe system of work, that system of work was in fact rendered an unsafe one in a way which triggered its liability by reason of the migration of asbestos dust'.[122] Cape thus was held liable for not having taken the duty of care required of it by law to give advise and ensure a safe system of work.

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[119] The form of concession was as followed: '[Cape] will admit that asbestos exposure in substantial concentration sufficient to create a risk of asbestosis was known to be foreseeably hazardous at the material time and that a person causing or permitting such exposure would be liable in respect to any relevant common law and statutory duties if the same were owed.' *Id.* at 35.

[120] *Id.* at 77-78.

[121] *Id.* at 78.

[122] *Id.* at 81.

The court gave a description of the set of circumstances in which there is sufficient proximity and the law attaches a legal duty of care on a parent company for the health and safety of a subsidiary's employees:

> (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding.

The UK Court of Appeal applied this test in *Thompson v The Renwick Group*.[123] The case had been brought by Mr. Thomson against The Renwick Group plc, a holding company, for injuries suffered as a result of exposure to asbestos during Mr. Thomson's employment at a subsidiary company where he was engaged in `hand baling` of raw asbestos. The central issue was whether there was sufficient evidence 'to justify the imposition of a duty of care on the parent company to protect the subsidiary company's employees from the risk of injury arising out of exposure to asbestos at work'.[124] The court clarified that the circumstances identified by the court in *Chandler v Cape* were not exhaustive of the possibilities in which a duty may be imposed. The court also noted:

> the balance of Arden LJ's indicia indicate, what one is looking for is 'a situation in which the parent company is better placed, because of its superior knowledge or expertise, to protect the employees of subsidiary companies against the risk of injury and moreover where, because of that feature, it is fair to infer that the subsidiary will rely upon the parent deploying its superior knowledge in order to protect its employees from risk of injury.

Upon application of the *Caparo* test, however, the court conceded that the facts of the case were too far removed from those in Chandler v. Cape.[125] It held that no duty of care could be imposed on the parent company in the case because the business it carried out, if any apart from holding shares, was not in relevant aspects the same as that of its subsidiary. The parent company was not involved in haulage, warehousing or handling asbestos; hence (not all) the indicia were satisfied.[126]

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[123] *Id.* at 33.

[124] Thompson v The Renwick Group plc [2014] EWCA Civ 635. [27]

[125] *Id.* at 29.

[126] *Id.* at 37.

This ruling affirmed that the chances a court will recognize that the circumstances of the case are sufficiently similar to those prevalent in *Chandler v Cape* to support the conclusion that the law imposes a legal duty of care to the parent company, in accordance with *Chandler v Cape*, are unlikely. Illustrative is also the Dutch court's ruling in *Milieudefensie v. Shell*. The court applied Nigerian law to the case and considered whether the common law of Nigeria recognized a legal duty of care to attach to the parent company RDS.[127] The court answered in the negative. The facts of the case did not engage all of the circumstances described in *Chandler v Cape*. A critical point was that RDS and SPDC were not in the same business. The RDS's business was policy, strategy and risk-management, whereas the SPDC was involved in oil-production. The court held that RDS was aware about the health risks involved in SPCD's operations, however it was not clear whether RDS had superior knowledge over the subsidiary about these risks and whether the people living in the vicinity relied on the RDS to use this superior knowledge to protect them against these risks. The court concluded that 'the special circumstances based on which the parent company was held liable in Chandler v Cape are not so similar to those in the subject case that on this ground alone it may be assumed that RDS had a duty of care in respect of Milieudefensie and Akpan' and that '*Chandler v Cape* does not create any precedent in the subject case'.[128]

6.3.3 Complicity Liability[129]

An alternative legal basis for establishing corporate civil liability for human rights abuses is complicity liability. The SRSG issued a report in 2008 in which he clarified this concept of complicity and made several observations.[130]

The SRSG acknowledges that there is no 'uniform' or 'static' definition of complicity,[131] hence it is 'not possible to specify definitive tests for what constitutes complicity in any given context'.[132] The SRSG distilled his legal definition of complicity from the complicity liability under international criminal law that prohibits aiding and abetting international crimes. This international criminal law standard has been referred to and applied in the jurisprudence under the ATCA. Although this jurisprudence relates specifically to the ATCA, the SRSG notes that the principles may have relevance outside the context of the ATCA context as well, in that courts

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[127] The court noted that Nigeria's legal system is based on the common law legal system of England and that while the decisions of English courts are not binding on the Nigerian court, they have 'persuasive authority and are therefore frequently followed in Nigerian case law'. Court of the Hague, 30 January 2013, 2013, C/09/337050 / HA ZA 09-1580 (Friday Alfred Akpan/ Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria LTD) (Neth.), § 4.22.

[128] *Id.* § 4.32.

[129] Enneking, *supra* note 70, at 180-181.

[130] Human Rights Council, *supra* note 1.

[131] *Id.* ¶ 70.

[132] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 76, U.N. doc. A/HRC/8/5 (April 7, 2008) [hereinafter *Ruggie, 2008 Report*] (by John Ruggie).

draw inspiration from international criminal law to define domestic standards of civil and criminal liability.[133]

The SRSG explains legal complicity as 'aiding and abetting', the relevant standard of which is 'knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime`. Complicity liability can arise if companies are involved in human rights abuses that are committed by other actors, including State and non-State actor, for instance paramilitaries.[134] Legal complicity can be triggered by way of an act or an omission. In order to meet the minimum threshold of substantial assistance for the purpose of complicity liability, the company should have facilitated the crime in a significant way, for instance by legitimizing or encouraging it.

Complicity also requires knowledge. The court would be looking at whether the company had actual knowledge, more specifically knowledge about the criminal intentions of the principle perpetrator.[135] The knowledge standard is less demanding on companies than the knowledge element of negligence, in that the standard of complicity does not impose a requirement on companies to be proactive and to investigate and acquire the knowledge that it should have. As noted by one commentator, the knowledge standard sets a low threshold of liability, however, in that it does not require exact knowledge of the crime, but only of the probability that a number of crimes would be committed, including the one perpetrated.[136] In the application of this knowledge test, the court would be looking for the subjective mental state of the accused in the particular circumstances of the case, which can be inferred from direct or indirect factual circumstantial evidence.[137]

Legal definitions of complicity vary according to international and national law, common law and civil law systems and between national jurisdictions. The SRSG also notes that the legal inquiry for complicity liability under domestic civil law on the basis of general tort principles can differ from that applied under international criminal law, in that the elements of knowledge and assistance requirements may be applied.[138] An example is the element of knowledge that, in the context of negligence, also imposes a requirement that the company 'should have known that it was taking a foreseeable risk of contributing to an abuse as opposed to needing to prove that there was actual knowledge'.[139]

The SRSG also clarified some of the confusion about legal and non-legal definitions of complicity. In doing so, the SRSG drew from the distinction often made in the literature between the following three categories of complicity: 'direct, indirect (beneficial) and silent

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[133] Human Rights Council, *supra* note 1, ¶ 33.

[134] *Id.* ¶ 30.

[135] *Id.* ¶ 42.

[136] R. Mares, *Defining the Limits of Corporate Responsibilities Against the Concept of Legal Positive Obligations* 40 The George Washington International Law Review, at 1206 (2009).

[137] Human Rights Council, *supra note* 1, ¶ 43.

[138] *Id.* ¶ 53.

[139] *Id.* ¶ 53.

complicity'.[140] According to the SRSG, legal liability is likely to arise in situations of direct complicity, but not in situations of indirect or silent complicity. Direct complicity entails that a company knowingly provides substantial contributions to the crime. Beneficial liability, which arises in situations where a company benefitted from human rights abuses, is in itself unlikely sufficient in order to trigger legal liability.[141] Also a company's presence in the country where the abuses occurred is in itself generally not a sufficient or necessary condition that can give rise to complicity liability. Beneficial or silent complicity is generally grounded in moral obligations and can provide a benchmark for societal actors to judge companies against.[142] Non-compliance can result in these actors inflicting costs on the company, for instance shareholder disapproval, reputational damage or divestment.[143]

The SRSG furthermore shed clarity on the relationship between complicity and due diligence. As the UNGPs affirm, the corporate responsibility to respect encapsulates a responsibility to avoid complicity. The SRSG notes that 'complicity is part and parcel of the responsibility to respect human rights, and entails acting with due diligence to avoid knowingly contributing to human rights abuses, whether or not there is a risk of legal liability'.[144] The UNGPs indicate that business enterprises should treat the risk of being complicit through causation or contribution in gross human rights abuses committed by others as a legal compliance issue wherever they operate. Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example).[145] Business enterprises thus have a responsibility to act with due diligence in order to avoid being complicit in human rights abuses. The UNGPs support an understanding of complicity that is much wider than the concept of direct complicity that can give rise to legal liability. Michalowski explains:[146]

> Thus, due diligence responsibilities are based on the assumption that mere business relationships can have an adverse human rights impact which needs to be avoided, even though it would not give rise to legal complicity liability. Due diligence responsibilities consequently not only include forms of complicity, such as silent and beneficial complicity, that are widely outside the scope of legal complicity, but moreover apply a broader approach to the definition of direct complicity than is covered by legal obligations.

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[140] Mares, *supra* note 136, at 1170.

[141] Human Rights Council, *supra* note 1, ¶ 58.

[142] *Id.* ¶ 53.

[143] *Id.* ¶ 56.

[144] *Id.* ¶ 71.

[145] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.* U.N.Doc. A/HRC/17/31, GP 23 and commentary (March 21, 2011) [hereinafter *UNGPs*] (by John Ruggie).

[146] Sabine Michalowski, *Due diligence and complicity: a relationship in need of clarification*, *in* Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, 230 (Cambridge University Press ed. 2013).

6.3.3.1 The Element of Foreseeability and Human Rights Due Diligence

The tests for the tort of negligence/ legal duty of care and complicity liability in tort law involve the element of knowledge. While the foreseeability in complicity liability generally requires 'actual knowledge', negligence liability requires an assessment of whether the parent company knew or should have known the risk of the company's conduct causing harm. The requirements that companies should have known entails 'a reasonableness test', meaning an assessment of whether a reasonable person would have appreciated 'that there was a risk of contributing to abuse and have changed their behavior to avoid the risk'? A company thus might incur negligence liability if it should have known of the risks. [147]

An analysis of these tests suggests that the UNGPs, and the human rights due diligence concept in particular, can be of relevance in establishing knowledge in the application of these tests.[148]

In order to establish that a company *knew*, the court may consider the information that was available to the company or information that was generally available at the time.[149] As the court in *Chandler v Cape plc* illustrated, it may not be difficult to establish such actual knowledge, as foreseeability was established on the basis of factual evidence of awareness and a general statement of knowledge by Cape plc. about the risk of asbestosis caused by exposure to asbestos. The court may also refer to relevant voluntary initiatives that operationalize the human rights due diligence concept in relation to particular sectors, operational contexts or activities as evidence of *general* knowledge of human rights risks. The ICJ notes that the mere adoption or introduction of these voluntary initiatives can signal the general foreseeability of human rights risks in the circumstances of the case.[150]

The court may also give consideration to the human rights due diligence practices of a company in its consideration of whether the company *should* have known the probability of its acts or omission having adverse human rights impacts. This aspect of foreseeability entails a positive prescription in that it requires companies that lack a level of knowledge, to diligently investigate and to acquiring the information that is necessary to understand the existence of potential adverse human rights impact resulting from the activities of a third person and the likelihood of these impacts actually occurring.[151] A company unknowledgeable of its human rights risks thus may still incur liability, unless the company undertook a due diligence inquiry about the risks, which entails 'an investigation and inventory of the potential risks to third parties that could be connected with its activities'.[152]

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[147] Human Rights Council, *supra* note 1, ¶ 53.

[148] *See* Cees van Dam, *Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights*, 2 Journal of European Tort Law 3, 221, at 244 (2011).

[149] International Commission of Jurists, Corporate Complicity and Legal Accountability, Volume 2: Criminal Law and International Crimes, at 17-18 (2008), http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf.

[150] *Id.* at 20.

[151] Mares, *supra* note 136, at 1185.

[152] *Id.* at 18.

This aspect of foreseeability and the human rights due diligence are linked at least in the following ways. First, adherence to human rights due diligence could help companies foresee and manage involvement in human rights risks. As the SRSG has recognized, the human rights due diligence process can serve as a means *ex ante* for companies to apprehend complicity risks and through better risk-management avoid complicity.[153] The reason is that companies by undertaking human rights due diligence 'can become aware of, prevent and address risks of complicity by integrating the common features of legal and societal benchmarks into their due diligence processes'.[154] Companies furthermore may turn to voluntary initiatives that are aimed at operationalizing the human rights due diligence concept for guidance and good practice on the types of assessments that company should take to meet the element of knowledge. These initiatives serve as useful references for identifying and investigating foreseeable risks.[155]

Second, human rights due diligence could *ex post* human rights abuses serve as a defense against complicity charges by demonstrating that the company did not stay willfully ignorant of its complicity risks.[156] Whether a company has a due diligence process in place and undertook human rights impact assessments could weigh into a courts determination of foreseeability and serve as evidence that the company did not and could not have foreseen the human rights risk.[157] Human rights due diligence thus can help companies to avoid complicity liability if human rights abuses have taken place, however this is not automatic.[158] Due diligence is not seen as 'providing a full legal defense against complicity charges'. [159] This is what the commentary to the UNGP 17 suggests:

> Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

The likelihood of human rights due diligence serving as a legal defense and the extent to which adherence to human rights due diligence may shield a company from liability will depend on the legal standard of knowledge that the court applies and to what degree this standard corresponds with the human rights due diligence concept. To determine whether human rights due diligence will effectively shield a company from civil liability is complicated. Partially this is because legal definitions of complicity vary between legal systems, which are furthermore applied in

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[153] Human Rights Council, *supra* note 1, ¶ 4.

[154] Michalowski, *supra* note 146, at 223.

[155] International Commission of Jurists, *supra* note 54, at 20.

[156] Mares, *supra* note 136, at 1186.

[157] International Commission of Jurists, *supra* note 54, at 20.

[158] Michalowski, *supra* note 146, at 219.

[159] *Id*.

light of the factual circumstances of the case.[160] The lack of precision by which the UNGPs define the scope of human rights due diligence adds to the unpredictability.

Third, the human rights due diligence may be *the* standard of knowledge that a company is reasonably expected to seek. As the SRSG notes, the reasonableness test for the purpose of establishing knowledge in fact 'may not be posed as a knowledge test but rather a question as to whether the company acted in accordance with the requisite standard of care'.[161]

6.3.3.2 Precautionary Measures and Human Rights Due Diligence

The tort of negligence involves an assessment of the measures a company is reasonably expected to take in order to prevent the foreseeable harm from materializing. A determination of whether a company has taken necessary measures will most commonly amount to an assessment of whether a company exercised due care as expected by law. A company may incur negligence liability if it failed to take diligence measures it was required to take under this standard. Several links can be discerned with the human rights due diligence concept.

The human rights due diligence can define the standard of a legal duty of care in negligence cases. In certain jurisdictions, a court may resort to international standards, inter alia the UNGPs, to construct this standard of care.[162] For instance, in the Netherlands a court may draw from existing legal and social norms and practices relating the behavior of companies in order to define the appropriate standard of care in a case brought on the basis of the Dutch general provision on tort/delict. As explained by Enneking, this is by reason of the nature of this standard of care as an open norm of a violation of unwritten norms pertaining to proper social conduct. These norms may be binding or non-binding, written or unwritten, and can be discerned from various sources. Enneking notes 'existing treaty or statutory provisions pertaining to behavior that is related to the behavior in dispute, general legal principles and convictions, existing norms of (self-regulatory) practices in the societal sector, industry or branch involved, and existing case law in related disputes'.[163]

The UNGPs and the OECD Guidelines for Multinational Enterprises are recognized as international instruments that a court may refer to in order to construe a legal standard of care.[164] A commentator notes that there is increasing recognition for the human rights due diligence as an international standard of conduct for dispute resolution, as demonstrated by the jurisprudence of the OECD NCP. Hence, more generally, there is a reasonable probability that the human rights due diligence concept may inform the legal standard of due care in future negligence cases.[165]

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[160] *Id*.

[161] Human Rights Council, *supra* note 1, ¶ 53.

[162] Enneking, *supra* note 70, at 240.

[163] *Id.* at 240. Also *see*, Liesbeth Enneking, et al., *supra* note 36, at 612.

[164] Enneking, *id.* at 173, 240.

[165] John Sherman & Amy Lehr, *Human Rights Due Diligence: Is It Too Risky,* 12 (John F. Kennedy School of Government, Harvard University, Corporate Social Responsibility Initiative Working Paper No.55, 2010).

Enneking furthermore notes that corporate negligence entails a normative judgment by a court as to whether a company had appropriate and sufficient measures to prevent harm from materializing and therefore acted in accordance with the applicable standard of a duty of care. This normative judgment of whether the company acted reasonably is determined on the basis of a judicial balancing act between care and risk. The elements that weigh into this balancing act signal that the essence of this balancing act is to determine whether 'the parent company has taken sufficient care in light of the potential risks inherent in the multinational corporation's host country activities'.[166]

Enneking notes the pragmatic nature of this balancing exercise, which 'revolves around the aim of avoiding or mitigating the risk of harm on the one hand and the means (time, money, effort) by which to achieve this on the other'.[167] Enneking also indicates that:[168]

> As the risk becomes more serious, the duty on the parent company to take precautionary measures shifts from best practicable means to best technical means, in the sense that business-economic considerations will become less and less important in view of the aim of avoiding widespread and/or serious people- and planet-related harm. Slowly but surely, the obligation on the parent company to perform to the best of its ability in view of the costs involved shifts in the direction of an obligation to perform to the best of its ability regardless of the costs and possibly even beyond, in the direction of an obligation to achieve (or, in this sense, rather avoid) a particular result and stricter forms of liability.

6.3.4 Piercing the Corporate Veil

An alternative legal basis that victims could rely on in order to establish parent liability is the corporate law notion of piercing of the corporate veil.[169] The doctrine entails a true exception[170] to the general principle of separate legal personality established in *Salomon v A Salomon and Co Ltd*. Piercing the corporate veil entails that the court disregards this principle. Upon incorporation, a company incurs a legal personality that is separate from its members, which entails that it has rights and liabilities on its own, including the right to sue and to be sued, to enter into contract and to own property. The principle of limited liability principle shields a shareholder from liability beyond the obligations on the part of its value share. This principle extends to the corporate group. While a parent company may create and own its subsidiary entities, the limited liability principle shields the parent and the group from liability risks with regards to the operations of its subsidiaries, which general law treats as separate legal persons.[171]

The doctrine of piercing the corporate veil may be relied on to establish the liability of a parent company. There are important differences between the piercing of the corporate veil and direct

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[166] Enneking, *supra* note 70, at 233.

[167] *Id.* at 233.

[168] *Id.* at 234.

[169] Enneking, *supra* note 70, at 248.

[170] Prest v Petrodel Resource Limited and others, [2013] UKSC 34.

[171] Peter Muchlinski, *Limited Liability and multinational enterprises: a case for reform?*, 34 Cambridge Journal of Economics, 918 (2010).

parent liability in tort liability cases, however.[172] Enneking notes that the piercing of the corporate veil doctrine has a different starting point, applies a different test, has different outcomes and may entail the application of different rules of private international law.[173] Unlike is the case for direct parent liability, a parent company is not held liable for its own acts or omissions, but for those of a subsidiary entity in the group.[174] The law attributes the acts and liability of the subsidiary entity to the parent company in situations where the law views these companies as having one identity by virtue of the parent company's control and ownership of the subsidiary entity.[175] The doctrine is usually evoked in situations where a creditor turns to a shareholder, the parent company in order to recover compensation that a subsidiary entity owes to this creditor by reason of its wrongful conduct having caused him or her damage. The creditor brings a suit against the parent company because it is unable to retrieve compensation from the subsidiary entity, because of the subsidiary's insolvency or lack of liability insurance.[176] The proceedings may result in the parent company having to settle the debt of the subsidiary entity.[177]

The legal ground and applicable test for piercing of the corporate veil doctrine varies depending on the law that is applied to the case. Where the common law of the UK is applied to the case, the relevant authorities on the piercing of the corporate veil doctrine are *Adams v Cape Industries plc*[178], *Trustor AB v Smallbone*[179], *A v A, Ben Hashem v Al Shayif*[180], *VTB Capital plc v Nutritek International Corpn*[181] and *Prest v Petrodel Resources*. The UK Supreme Court in *Prest v Petrodel Resources* Limited and others shed clarity on the relevant principles and critical features of situations in which the corporate veil has been pierced, which was subsequently referenced in the more recent ruling by the Chancery Division of the High Court in *Wood v Baker.*[182] A short review follows.

The court in *Adams v Cape Industries* plc recognized that subsidiary entities may have been created by parent companies, however this does not alter the fact that general law treats these entities as separate legal persons with their own rights and liabilities.[183] The court also affirmed

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[172] Enneking, *supra* note 70, at 248.

[173] *Id.* at 248.

[174] If a company is held liable for its own tortious conduct on the basis of direct parent liability, the corporate veil is 'crossed, not pierced'. Demeyere, *supra* note 115, at 388.

[175] Prest v Petrodel Resource Limited and others, [2013] UKSC 34, [16].

[176] Enneking, *supra* note 70, at 248.

[177] This obligation is said to be much wider than the obligation that attaches to a company in direct parent liability cases in that 'it enables the creditor to recover his entire claim against the subsidiary from the parent company, irrespective of whether it was actually involved in the coming into being of that claim'. *Id.* at 250.

[178] Adams v Cape Industries plc [1990] Ch 433.

[179] Trustor AB v Smallbone and Others, [2001] EWHC 703.

[180] Ben Hashem v Alshayif [2009] 1 FLR 115.

[181] VTB Capital plc *v* Nutritek International Corp and others, [2013] UKSC 5, appeal from [2012] EWCA Civ 808.

[182] Wood v Baker [2015] EWHC 2536.

[183] The court noted that 'Our law, for better or worse, recognizes the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be

that a corporate group is legally permitted to organize itself through legal form in order to evade legal liability for the activities of one member of the group.[184] The court adopted the dictum in *Woolfson v Strathclyde Regional Council* recognized that 'the corporate veil could be disregarded only in cases where it was being used for a deliberately dishonest purpose'.[185] By stating that piercing the corporate veil is only allowed in situations where the corporate structure amounts to a 'mere façade conceiling the true facts', the alternative ground for piercing the corporate veil, that is the agency theory and the economic entity doctrine, came to occupy a lesser relevant position for the purpose of veil piercing.

A court may invoke the agency theory and hold a company vicariously liable in situations where a subsidiary acts or was acting as a mere agent of the principle, the parent company. In the common law system of the UK, vicarious liability on the basis of agency can arise in exceptional circumstances only.[186] The court in *Adams v Cape* held that piercing the corporate veil on the basis of the agency theory not only requires a close relationship of control between the principle and the agent and authority within the agent, but also an agreement of consent between the principle and the agent, which can be either express or implied. The requirement of consent is problematic in that usually there is no such agreement of consent, hence a parent-agency relationship will not typically be assumed to exist.[187]

The single economic entity doctrine applies to cases in which the parent company exercises close control and dictates the corporate policy of a subsidiary entity to a sufficient extent to establish that the law treats the parent-subsidiary relation as a single economic unit. Like the agency doctrine, the single economic entity doctrine requires a relationship of excessive control by the parent company over the subsidiary entity.[188] What this comes down to 'in practical terms, is that a parent company would be held strictly liable for the activities of a foreign subsidiary by virtue of the 'control relationship' that exists between parent and subsidiary'.[189] The court in *Adams v Cape Industries* held that control over the policies of another entity was, in itself, not sufficient to pierce the corporate veil, however. It also indicated that a court may not threat a group of

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treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities'.

[184] The court in Adams v Cape Industries held that 'we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this way is inherent in our corporate law'.

[185] Prest v Petrodel Resource Limited and others, [2013] UKSC 34, [21].

[186] Zerk, *supra* note 105, at 233.

[187] Anna Farat & Denis Michoñ, *Lifting the Corporate Veil: Limited Liability of the Company Decision-Makers Undermined? Analysis of English, U.S., German, Czeck and Polish Approach*, The Common Law Review, http://www.commonlawreview.cz/lifting-the-corporate-veil-limited-liability-of-the-company-decision-makers-undermined-analysis-of-englishus-german-czech-and-polish-approach.

[188] Eroglu, supra note Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination, 155 (Edward Elgar. 2008).

[189] Zerk, *supra* note 105, at 229-230.

companies as a single unit unless this is expressly permitted by specific statutes and contractual provisions.[190]

The court in *Prest v. Petrodel Resources Limited* and others recalled the ruling of the Vice Chancellor in *Trustor AB v Smallbone* (No 2). This ruling identified three situations in which piercing the corporate veil was considered justified: '(1) the company was shown to be a face or sham with no unconnected third party involved, (2) where the company was involved in some impropriety and (3) where it is necessary to do so in the interests of justice and no unconnected third party is involved'.[191] The court applied the first and second proposition and held that it was entitled to pierce the corporate veil. The judgment was important because it noted that the court is 'entitled to "pierce the corporate veil" and recognise the receipt of the company as that of the individuals(s) control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of those individual(s)'.[192]

The Court in *Prest v Petrodel Resources Limited and others* also considered the decision in *Ben Hashem v Alshayif,*[193] in which Munby J identified six principles that apply to piercing the corporate veil:

> (i) ownership and control of a company were not enough to justify piercing the corporate veil; (ii) the court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of justice; (iii) the corporate veil can be pierced only if there is some impropriety; (iv) the impropriety in question must, as Sir Andrew Morritt had said in Trustor, be 'linked to the use of the company structure to avoid or conceal liability'; (v) to justify piercing the corporate veil, there must be 'both control of the company by the wrongdoer(s) and impropriety, that is (mis)use of the company by them as a device or facade to conceal their wrongdoing'; and (vi) the company may be a 'façade' even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.[194]

This judgment indicates that a court may pierce the corporate veil and attach liability to a parent company in the circumstances where there is ownership and control, some impropriety that involves a deliberate abuse of the corporate structure in order to evade the law or its enforcement and piercing the corporate veil is necessary to provide remedy for the wrong done. The case law indicates that the criteria are not in themselves regarded as sufficient to justify the piercing of the corporate veil, all criteria have to be satisfied.

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[190] Farat & Michoñ, *supra* note 187.

[191] Trustor AB v Smallbone (No 2) [2001] EWHC 703(Ch).

[192] Trustor AB v Smallbone and Others, [2001] EWHC 703, (Ch), [23].

[193] Ben Hashem v Alshayif [2009] 1 FLR 115.

[194] Prest v Petrodel Resource Limited and others, [2013] UKSC 34, [24].

The respective authorities indicate that piercing the corporate veil requires control over the subsidiary. As the court in Adams v Cape plc. expressly mentioned, control in itself does not provide a sufficient ground for piercing the corporate veil, however. There must be impropriety on the part of the parent company. As the court in *Trustor AB v Smallbone* indicated, not just any impropriety would qualify; the impropriety must be 'linked to the use of the company structure to avoid or conceal liability for that impropriety'.[195] There must be a link between the impropriety and the abuse of a company's separate legal personality in order to avoid or conceal liability. The 2012 ruling in *VTB Capital plc v Nutritek International Corpn* recognized that wrongdoing 'must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts'.[196] The court in *Prest v Petrodel Resources Limited and others* noted 'the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities'.[197]

The court in *Prest v Petrodel Resources Limited and others* clarified the meaning of relevant wrongdoing for the purpose of the piercing of the corporate veil doctrine. The court distinguished between two principles, the concealment principle and the evasion principle, in order to determine whether there is question of piercing the corporate veil in particular circumstances:

> 28. The difficulty is to identify what is a relevant wrongdoing. References to a 'façade' or 'sham' beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical.

The court adopted the view that the 'evasion principle' engages the piercing of the corporate veil doctrine, while the 'concealment principle' does not. The evasion principle involves situations in which a company is interposed in order to enable the individual that is in control of this company to evade its legal obligation or to frustrate the enforcement of these obligation against him. There is question of abuse of the separate legal personality of the company in order to evade liability,

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[195] Trustor AB v Smallbone and Others, [2001] EWHC 703, (Ch), [22].

[196] Prest v Petrodel Resource Limited and others, [2013] UKSC 34, [26].

[197] *Id.* at 27.

and the courts may pierce the corporate veil in these situations so as to prevent this abuse. The concealment principle is engaged in situations where the corporate structure is concealing the identity of an actor and the court looks behind the façade in order to discover relevant facts that ascertain the actor's true identity. There may be a link to the use of the corporate structure so as to conceal liability, however the court does not pierce the corporate veil in order to attribute liability, hence the doctrine does not apply in these situations.[198]

Once the wrongful conduct has been established, public policy imperatives come into play to determine whether applying the corporate veil doctrine is justified in the circumstances of the case. The case law appears to indicate that piercing the corporate veil for a wrongful conduct amounting to abuse of the separate legal personality is only justified on the basis of a public policy objective. The court expressly noted that applying the doctrine is inappropriate if it is not necessary to do so, because there would be no public policy imperative justifying that course.[199] This public policy imperative is for the law 'not to be disarmed in face of abuse'. The Court also held that, provided the limits are recognized and respected, the application of the doctrine is consistent with the general approach of English law in dealing with problems raised by 'the use of legal concepts to defeat mandatory rules of law'.[200] The court in *Prest v Petrodel Resources Limited and others* stated:

> But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law'. [201]

The Chancellor Division of the High Court in *Wood v Baker* held that the joint trustees in bankruptcy had presented a good arguable case for interim injunctive relief on the basis of a corporate veil analysis, and the evasion principle, which it summarizes as follows:[202]

> In summary, the bankrupt was, and remains, subject to an existing obligation to disclose after-acquired assets to his trustees. He has evaded that obligation by interposing some, or all of the corporate respondents. His motivation is said to be clear, namely to evade the consequences of disclosure under section 333, and thus the expropriation of those assets under section 307. This is said to be an exercise in evasion by the bankrupt of his statutory obligations under section 333.

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[198] *Id.* at 28.

[199] The court like Munby J in *Ben Hashem* considered that 'if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course'. *Id.* at 35.

[200] *Id.* at 27.

[201] *Id.* at 27.

[202] Wood v Baker [2015] EWHC 2536 [32-33].

The case law indicates that the corporate veil doctrine generally does not create liability for a parent company for the adverse human rights impacts resulting from the activities of a subsidiary undertaking. The doctrine only allows for the liability of parent undertaking in certain cases where there is abuse of the corporate structure. The case law suggests that there is abuse where a parent undertaking interposes a company that it is in control of, in order to defeat a legal right of, or to frustrate the enforcement of this right against it. Thus, the doctrine commonly cannot give rise to liability unless there is abuse of the corporate structure for the purpose of avoiding legal obligations or liability for human rights breaches, or for other rights or obligations that amongst other impacts have adverse human rights impacts. The public policy imperative delimits liability, in that a court may not pierce the corporate veil on the basis of public policy objectives other than to ensure that the law is not disarmed in face of abuse. It appears that the veil piercing doctrine creates liability and provides a remedy for the abuse of the corporate structure by a parent for the sole purpose of avoiding abuse of the law. Liability is limited in that it only applies to the extent necessary to exempt the defendant from the advantages obtained from this abuse.

6.3.5 Preliminary Considerations

6.3.5.1 Sphere of Influence Concept v Human Rights Due Diligence

In the UK common law system, direct parent liability is delimited by an assessment of whether a duty of care does or does not exist.[203] The elements of 'proximity', 'control' and 'the nature of the relationship' 'causality' are integral to, and serve as the delimiting factors for the test of the legal duty of care. These factors mirror and operationalize the sphere of influence concept.[204] Partially because they are expressions of the sphere of influence concept, their application as delimiting concepts are unsuited. Such application has the effect of excluding from the scope of responsibility and liability a broad range of situations in which business enterprises are involved in human rights abuses. The narrow range of situations in which liability may arise and the difficulty of demonstrating the circumstances in which connections of 'proximity' or 'control' exist illustrate the limits of current approaches in ensuring that business involvement in human rights abuses meets with legal consequences. As will be elaborated below, these approaches furthermore contribute little in terms of fostering human rights due diligence practices by companies. A revision of current approaches to parent liability in order to bring these into alignment with the human rights due diligence concept would be in line with current social expectations.

The following sections will explain the link between the current approaches to parent liability outlined above and the 'human rights due diligence' concept.

6.3.5.2 Proximity

The element of 'proximity' that serves as a requirement of the *Caparo* test of a duty of care operationalizes the 'sphere of influence' concept. The sphere of influences concept includes within the sphere of the responsibility of a company for human rights those actors with whom the

[203] Prest v Petrodel Resource Limited and others, [2013] UKSC 34, [174].

[204] Mares, *supra* note 136, at 1176.

company has 'a certain political, contractual, economic or geographic proximity'.[205] The concept of 'sphere of influence' determines corporate responsibility in relation to the 'leverage' that a company has over actors that cause or prevent the harm. The concept of human rights due diligence determines responsibility in relation to the 'impacts' that result from the activities or relationships of the entity.[206] The SRSG furthermore notes that 'proximity' understood in a geographical sense can be misleading in suggesting that companies are not responsible for the activities that affect human rights far away from the source, which is not the case. For this reason 'it is not proximity that determines whether or not a human rights impact falls within the responsibility to respect, but rather the company's web of activities and relationships'.[207]

A court can impose a legal duty of care and liability on a company in accordance with the test in *Caparo* only if the business of the parent and that of the subsidiary entity are in relevant aspects the same, which is also a necessary indicia for establishing 'proximity'. As explained in *Thompson v Renwick Group plc,* this requirement is important because the court is looking for a situation in which the parent company has 'superior knowledge or expertise' and for this reason is 'better placed' to protect the employees of subsidiary companies against adverse human rights impacts and expected to employ its knowledge to do so.[208] The court noted:

> This is no mere formalism, for as the balance of Arden LJ's indicia indicate, what one is looking for is 'a situation in which the parent company is better placed, because of its superior knowledge or expertise, to protect the employees of subsidiary companies against the risk of injury and moreover where, because of that feature, it is fair to infer that the subsidiary will rely upon the parent deploying its superior knowledge in order to protect its employees from risk of injury'.

The human rights due diligence concept does not require similarity between the business of the parent company and the subsidiary entity, or 'superior knowledge' for that matter. Whether the parent and a subsidiary entity are in the same business is not a determinant factor for the attribution of responsibility.

The legal duty of care corresponds with the human rights due diligence concept as defined by the UNGPs in that, unlike is the case of vicarious responsibility, the parent company is not deemed responsible for the actions of its subsidiary entity, but for a duty of care that the law imposed on the parent company itself. This duty arises through the company's own behavior. The law creates a legal duty of care if the parent company has *de facto* taken a role upon itself to protect the employees from harm. It is separate from, and arises independent of any civil liability on the part of the subsidiary entity. This is in alignment with the UNGPs, which recognizes that the parent company and the subsidiary entity each have their own responsibility to undertake human rights due diligence and that these responsibilities are 'differentiated' and 'mutually-reinforcing'.[209]

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[205] *Id.* ¶ 15.

[206] Human Rights Council, *supra* note 1, ¶ 12.

[207] *Id.* ¶ 15.

[208] Thompson v The Renwick Group plc [2014] EWCA Civ 635. [37]

[209] OECD, *Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship,* 8 (Jun. 26-27, 2014),

The assessment of whether a duty of care attaches to the company in a specific situation serves as a limitation mechanism. As illustrated in the case of *Chandler v. Cape*, the element of 'sufficient proximity' turned out to be decisive for whether a legal duty of care attached to the parent company. The element of proximity serves as a delimitation concept for responsibility and legal liability, because no legal duty of care exists in the absence of proximity between the parent undertaking and the harm. A minimum threshold requirement furthermore applies in that proximity must be 'sufficient' in order to trigger legal responsibility. The court considered 'sufficient proximity' between the parent and the victim in reference to indicia related to, inter alia, control, foreseeability and superior knowledge. A high threshold was established in that all indicia had to be satisfied; the required circumstances were not in themselves decisive for establishing a relationship of sufficient proximity.

The principle of 'sufficient proximity' delimits the scope of applicability of the legal duty of care standard and excludes liability in situations where the relationship between the parent and the harm is too remote. The closer or more proximate the plaintiff is to the parent company, the more likely the court will recognize that the parent company has a legal duty to take positive action in order to prevent harm to employees of the subsidiary entity. Also the closer this relationship, the more may be legally required of a parent company with regards the precautionary steps it should take for protecting the plaintiffs from harm. Sufficient proximity has been established on the basis of factual evidence of the business and acts of the parent company. The court held that the parent company had some control over the operations of the subsidiary as apparent by its practice of intervening in these operations. The parent company was by reason of its superior knowledge on safety and health matters in the asbestos business expected to intervene in order to protect the employees of the subsidiary from foreseeable harm.[210]

6.3.5.3 Control

Also the requirement of control suggests that the 'sphere of influence' concept underpins the existing approach to parent liability under UK common law. The *Caparo* test of a duty of care requires that a parent company exercises some *de facto* control over relevant aspects of the operations of the subsidiary entity in order to establish a relationship of sufficient proximity. Evidence of some *control* by a parent company over relevant operations of a subsidiary entity serves as a precondition for establishing a relationship of proximity between the parent company and the plaintiff that is sufficient to trigger a legal obligation and liability. The element of control is determined on a case-by-case basis and on the basis of factual evidence of how the company has acted, rather than formal relationships. The SRSG has noted, however, that the responsibility of business enterprises should not be determined on the basis of 'control', or 'causation' for that matter. The reason is that these concepts 'wrongly limit the baseline responsibility of companies to respect rights' and 'could imply, for example, that companies were not required to consider the human rights impacts of suppliers they do not legally control, or situations where their own actions might not directly cause harm but indirectly contribute to abuse'.[211]

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http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/GFRBC-2014-financial-sector-document-1.pdf.

[210] *Chandler v Cape PLC*, [2012] PIQR P17, [2012] 3 All ER 640, [2012] 1 WLR 3111, [2012] ICR 1293, [2012] EWCA Civ 525, [66]. It is not necessary for a parent company to have absolute control over the subsidiary.

[211] Human Rights Council, *supra* note 1, ¶ 17.

There are several reasons why it is unjust to apply control as a delimiting principle. One reason is that this *ex ante* excludes certain parents from liability for human rights impacts resulting from the activities of another entity in the corporate group. A relationship of sufficient control between the parent and other companies within a corporate group exists in most[212] but not in all circumstances. The control theory may be applied to companies in which there is a controlling entity, for instance 'franchise chains, consortia or joint venture companies'.[213] This theory may be inapplicable to companies that display a more horizontal organizational structure. As Eroglu notes:

> All the basics of the veil-piercing doctrine have been built on excessive control by parent corporations over subsidiaries. However, under the modern complicated horizontally structured corporate groups, the control has been spread over subsidiaries, which appears in two ways. There are more self-dependent and self-operated subsidiaries and there are changing components of control and influence over others operating in the group. Consequently, in this new and complicated structure, it is almost impossible to establish a simplified method of control under which excessive control of one entity over another is established.[214]

Control or agency theories are not applicable to the horizontally organized structured entities whose subsidiary entities have greater autonomy and shifting control structures do not point to one entity as the 'controlling' entity that exercises excessive control over another entity in the group.

The absence of an agency or control relationship in practice should not serve as an apology for denying recourse to victims. It seems unjust that the corporate veil cannot be pierced in situations where the parent and its subsidiary entities operate as an economic entity in practice, but the organizational links between them do not reach the high threshold of control that the piercing the corporate veil doctrine requires. Similarly, it seems unjust that some *de facto* control by a parent company over the operations of a subsidiary entity is necessary in order to establish a relationship based on an assumption of a duty of care in accordance with the test in *Caparo*, if it would be too difficult or impossible for plaintiffs to demonstrate that such *de facto* control by a parent entity exists. In these situations, there is a mismatch between the legal doctrines for attributing liability and the organizational reality of corporate groups.

To shield certain companies from legal liability by reason of the absence of a relationship of control does not correspond with the human rights due diligence concept. According to the UNGPs, business enterprises have a responsibility for the adverse human rights impacts that arise in affiliate operations and a parent company has a responsibility to act with due diligence in order to prevent and mitigate these risks. This responsibility applies to all business enterprises, irrespective of their ownership or organizational structure. This responsibility also exists irrespective of whether the company actually has control or leverage over these operations or

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[212] Helen Anderson, *Piercing the Veil on Corporate Groups in Australia: The Case for Reform*, 33 Melbourne Journal of International Law 333, 353 (2009).

[213] Muchlinski, supra note 67, at 7.

[214] Eroglu, *supra* note 52, at 157-158.

risks. For instance, a parent of a loosely integrated enterprise may have a responsibility for the adverse human rights impacts of a subsidiary entity that belongs to the group, but that the parent has no strategic or operational control over by reason of this entity operating autonomously and being an organizationally separate entity.[215]

Current doctrines to parent liability have the effect of discouraging compliance by business enterprises with their human rights responsibilities. As the court in *Adams v Cape Industries* affirmed, a corporate group is legally permitted to organize itself through legal form so that the legal liability for the activities of one member of the group does not fall on another member of the group. By reason of the limited liability principle, it is not illegal for a parent company to rely its limited liability privilege to shield itself from liability for harm caused to human rights abroad resulting from the operations of subsidiary entities abroad.

Companies are known to rely on the principle of limited liability and separate legal personality in order to attribute legal responsibility throughout the group and escape accountability if human rights abuses have occurred.[216] Various liability avoiding means are employed for this purpose, e.g., artificially configuring a corporate structure, undercapitalizing subsidiary entities, withdrawing personal assets from a company or liquidating it prematurely in face of tort liabilities. One of the benefits of limited liability is 'lowering [of the] risk of legal liability by confining high liability risks, including environmental and consumer liability, to particular group companies, with a view to isolating the remaining group assets from this potential liability'.[217]

Only in specific circumstances can this general rule of UK common law be disregarded and the corporate veil that separates the subsidiary and a parent company be pierced.[218] In the absence of these requirements, a court may not pierce the corporate veil on the basis of justice considerations, which in themselves do not provide sufficient legal ground for corporate veil piercing.[219] [220] The piercing of the corporate veil doctrine applies in the particular context of involuntary creditors seeking to access the assets of a parent to obtain compensation for the wrongful acts of a subsidiary entity that has become insolvent. In most tort liability cases, the main issue is not that the affiliate has insufficient assets, but the lack of access to remedies in the

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[215] R. Mares, *"Respect" Human Rights: Concept and Convergence*, *in* Law, Business and Human Rights: Bridging the Gap, at 36 (Robert C. Bird, et al. eds., 2014) (forthcoming 2014), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387345.

[216] *UNGPs*, *supra* note 145, Commentary to GP 26.

[217] Anderson, *supra* note 212, at 352.

[218] Prest v Petrodel Resource Limited and others, [2013] UKSC 34.

[219] This proposition was established by *Adams v Cape* and upheld in *Trustor AB v Smallbone* 'the court is not free to discharge the principle of *Solomon v A Salomon & Co Ltd* [1879] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognizes the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities'.

[220] The court in *Trustor AB v Smallbone* recalled the judgement in *Re a Company* in which the court indicated that it would use its power to pierce the corporate veil if this were necessary to achieve justice. While seemingly inclined to apply this proposition, the court decided eventually to follow the authority in Adams v. Cape Plc. on the issue. Re a Company [1985] BCLC 333. Trustor AB v Smallbone (No 2) [2001] EWHC 703(Ch).

domestic legal system.[221] Moreover, if insufficient assets were the problem, meaning that a tort victim cannot retrieve assets from a subsidiary company because the subsidiary company lacks liability insurance or went insolvent, this fact is in itself not a sufficient reason for corporate veil piercing. The standard scenario of foreign direct liability cases thus commonly does not satisfy the conditions required by the doctrine.

Consequently, in typical direct tort liability scenarios, business enterprises can effectively rely on the limited liability principle and liability evading practices to avoid liability for human rights abuses by subsidiary entities. In these circumstances, tort law creates few incentives for companies to take their responsibility for human rights seriously and to act on their responsibility to prevent the occurrence of human rights abuses. The principle of limited liability encourages business enterprises to invest in liability avoiding measures in order to insulate themselves from liability instead.

Many view the possibility that the limited liability principle creates for business enterprises to absolve themselves from liability for harm to human rights as unjust. Upholding the limited liability principle in these situations allows for the risk of loss to be externalized and allocated from the company to tort victims (i.e., involuntary tort creditors), while these victims have not agreed to bear these risk, unlike is the case for voluntary creditors that have entered into an agreement with the company.[222] Victims are in a worse position that these creditors to *ex ante* protect themselves against these risks,[223] as well as to bear and avoid these risks in relation to the parent company that is professionally, legally and economically superior.[224] The limited liability principle furthermore not only permits,[225] but also encourages irresponsibility of the parent

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[221] Mares, *supra* note 215, at 32.

[222] Muchlinski notes,

> The classical model of the limited liability joint stock company assumes that the owners are actual persons who require the corporate form to engage in the risks of business. It does not contemplate the situation where one company owns and controls another. This creates particular problems in relation to one class of actors: tort victims, who are often referred to as '*involuntary creditors*' of the company that has caused them injury. They have no chance to bargain with the corporation over the allocation of risks, unlike voluntary creditors, who enter into contracts with the corporation […] Yet they may have to bear the risk of loss if the corporation does not possess sufficient assets to compensate them for their injuries.

Muchlinski, *supra* note 171, at 918.

[223] Anderson, *supra* note 212, at 348. Muchlinski notes the critique that this 'externalizes a risk that ought properly to be held by the company to the involuntary creditor' and that the poorer risk taker assuming the burden of the risk is 'contrary to well understood notions of efficient risk allocation in law which stress that the person who has the best knowledge of the risk should bear it, which, in the case of hazardous corporate actions would be the corporation itself'. Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation,* 22 Business Ethics Quarterly, 152 (2012).

[224] Eroglu notes that the MNE is professionally, legally and economically better organized to bear and avoid the risk of liabilities than individual tort victims. Eroglu, *supra* note 52.

[225] Muchlinski notes that 'the abuse of limited liability in group structures, especially in regard to the liability of third party involuntary creditors, allows for the irresponsibility of the parent company, and other relevant affiliates, in cases where involuntary creditors have suffered harm as a result of the operations of the group enterprise'. Peter Muchlinski, *The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World*, 18 Indiana Journal of Global Legal Studies 665, 669 (2011).

company by way of increasing moral hazard.[226] Anderson notes that 'the moral hazard created by limited liability may encourage excessive risk-taking, causing personal injury to a small or large number of victims (irrespective of company size)'.[227]

A parent company may be encouraged to undertake human rights due diligence if doing decreases its exposure to potential liability risks. Current approaches to parent liability and corporate veil piercing appear to create limited legal incentives for parent undertakings in this regard, however. In fact, they can have the opposite effect of discouraging companies to take their human rights due diligence responsibility seriously. The human rights due diligence activities of companies may be 'counterproductive' for companies if evidencing knowledge and control that exposes companies to greater potential legal liability risks.[228] In the context of complicity charges, for instance, Michalowski notes that companies may be more prudent in acquiring information to become aware of complicity risks where this action could evidence 'knowledge' for the purpose of legal complicity.[229] Whether this prudence is warranted depends on the national standard of complicity. A lack of knowledge of complicity risks does not automatically serve as a defense against liability charges [230] if the law also looks at what companies ought to have known for the purpose of establishing complicity liability.[231]

There are real concerns about an emerging tension between company's objective of mitigating legal liability risks and undertaking due diligence to manage risks to human rights instilling companies with a sense of caution. A recent update by a law firm states:

> While lawmakers may be motivated to help bring about positive social change, unfortunately the increase in supply-chain litigation and the passage of these disclosure laws likely means that companies may dial back on certain programs to mitigate risk of potential liability; companies will be incentivized to put as much risk as possible on third party auditors, and will have to rethink their relationships with suppliers. The unfortunate end result may be that less happens to address these global social challenges. And, in the short-term, companies will need to think carefully about what they say in their disclosures and other public facing statements.[232]

This gap could be filled by revisiting these approaches by reference to the human rights due diligence concept as stipulated in the UNGPs. If the legal liability standard and the standard of human rights due diligence would be aligned, non-compliance with the human rights due diligence responsibility would expose companies to greater potential liability risks. Human rights

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[226] Muchlinski, *supra* note 223, at 152.

[227] Anderson, *supra* note 212, at 349. *See* also Virginia Harper Ho, *Does Corporate Law Reach Human Rights?*, 52 Columbia Journal of Transnational Law, 136 (2013).

[228] Michalowski, *supra* note 146, at 218-242.

[229] *Id.*

[230] Mares, *supra* note 136, at 1184.

[231] Van Dam, *supra* note 148, at 245.

[232] Gibson Dunn 2015 Year-end Transnational Litigation Update (Feb. 16, 2016), http://www.gibsondunn.com/publications/documents/2015-Year-End-Transnational-Litigation-Update.pdf.

due diligence would also be a more useful tool to assist companies in avoiding such risks. I argue that current legal barriers to accessing justice will not be overcome unless there exists a rebuttable presumption of a legal duty of care construed on the human rights due diligence concept, a so-called 'legal duty of human rights due diligence'. The limiting factors that determine whether a company should be held liable for a breach of this duty, should align with the human rights due diligence concept and the factors integral to this concept. The test for liability should hinge on companies human rights due diligence and whether the company has taken reasonable due diligence to rebut the presumption of a legal duty of care.

6.4 A Presumption of a Legal Duty of Care Based on the Human Rights Due Diligence Concept

Arguably, there should be a presumption in tort law that companies have a legal duty of care that is construed in accordance with the human rights due diligence concept as set out in the UNGPs.[233] The assumption would be that the human rights due diligence is a standard of conduct,[234] that a company is expected to meet in order to discharge its legal duty of care. Non-compliance with this standard gives rise to liability under a tort of negligence.

Introducing a legal duty of human rights due diligence would entail a minor adjustment to the legal duty of care standard as it is currently applied under certain common law and civil law jurisdictions. In common law countries, this would entail recognizing a cause of action for a breach of a legal duty of care that aligns with the UNGPs amounting to a tort of negligence that could give rise to liability not only in specific factual situations, but generally. The existence of this standard would be presumed. In civil law countries, this would entail introducing a statutory provision in tort law that would serve as a legal basis for a liability in the form of a breach of a legal duty of care construed in accordance with the human rights due diligence concept as defined by the UNGPs. The limiting principles in both common law and civil law systems would be aligned with the human rights due diligence concept.

6.4.1 Human Rights Due Diligence as a Standard of Fault

The standard of conduct for the legal duty of care would align with the human rights due diligence concept, in terms of both content and scope. The presumption holds that if human rights abuses occurred, and the company was involved in the harm to human rights, the company acted negligently by fault for having omitted to take the appropriate due diligence steps to prevent the adverse human rights impacts from occurring.[235] The human rights due diligence would serves as a standard of fault, which Bonnitcha and McCorquodale explain as follows:[236]

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[233] A related argument by Anderson is that 'directors' duties to act with care and diligence and in good faith be the model of liability for parent companies facing veil-piercing. This would build on and codify the present liability of parent companies as shadow directors'. Anderson, *supra* note 212, at 336.

[234] Jonathan Bonnitcha & Robert McCorquodale, *Is the concept of `due diligence` in the Guiding Principles coherent?,* 2 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208588

[235] Note the consistency with the diligence paterfamilias standard described by Bonnitcha and McCorquodale. *Id.*

[236] *Id* at 3.

> [due diligence] provides a benchmark to determine whether an actor should be held responsible for the results of its conduct. As a standard of fault, due diligence is a legal concept that sits somewhere in the middle of a spectrum that runs from *intent* – a standard which holds and actor responsible for the results of its conduct only if that conduct is committed willfully – to *strict liability* – a standard that holds an actor responsible for the results of its conduct without any inquiry into whether the conduct was blame worthy.

The presumption of a legal duty of human rights due diligence would not be absolute, however, and rebuttable if the defendant could provide sufficient evidence of having acted as a 'diligent person' by having taken all reasonable measures in attempting to prevent the adverse human rights impacts from occurring. The negligence would be inversely proportional to the due diligence steps taken by the company, in that the more due diligence steps a company takes the less serious the negligence will be. When a company has taken reasonable due diligence, the negligence would be negligible and the presumption may be rebutted.

The standard of human rights due diligence would derive from the UNGPs. This standard attaches to the business enterprise at all times, irrespective of prevailing circumstances. Business enterprises would be expected to carry out risk-based human rights due diligence to manage the potential adverse human rights impacts that it causes or contributes to, or that it may be directly linked to through its operations, products or services. Human rights due diligence entails 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.[237]

While human rights due diligence is an objective standard that applies to companies irrespective of circumstances, it is fact specific in that the due diligence expected of a company depends on prevailing circumstances. The standard is also indeterminate to a degree in that the expectations are not pre-defined and entail a contextual judgment of what is reasonable in the circumstances, which may furthermore evolve over time.[238] This normative judgment of whether business enterprises have acted reasonably entails a balancing act, which is further elaborated below.

The scope of the legal duty of human rights due diligence would be defined and qualified by the human rights due diligence concept. The presumption of a legal duty of care would entail that liability for a breach would be limited to a failure to act diligently to prevent the human rights impacts that a company is involved in. The UNGP 13 distinguishes between three types of involvement in adverse human rights impacts: causation, contribution and direct linkage:

> 13. The responsibility to respect human rights requires that business enterprises:
>
> (a) Avoid *causing* or *contributing* to adverse human rights impacts through their own activities, and address such impacts when they occur;

[237] *UNGPs*, *supra* note 145, at 17.

[238] Bonnitcha & McCorquodale, *supra* note 234, at 14.

(b) Seek to prevent or mitigate adverse human rights impacts that are *directly linked* to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

A breach of a legal duty of care could give rise to fault liability in situations where a business enterprise is involved in human rights impacts by way of causation, contribution or direct linkage. That what is expected of companies in terms of due diligence may vary according to these types of involvement. The measures that a company is expected to take may differ in scope and complexity depending on whether the company contributed to the harm, or whether the company's operations, products and services are linked to the adverse impact through its business relationships.[239]

First, a company can have adverse impacts on human rights through *causation*, when a company by action or omission may cause an adverse human rights impact. Causation entails that there is 'causality between the operations, products or services of the enterprise and the adverse impact'. Factors that enter into the determination of appropriate action in situations where the company has caused an adverse human rights impact, the court would look at the steps that a company has taken to ease or prevent the impact.

A company may have adverse impact on human rights through *contribution*. A company may contribute to adverse human rights impacts through its relationships. The factors, relationships and actors that a company would need to consider and that delimit the scope of due diligence in situations where the company contributes to human rights impacts are linked to the concept of complicity. A company can be said to contribute to adverse human rights impacts when it makes a substantial contributions to an adverse impact, i.e., 'an activity that causes, facilitates or incentivizes another entity to cause an adverse impact', or contributes to an adverse impact 'if the combination of its activities and that of another entity result in an adverse impact'. In situations where a company has *contributed* to adverse human rights impacts, the court would consider whether the company has taken the necessary steps to cease or prevent its contribution and whether the company used its leverage to mitigate any remaining impact to the greatest extent possible.[240]

A company may also have adverse impacts on human rights by its products, services or operations. The adverse human rights impacts are connected to the parent company through *direct linkage*. A relationship of direct linkage is one in which adverse human rights impacts are 'directly linked' to a company's operations, products and services through its business relationships.[241] In situations of where a company is directly linked to a human rights impacts, the court would assess the action a company has taken in relation to several factors: 'the enterprise's

[239] The 'business relationship' refers to the other entity through which the parent company is linked to the harm. The term 'business relationship' is understood broadly as defined by the UNGPs, that is as 'relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services'. These examples are not exhaustive however, and may also include 'indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholder position in joint ventures'. Commentary to UNGP 13.

[240] *UNGPs*, *supra* note 145, Commentary to GP 19.

[241] OECD, *supra* note 209.

leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences'.[242]

6.4.2 The Rationale for Introducing a Legal Duty of Human Rights Due Diligence

A presumption of a legal duty of care construed on the human rights due diligence concept entails that business enterprises could rely on human rights due diligence as a defense against liability charges.[243] The understanding that human rights due diligence can serve as a means to avoid liability *ex ante* is not new.[244] The SRSG has affirmed that human rights due diligence can serve as a tool[245] for business enterprises to avoid liability for complicity in human rights violations, allowing the company to identify and act upon risks of having adverse human rights impacts through their business relationships.[246] [247] Consequently, conducting human rights due diligence can be of use to companies in addressing the risk of legal claim against them. By undertaking human rights due diligence, 'companies can become aware of, prevent and address risks of complicity by integrating the common features of legal and societal benchmarks into their due diligence processes'.[248] There is no guarantee that compliance with due diligence would fully exempt business enterprises from liability, however.[249]

If a presumption of a legal duty of care were to be introduced, the human rights due diligence may be understood as *the* expected standard of conduct, and the fault element of a breach of a legal duty of care amounting to a tort of negligence. The human rights due diligence would still serve as an *ex ante* means to manage liability risk, and in fact may be a more effective tool, because the expected legal standard of care and the human rights due diligence concept would align. It would take on greater importance *ex post*, however, because business enterprises would be able to present a reliable defense on the basis of evidence of human rights due diligence that, if successful, could insulate a company from liability.[250] The rebuttable presumption would not be aimed at insulating business enterprises from liability, but to increase the protection of victim

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[242] *UNGPs*, *supra* note 144.

[243] On this issue, *see* Michalowski, *supra* note 146. Lucien J. Dhooge, *Due Diligence as a defense to corporate liability pursuant to the alient tort statute*, 22 Emory International Law Review 455(2009).

[244] Bonnitcha & McCorquodale, *supra* note 234, at 8.

[245] Michalowski, *supra* note 146, at 233, (quoting Human Rights Council, *supra* note 1, ¶ 32).

[246] Human Rights Council, *id.* ¶ 32

[247] The commentary to *UNGPs* 17 notes the following:

> Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.
>
> *UNGPs, supra* note 145.

[248] Michalowski, *supra* note 146, at 223 (quoting Human Rights Council, *supra* note 1, ¶ 32).

[249] *Id.* at 222.

[250] For a similar argument in the context of complicity charges, *see* Michalowski, *supra* note 146, at 238.

and community's right to an effective remedy and justice and to strengthen the legal underpinnings of the corporate respect for human rights.

Another objective is the deterrence of irresponsible behavior by companies by increasing liability exposure to business enterprises that do not undertake human rights due diligence. The scope and substance of the legal duty of care and the human rights due diligence concept as defined in the UNGPs would correspond. In the case human rights abuses occurred, evidence of human rights due diligence would serve to reduce the seriousness of negligence by demonstrating that the company took all the reasonable steps in its attempt to prevent the harm from occurring. If the company acted with sufficient due diligence, the presumption of a legal duty of care would be rebutted and no liability would be imposed on the company. The rebuttable presumption could have a deterrent effect by reason of the liability that is presumed to fall on companies in case of non-compliance and the possibility for companies to lower exposure to liability by undertaking human rights due diligence.[251]

The rebuttable presumption thus entails that the company is presumed to be at fault when human rights abuses have occurred. The company can rely on human rights due diligence as a defense against liability charges.[252] The burden should be on business enterprises to demonstrate that it took all the reasonable steps for rebutting the presumption of a legal duty of care and liability. This may be irrespective of the fact that a lack of due diligence constitutes the fault conduct. Placing the burden on companies to provide the evidence of due diligence is in line with UNGP 21, which recognizes that disclosure on human rights due diligence is an integral part of a company's human rights due diligence responsibility. According to this principle, business enterprises 'should account for how they address their human rights impacts' and 'should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders'. The information should 'be sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved'.[253] A reversed burden of proof would benefit plaintiffs that currently carry the burden of having to provide evidence that material criteria have been satisfied, e.g. for instance a relationship of control and proximity.

Often the plaintiffs depend on the defendant parent company to provide them with the necessary information. A lack of evidence in situations where the company is unwilling to provide access to essential information can result in a dismissal of the case. The plaintiffs in *Milieudefensie v Shell* were denied access to internal documents that were crucial to proving that the parent company RDS determined the daily affairs of its Nigerian subsidiary. The plaintiffs had filed ancillary claims on the basis of Article 843a of the Dutch Code of Civil Procedure requesting the production of documents, arguing that these documents were essential to the plaintiffs for substantiating a list of arguments. The court dismissed the claims on the ground of a lack of legitimate interest by the plaintiffs in these documents,[254] which according to Milieudefensie,

[251] Indeed, as Ho has noted, 'the shareholder wealth maximization norm and human rights commitments may in fact align, since clear attention to human rights issues can lower MNE's liability exposure and promote a global business strategy'. Ho, *supra* note 227, 139 (2013).

[252] Bonnitcha & McCorquodale, *supra* note 234, at 8.

[253] *UNGPs, supra* note 145, GP 21.

[254] Rechtbank Den Haag, 14 September 2011, 2011, 337050 / HA ZA 09-1580 (Friday Alfred Akpan/ Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria LTD) (Neth.), § 4.13.

caused the court to conclude that no legal duty and liability attached to the parent company RDS.[255] The court reversed this decision on appeal and ordered RDS to give access to almost all these documents nonetheless, because of the potential relevance of this information in relation to the alleged breach of a duty of care by RDS. Due to the company confidentiality of the documents, access was to be granted to lawyers, judges and experts only, however.[256]

6.4.3 A Human Rights Due Diligence Defense: Too Much Protection for Companies?

There are diverging views as to the desirability of creating a legal defense in negligence law that exempts business enterprises that exercise human rights due diligence from liability for involvement in human rights impacts. I agree that a due diligence standard of conduct is less suited and should not be applicable to companies in so far they themselves *cause* the averse human rights impact. A reading of the UNGPs supports the argument that enterprises have a strict responsibility for their own adverse human rights impacts. Commentators have failed to recognize a qualification or fault element in UNGP 13a, which merely states that business enterprises should 'avoid' causing or contributing to adverse human rights impacts.[257] The UNGPs are understood to apply fault liability only to companies for their involvement in adverse human rights impacts by third parties. This is derived from the wording of UNGP 13 b) recognizing that business enterprises have a responsibility to 'seek to prevent' adverse impacts that companies are directly linked to through their business relationships. [258]

The proposition to impose strict liability (independent of fault) on companies for their own adverse human rights impacts, while imposing negligence liability (based on fault) for the adverse human rights impacts resulting from the operations of a third party relies on an existing approach of general international law. General international law relies on the due diligence standard to limit an actor's responsibility for third parties: it is only when a State failed to protect human rights against infringements by a third party that it can limit its legal responsibility by conducting due diligence.[259] The same rationale is said to underpin the due diligence standard for the responsibility to respect, namely that it would be 'both impractical and unfair to hold one

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[255] Friends of the Earth Europe, Watershed Dutch court ruling against Shell (Jan.30, 2013), https://www.foeeurope.org/Watershed-Dutch-court-ruling-against-Shell-300113

[256] The court ordered Shell to give access to certain information on abandonment programs, audit reports, assurance letters, notifications of significant incidents and high potential incidents and certain information relating to hazards and effects. *See* Gerechtshof Den Haag, 18 December 2015, 2015, ECLI:NL:GHDHA:2015:3587, (Friday Alfred Akpan / Royal Dutch Shell PLC en Shell Petroleum Development Company of Nigeria LTD.) (Neth.), 5.1-5.12. In the case of Oguru et all v. RDS, the court ordered Shell to give access to audit reports, assurance letters, notifications of significant and high potential incidents, and certain information related to Hazards and Effects. *See* Gerechtshof Den Haag, 18 December 2015, 2015, ECLI:NL:GHDHA:2015:3588, (Fidelis Ayoro Oguru, Alali Efanga, Vereniging Milieudefensie/ Royal Dutch Shell PLC en Shell Petroleum NV) (Neth.), 5.1-5.12.

[257] Sherman & Lehr, *supra* note 165, at 12.

[258] *Id.*

[259] Tara van Ho, *"Due Diligence" in "Transitional Justice States": An Obligation for Greater Transparency?, in* Human Rights and Business: Direct Corporate Accountability for Human Rights, 245 (Jernej Letnar Černič & Tara Van Ho eds., 2015).

entity strictly responsible for the conduct of another entity that it does not control, and whose every action it could never realistically monitor'.[260]

Analogizing to the rebuttable presumption of a legal duty of care, this would entail that the presumption would apply to companies but that this presumption would not be rebuttable by evidence of reasonable due diligence in situations where the company causes the adverse human rights impacts. Strict liability would entail that no fault element applied in these scenarios and that business enterprises would be liable for their adverse human rights, full stop. It has been rightly argued that this would establish a clear line of accountability and avoid discussion as to whether a company acted in breach of its responsibility, which companies may have otherwise used to their strategic advance.[261]

Some call for restraint in terms of the degree of protection that should be afforded to business enterprises in foreign direct liability claims in which human rights are at issue. Sherman and Lehr raise this point in the context of the ATS, and in response to a proposal by a commentator to create a due diligence defense under this Statute tailored to the business judgment rule, the effect of which would be to render a business enterprise immune to ATS liability, provided that it conducted human rights due diligence in good faith.[262] The authors rightly consider this proposal as 'problematic', noting the seriousness of the human rights violations that give rise to the claims under ATS. They underscore the universal condemnation under the law of nations of these crimes and the serious damage these inflict on individuals that are more vulnerable to such damage than companies. The authors note that 'when human rights are at issue, a company should not be entitled to the same broad degree of protection that the business judgment rule grants to directors in financially managing a company'.[263]

The human rights abuses that give rise to tort liability claims equally warrant consideration of whether a due diligence defense would give too much protection to business enterprises that stand accused of involvement in severe human rights abuses. These concerns are alleviated to a certain extent by the proportionality test that is built into human rights due diligence concept. In situations where the adverse human rights impacts giving rise to the claims are of a severe nature, the proportionality principle shifts and certain discretion is removed from the company. In order to rebut the presumption of a legal duty of care, the company would have to demonstrate greater caution and measures of a more technical nature, in order to demonstrate that its negligence was insufficient to uphold the presumption of the legal duty of care.[264] In other words, the presumption of a legal duty of care would be far less easily rebuttable in the presence of

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[260] Sherman & Lehr, *supra* note 165, at 14.

[261] *Id.* at 13.

[262] Sherman & Lehr, *supra* note 165, at 18. Lucien J. Dhooge, *Due Diligence as a defense to corporate liability pursuant to the alient tort statute*, 476-478, 22 Emory International Law Review 455(2009).

[263] *See* Sherman, *id.* at 18-19.

[264] The civil law of remedies has recognized that the severity of human rights risks is a relevant factor that determines the scope of a legal duty of care in tort law. The report of the ICJ explains: 'under the law of civil remedies the higher the risk, the more cautious a company needs to be. This means that the more likely it is that third parties will be negatively affected by a company's conduct or the more serious the harm in question, the more care the company needs to take'. International Commission of Jurists, *supra* note 54, at 19.

severe human rights impacts.[265] Similarly, a more stringent rebuttable presumption would also apply in the presence of a greater probability of these human risks materializing. The rationale for a more stringent rebuttable presumption is that the severe nature of the adverse human rights impacts and the greater probability of human rights risks indicates the seriousness of the company's fault committed by its negligence conduct.

6.4.4 A 'three stage' test

What should be the test for determining whether a legal duty of care based on the human rights due diligence concept can be disregarded and what factors should weigh into a court's decision as to whether the conditions of this test are met? Arguably, the court should look for a situation in which the company has acted as a 'due diligent' person by taking the appropriate measures to prevent the occurrence of foreseeable harm and that for this reason it would be unjust to impose liability on the company. A three-stage test for rebutting a presumption of a legal duty of care may be considered.

The first stage of the test is foreseeability. The underlying premise is that the presumption of a legal duty of care is not rebutted, unless the human rights risks were foreseen by the company. This elements requires an assessment of whether the company foresaw or should have foreseen the adverse human rights impacts of its conduct. There is a positive prescription to the element of foreseeability, in that in order to know its human rights risks, the company should take diligent steps to investigate and acquire the information that it should seek in the circumstances.[266] The responsibility to undertake human rights assessments in order to identify potential and actual human rights risks is an essential part of conducting a human rights due diligence process. Companies should 'identify and assess' their potential and actual human rights impacts through a process that involves independent expertise and meaningful consultations with relevant stakeholders.[267] Michalowski observes that 'due diligence determines the standard of knowledge a corporation is expected to have and, to the extent that no such knowledge exists, imposes a responsibility to collect the necessary information'.[268]

A company thus would be negligent if it failed to act in order obtain the necessary information that human rights due diligence requires companies to seek under the circumstances. The element of foreseeability would entail an assessment of whether the company took sufficient steps to identify, become aware and act upon the potential and actual human rights impacts in its business relationships. In other words, the presumption of liability would not be rebuttable and the company would be charged with negligence if it failed to know what it should have known and failed to act on the existence of potential or actual human rights risk where it should have acted in the prevailing circumstances, as required by human rights due diligence.[269]

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[265] *See* Van Dam, *supra* note 148, at 245.

[266] Michalowski, *supra* note 146, at 232.

[267] UNGP, *supra* note 145, GP 18 and commentary.

[268] *Id.* at 234.

[269] *Id.* at 232.

The second stage of the test involves a normative assessment of whether the company acted with the appropriate and sufficient care that is reasonably expected in order to prevent the adverse human rights impacts from occurring. This normative judgment would entail a fact-based analysis of the circumstances of the company and a balancing exercise in which the factors will be weighed. The court would need to consider the same actors and relationships that determine human rights due diligence, that is the types of involvement of the company in the adverse impact (i.e. whether contributed or was directly linked to the human rights impact). The court would need to undertake a balancing exercise in which the factors that determine human rights due diligence are weighed in light of the circumstances of the case. Relevant factors are the complexities involved in effectively managing human rights risks, which can be specific to the context or sector in which the company operates, or result from the nature of human rights risks, the unpredictability of human rights risks from materializing, and the need for companies to make choices in faced of resource constrains and priorities etc.[270]

The third stage of the test is that rebutting the presumption would be just, fair and reasonable in the circumstances of the case. This phase invokes policy considerations that may vary according to the circumstances of the case. The courts findings in relation to the second stage of the test and its conclusion as to whether the due diligence responses of the business were appropriate and sufficient to prevent the harm from occurring in light of the prevailing circumstances, could weigh into the court's decision in this phase of the test. There are various factors that can weigh into these judicial policy considerations for whether it is 'just, fair and reasonable' to rebut a presumption of a legal duty of care. For instance, a court may consider whether rebutting the presumption may lead to business enterprises taking their human rights due diligence more seriously, provide victims of human rights abuses with similar protection of their legal interests as those that have entered into a contractual obligation with the company, leave a victims without an effective remedy, create inconsistencies with other areas of law, increase litigation and place an undue burden on certain types of defendants, allocate losses to the company that is in a better position bear these them than individuals, and the extent to which the threat of liability might affect the economic interests of companies.[271]

6.4.5 Setting a Penalty through a Balancing Act: The Case of Trafigura

Once liability has been established, a court could apply a similar balancing act to determinate the level of penalties. In 2011, the district court of Amsterdam sentenced Trafigura to pay a fine of € 1 million for transporting waste from Amsterdam to the Ivory Coast, thereby acting in breach with art 18(1) EU regulation on the shipment of waste, and for concealing the hazardous nature of this waste.[272] The court applied a balancing act to determine the level of this fine.[273] The court struck a balance between the risks and care of the company. The court considered that the committed fact met a level of seriousness, which affected the applicable proportionality

[270] Commentary to GP 19.

[271] Mares, *supra* note 136, at 1194.

[272] Gerechtshof Amsterdam, 23 December 2011, 2011, 23-003334-10, (Trafigura Beheer B.V.) (Neth.).

[273] The *Trafigura* is a criminal case that furthermore differs from the tort-liability cases discussed above in that it does not primarily involve a parent-subsidiary relationship, and that the claims arose out of environmental damage, rather than human rights abuse or labour related damage. Enneking, *supra* note 75, at 286.

principle. The Court noted that the seriousness of the committed facts underscored the importance of international conventions regulating the transportation, handling and disposal of waste, and also explained why high standards applied to companies in the disposal of this waste. The court held that Trafigura should know about the risks involved and the applicable standards, this being an important integral part of CSR. The court also recognized the responsibility of Trafigura to be proactive in order to acquire this knowledge by inquiring about the applicable rules and regulations before undertaking a special production process, especially when problems arise. There was no indication of Trafigura having acted to this effect, despite having the collective knowledge about the (deviating) chemical composition of the waste and how this waste should be handled. The court also affirmed that, by reason of this knowledge, Trafigura had a responsibility to ensure that the recipient(s) of the waste and all undertakings involved had a sufficient understanding about the hazardous nature of the waste in order for this waste to be processed responsibly.[274]

The court also argued that the high costs involved in the processing of the waste were not an issue. These costs should not serve as an apology for not abiding by the applicable standards, but, on the contrary, should be factored in, the Court noted. The court takes a peculiar turn by also giving weight to the negative publicity and the damage to the image of Trafigura, which it incurred *after* the harmful events. In addition, the court gave consideration to the positive contribution of Trafigura to the global welfare through the Trafigura Foundation, which had been created in November 2007.[275] The balancing act differs from the one the human rights due diligence concept supports in that this act also gives consideration to the positive attributions of Trafigura. These positive attributions are not part of human rights due diligence if not involved in the managing of *negative* human rights impacts. Also, to consider the costs inflicted on the company *ex post* the harmful events is unusual. The appropriate balance to strike is to accept only the care taken by the company *ex ante* in order to prevent the harm, and, once the harm occurred, the remedial measures that the company has taken.

Apart from these two factors, the balancing act seems to be keeping with the appropriate balancing act under the rebuttable presumption of a legal duty of care for human rights due diligence proposed by this chapter. The rational for applying the balancing act to determine the penalty is the effect that it could have of further strengthening the function of tort law in deterring business involvement in human rights abuses. The prospect of having to pay high penalties could create incentives for business enterprises to undertake human rights due diligence. This deterrent effect would be greater if liability would not only fall on the company but also on the directors and/or those responsible for human rights due diligence processes and policies. Personal liability of directors for carrying out human rights due diligence seems needed to encourage responsible conduct by these directors and other persons, while company liability is needed ensure corporate cultures of compliance.[276]

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[274] Gerechtshof Amsterdam, 23 December 2011, 2011, 23-003334-10, (Trafigura Beheer B.V.) (Neth.), 6

[275] *Id.*

[276] Mushlinski notes that 'it is essential that due diligence liability is not embroiled in arguments about the legal separation between the company and its directors, officers and agents, so as to shield these classes of corporate personal responsibility, nor the insulation of corporate liability though the direct and exclusive personal liability of directors'. Muchlinski, *supra* note 223, at 161.

6.4.6 A Legal Duty of Care for Human Rights Due Diligence Through Statute

One may consider that in civil law systems, a legal standard of human rights due diligence be created through statute under national law, that is construed in conformity with the UNGPs, and on which liability can be based.[277]

There are various policy reasons supporting the creation of a statutory presumption of a legal duty of care and liability construed on the human rights due diligence concept. One is that this legal presumption would contribute to strengthening the protection of the legal rights of individuals to redress and remedy. States have an obligation to ensure this right under international human rights law. The State would fulfill this obligation by creating a new avenue through tort law for individuals to pursue the legal accountability of a parent company. This could provide access to remedies for victims of human rights abuse in situations where an a company contributes to, or directly linked to adverse human rights impacts but where currently no meaning full redress can be obtained, for instance because a subsidiary entity went insolvent and the principle of limited liability. Victims would no longer have to rely on companies to provide remediation in these types of scenarios.[278]

Certain legal barriers to accessing judicial remedies that victims are currently struggling to overcome may be lifted as a result of the rebuttable presumption. The existence of a legal duty of care is presumed, and thus would not need to be established first. Individuals would not have the burden of evidencing high thresholds of 'proximity' or some or excessive 'control', which can exist in theory but may not be provable in practice. The burden would be on business enterprises to demonstrate foreseeability and human rights due diligence that is sufficient to rebut the presumption. The legal duty of care would encapsulate the human rights due diligence duties for involvement in the adverse human rights impacts by third parties through contribution and direct linkage. The legal duty of care would extend beyond existing legal duties to refrain from complicit behavior. Complicity would be defined more widely, including also silent and beneficial complicity within its applicable scope.

A duty may have the result of changing the behavior of companies. It would create greater legal certainty and predictability of the outcomes of judicial decisions, in part because the legal duty of care would be defined in alignment with the human rights due diligence as described by the UNGPs.[279] [280] There is an increased likelihood of corporate liability in case a company does not comply with its human rights due diligence obligation. The statute would send out a clear signal to companies that omitting to exercise human rights due diligence to prevent adverse human rights impacts can attract legal liability, not only in specific circumstances, but generally in direct-tort liability scenarios. The legal duty of care would be applicable to all companies,

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[277] Anderson has similarly argued that 'in the same way that legislatures and courts pierce the veil to render directors liable for their wrongful conduct, it is proposed that legislation be enacted to impose upon parent companies (rather than upon their directors) the equivalent of current directors' duties – in particular, the duties of care and diligence and of good faith.' *Id.* at 355 (2009).

[278] Michalowski, *supra* note 146, at 231.

[279] *UNGPs*, *supra* note 145, Commentary to GP 2.

[280] With greater certainty also come reduced costs of litigation. *Id.* at 359.

irrespective of their organizational structure, including to horizontally organized undertakings. This duty may counterbalance the incentives of parents to off-load, through out-contracting and subsidiarization, its risk management responsibility to affiliates for organizational efficiency reasons. The implementation of the human rights due diligence on which this legal duty is build entails that in practice, the parent of loosely integrated companies may need to re-assume the burden to manage the risks that it has off-loaded to affiliates.[281] A legal duty of care would incentivize parent entities to take their human rights due diligence responsibility seriously and propel changes not only in the practices of the parent itself, but also to foster corporate cultures respect full of human rights throughout the corporate group as a whole.

A statutory legal duty of care would not create inconsistencies with other areas of law, and in particular the principles of separate legal personality and limited liability as recognized in *Salomon v Salamon & Co*. The reason is that the parent company would be liable for its own conduct and separately from any liability on the part of the subsidiary entity. This would be no different from the existing standard of direct parent liability. The Court in *Chandler v Cape* held that a duty of care attached to a parent company over and above the principles of limited liability and separate legal personality and that the law can create a duty of care without disregarding the separate legal personality of company, i.e., piercing the corporate veil.[282] Concerns about liability unduly intruding into these principles have often been raised in relation to theories of indirect corporate liability, e.g., vicarious or agency liability, and are an important reason for why claims are most often based on direct/primary parent liability.[283] The statutory duty of human rights due diligence as proposed in this chapter would alleviate these concerns.[284]

A statutory legal duty of care would drive convergence across other areas of law. It would respond to UNGP 2 that encourages States to set out clear expectations that businesses respect human rights abroad. Human rights due diligence replaced the sphere of influence concept is *the* standard of expected conduct.[285] Creating a legal duty would set out clearly the expectation that business enterprises should respect human rights and that human rights due diligence is the applicable standard of expected conduct. Such expectations create predictability for business enterprises. A legal duty of care would align with existing efforts by States to encourage business enterprises to respect human rights at home and abroad. It would contribute to the

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[281] Mares, *supra* note, at 45.

[282] The court noted the following: 'I would emphatically reject any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company. The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees'.[282] *Chandler v Cape PLC*, [2012] PIQR P17, [2012] 3 All ER 640, [2012] 1 WLR 3111, [2012] ICR 1293, [2012] EWCA Civ 525, [69].

[283] Enneking, *supra* note 70, at 179.

[284] *See* Anderson for an alternative proposal to create a statutory duty of good faith or care and diligence that in case of a breach would amount to a fault that could justify corporate veil piercing. The author notes that 'in the same way that legislatures and courts pierce the veil to render directors liable for their wrongful conduct, it is proposed that legislation be enacted to impose upon parent companies (rather than upon their directors) the equivalent of current directors' duties – in particular, the duties of care and diligence and of good faith.' Anderson, *supra* note 212, at 355.

[285] *UNGPs*, *supra* note 145.

implementation of policy commitments that some EU Member States have expressly set out in their NAPs on business and human rights. There already is alignment between the expectation of governments on corporate human rights due diligence in countries that are contracting parties to the OECD Guidelines.

A legal presumption of a duty of care would give courts a role in effectively operationalizing the human rights due diligence concept. The argument that the legislator has not intervened on the matter would no longer be a valid ground for the courts to act with caution on the issue, because the legal duty would no longer be controversial.[286] The court would have less discretion to consider that no legal duty of care and liability attaches to a company in a particular situation. Jurisprudence could contribute to the further clarification of what is (legally) expected of companies in terms of meeting their responsibility to respect, and specify with greater precision the scope of human rights due diligence. The application of the test for the duty of care with the UNGPs and by reference to international human rights standards would give these interpretations meaning with the context of the further development of international law.

The judicial interpretations of the human rights due diligence concept could serve to put the human rights due diligence to the test. A presumption of a legal duty of care would also rest on an assumption that the human rights due diligence concept is a reliable method through which adverse human rights impact can be effectively avoided. Thus, the assumption is that if companies had taken the appropriate human rights due diligence measures, no adverse human rights impacts would have occurred.[287] It logically follows that civil liability may not only expose non-compliance with human rights due diligence by companies in the factual circumstances of the case, however it may also serve as a mechanisms through which the reliability of the human rights due diligence concept itself may be put to the test.

If a court would acquit a company from liability in situations where it took all the appropriate measures that it was reasonably expected to take in given circumstances, there is a reasonable possibility that the human rights due diligence is not reliable. This may raise red flags that can lead to further clarification and drive improvements in the human rights concept. Alternatively, it may well result in its abandonment as a proper standard of conduct for human rights responsibility. Another question that arises is the role of courts in testing the reliability of multi-stakeholder initiatives that companies may claim adherence to in their defense against the application of a legal presumption of liability.

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[286] Eroglu notes that courts are reluctant to act on issues that require legislative action. Eroglu, *supra* note 52, at 156.

[287] For a similar argument in the context of complicity charges, *see* Michalowski, *supra* note 146, at 238-9. Michalowski explains that:

> Even though due diligence cannot technically provide a defense for complicity charges in these cases, if one aim of due diligence responsibility is to avoid legal complicity liability, due diligence needs to be conceptualized in a way that it achieves what it sets out to do. This would require that due diligence responsibilities include, as a minimum, to identify the risk of legal complicity and to prevent it from materialising. If the avoidance of legal complicity was part of the due diligence responsibilities, then, where legal complicity occurs, due diligence cannot be said to have been appropriately carried out. Conversely, proper human rights due diligence would, by definition, prevent legal complicity from occurring.

6.4.7 The French Proposal to Create a Legal Duty of Vigilance

On 23 March 2016, the French General Assembly adopted a draft law introducing a duty for certain companies to establish and effectively implement a so-called 'plan de vigilance' for identifying and preventing risks, *inter alia*, to human rights and the environment.[288] The following section examines this draft law in further detail.

To be noted is that an earlier version of this draft law was passed by the French General Assembly on 31 March 2015, but was then been rejected by the French Senate and send back for a second reading. The French Senate adopted a different version of the proposed bill in October 2016, which did not feature a duty of vigilance. A special parliamentary committee was created to settle the disagreement between both chambers and to reach a compromise.[289]

The draft law that was adopted on 23 March 2016 applies to French-domiciled companies with 5000 or more employees in France and with 10.000 employees or more in France and abroad. The law creates a legal duty for companies to develop and implement a vigilance plan for identifying and preventing risks of harm to human rights and fundamental freedoms, severe bodily or environmental damage and health risks resulting from the activities of the company and those which it controls, directly or indirectly, and the activities of its sub-contractors or suppliers with whom the company has an established commercial relationship. The plan should also cover measures to prevent active and passive corruption by the company itself and the companies it controls.

A decree by the Council d'Etat would further specify the modalities of the plan of vigilance, as well as the conditions for monitoring their effective implementation, and if appropriate, in the context of multi-stakeholder initiatives at industry or national level.

There are various aspects in the proposed law and therein obligation set out for companies to develop and implement a program of due diligence that are aligned with the expectations of human rights due diligence set out in the UNGPs. First, the proposed law models the duty of vigilance on the concept of due diligence, and relies on the risks of harm to human rights and the company's relation to these risks to determine how this duty of vigilance applies to companies. Companies are required to include in their `plan de vigilance` measures to prevent not only the human rights risks that result from the company's own activities, but also those resulting from the activities of certain subsidiary entities, sub-contractors and suppliers. These elements reflect the expectation set out in the UNGPs, and is also consistent with the proposal set out in this chapter to create a legal duty of human rights due diligence that aligns with the expectations set out in the UNGPs.

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[288] Proposition de loi relative au devoir de vigilance des sociétés mères *et des* entreprises donneuses *d'*ordre, [Proposal for a law on a duty of vigilence of parent companies and contracting agencies], adopted by the French National Assembly, March 23, 2016, ¶ 2.

[289] *See* section 6.4.1.2. *Also see*, http://www.senat.fr/dossier-legislatif/ppl14-376.html, and Nadia Bernaz, Unpacking the French Bill on Corporate Due Diligence: a presentation at the International Business and Human Rights Conference in Sevilla (Oct. 21, 2016), http://rightsasusual.com/?p=1087

The proposed duty to develop and implement a vigilance plan is matched with certain enforcement mechanisms.

First, companies are required to communicate their vigilance plan to the public and to include this plan in their annual account. The mandatory disclosure of the plan in itself could have the positive effect of increasing the level of transparency and accountability of companies in respect to their due diligence. The exposure of companies to greater external pressures by market forces and States and non-state actors can enforce due diligence. Costs or rewards may be inflicted on companies for their performance. Such pressures may drive companies to be more proactive in order to become aware of the risks that its own activities or those of its subsidiary entities pose to human rights in their supply chain.[290] Incentives to do so may be great where such disclosure might increase the exposure of companies not only to external condemnation, but also to risks of legal liability. Such information could be used as evidence in courts that companies have acted in breach of not only their obligations under this law, but also other laws.

Second, a company that is non-compliant with the law may be ordered by a French court upon request by an interested party to adopt a vigilance plan and to communicate this plan to the public, thereby giving account to the obligation of the company to effectively implement this plan of vigilance. A company that is not compliant with its duty of vigilance may be imposed a fine by a French court up to an amount of 10 million euro's.

The company may also incur legal liability under national tort law where non-compliance by the company with its duty of vigilance caused damage to another person. Any person with an established interest may bring an action for damages. The company may be held liable to pay compensation for the damage caused and in addition may be imposed a fine.

The proposal to create a duty of vigilance is an important step forward, yet in certain aspects also less ambitious than the presumption of a legal duty of care that this chapter proposes.

First, a great many entities are excluded from its scope of application, including entities that operate in high-risk sectors or operational contexts.[291]

Second, the proposed law endorses the concept of control to determine whether a duty of due diligence applies to a company in respect of the human rights risks resulting from the activities of a subsidiary entity. The proposed law recognizes that a duty of vigilance applies to a company in respect to only those subsidiaries that the company has direct or indirect control over. For the purpose of the proposed law, a relationship of control exists in respect of subsidiaries that it solely or jointly controls, or over which it exerts significant influence. Indicative of a relationship of control is the company holding a majority of the voting rights, an agreement with partners, members and shareholders on shared decision-making or certain circumstances in which the company owns a fraction of the voting rights.[292]

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[290] Ana Triponel, *Can a Consensus be reached on the French Duty of Care Bill?* (undated), https://business-humanrights.org/en/can-a-consensus-be-reached-on-the-french-duty-of-care-bill.

[291] *See* European Coalition for Corporate Justice, *France: A Historic Vote for Corporate Accountability* (May 13, 2015), http://corporatejustice.org/news/124-france-historic-vote-for-corporate-accountability.

[292] Code de Commerce art. L. 233-16 (France).

The proposed law thus excludes subsidiary entities with whom the company does not have a relationship of control in the sense described above. This chapter supports the view that the concept of control is not the right concept to delimit the scope of obligation. Responsibility or liability of companies should be delimited by the adverse human rights impacts by a commercial relationship that the company is involved in, by way of causation, contribution or direct linkage.

The burden to demonstrate that a link of control exists furthermore falls on the victims,[293] while in my hypothesis the burden of proof should be reversed and fall on the defendant.

Third, a related point is that the duty of vigilance applies to a company only in respect of certain types of business relationships, that is subcontractors or suppliers.[294] In my hypothesis, business relationships should be defined in broader terms, encompassing any entity with whom the company has a commercial relationship.[295]

If the bill were to be adopted upon review by the Senate, this would constitute an important achievement. France would be the first to adopt a mandatory human rights due diligence requirement for companies. The proposed bill may set a precedent for future laws creating a legal duty of care, also at EU level.[296]

Outside the EU, a popular initiative was launched in Switzerland in April 2015, entitled the 'Swiss Responsible Business Initiative'. The aim of this initiative is the introduction of an Art. 101a in the Swiss Federal Constitution that would create a legal obligation for Swiss-based multinational companies to carry out appropriate human rights due diligence in their activities abroad in alignment with the UNGPs. The scope of this due diligence would be broader however, encompassing also the protection of the environment. Non-compliance with this obligation could result in legal liability before a Swiss court.[297]

The French proposal has served as inspiration[298] for a Resolution adopted by the European Parliament ('EP') on 29 April 2015 at the occasion of the second anniversary of the Rana Plaza building collapse. This Resolution calls 'on the Commission, EU Governments and others to consider proposals for mandatory frameworks that will ensure that access to remedy and compensation is based on need and responsibility and not just on the ability of campaign groups to name and shame or on the voluntary efforts of companies'.[299] The Resolution furthermore

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[293] Sherpa, *A historic first step for multinationals' duty of care!* (March 31, 2015), http://www.asso sherpa.org/historic-first-step-multinationals-duty-care#.VjSxjFQ1jIU.

[294] *Id.*

[295] OECD, *supra* note 209.

[296] There have been calls for the EU to introduce similar legislation at EU level. (European Coalition for Corporate Justice 2015).

[297] The required number of signatures has been reached and the initiative will be presented to the Swiss government in October 2016. Upon consideration by the Federal Council and subsequently the Parliament, the initiative will be put to the Swiss people in a referendum. *See,* http://konzern-initiative.ch/initiativtext/?lang=en.

[298] Arnaud Poitevin, *The EU may move towards mandatory business & human rights regulation* (May 9, 2015), https://www.linkedin.com/pulse/eu-moves-towards-mandatory-business-human-rights-arnaud-poitevin.

[299] European Parliament resolution of 29 April 2015 on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact, ¶ 6, Eur. Parl. Doc. P8 TA (2015)0175 (Apr. 29, 2015).

notes that it 'considers that new EU legislation is necessary to create a legal obligation of due diligence for EU companies outsourcing production to third countries, including measures to secure traceability and transparency, in line with the UN Guiding Principles on Business and Human Rights and the OECD MNE Guidelines'.[300]

On 18 May 2016, eight national parliaments expressed their support to the 'green card' initiative, jointly calling for 'a duty of care towards individuals and communities from EU-based companies whose human rights and local environments are affected by their activities'.[301]

6.4.8 What should be the Law Governing the Conduct?

In relation to the applicable law question, courts generally apply the *lex loci damni* rule in cases that fall within the scope of the Rome II Regulation. Consequently, the law of the third country commonly will determine the substantive liability issue in foreign direct liability cases were damages typically arise out of events that occurred in a third country, provided that this was after 11 January 2009.

It has been argued from an international law perspective that the application of the general rule of *lex loci damni* may ease concerns related to extraterritoriality and about the EU imposing its laws on foreign conduct or actors.[302] Others argue that applying the *lex loci damni* rule is not desirable if this impacts negatively on the protection afforded to victims. If foreign countries uphold a lower standard of human rights protection and remedy than the EU Member States, victims will be worse off.[303] This gives rise to the question to what extent a court can and should weigh into its decision on the choice of law question the differences in the substantive laws of the domestic private law regime that can apply to a case and how these substantive laws define the duty of care of a company?

Divergence between the substantive rules that private law systems may apply and the protection these laws afford to victims may be less of an issue in the inter-EU context. The relevant substantive laws of EU Member States are harmonized to a significant degree and uphold international human rights standards that will not differ greatly in substance.[304] In the context of foreign tort-liabilities however, in which the choice of law is one between the law applicable in the EU Member State and the law of the third-country in which the damages occurred, the divergence between these laws is usually greater. Especially where this third-country is a developing country, there is commonly wide variation according to the domestic laws that are

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[300] *Id.* ¶ 23.

[301] The national parliaments supporting the Green Card Initiative are: `Parliaments of Estonia, Lithuania, Slovakia and Portugal, the UK House of Lords, the House of Representatives in the Netherlands, the Senate of the Republic in Italy, and the National Assembly in France`. CIDSE, *Media Alert - NGOs welcome support of European Parliament for duty of care legislation* (May. 23, 2016, 15:35 PM), http://www.cidse.org/newsroom/media-alert-ngos-welcome-support-of-european-parliamentarians-for-duty-of-care-legislation-of-eu-corporations-towards-people-affected-by-their-activities.html.

[302] *EU Study of the Legal Framework on Human Rights*, *supra* note 53, § 215.

[303] *See id,* § 215.

[304] Van Calster, *supra* note 30, at 239, ftn 812.

applicable to the case, in terms of the protection accorded and the level of damage awarded.[305] Since the behavioral standard for similar activities and damages awards may be lower in third-country jurisdictions than in Western home jurisdictions,[306] the choice of law issue can have a discernable impact on the outcome and effects of the proceedings.[307]

Currently, there is no rule that by general or specific exception to the generally applicable rule of *lex loci damni* determines that the court must apply the law of the country that affords the highest standard of protection to human rights. The content of the law otherwise applicable to the case and the standard of human rights protection it affords to the victim are, in themselves, not sufficient reasons for a court to displace the application of the general rule of *lex loci damni* rule. A court may give consideration to the content of the applicable laws by exception under the provisions pertaining to overriding mandatory rules (Article 16) or environmental damage (Article 7) and apply the *lex fori* only in cases where the necessary conditions are satisfied.

In case a (statutory) presumption of a legal duty of care were to be introduced, the court may be required to apply more often the law of the EU Member State in cases that fall within the scope of the Rome II Regulation.

A court may interpret the statutory presumption of a legal duty of care as an overriding mandatory rule under Article 16 of the Rome II Regulation. The statutory presumption would have the regulating of the conduct of the business enterprise as its main objective. There would be a greater likelihood of this presumption overriding the law of the third-country than when mandatory rules have the protection of human rights as their main objective. While the latter usually requires a nexus between the victim and the EU forum, in the case of the former, a nexus between the defendant and the EU Member State may be sufficient. The domicile of the defendant in the EU Member State may be sufficient for the court to enforce the presumption of a legal duty of care on companies on the basis of the mandatory provision. Enforcing this mandatory rule on companies also may be less controversial from an extraterritorial viewpoint where the main objective is regulating the conduct of EU companies rather than protecting the human rights of victims of third countries.

A company expresses its commitment to human rights due diligence and the UNGPs may be more prepared to sign an agreement under Article 14 stating that the law of the EU Member State is the applicable law to the dispute. If there were a (statutory) presumption of a legal duty that aligns with the human rights due diligence concept as defined by the UNGPs, the incentives of a company to sign such an agreement may be greater. The company would lose credibility if it were to accept that a court assesses its conduct on the basis of a standard of protection that is much lower than the one it has committed itself to. The choice of entering the agreement or not would be the company's, however. The agreement is to be reached after the events giving rise to the damage occurred. By that time, the cost/benefit of signing the agreement may be more apparent and where it is clearly less favourable for the company to sign the agreement, it may decide not to sign.

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[305] Enneking, *supra* note 70, at 215.

[306] *Id.* at 169-170.

[307] Enneking, *supra* note 75, at 292.

Currently, a court may apply the law of an EU Member State under the 'escape clause' under Article 4(3), provided that the tort/delict is manifestly more closely linked with the EU Member State. One may consider that there is a stronger case for the application of the *lex loci delicti* rule under Article 4.3. of the Rome II Regulation in foreign direct liability case where the tort/delict amounted to a breach of a legal duty of care that aligns with the human rights due diligence concept, and the elements occurred on the territory of the EU Member State. The nexus to this forum may still be in sufficient to satisfy the criterion of a 'manifestly closer connection' however, and the court may still require that the law of the third country is applied to the case.

Arguably, the substantive liability issue should have a greater role to play in the choice of law question as it applies in tort liability cases. The human rights due diligence concept would be operationalized most effectively if there were a provision in the Rome II Regulation that would give victims a choice to base their legal claim on the law of the country that affords the highest standard of human rights protection to victims residing outside the EU. Ideally, by rule or implication the Rome II Regulation should allow a court to accept this choice and to apply the law of the country that defines the scope and nature of the legal duty of care in accordance with international human rights standards and the UNGPs.[308] Attention should be paid to how the domestic tort system construes the legal standard of care. The UNGPs provide that the scope of human rights due diligence should be defined at a minimum by reference to 'the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work'.[309]

Alternatively, one may consider creating new or revisiting existing provisions under the Rome II Regulation in order to create a general or specific exception to the general rule that the *lex loci damni* applies for cases that fall within the scope of this regulation, and that have the effect that the court must apply the law of the EU Member State in tort-liability cases.

Different factors can link the occurrences and the parties to the territory of an EU Member State.[310] The analysis suggests that the rule connecting tort liability cases most closely to the territory of the EU Member State is the *lex locus delicti* rule. One may consider introducing a specific rule to the Rome II Regulation applying the *lex locus delicti* in cases where the non-contractual obligations arise out of damages resulting from human rights violations. The occurrence of the alleged tort/delict on the territory of the EU Member State would point to the law of the EU Member State as the applicable law for the dispute, hence applying this rule in tort

[308] For instance, Amnesty International argued in a submission to proceedings in *Choc. v. Hudbay Minerals Inc*., that 'the Canadian government has endorsed the main relevant standards, including the *UN Guiding Principles on Business and Human Rights*, the *OECD Guidelines for Multinational Enterprises* and the *Voluntary Principles on Security and Human Rights*. As such, Canadian courts should have no difficulty in recognizing these principles and drawing upon international norms and standards of conduct in considering whether a Canadian corporation owes a duty of care in the circumstances of this case.' Choc v Hudbay Minerals Inc., 2013 ONSC 1414, 36 (Can. Ont. S.C.J.)

[309] *UNGPs*, *supra* note 145, GP 12.

[310] These considerations include 'the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation and the place of business of the parties, and the place where the relationship, if any, between the parties is centralized'. International Commission of Jurists, *supra* note 54, at 52.

liability cases could be beneficial for victims. The application of this rule may be less desirable if one considers the degree of uncertainty it adds with regards to the outcome of court decisions.[311] The decision of the court on the applicable law question may differ in similar situations depending on the place where the tort has its centre of gravity.

The *lex loci delicti* rule may complicate the choice of law question where elements of the tort are scattered across several countries. Illustrative is jurisprudence in the UK common law system where the *lex loci delicti* was the law generally applicable before the Rome II Regulation came into force.

The Court of Appeals in *Lubbe v Cape Industries* examined the choice of law question in the context of the jurisdiction issue, more specifically as a relevant factor in the application of the *forum non conveniens* rule.[312] The court reviewed relevant authorities on how the municipal law governs the tort liability question in relation to acts that occurred abroad. The conclusion was that in case a tort is constituted of composite acts taking place in different jurisdictions,[313] the court should consider the complete series of events constituting the tort and apply the law of the country in which the tort in substance arose. The Court noted that 'the issue whether a duty of care was owed by the defendant, in England, may be governed by English law, even if the other factors making up the alleged tort of negligence are governed by South African law'. This entailed the kind of hybrid situation envisaged by Dicey and Morris' Rule 203(2), the court noted, which entails that 'a particular issue between the parties may be governed by the law of the country which, with respect to that issue has the most significant relationship with the occurrences and the parties'. [314]

Analogizing this case law to the question of applicable law and the presumption of a legal duty of care construed on the human rights due diligence concept, similar complications may arise. The applicable law question can be complicated not only because different bodies of law may govern the factors constituting a tort of negligence, but also because the place in which the tort in substance arose may not be identified easily. Factual allegations of a breach of a legal duty of care construed on the human rights due diligence concept may point to the law of the EU Member State as the applicable, because the company has its main seat and relevant decision making took place on the territory of this EU Member State. It cannot be presumed that this will be the outcome always, however. The companies' decision making related to human rights due diligence policies may be decentralized and the locus of where the duty of care was breached may be located elsewhere. For this reason the applying the *lex loci delicti* rule can create uncertainty as to what law will apply to the dispute. This was one of the considerations of the EU Commission for deciding not to opt for the *lex loci delicti* rule as the general rule, but only allow for the application of this rule under an 'escape clause'.[315]

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[311] Dickinson, *supra* note 73,at 340. *Rome II Regulation*, *supra* note 71, Recital 16.

[312] The judgement in *Spiliada* indicated that the choice of law issue was a relevant factor for determining whether the South African or the UK forum was the more appropriate forum to hear the case.

[313] Lubbe & Ors v Cape Plc, [1998], CLC 1559,[1998] EWCA Civ 1351.

[314] *Id.*

[315] *Rome II Regulation*, *supra* note 71, Recital 16. Enneking, *supra* note 75, at 297.

Apart from considerations related to the un-certainty of the outcome, applying the *lex loci delicti* rule in tort liability cases would be not ideal from the perspective of the victim. The rule would not ensure that the law of the EU Member State applied to the dispute in all cases. One may consider introducing a European equivalent to the rule under Article 7 of the Rome II Regulation, allowing victims to choose for the application of the law of the country where the event giving rise to the damage occurred. Such a rule creating a specific exception in tort liability cases in the context of human rights abuses would not ameliorate these concerns, however. The circumstances of the case may not clearly point to the EU Member State as the place where the breach of the legal duty of care occurred.

One may consider introducing a rule that would give individuals the choice to base their claim on the *lex fori*, meaning that the law of the country where the case was brought applies. Recourse to the *lex fori* rule would simplify the applicable law question. This rule has been applied to determine the choice of law issue in piercing of the corporate veil for the same reason.[316] Where tort liability claims are framed on the basis of the piercing of the corporate veil doctrine, the applicable law question can be complex, in part because there is no uncontested rule under international or national rules of private law as to what national law to apply to cases involving veil-piercing issues. The question is further complicated by the fact that issues in the same case may be governed by different domestic laws, depending on whether a case is characterized in view of the claim against the subsidiary or as a veil piercing issue. Both characterizations are possible.[317] Courts have sought to simplify the applicable law question by applying the *lex fori* to the entire case.[318] Giving victims a choice to have the *lex fori* rule applied to the case could have similar positive effect in the context of direct tort liability claim. The law of the EU Member State in which the case was brought would govern the substantive liability issue in situations where this would be in the victim's best interest.

Recourse to the *lex fori* rule would entail breaking with the principle of neutrality.[319] The Rome II Regime applies in light of the EU objective of enhancing the proper functioning of the internal market. In order to advance this objective, the EU seeks to enhance the predictability, certainty and free movement of judgements through harmonization of national PIL rules. Some may argue that applying the *lex fori* rule would entail a departure from enhancing the predictability of judgements. Ensuring that the same national law governs the dispute, irrespective of where the court was seized, is one of the main objectives behind creating uniformity of decisions under EU private international law.[320] As a consequence of applying the *lex fori* rule, there could be

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[316] Demeyere, *supra* note 115, at 388.

[317] *Id.* at 388.

[318] *Id.* at 388.

[319] The dogma refers to the neutrality and apolitical nature of the Private International Law as a reference system and implies that, 'independent of any legal political consideration or political objective, the law applied to an international legal relationship is the law most closely connected to that legal relationship'. Veerle Van Den Eeckhout, *The Instrumentalisation of Private International Law by the European Institutions: Quo Vadis? Rethinking the 'Neutrality' of Private International Law in an Era of Europeanisation of Private International Law and Globalisation, 3* (Jul. 1, 2014), *available at* http://ssrn.com/abstract=2485779 and http://dx.doi.org/10.2139/ssrn.2485779.

[320] *Rome II Regulation*, *supra* note 71, Recital 6.

increased diversity in the national laws governing the substantive liability issue in tort liability cases according to the court seized. In other words, the national courts of the EU Member States would not apply the same *lex fori* to similar disputes.

The *lex fori* rule should not have a discernable effect on the predictability of the outcome of litigation in practice, however, at least not in the EU context. The substantive laws of EU Member States do not differ greatly in relevant aspects, because they uphold international human rights standards. In so far that the *lex fori* will result in the application of the law of one of the EU Member States, the outcome of proceedings should be predictable to a sufficient degree. Another reason is that the *lex fori* is often the law of the country in which the parent company is domiciled. There is no uncertainty in being subject to the law of the country in which a parent company is domiciled.

The specific rule set out under Article 7 on environmental damage already indicates a departure from the neutrality principle. This provision creates an exception to the general rule in the public interest of greater environmental protection. A revision of the Rome II Regulation to allow for the application of the *lex fori* rule in cases where the liability issue arises from damages resulting from human rights abuses is not problematic and justifiable by the public interest objective of human rights protection.

The application of the general rule of *lex loci damni* in direct tort liability cases frustrate the right of the victim to have access remedies for human rights abuses. Introducing the *lex fori* rule would be in line with Art. 47 of the EU Charter of Fundamental Rights and the principle of effectiveness, which has been recognized as a general principle in EU law. The principle requires that the exercise of rights is not made virtually impossible or excessively difficult.[321]

The argument that applying the *lex fori* to the case would redirect focus on regulating the conduct of business enterprises and affect the competiveness of companies that would have to abide by higher standards than their non-EU competitors would not uphold, because human rights have a basis in EU law.

6.4.9 What Implications for Jurisdiction?

The Brussels Regime has made it easier for courts to assume jurisdiction over a defendant in tort liability claims on the ground of it being domiciled in the EU Member State in which the court was seized. The domicile principle creates legal certainty and foreseeability of the possibility that a civil suit may be brought against a parent company in an EU Member State.[322] Other advantages are that it simplifies the jurisdiction issue, and allows the parties to move to the substantive question of liability more quickly.[323] The Brussels Recast extends these advantages to claimants starting procedures against a defendant not domiciled in the EU, but only if the subject matter of the claim is insurance, consumer or employment contracts. There is no rule in the Brussels Recast that allows a court to assume jurisdiction over a defendant that is not domiciled in the EU in a direct tort liability case in which the subject matter is human rights.

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[321] *See* Case C-199/82 *Administrazione delle Fianze dello Stato v. SpA San Giorgio* [1983] ECR 3595, ¶ 14.

[322] Muchlinski, *supra* note 67, at 11.

[323] *Id.* at 12.

One may consider various scenarios for the further harmonization of the national jurisdictional rules governing tort liability cases in which at least one of the defendants is a third-country subsidiary entity not domiciled in an EU Member State.

There are various policy reasons supporting amendments to the Brussels I Regulation in order to facilitate access to courts for victims in foreign direct liability cases. Individuals are in a less advantageous position than business enterprises to protect themselves from harm and to vindicate their rights. Since they are the weaker party in tort liability suits, greater protection of their rights by rules of jurisdiction is warranted.

Revisions to the Brussels I Regime in line with the duty of State to ensure and provide remedies, which is recognized in all international and key regional human rights treaties and integral to the more general duty of States to protect individuals from human rights abuses committed by third parties.[324] [325] An equivalent duty to protect this human right applies to States that are party to the same international human rights treaty guaranteeing this right. The argument that the exercise of adjudicative extraterritorial jurisdiction could compromise good relations with third countries, or amount to 'an offence against international courtesy' is not applicable in such contexts.[326] Amendments to the Brussels I Regulation to this effect would be in line with Article 47 of the EU Charter of Fundamental Rights and consistent with Articles 81 and 82 of the TFEU.[327]

One possible scenario is to widen the applicable scope of the *forum connexitatis* rule under article 8(1) of the Brussels I Regulation in order to allow a court to assume jurisdiction over a third-party defendant in a direct tort liability case related to human rights protection. In the case a (statutory) presumption of a legal duty of care were to exist, the likelihood of this European rule creating a legal basis for jurisdiction over a defendant that is not domiciled in the EU would be greater. Arguments against its application could be rebutted more easily. Presuming that in the scenario described above that the court must apply the law of the EU Member State to the dispute, and this law recognizes a legal duty of care, it would be possible that a parent company and/or the subsidiary entity could be held liable for a breach of a legal duty of care. This would render void the argument that assuming jurisdiction over the parent company would amount to an abuse of process because establishing corporate liability on the basis of a duty of care would evidently be impossible. Also the argument that a court in the EU forum state cannot develop foreign law in order to create a novel duty of care where previously there was none would no longer be applicable as this law would not govern the liability issue in the dispute.

The fact that the law of the EU Member State is the applicable law lifts policy objections that the EU Member State may not be the most suitable forum to hear the case. The law in the EU Member State would provide for a legal basis for liability of both the subsidiary and the parent company. There should therefore be sufficient foreseeability that both entities can be sued jointly before a court in the EU Member State. The legal duty of care may be applied to both. The

[324] Amnesty International, Injustice Incorporated: Corporate Abuses and the Human Rights To Remedy, 16 (2014)

[325] The UNGPs indicate that in order to discharge this duty, State should protect individuals through 'effective policies, legislation, regulations and adjudication'. *UNGPs*, *supra* note 145, GP 1.

[326] Redfield, *supra* note 28, at 911.

[327] Commission Staff Working Document, *supra* note 4, at 23.

factual allegations against both companies may be different, but this should not be an issue, since the due diligence concept recognizes differentiated responsibilities of a parent and subsidiary entity and different forms of involvement in human rights abuses. The fact that the factual damages as a result of adverse human rights impacts giving rise to the claims against the parent and the subsidiary entity are the same, should provide for a connection between the claims that is sufficient to treat the cases jointly for reasons of expediency.

Arguably, it would be desirable as a matter of public policy that individuals have access to remedies for harm suffered as a result of a breach of human rights due diligence that occurred on the territory of an EU Member State. The court should be able to assume jurisdiction over all defendants that are alleged liable for the same harm, provided that the court has personal jurisdiction over one the defendants by reason of this defendant being domicile in an EU Member State. The connection between the third-country company not domiciled in the EU and the forum of the EU Member State would be indirect however, because it is established via a court's jurisdiction over another defendant.

There should be a jurisdictional basis in national or European rules for courts to assume exclusive jurisdiction over defendants in a tort-liability case where the subject matter is human rights protection and factual allegations of a breach of a legal duty of care occurred on the territory of an EU Member State. Where factual allegations against a company are based on a duty of care that premises on the human rights due diligence concept, and alleged facts point to this duty having been breached in the jurisdiction of an EU Member State because relevant decision making occurred there, there is a tenuous link between the proceedings and the territory of the EU Member State. The location of the delict/tort would constitute the connection and should be sufficient for the court to assume jurisdiction over all parties in the case. Whether the case has been brought against an EU or non-EU defendant should not be a factor in deciding jurisdiction on this basis.

If the locus of the factual allegations were to be a determinant for jurisdiction, this would discourage a court from using its discretion to dismiss a case on the basis of the *forum non conveniens* doctrine. An individual can seize a court in an EU Member State as of right. Arguably, the court first seized by the victim should be the designated court to assume jurisdiction over the defendant. Following the authority of the court in *Lubbe v Cape* in its application of the test in *Spiliada*, the balance of private interests factors would tip in favor of the jurisdiction of the EU Member State as the natural forum to hear the case. The factual allegations of a breach to human rights due diligence most likely will point to the forum of the EU Member State in which the company is incorporated, because its seat of central management is most likely to be based there. In our hypothesis this is the EU Member State in which the court was seized. If so, this forum has a stronger connection to the issues of the case and appears to be *prima facie* the natural forum to hear the case.

The place where the relevant decisions were made may not be easily identified. At best, upholding the locus of the factual allegations as the determinant key criteria would render the *forum non conveniens* doctrine in-applicable. This may be the case where claims are brought against a company that belongs to a horizontally structured network enterprise in which

management functions are distributed throughout the group.[328] Eroglu has argued that due to this horizontal structure, it has become practically impossible for a defendant to prove that one forum is more appropriate that an alternative forum on the basis of conventional public and private interest factors. The argument holds that the *forum non conveniens* doctrine as it has been applied in the jurisdiction of the UK and the US is therefore practically irrelevant.[329] At least, in situations where some relevant decision-making occurred on the territory of an EU Member State, it would be more difficult for a defendant to meet the burden of demonstrating that a foreign jurisdiction is available and is clearly a more natural forum to hear the case.

In addition, courts should be able to apply of the *forum necessitates* principle in cases where individuals do not have access to courts elsewhere. Individuals may not be able to recover funds from a subsidiary entity, or have no forum available to them in host countries, and Western jurisdictions may provide the only avenue for obtaining redress. Then both EU nationals and non-nationals should be able to rely on the *forum necessitates* in order to bring a claim and benefit from access to the forum of an EU country. The doctrine could complement the jurisdictional grounds outlined above because it guarantees access to courts in the specific situations where no alternative forum is available.

6.5 Conclusion

This section suggests that human rights due diligence can have a role in a courts consideration of the elements that a court commonly looks for in order to establish parent liability in tort liability cases. The following considerations come to the fore. The connexions between current approaches and the human rights due diligence concept are sufficient to support the view that these approaches can be reconciled with the human rights due diligence concept. Current approaches to parent liability are oriented towards operationalizing the wrong concept of CSR, more precisely, that of 'sphere of influence' instead of the human rights due diligence concept. The proposed solution is to create a rebuttable presumption of a legal duty of care that is construed according to the human rights due diligence concept. A number of policy considerations support the creation of such a rebuttable presumption. For reasons of consistency throughout all stages of the proceedings and enhancing access to justice, also approaches to applicable law and jurisdiction should be revisited to align with the human rights due diligence concept.

[328] Muchlinski, *supra* note 67, at 13.

[329] Eroglu, *supra* note 52. Stephanie Bijlmakers, M. Eroglu*, Multinational Enterprises and Tort Liabilities (Edward Elgar, Cheltenham 2008)*, 21 European Review of Private International Law (2013).

7 The Role of Mandatory Disclosure in Operationalizing Human Rights Due Diligence: the Case of the EU Directive on Non-financial Disclosure and Board Diversity

7.1 Introduction

Recent years have seen the adoption and revision of mandatory disclosure rules in the EU and beyond. These rules set out requirements for companies to disclose externally information that is necessary not only to obtain an understanding of the economic performance of companies, but also the impact of business enterprises on non-financial points that are of public interest, including human rights. There is an increasing number of mandatory disclosure rules that require companies to disclose on human rights risks, policies and due diligence. The impetus for the adoption (or revision) of such instruments comes from regulators and increasing stakeholder expectations that business enterprises release such information. In order to enhance regulatory coherence and legal certainty, the more recent instruments adopted in this domain also include among their objectives to foster greater convergence between the existing disclosure requirements. The focus of this chapter is on Directive 2014/95/EU, of 22 October 2014, *as regards disclosure of non-financial and diversity information by certain large undertakings and groups* (hereinafter the 'Non-Financial Reporting Directive' or the 'Directive').[1] This Directive amended Directive 2013/34/EU, of 26 June 2013, *on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings*.[2] These EU Directives provide a minimum harmonisation of the EU regime for non-financial disclosure by requiring EU Member States to enforce on certain business entities ('undertakings' in the Directive's jargon) and groups minimum disclosure requirements on certain non-financial matters including, *inter alia*, human rights.

The chapter departs from conventional wisdom, according to which the national and EU mandatory disclosure legislation are a method for indirectly regulating business respect for human rights. As will be gathered from the following pages, the reporting on human rights issues by corporations has the potential to result in improved human rights performance.[3] Mandatory reporting requirements, alongside other multi-stakeholder and self-regulatory reporting initiatives, contribute to the regulatory dynamics affecting business conduct, which the UNGPs

[1] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014/95/EU, 2014 O.J. (L 330) 1 [hereinafter *Non-Financial Reporting Directive*].

[2] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. (L 182) 19 [hereinafter *Accounting Directive*]

[3] 'Ultimately, if reporting is refocused to address a number of key criteria, it can lead to improved human rights performance, thereby creating both internal systems and the accountability mechanisms needed to anticipate and address human rights harms and to communicate these efforts effectively'. Amol Mehra & Sara Blackwell, *The rise of non-financial disclosure: reporting on respect for human rights*, *in* Business and Human Rights: From Principles to Practice, 276 (Dorothée Baumann-Pauly & Justine Nolan eds., 2016).

set out to promote. This chapter will examine the legal implications of ensuring the effective operationalising of the responsibility to communicate in particular (as an integral part of human rights due diligence, in conformity with the expectations set out in the UNGPs) through national and EU mandatory disclosure legislation.

The chapter examines the effect of the Directive on consolidating the State duty to protect human rights by imposing an obligation on EU Member States to require certain large undertakings and groups to disclose on human rights. This reinforces State responses to UNGP 3, which articulates that, in meeting their duty to protect, States should 'encourage, and where appropriate require business enterprises to communicate how they address their human rights impacts'.[4] Special attention will be paid to factors that might limit or enhance the effectiveness of the Directive in shaping human rights compliance conduct by business enterprises across the EU.

The chapter will first describe (Section 7.2) the expectations of the UNGPs in relation to the responsibility of business enterprises to communicate (UNGPs 17 and 21), as well as the corresponding duty of States to adopt appropriate measures to ensure such communication by business enterprises (UNGP 3). This will be followed (Section 7.3) by an examination of the factual considerations and rationales which prompted the European Commission to propose the adoption of the Non-Financial Reporting Directive. It is argued that the Directive has the potential to serve as a useful regulatory tool that can lead to improvements in the human rights performance of companies. More precisely, the required disclosure can enable stakeholders (*i.e.*, regulators, NGOs, business enterprises, consumers, investors) to evaluate, compare and hold companies accountable for their human rights performance.

Next, the chapter examines (Section 7.4) the Non-Financial Reporting Directive in detail to determine whether and the extent to which the minimum disclosure requirements articulated in the Directive correspond with the expectations set out in the UNGPs, and specifically regarding the responsibility to communicate set out in UNGPs 17 and 21. Assuming that the Directive does intend to give effects to these two UNGPs, the chapter also examines the way in which and detail to which the Directives defines disclosure requirements related to human rights due diligence. The fifth section (Section 7.5) will explore in detail the legal effects that the Directive has already had and, more specifically, those that it is likely to have upon the expiration of its period for transposition, in relation to human rights. The CFREU having acquired the same binding nature as the EU Treaties with the entry into force of the Treaty of Lisbon,[5] the Directive should be interpreted in accordance with EU protected fundamental rights. The first sub-section concentrates on the so-called 'indirect effect' of the Directive, according to which national measures should be interpreted in light of the Directive, and EU protected fundamental rights (most notably, the rights recognised in the CFREU), in particular in the light of the rights to respect of private life and the right to freedom of expression. It will be concluded that, while EU

[4] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.* U.N.Doc. A/HRC/17/31, UNGP 3 (March 21, 2011) [hereinafter *UNGPs*] (by John Ruggie).

[5] *See* Article 6(1) of the Treaty of Lisbon, OJ C 306/13 2007. *See* further, CFREU, OJ C 83/02 2010. Please note that the CFREU had been formally proclaimed in December 2000 in Nice by the European Parliament, Council and Commission.

law mandates national disclosure obligations to be interpreted in the light of the Directive and in the light of EU protected fundamental rights, the content of the Directive itself and, in particular, the 'comply or explain' modality, might not necessarily further the cause of those stakeholders intending to rely on the Directive for the purpose of obtaining enhanced disclosure from corporations.

The second section examines whether the Directive has direct effect (*i.e*., whether it is directly applicable by courts and authorities at the national level). It is argued that the Directive is unlikely to acquire direct effect, not necessarily because it is a Directive, but because its provisions on mandatory disclosure are unlikely to be considered by the CJEU as 'clear and unconditional and not contingent on any discretionary implementing measure'.[6] Perhaps more importantly, to the extent that such direct effect is framed as obligations for (non publicly-owned) corporations vis à vis stake holders (NGOs, shareholders, etc.), it would be hard for the Directive to overcome the CJEU's prohibition of direct effect of Directives.[7] Which is not to say that the Directive will not have *any* legal effects. Apart from the indirect effects referred to in the preceding paragraph, stakeholders might file a complaint for a breach of EU law before the European Commission in order for the Commission to bring an action against the Member State in question before the CJEU pursuant to Article 258 TFEU. All in all, by enacting the Directive, the EU opted for a *type of legal instrument* which has potentially sweeping implications in the rights of stakeholders when it comes to the disclosure obligations of corporations. However, irrespective to the *type* of instrument chosen, and as noted in the preceding section in relation to the 'comply or explain' example, it is uncertain whether the *content* of the Directive will contribute to further the rights of stake-holders. A point which I will analyse in more detail next.

The chapter (Section 7.6) will then examine the potential effectiveness of the Directive in fostering business disclosure practices corresponding with UNGPs. It is argued that too much flexibility for corporations in meeting their disclosure requirements risks easing the disclosure requirements on undertakings to an extent that the potential effect of the Directive on human rights compliant conduct by business enterprises becomes diluted. I argue that the Directive can become a powerful tool in the regulation of business in relation to human rights, provided that certain conditions are met related to, *inter alia*, the reporting audience, stakeholder participation and the approach of reporting.

The seventh section (Section 7.7) will explore the connections between the human rights due diligence concept and the concept of the group entity. I argue that the concept of the group entity that will be applied is crucial for the effectiveness of the Directive and EU Member States should consider adopting a functional approach to the group entity, one that refers to the subject matter of the Directive to determine the concept of the group entity. The chapter finds that approaches to the group entity that do not focus on legal control but on whether the undertaking has `the power to exercise, or actually exercises; dominant influence or control` over another undertaking or whether the company pursues a common management policy for the group as a whole are the most suitable approaches to the group entity in light of the effective operationalisation of human rights due diligence.

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[6] Case 44/84, Hurd, 1986, E.C.R. 29, ¶ 47.

[7] Case 91/92, Faccini Dori*,* 1994, E.C.R. 3325.

The eighth section (Section 7.8) will reflect on the extraterritorial applicability of provisions of the Directive and their potential extraterritorial indirect regulatory effects. The final section (Section 7.9) will explore the legal implications of the disclosure requirements under the Directive, as well as complementary national legislations in the UK and the US that require business enterprises to disclose information on slavery and trafficking-related risks in corporate supply chains. I argue that the disclosed information may expose business enterprises to greater liability risks under various of sources of national and EU law, *inter alia*, the law of negligence and company law.

7.2 The UNGPs and the Corporate Responsibility to Disclose on Human Rights

The UNGPs provide that, where States have laws in place that are intended or have the effect of requiring business disclosure on respect for human rights, these laws should be enforced effectively and their adequacy assessed periodically.[8] This entails that States must enforce existing laws that set out such requirements and, from time to time, review these in order to ensure these laws provide the necessary coverage in light of prevailing circumstances. The UNGPs indicate that States should encourage, or where appropriate require companies to communicate on how they address their human rights impacts. The UNGPs suggest that it would be appropriate for States to require business enterprises to communicate in the presence of a significant risk to human rights that may result from the nature of the business operations or the operating context. The laws setting out such disclosure requirements should be sufficiently clear in order for right-holders and business enterprises to be able to rely on the information thus disclosed in order to exercise their rights. Moreover, States should provide sufficient guidance to business enterprises, which cover expected outcomes, best practices, advise on methods, human rights due diligence. Particular attention should be paid to the challenges posed to the respect for human rights of gender and vulnerable and marginalised groups.[9]

The UNGPs also stress the importance of such disclosure requirements in contributing, together with other areas of law and policy, to the realisation of an environment conducive to business respect for human rights. Whether disclosure obligations will realise their full potential depends on the adequacy and effective enforcement of these requirements. More precisely, the effectiveness of these requirements depends on their ability to trigger the disclosure of information that meets, in form and substance, a minimum standard of accuracy, accessibility, and quality. Consequently, in drawing up disclosure requirements, States should consider whether communications reflect a balance between disclosure and risks. Disclosure should thus provide the most optimal representation of an undertaking's respect for human rights while minimising the potential adverse impacts that such disclosure may have on human rights. Disclosure may not create undue risks to the safety and security of the individuals. Other factors that should be weighed into the balance are: (i) the respect for the legitimate requirements of commercial confidentiality; and (ii) a certain responsiveness to the size and structure of the undertaking.[10]

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[8] UNGPs, *supra* note 4, GP 3.

[9] *Id.* Commentary to GP 3.

[10] *Id.*

It follows from the interaction between Pillar 1 and 2 of the UNGPs that the responsibility to disclose, as an integral part of the human rights due diligence process, can and, where appropriate, should be legally required and enforced by States through mandatory disclosure obligations in order to ensure business enterprises disclose in practice. The underlying rationale is that the responsibility to disclose would be operationalised most optimally if the human rights due diligence concept were to inform national disclosure regulations and where these regulations require undertakings to disclose in accordance with the UNGPs. If such outcome materialises, this would enable States to strengthen their human rights protection by ensuring that business enterprises publicly disclose information on their human rights risks and their human rights due diligence that individuals need to exercise their human rights. Such national laws and regulations can add clarity to the requirements to disclose in conformity with the UNGPs in a particular country context. These can also contribute to the further development of due diligence through national jurisprudence, as the UNGPs note that States should 'give weight to such self-reporting in the event of a judicial or administrative proceeding', and adopt laws to this effect.[11]

7.3 The Non-Financial Reporting Directive: Origin and Objectives

The following sections will examine the factual origins, the rationale of the EU Commission to issue the proposal for the Non-Financial Reporting Directive, and the objectives of the Directive with regard to fostering improvement in the disclosure and actual performance of business enterprises in relation to human rights.

7.3.1 Legislative History and Factual Origins

The European Commission first expressed its commitment to issue a legislative proposal on non-financial disclosure in the Single Market Act 2011. The Act was set out to contribute to the objectives of the EU 2020 Strategy to bring the EU on course towards 'smart, sustainable and inclusive growth'.[12] The Act recognises the importance of transparency in the transition towards a sustainable global economy, and the need to enhance it.[13] [14] The Act identifies a trend towards these objectives, which is visible in new business models integrating these social considerations. The view is that this trend should also be reflected in the single market, which could be achieved by ensuring a level playing field and by supporting initiatives that enhance fairness and contribute to the fight against social exclusion. The Act expressed the commitment of the Commission to present a legislative proposal on the transparency of the social and environmental

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[11] *Id.* Commentary to GP 3.

[12] Transparency thus also contributes to the goal set out in Article 3(3) of the Treaty of the European Union to establish an internal market and sustainable development based on 'a highly competitive sustainable market economy' TEU, Article 3(3). The terms Commission and EU have sometimes been used interchangeably in the light of the Commission's leading role in EU policies in relation to CSR and business and human rights.

[13] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility*, at 12, COM (2011) 681 final (Oct. 25, 2011) [hereinafter *Commission, A renewed EU CSR Strategy*].

[14] *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth"*, at 5, COM(2011) 206 final (Apr. 13, 2011).

information provided by companies in all sectors to contribute to the first objective, to level the playing field.[15] The Commission reiterated this commitment in its renewed EU CSR Strategy,[16] and both these initiatives were presented as part of a package of measures, titled the 'Responsible Business Package'.[17] On 16 April 2013, the European Commission issued a legislative proposal to amend the 4th and 7th Accounting Directives on Annual and Consolidated Accounts, 78/660/EEC and 83/349/EEC.[18] The EP expressed its support for a legislative proposal on disclosure of non-financial information in two Resolutions.[19] [20] Upon approval by the EP on 15 April 2014 and the Council of the European Union on 29 September 2014, the Directive 2014/95/EU amending Directive 2013/34/EU on Non-financial information and diversity information was adopted on 22 October 2014.[21] The date of transposition of this EU Directive into national law is 6 December 2016. After the transit period has passed, business enterprises should start reporting as per January 2017. The EU Commission has committed to publish non-binding guidelines for reporting on non-financial information by the end of 2016.

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[15] *Id.* at 14-15.

[16] *Commission, A renewed EU CSR Strategy*, *supra* note 13, at 12.

[17] *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the Economic and Social Committee, the Committee of the Regions and the European Data Protection Supervisor: "Responsible Businesses" package*, COM(2011) 685 final (25 Oct., 2011).

[18] This proposal outlined regulatory requirements for certain large undertakings and groups to disclose their non-financial performance as regards, amongst others, respect for human rights, in their annual and consolidated financial statements and related reports. *Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups*, COM(2013) 207 final (16 Apr., 2013) [hereinafter *Proposal Non-Financial Reporting Directive*].

[19] In its Resolution entitled 'Corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth' of 6 February 2013, the European Parliament expressed its support for the adoption of a legislative proposal 'allowing for high flexibility of action, in order to take account of CSR's multi-dimensional nature and the diversity of the CSR policies implemented by businesses, matched by a sufficient level of comparability to meet the needs of investors and other stakeholders as well as the need to provide consumers with easy access to information on businesses' impact on society'. Resolution on Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth, Eur. Parl. Doc. P7 TA(2013) 0049 (6 Feb., 2013). Also *see* Resolution on Corporate Social Responsibility: Promoting Society's Interests and a Route to Sustainable and Inclusive Recovery, Eur. Parl. Doc. P7 TA(2013) 0050 (3 Feb., 2013).

[20] The European Parliament has been a staunch supporter of a regulatory approach to CSR. The European Parliament issued a critical report on the theme of business and human rights in 2009, stipulating that a legal turn to CSR was 'most necessary' to advance the business and human rights agenda. Amongst a variety of policy recommendations, the report suggested the development of a legal framework for foreign investment protection that ensures, next to investor protections, accountability for human rights violations, mandatory reporting on human rights performance, regulated benchmarks on CSR and the establishment of accountability mechanisms in EU external relations that target business enterprises directly, rather than only States. It also emphasised that the EU should strengthen accountability for corporate human rights violations by working towards the establishment of 'victim-oriented accountability and redress mechanisms on a global scale', including an EU-wide ombudsman. *European Parliament Business and Human Rights in External Relations: Making the EU a Leader at Home and Internationally*, at 81, EXPO/B/DROI/2009/2, PE407.014 (23 April, 2009), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/407014/EXPO-DROI_ET(2009)407014_EN.pdf.

[21] *Non-Financial Reporting Directive*, *supra* note 1.

7.3.2 Rationales and Objectives

An impact assessment was carried out, which considered the case for improving the transparency of non-financial information, meaning environmental, social and governance information, including information on the diversity in the composition of a government board. The impact assessment pointed to the inadequacy of such non-financial information as the main issue, in terms of both the quantity and quality. The impact assessment recognized the potential of the proposed Directive to increase the transparency and comparability of non-financial information that is available, which in turn could affect the capacity of both business enterprises and other stakeholders to measure, monitor and manage the performance of business enterprises and groups, and their impact on society more generally.[22] An important objective thus was to affect the disclosure practices of large undertakings and groups to an extent that it reaches a sufficient scale and quality to meet stakeholder needs.

7.3.2.1 Quality and quantity of reporting

First, the impact assessments documents confirmed a trend in the EU context that reporting practices of companies had improved in terms of the number of reports issued, but that deficiencies had remained in terms of both the quantity and the level of quality in reporting. There were statistics showing an increase in the total number of reports, reaching up to 4000 in 2010 and covering 80% of the world's largest companies, and also that reliance on the GRI guidelines in the preparation of these reports increased to over 850 in 2011.[23] The total number of reports accounted, however, for only 6% of the total of 42000 EU large companies, the majority of which furthermore originated from only four EU member states (the UK, DE, ES, and FR).[24]

With regards to the quality of disclosure, a stakeholder consultation found that the information disclosed failed to meet stakeholder expectations. The information disclosed was said to lack in materiality and balance. Companies tended to cover the positive rather than the negative, and to not reflect on performance and material negative externalities, or aspects that were relevant to stakeholders, particular risk management aspects and human rights. Reports were not issued consistently and annually, and, furthermore, often not subject to independent verification, hence their accuracy and reliability of information was questionable. The comparability of information was compromised due to reliance on what most users considered as 'poor' key performance indicators.[25]

These finding broadly aligns with studies that have documented a similar trend in non-financial disclosure practices, in both the EU context and beyond.[26] For instance, the 2013 UNGC Annual

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[22] *Proposal Non-Financial Reporting Directive*, *supra* note 18, Recital 3.

[23] *Commission Staff Document Impact Assessment, accompanying the document proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups*, SWD (2013) 127 final, at 10 (16 Apr. 2013) [hereinafter *Commission Staff Document Impact Assessment*].

[24] *Id.* at 10.

[25] *Id.* at 10-11.

[26] A review by the GRI of trends in human rights reporting found that 'the quality of human rights reporting in 2009, in general, still falls far short when measured in relation to certain key principles and elements of good

Implementation Survey indicates that reporting on human rights remains insufficient. Only 29% out of the total of 8000 company members of the UNGC indicates to publicly disclose on human rights policy and practices. The rate of disclosure tends to be higher for large companies (40%) than for Small and Medium-sized Enterprises (SMEs) with less than 250 employees (18%).[27] A more recent study commissioned by Shift in 2013-4 on human rights reporting by leading companies, and in relation to the UN Guiding Principles, indicates that 'many companies already disclose information about their human rights performance in relation to the key components of the corporate responsibility to respect human rights, as set out in the UN Guiding Principles'. The study also found weaknesses in that 'most disclosure on human rights is at present limited to relatively general statements about process, with little information disclosed about how these relate to specific risks or impacts, or company responses to them.'[28]

7.3.2.2 Regulatory gaps

The impact assessment indicates that, in the EU context, both national regulation and markets have failed to provide an adequate solution to insufficient reporting on non-financial information. An important reason for why markets have been insufficient to move companies relates to the disputed business case for disclosure. There is no uncontested evidence that the long-term benefits of being more transparent outweigh the short-term costs. These short-term costs can be significant and more discernible and imminent than the long-term benefits of disclosure.[29] This finding supports the notion that companies do not tend to disclose unless they are compelled to do so, by means of market pressure, or if absent, national legislation imposing mandatory disclosure requirements.[30] The enforcement of business disclosure thus is difficult to achieve in practice without State intervention.[31] The assessment also supports the argument that CSR more generally does not flow naturally under the force of market mechanisms only, but

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human rights reporting'. Reporting on potential negative human rights impacts was identified as a continuing challenge, as well as reporting in a balanced, comprehensive and effective manner by focusing on the most relevant issue and placing these within a wider sustainability context. GRI, Corporate Human Rights Reporting – An Analysis of Current Trends, at 1 (2009), https://www.globalreporting.org/resourcelibrary/Human_Rights_analysis_trends.pdf. The SRSG observed in its 2007 report that business enterprises tend not to present a complete and systematic account of companies' adverse human rights impacts, and therefore reporting is lacking in materiality. '[A]anecdotal descriptions of isolated project and philanthropic activity often prevail'. Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/35 (Febr. 19, 2007) (by John Ruggie).

[27] UN Global Compact, Global Corporate Sustainability Report, at 8, 16 (2013), https://www.unglobalcompact.org/AboutTheGC/global_corporate_sustainability_report.html.

[28] Shift, Evidence of Corporate disclosure relevant to the UN Guiding Principles (June 2014), http://shiftproject.org/sites/default/files/Evidence%20of%20Corporate%20Disclosure%20Relevant%20to%20the%20UN%20Guiding%20Principles%20on%20Business%20and%20Human%20Rights.pdf .

[29] *Id.* at 2-3.

[30] Nicola Jägers, *Will transnational private regulation close the governance gap?*, *in* Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, 295, 315 (Surya Deva & David Bilchitz eds., 2013).

[31] *Id.* at 295, 315.

depends for its success on effective regulatory intervention to create the conditions for CSR to work.[32]

The non-financial disclosure by companies in the EU had been partly regulated by the EU regime on non-financial disclosure, which had previously been governed by the Fourth Council Directive 78/660/EEC on the annual accounts of certain types of companies and Seventh Directive 83/349/EEC on consolidated accounts, as amended by Directive 2006/46/EC. This regime did not impose disclosure obligations on companies, however.[33] [34] This followed from the wording of Recital 10 of the Preamble of Directive 2006/46/EC, which noted that 'companies whose securities are admitted to trading on a regulated market and which have their registered office in the Community should be obliged to disclose an annual corporate governance statements' and that '*where relevant*, companies may also provide an analysis of environmental and social aspects *necessary for an understanding of the company's development, performance and position*'.[35] The limiting concepts set out therein were formulated in too open-ended language to impose a clear legal obligation on companies.[36] In the absence of clear obligations, business enterprises perceived the reporting regime as 'voluntary'.[37] The Directive thus had a limited effect of compelling business enterprises to disclose.

7.3.3 Fragmentation

The Impact Assessment also notes an increasing number of national disclosure regulations imposing obligations on companies to provide information about their social impacts. Fragmentation in the European landscape resulting from national legislations imposing diverse disclosure requirements on companies turned out not only to be costly for companies operating in multiple countries, but also to complicate efforts to compare and benchmark performances

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[32] According to Olivier de Schutter:

> Potentially most important of all, however, is the fact that the 'business case' for CSR produces, at the rhetorical level, a powerful consequence: it serves to create the impression that the development of CSR will make natural progress, in a sort of evolutionary growth driven by market mechanisms, without such progress having to be encouraged or artificially produced by an intervention of public authorities. There is a very thin line between the idea that 'CSR is profitable for business' and the idea that 'CSR may take care of itself'. This consequence should be avoided at all costs. There is a need, clearly identifiable, for a regulatory framework to be established, if CSR is to work. This is not in contradiction with the voluntary character of CSR. On the contrary, it attaches its meaning to voluntary commitments.

Olivier de Schutter, Corporate Social Responsibility: European Style, 14 European Law Journal, 219 (2008).

[33] *Id.* 219, 232.

[34] Earlier proposals to amend the 4th and 7th Council Directive to create obligations for business enterprises to disclose in their annual review on environmental, social, and other aspects relevant to an undertaking of the company's development and position had been abandoned. On this issue, *see id*. 203, 231.

[35] Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings, Recital 10, 2006/46/EC, 2006 O.J. (L 224) 1.

[36] *Commission Staff Document Impact Assessment, supra note 23*, at 12.

[37] *Id.* at 12; Jägers, *supra* note 30, at 295, 315.

across the internal market. The cross-border nature of business operations called for greater coordination at the EU level. The proposal Directive thus aimed at harmonising the proliferation of national legislations and to enhance the 'relevance, comparability and consistency' of the information disclosed by companies and groups in the EU and to lift transparency to a similarly high level across the EU.[38]

7.3.4 Disclosure as a Regulatory Tool

The main rationale for the EU Commission to issue the Non-Financial Reporting Directive thus is to affect and coordinate the regulation by EU Member States of the disclosure of non-financial information by companies with the aim of enhancing the quality and quantity of such disclosure, which had before been inadequate. There is potential for the Directive to serve as a useful regulatory tool that can lead to improvements in the human rights performance of companies. The Directive can illicit disclosure by companies of information that can enable stakeholders (i.e. regulators, NGOs, business enterprises, consumers, investors) to evaluate, compare and hold companies to account for their human rights performance. Business enterprises can be incited to take their responsibility seriously if these stakeholders inflict costs or rewards on them for (non-) compliance. The effectiveness of the Directive in achieving this objective will depend on how Member States will implement the provisions of the Directive and the preparedness of regulators and stakeholders to pressure companies to adhere to the disclosure requirements.[39] The required disclosure has the potential to have positive effects on business respect for human rights in various ways. The effectiveness of Directive will depend on a number of factors however, which will be elaborated in Section 7.6.

First, the disclosure of relevant non-financial information can strengthen accountability by improving the ability of NGOs and civil society actors to monitor business performance. More specifically, the disclosure requirements can lead to the disclosure by undertakings of relevant and accurate information that civil society organisations and right-holders can rely on to monitor and hold business enterprises to account for preventing adverse human rights impacts through due diligence, and once human rights impacts have occurred, for their effective remediation. In order for NGOs to discharge their role in monitoring business performance, they may need information on the human rights policies and human rights risks of business undertakings that undertakings may not be prepared to disclose voluntarily in the absence of a legal requirement that obliges them to do so. The disclosure requirements thus may legally require and enforce the disclosure of information that would otherwise not be publicly available. Stakeholders rely on the information disclosed to monitor and exert direct pressure on undertakings to meet their responsibility to respect human rights. Disclosure can also allow for the legal enforcement of corporate obligations *ex post* the occurrence of actual adverse human rights impacts. The information disclosed may be useful in establishing liability under national tort laws.[40]

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[38] *Non-Financial Reporting Directive*, *supra* note 1, Recital 21.

[39] Liesbeth Enneking, et al., *Zorgplichten van Nederlandse ondernemingen inzake international maatschappelijk verantwoord ondernemen: Een rechtsvergelijkend and empirisch onderzoek naar de stand van het Nederlandse recht in licht van de UN Guiding Principles,* 624 (Boom Juridisch, 2016).

[40] *See*, for further detail, the sections 6.3.3.1.

Consumers, who rely on the disclosed information to make informed purchasing decisions, may exert such pressure. Also, investors find use in the transparency of comparable and accurate information, which they rely on to measure and compare the performance of companies. Enhance disclosure can result in better-informed investment decisions. It can furthermore empower institutional shareholders in exercising their corporate governance rights to monitor the activities and behaviour of directors, and to intervene where necessary.[41] Research has shown that the availability of information can be critical for leveraging business behaviour through alternative avenues, e.g., transnational private regulation.[42] [43]

Second, the implications of the disclosure requirements that undertakings must collect the information to meet these requirements can affect the capacity of business enterprises to measure and monitoring their own risks and performance regarding respect for human rights. While process oriented, the human rights due diligence is linked to performance in that findings must be integrated and acted upon. Better measurement as a result of greater transparency can translate into improvements in policies and processes to discharge their responsibility to respect human rights.[44] [45] [46] The pressure that NGOs may exert as a result of their improved monitoring role also can have the positive impact of creating greater human rights awareness within business enterprises and spur improvements in business performance in relation thereto.[47]

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[41] Louise Gullifer & Jennifer Payne, Corporate Finance Law: Principles and Policy, 523-540 (2nd ed., Hart Publishing, 2015).

[42] Nicola Jägers notes how NGOs can use this information to pressure companies to join private or hybrid regulatory initiatives and to comply with the standard set out therein, to which companies have committed themselves when joining. The availability of information becomes of greater importance where the monitoring and verification mechanisms that these initiatives have in place are insufficient in themselves to ensure that relevant information is available to stakeholders. The availability of information, hence, is also critical for the effectiveness of these transnational private initiatives. Jägers, *supra* note 30.

[43] GRI, *Making Headway in Europe: Linking GRI's G4 Guidelines and the European Directive on Nonfinancial Disclosure and Diversity Disclosure*, at 3 (2015).

[44] The UNGPs indicate that a human rights due diligence process must contain at least the following elements:: 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'. UNGPs, *supra* note 4, GP 17.

[45] Other benefits for companies related thereto include enhanced trust, brandvalue and responsiveness to stakeholders. *Commission Staff Working Document Executive Summary of the Impact Assessment, Accompanying the Document Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of Nonfinancial and diversity information by certain large companies and groups*, § 5.2 SWD(2013) 128 final (16 April, 2013). A study based on an analysis of the cost/benefit assessment of mandatory reporting requirements showed that European companies perceived identifying and controlling risks an important, although not the most important, benefit of transparency. The companies said that the main benefits of transparency were enhancing the credibility of the company and improving transparency of reporting. Also, enhancing the brand image of products was considered very important, while improvements to internal culture and the ability to react with stakeholders were considered important. *European Commission Disclosure of Nonfinancial Information by Companies (Final report)*, at 27-30 (December 2011), http://ec.europa.eu/finance/accounting/docs/non-financial-reporting/com_2013_207-study_en.pdf.

[46] *Commission, A renewed EU CSR Strategy*, *supra* note 13, at 11.

[47] *Commission Staff Document Impact Assessment, supra* note 23, at 6.2.3.

The business case for disclosure suggests that transparency can have economic value by facilitating the measurement and monitoring by companies of their risks and opportunities more generally. Disclosure of relevant information also allows companies to meet the demand for information by relevant stakeholders, including consumers, investors and NGOs. In the absence of legal obligations, business respect for human rights in practice largely depends on the voluntary uptake by undertakings of the UNGPs following from social pressure.[48]

Disclosure also can make change in business behaviour and markets visible and manageable, and can facilitate the channelling of this change towards the goal of creating a 'sustainable global economy'.[49] Transparency is perceived as 'a "smart lever" to strengthen citizen and consumer trust and confidence in the Single Market and to encourage sustainable economic growth'.[50]

7.4 The non-financial Reporting Directive and the Human Rights Due Diligence Concept: Exploring the Links

The following section aims to determine through an examination of the text of the Non-Financial Reporting Directive whether, and if so, to what extent, the disclosure requirements related to human rights articulated therein conform to the expectations set out in UNGP 17 and UNGP 21. The first section examines the type and number of companies that are subject to the Directive and the scope of their obligation to disclosure on human rights. The second section focuses on the way in which and detail to which the Directive defines disclosure requirements related to human rights and due diligence.

7.4.1 Mandatory Disclosure on Corporate Respect for Human Rights

The Directive 2014/95/EU introduces legal requirements for certain large undertakings and groups to disclose information on non-financial issues and, *inter alia*, human rights. It sets a minimum legal benchmark regarding the content of this disclosure, as well as the frequency, form and means of this disclosure. The following section focuses on the disclosure requirements that apply to certain large undertakings individually. Article 19a(1) of the Directive defines the disclosure requirement as follows:

> Large undertakings which are *public-interest entities* exceeding on their balance-sheet dates the criterion of the average number of *500* employees during the financial year shall include in the management report a non-financial statement containing information *to the extent necessary* for an understanding of the undertaking's development, performance, position and *impact of its activity*, relating to, as a minimum, environmental, social and employee matters, *respect for human rights*, anti-corruption and bribery matters.

The Directive applies to 'large undertakings', the size threshold of which is determined by reference to the 'average number of employees, balance sheet total and net turn over'.[51] The

[48] Jägers, *supra* note 30, at 295, 308.

[49] *Non-Financial Reporting Directive*, *supra* note 1, Recital 3.

[50] *Commission Staff Document Impact Assessment, supra* note 23, at 2.

[51] *Non-Financial Reporting Directive*, *supra* note 1, Recital 14.

criterion of the average number of employees during the financial year is determinant, and should exceed at least 500 on the date of the balance sheets.[52] Only public interest entities are subject to the Directive, which entities are defined as listed companies, credit institutions, insurance undertakings, and entities designated by Member States as public interest entities.[53] These undertakings must disclose through the formal means of a non-financial statement in the management report. The disclosure requirements extend beyond what is necessary to understand the economic affairs of the undertaking to also include information on the undertaking's impact on public interest issues, including respect for human rights.

Undertakings that are subject to the Directive have an obligation to disclosure on respect for human rights only 'to the extent necessary'. This suggests that the non-financial statement should only contain information that is relevant and sufficient for an understanding of the undertaking's development, performance and position and the impact of its activities. The Directive does not further specify the target audience whose understanding of the company should be informed by this information. Also, the Directive does not specify the standard by which to determine when information is relevant and thus 'necessary'. The Directive does note that certain minimum requirements regarding the extent of the disclosure apply and that 'the undertakings subject to this Directive should give a fair and comprehensive view of their policies, outcomes, and risks'.[54] In the absence of further clarification of 'to the extent necessary' for the purpose of the Directive, the company has discretion to decide itself when it is necessary to provide information, at least to a certain extent.

The Directive introduces minimum legal requirements regarding the content of this disclosure. The requirements relate to the type and extent of information that large undertakings subject to the Directive should disclose. Pursuant to Article 19a (1), this information should cover the following.

(a) a brief description of the undertaking's business model;

(b) a description of the policies pursued by the undertaking in relation to those matters, including *due diligence processes implemented*;

(c) the outcome of those policies;

(d) the principal risks related to those matters linked to the undertaking's operations, including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks;

(e) non-financial key performance *indicators* relevant to the particular business.[55]

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[52] *Accounting Directive*, supra note 2, Article 3.4.

[53] *Id.*

[54] *Non-Financial Reporting Directive*, *supra* note 1, Recital 5.

[55] *Id*.

EU Member States must ensure in their national legislation that business enterprises disclose, at a minimum, on: (a) the business model of the undertaking; (b) the human rights policies pursued by the company, including its due diligence processes; (c) the outcome of those policies; (d) the 'principal' human rights risks related to matters that are linked to the undertaking's operations, including 'where relevant and proportionate', its business relationships, products or services, and how the undertaking manages these risks; and (e) relevant non-financial key performance indicators.

There is a discernible conceptual influence of the UNGPs on the text of the Directive. This influence is apparent from the concepts on which the disclosure requirements are construed, in particular, the concept of 'due diligence', as well as the concepts delimiting the content and the extent of the required disclosure.

The requirement that undertakings disclose information that is sufficient to provide a fair and comprehensive overview of their human rights policies, the outcomes of those policies and the risk-management implemented to prevent human rights abuses corresponds to the expectation set out in the UNGPs.[56] The Directive also expressly mentions that undertakings should disclose on their due diligence processes implemented. The Directive furthermore extends the scope of the required disclosure beyond the human rights risks that the undertaking may be involved in through its own operations to risks that may be linked to the undertaking's business relationships, products and services. This is important in that it requires undertakings to disclose information on (sub-) subsidiary entities and their supply chains, and the human rights risks relating to their activities that are directly linked to the parent undertaking.[57] These provisions suggest broad alignment between the disclosure requirements as related to human rights and the responsibility to communicate as defined by UNGP 17 and UNGP 21.

There are other elements that point to alignment with the expectations set out under the UNGPs. The requirement that the non-financial statement covers information on *adverse* human rights impacts is a case in point. The disclosure on respect for human rights, after all, is concerned with managing potential adverse human rights impacts. The disclosure must include information on the outcomes of human rights due diligence policies, which requires, in fact, reflection of not only an undertaking's potential but also its actual human rights impact. The Directive appears to orient disclosure primarily to policies and its processes, including human rights due diligence, however, rather than to actual outcomes and impacts.[58] This is by ways of exempting undertakings from their obligation to disclose on outcomes if all other obligations under Article 19a 1. have been fulfilled.[59] The Directive calls for the disclosure of information on retrospective management processes, to the extent that business enterprises must provide a description of the due diligence policies they have implemented. It also requires disclosure on forward-looking

[56] *Id.* Recital 5, ¶ 2.

[57] Recital 6 affirms that 'the non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts'. *Id.* Recital 6, 2014 O.J. (L 330) 1.

[58] *Id*.

[59] *Id.* Article 19a, ¶ 2.

management processes in that disclosure must cover due diligence processes that are ongoing to manage potential human rights risks.

7.4.2 Conceptual Clarity: The Due Diligence Concept

The broad alignment of the disclosure requirements set out in the Directive with the UNGPs should be welcomed, because this increases the likelihood of the Directive having impacts on the disclosure practices and actual human rights due diligence by undertakings in practice. The Directive presents deficiencies, however, in that the disclosure requirements relating to human rights are formulated in ambiguous language. The Directive does not specify the content and the degree of detail of reporting in relation to the 'business model', 'policies' and 'due diligence'.

For instance, there is no exact definition of due diligence in the text of the Directive, nor are its exact requirements in relation to reporting on due diligence implemented relating to human rights defined. The Directive is silent with regards to the specific elements of due diligence that undertakings should report on, and to what extent these correspond to expectations of human rights due diligence as defined by the UNGPs. For instance, there is no provision in the Directive that indicates that the non-financial statement should include information on how the company has integrated the findings relating the outcome of its human rights due diligence in the processes or functions of the undertaking or any action taken in response to these outcomes. The Directive is also silent with regards to the tracking of responses and stakeholder engagement. In the absence of further clarity, the undertaking itself determines the content and detail of the disclosure relating due diligence.

Where the disclosure requirements on human rights risks are concerned, which are articulated under the Article 19a (1) (d,) the Directive does not specify what constitutes 'principal' risks. Recital 8 provides some guidance, noting that 'the undertakings which are subject to this Directive should provide adequate information in relation to matters that stand out as being most likely to bring about the materialisation of principal risks of severe impacts, along with those that have already materialised'. The Recital suggests that disclosure should reflect on human rights *matters* that respect for human rights may give rise to, and not just on any matters, but prioritise those matters that stand out as most likely to give rise to '*principal* risks of *severe* impact'. These impacts may be likely to materialise or may have materialised already.

The Directive notes that 'severity' must be judged in relation to the 'scale and gravity' of these impacts.[60] The Directive thus prescribes as a minimum legal requirement that an undertaking has a duty to disclose on human rights risks in the presence of matters reflecting the principal risks of severe human rights impacts. The Directive not only establishes the presence and delimits the scope of the disclosure requirements by reference to the qualification of human rights risks as 'principal' and 'severe', but also by reference to the undertaking's involvement in these risks. Pursuant to the Directive, the non-financial statement must include information on matters reflecting risks that are linked to the undertaking's business relationships, products or services. The Directive thus sets out the requirement that companies report on all their principle risks of

[60] This resonates with UNGP 21, which recognises that severe human rights risks can give rise to an elevated responsibility to disclose— that is, to disclose formally. UNGPs, *supra* note 4, GP 21.

severe impacts, irrespective of whether these risk are caused by the entity concerned, or whether these result from the activities of other undertakings that can be linked to the undertaking.

This disclosure obligation is triggered only when such disclosure is '*relevant and proportionate*', however.[61] The Directive does not specify what constitutes 'relevant and proportionate' for the purpose of the Directive. It is reasonable to assume that Article 19a 1.(d) should be contextualised in relation to Article 19a1(b), which requires disclosure on the human rights policies, including the human rights due diligence processes that the undertaking has implemented. Disclosure on matters linked to a company's business relationships, products or services then could be seen as 'relevant and proportionate' where these issues reflect human rights risks that give rise to a due diligence responsibility by the company.[62] Since the Directive fails to define the due diligence concept in the human rights context, however, the disclose requirements that mirror this concept are also ambiguous.

The Directive does not expressly note that the undertakings subject to the Directive should disclose by reference to the UNGPs, although it is mentioned that national implementing measures should permit undertakings to rely on international frameworks, including the UNGPs. The Directive thus leaves flexibility for EU Member States, which must transpose the Directive into national law by 6 December 2016,[63] to decide what is the meaning of '*due diligence*', what constitutes '*principal*' risks and when disclosure on issues is '*relevant and proportionate*' under national law. The Directive leaves discretion to EU Member States as to how to define these concepts, and whether to define these in reference to the expectation set out under the UNGPs, including relating the responsibility of companies to communicate under UNGP 17 to 21. EU Member States are permitted, but not required, to introduce such improvements.[64] Clarity may result from the guidelines on non-financial disclosure that the EU Commission is expected to publish. These may set out a clear expectation that undertakings should disclosure by reference to the UNGPs. The potential impact of these guidelines on State practices will be limited, however, not only by reason of their non-legally binding nature, but also because they are due to be published by the same date on which the transition period ends, 6 December 2016.

Absent clarity of the concepts, the Directive creates uncertainty and allows for possible divergence between EU Member States as to how their national laws define due diligence and the degree to which these laws ensure large undertakings effectively disclose in reference to the human rights due diligence concept described by UNGP 17 and 21. As will be elaborated below, this discretion undermines the potential of the Directive to generate indirect regulatory effects on business disclosure and human rights due diligence in practice. Where the language of the

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61 *Non-Financial Reporting Directive*, *supra* note 1, Article 19a. 1(d).

62 To be noted is Recital 6, which reflects the conceptual influence of the UNGPs on the Directive, indicating that 'the non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts'. *Id*. Recital 6.

63 *Non-Financial Reporting Directive*, *supra* note 1, Article 4.1.

64 Recital 1 of the Directive notes 'the possibility for Member States to require, as appropriate, further improvements to the transparency of undertakings' non-financial information, which is by its nature a continuous endeavor'. *Non-Financial Reporting Directive*, *supra* note 1, Recital 1.

Directive is formulated in open-ended language, this can also undermine the capacity of the Directive to have 'direct' and 'indirect' effects, to which I will turn next.

7.5 The Non-Financial Reporting Directive in the Light of the Doctrines of 'Direct' and 'Indirect' Effect

It could be argued that an optimal use of the Directive requires that stakeholders (citizens, NGOs, shareholders, etc.) can rely on its provisions when a company does not comply with its requirements. The following section thus aims at ascertaining the exact legal effects the Non-Financial Reporting Directive may have for stakeholders, and right holders in particular.

This section will focus *first* on the doctrine of the so-called 'indirect effect' of the Directive, according to which national measures should be interpreted in light of EU law, including the Directive (*see* Section 7.5.1. below). Moreover, given that the provisions of the Directive should be interpreted in accordance with EU protected fundamental rights, and that EU protected fundamental rights also have 'indirect effects', it is argued that an interpretation of the Directive (and its implementing national measures) should be adopted that is most favourable to EU protected fundamental human rights, in particular the right to respect of private life and the right to freedom of expression.

This section will then examine whether the Directive has the so-called 'direct effect' (*see* Section 7.5.2. below). It is argued that the Directive is unlikely to have direct effect. The following considerations come to the fore: (i) the Directive's provisions are unlikely to be considered by the CJEU as 'clear and unconditional and not contingent on any discretionary implementing measure';[65] and, perhaps more importantly, (ii) attempts to invoke the hypothetical direct effect of the Directive are likely to face the obstacle of the CJEU's refusal to recognise the so-called 'horizontal' direct effect of Directives, *i.e.*, to recognize that a Directive can impose obligations in proceedings between individuals.[66]

7.5.1 Indirect Effect of the Directive and EU Protected Fundamental Rights

The Directive is capable of having 'indirect effect',[67] an effect referred to as 'the principle of interpretation in conformity with Union law'.[68] As noted by Lenaerts and Van Nuffel, pursuant to the doctrine of 'indirect effect', the CJEU 'TEU place[d] all public authorities, and therefore also judicial authorities, under a duty to interpret the national law which they have to apply as far as possible in conformity with the requirements of Union law'.[69] More precisely, the CJEU introduced in *Van Colson* the principle of indirect effect, according to which national authorities

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[65] Case 44/84, Hurd, 1986, E.C. R. 29, ¶ 47.

[66] Case 91/92, Faccini Dori, 1994, E.C.R. 3325.

[67] *See* P. Craig & G. De Búrca, EU Law: Text, Cases and Materials, 200 (Oxford University Press 5th ed. 2011). See further, T. Hartley, The Foundations of European Union Law, at 235 (Oxford University Press 8th ed. 2014) and R. Schütze, European Union Law, at 105 (Cambridge University Press. 2015).

[68] *See* K Lenaerts & P Van Nuffel, European Union Law, ¶ 21-007 (Sweet & Maxwell 3rd ed. 2011).

[69] *Id*, referring, *inter alia*, to Case 106/98, Marleasing, 1990, E.C.R. 4135, ¶ 8 and Case 60/02, Criminal Proceedings against X, 2004, E.C.R. 651, ¶¶ 59-60.

(including courts) have to interpret national laws 'as far as possible' in conformity with European law.[70] In the subsequent *Marleasing* ruling, the CJEU held that a Directive can have such indirect effect, irrespective of whether the Directive has been transposed. In the case of the Non-Financial Reporting Directive, by operation of such effect, national laws would have to be interpreted in light of this Directive. To be noted is that the effect of the Directive is indirect by reason of this effect being imposed by national law, instead of by the Directive itself.

According to the case-law of the CJEU,[71] indirect effect does not apply, as such, before the expiration of the deadline for implementation of a directive (in the case of the Directive, 6 December 2016).[72] However, before that date, and pursuant to the *Inter-Environmental Wallonie* ruling of the CJEU,[73] Member States must not enact any legislation that could seriously compromise the attainment of the result required by the Directive. Consequently, during this period, national legislation must be interpreted, to the extent that is possible, in a manner conducive to avoiding this.[74]

The Non-Financial Reporting Directive defines the objectives of the Directive as follows: 'to increase the relevance, consistency and comparability of information disclosed by certain large undertakings and groups across the Union'.[75] Given that the rationale behind the Directive is to enhance transparency to a similarly high level across the EU, it is necessary for EU Member States to adopt adequate and effective means for the application and enforcement of the Directive, in order for this objective to be achieved.[76] These national implementation measures may not go against the objective of the Directive. This may affect the discretion of national authorities in areas of law different from financial regulation as well. The implementing measures, moreover, must uphold EU-protected fundamental human rights when implementing EU Directives, which will be assessed in detail below.

Of particular interest, in relation to indirect effect, is the Directive's provision that requires large undertakings to disclose information 'to the extent *necessary* for an understanding of the undertaking's […] respect for human rights'.[77] In the light of that provision and, given the importance the Treaties award to fundamental rights (see Articles 2 and 6 TEU), the duty to interpret Secondary legislation, such as the Directive, in the light of the Treaties,[78] (and the fact

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[70] *See* Case 14/83, Von Colson and Kamann, 1984, E.C.R. 1891.

[71] *See* Case 212/04, Adelener, 2006, E.C.R. 6057.

[72] *See Non-Financial Reporting Directive*, *supra* note 1, Article 4(1).

[73] *See* Case 129/96 Inter-Environnement Wallonie v Région Wallone, 1997, E.C.R. 7411.

[74] *See* Case 212/04 Adeneler, 2006, E.C.R. 6057, ¶¶ 107-124. *See* Hartley, *supra* note 67, at 239.

[75] *Non-Financial Reporting Directive*, *supra* note 1, Recital 21.

[76] The Directive notes that 'EU Member States should ensure that effective national procedures are in place to enforce compliance with the obligations laid down by this Directive, and that those procedures are available to all persons and legal entities having a legitimate interest, in accordance with national law, in ensuring that the provisions of this Directive are respected'. *Non-Financial Reporting Directive*, *supra* note 1, Recital 10.

[77] Emphasis added.

[78] *See*, *inter alia*, Cases 305/05, Ordre des barreaux francophones , 2007, E.C.R. 5305., ¶ 28 and Cases 386/08 Brita, NYR, ¶ 39 and Case 63/09 Walz [NYR], ¶ 22.

that the Treaties themselves have indirect effect),[79] when interpreting the national measures implementing the provisions of the Directive, the requirement to disclose should be widely interpreted in order to further these rights. Moreover, UNGP 3 articulates that, in meeting their duty to protect, States should 'encourage, and where appropriate require business enterprises to communicate how they address their human rights impacts'.[80]

Unlike, as we will see in more detail in the following section, 'direct effect', the doctrine of 'indirect effect' applies also to scenarios where the interpretation of the Directive can affect the legal position of individuals in a disadvantageous way.[81] Consequently, stakeholders can rely on the indirect effect of the Directive before national courts to make sure corporations fully give effect to the Directive.

The provisions of the Directive should be interpreted in accordance with EU protected fundamental rights including, *inter alia*, the right of respect for private and family life (Article 7 CFREU) and the right to freedom of expression (Article 11 CFREU).

7.5.1.1 The Right to Respect for Private and Family Life

Article 7 CFREU establishes that 'everyone has the right to respect for his or her private and family life, home and communications'. This right corresponds to, both in meaning and scope, the right to private life as guaranteed by Article 8 of the ECHR. Pursuant to Article 52(3) CFREU, '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention'. Consequently, the rulings by the ECtHR applying the provisions of the ECHR equivalent to Articles 7 and 11 CFREU (namely, Articles 8 and 10 ECHR) are of the utmost relevance when it comes to determining the scope of the (EU protected) fundamental rights.

The ECtHR held in the 1998 *Guerra* Ruling that Article 8 ECHR created a positive duty on the part of the State to provide information on environmental risks related to the applicants' exposure to chemical emissions by a factory. The denial of this information prevented the individual and his family from assessing the risks to their lives and home. This case law suggests that, under certain circumstances, States may have a positive obligation to make available to the public certain information that would otherwise not become known, in order to secure an individual's right to private life.[82] Article 8 of the ECHR may thus result in the creation of a positive obligation on the part of States to ensure that information about the potential and actual human rights risks of undertakings is publicly available.

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79 *See* Case 5-88, Wahchauf, 1989, E.C.R. 2609, ¶ 19. *See* Lenaerts & Van Nuffel, *supra* note 68, ¶ 21-007.

80 UNGPs, *supra* note 4, GP 3.

81 *See* Case 106/98, Marleasing, 1990, E.C.R. 4135. The only limit to this applicability would be that individuals would not be able to rely on the Directive in order to obtain the imposition or aggravation of criminal liability on individuals, *see* Case 60/02, Criminal Proceedings against X, 2004, E.C.R. 651. *See* further Craig & De Búrca, *supra* note 67, at 204.

82 Guerra and Others v. Italy, App. No. 14967/89, Eur. H.R. Rep. 1998-I (1998).

7.5.1.2 The Right to Freedom of Expression

Article 11 CFREU establishes the right to freedom of expression, which 'shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities regardless of frontiers'. The scope of this right, which mirrors that of Article 10 of the ECHR, thus includes, *inter alia*, the receipt of information. The Grand Chamber of the ECtHR has established that integral to the right to freedom of expression under Article 10 ECHR is the right to receive information. The right of freedom of expressions was initially viewed as creating only a negative obligation for States to refrain 'from restricting a person from receiving information that others wished or might be willing to impart on him'.[83] The Grand Chamber of the ECtHR, has held that Article 10 does not give rise to a positive duty for States to collect and disseminate information to the public on their own motion.[84] More recently, however, decisions by sections of the ECtHR suggest the Court may be abandoning this narrow approach. These recent decisions have pointed to a general 'direction of travel'[85] in the case law, departing from the Grand Chamber's narrow interpretation of Article 10 ECtHR and towards the notion that Article 10 gives rise to a positive right of access to information.[86]

The cases in which certain sections have recognised this positive right involved the legitimate gathering of public information by NGOs. More precisely, the ECtHR has held that the activities of NGOs warrants similar protection as those of the press by reason of these NGOs having a similar function to social 'watchdog'.[87] This case law suggests that Article 10 of the ECHR might create (or be on the verge of creating) a right to access public information and a positive obligation on States to make available certain information of public interest. While the Grand Chamber ECtHR has not yet confirmed this interpretation, a substantial body of case-law of the court seems consistent with this interpretation. This interpretation would furthermore follow developments in international law, the interpretation of Article 10 ECHR should be interpreted in accordance with. The right to freedom of expression finds an international equivalent under Article 19 of the ICCPR and Article 13(1) of the IACtHs. These provisions have both been interpreted as giving rise to a right to access information held by public bodies.

7.5.1.3 The effects of the 'indirect' effect of the Directive and EU Protected Fundamental Rights

There is case law of the ECtHR supporting the view that States have a legal obligation to ensure a level of disclosure about the due diligence policies and human rights risks of these undertakings that provides right-holders with the information they need to vindicate their rights. An interpretation of the Directive that is most favourable to giving effect to these rights (and their equivalents under EU law) should be adopted, one that takes this State duty to protect

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83 Guerra and Others v. Italy, App. No. 14967/89, Eur. H.R. Rep. 1998-I (1998), ¶ 53. Also *see*, Leander v Sweden, App. No. 9248/81, Eur. Ct.H.R (1987), ¶ 74. Gillberg v. Sweden, App. No. 41723/06, Eur. Ct. H.R. (2012), ¶ 83.

84 Guerra and Others v. Italy, App. No. 14967/89, Eur. H.R. Rep. 1998-I (1998), ¶ 53.

85 Kennedy v The Charity Commission [2014] UKSC 20, [217].

86 Guerra and Others v. Italy, App. No. 14967/89, Eur. H.R. Rep. 1998-I (1998).

87 Youth Initiative for Human Rights v. Serbia, App. No. 48135/06, Eur. Ct. H.R. (2013), ¶ 20.

human rights into account. National disclosure obligations, including those deriving from acts of implementation of the directive, should be interpreted by reference to the Directive and to the CFREU (and, through it, the ECHR).

The Directive permits EU Member States to require further improvements to the transparency of undertakings disclosure on human rights.[88] However certain provisions in the Directive may restrict EU Member States from doing so. While the Directive sets out certain conditions regarding the modality by which EU Member States must require enterprises to disclose on human rights, these conditions seem more oriented towards ensuring that national implementation measures allow for flexibility in order to ease the burden of disclosure on undertakings, rather than to impose clear disclosure obligations on undertakings. The Directive creates incentives but no obligation for undertakings to rely on international frameworks, *inter alia*, the UNGPs in their disclosure.

The 'comply or explain' modality is an example in point. The Directive provides that an EU Member States should oblige an undertaking to report on its human rights policy and if it does not pursue such a policy to provide in their non-financial statement a 'clear and reasoned' explanation for why they are not doing so.[89] This policy does not amount to a requirement that undertakings pursue a human rights policy in case it is not already pursuing one, but merely, that the undertaking explains why it is not doing so. This explanation must be 'clear and 'reasoned'. It should be noted, in this regard, that research shows that, in practice, undertakings that were subject to the 'report and explain' requirement tended not to disclose as they should, giving invalid, general or false explanations.[90] This prompted the EU Commission to issue guidance and to assist companies in improving the quality of these explanations.[91]

In any event, if transposing the 'comply or explain' modality into national law becomes mandatory for EU Member States, which appears to be the case, the Directive would have the perverse result of pre-empting EU Member States from adopting a more stringent reporting obligation that would not accept a mere explanation, but that would require companies to adopt a human rights policy and to acquire the level of knowledge it should have about its human rights risks. Disclosure requirements that not only solicit disclosure about the understanding that an undertaking has, but that also requires undertakings to be proactive in order to acquire the level of understanding that it should have about its human rights policies and risks aligns with the *ethos* of the human rights due diligence concept. Human rights due diligence requires business enterprises to enquire and investigate their human rights impacts with the aim of preventing these impacts.

However, the obligations of EU Member States to respect EU protected fundamental rights may require EU Member States to impose a more demanding disclosure requirements on

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88 *Non-Financial Reporting Directive*, *supra* note 1, Recital 1.

89 *Id*.

90 *See* Dániel Gergely Szabó & Karsten Engsig Sørensen, New EU Directive on the Disclosure of Non-Financial Information (CSR), 12 European Company and Financial Law Review (2015).

91 Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting ('comply or explain'), 2014 O.J. (L 109) 43.

undertakings. EU Member States may be under a legal obligation to require improved disclosure from undertakings not only about the understanding they have, but also about the level of understanding they should have on their human rights policies and risks. Adopting such national disclosure regulations mandating greater transparency from undertakings may be necessary for States to secure the right of individuals to receive the information on the basis of which they can assess the risks to their human rights. Since the national implementation measures that require more stringent disclosure requirement would extend beyond the minimum requirements of the Non-Financial Reporting Directive, they may be susceptible to control of compatibility with national standard of human rights protection by national courts. A more demanding disclosure requirement may be necessary in order for States to meet their legal obligations to ensure the right to private life and the right to freedom of expression.

It remains to be seen, in short, how, if at all, the CJEU will interpret the 'indirect effect' of the (not always satisfactory, from the perspective of its content) Directive in the light of the (also indirectly effective and hierarchically superior provisions of the) CFREU and EU protected fundamental rights.

7.5.2 Direct Effect

The question arises whether, after the expiration of the deadline for transposition, stakeholders (NGOs, shareholders, individuals, etc.) can rely on the Directive before the national authorities and courts of the EU Member States in order to obtain enhanced disclosure from corporations.

Pursuant to Article 288 TFEU, '[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Consequently, it is implicit in the very nature of an EU Directive that Member States have the discretion to choose the preferred method and form of implementation. Unlike Regulations, in relation to which the literality of Article 288 TFEU expressly provides that they will be 'directly applicable', the TFEU does not contain any provision in relation to whether Directives can be directly applicable. Direct effect is the capacity of Community law to give rise to rights and obligations directly, *i.e.*, without the need to be implemented by national law.[92] According to Professors Paul Craig and Gráinne de Búrca, pursuant to the doctrine of direct effect 'provisions of binding EU law which are sufficiently clear, precise and unconditional to be considered justiciable can be invoked and relied on by individuals before national courts'.[93]

The CJEU has recognised that Directives can have direct effect provided that certain general requirements for direct effect are met.[94] The CJEU established these criteria in its seminal *Van Gend en Loos v Nederlandse Administratie der Belastingen* ruling, noting that, in order for provisions in an instrument of EU law to be directly effective, the provisions should be: (i)

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[92] Or, more precisely, without the need, in the so-called 'dualist' countries from the perspective of classic International law, to adopt a domestic measure giving effects to the provision in question from International / European law. *See* Schütze, *supra* note 67, at 76.

[93] *See* Craig & De Búrca, *supra* note 67, at 181. *See* further, Hartley, *supra* note 67, at 209.

[94] *See* Case 41/74, Van Duyn, 1974, E.C.R. 1337.

precise; (ii) unconditional; and (iii) not dependent on implementing measures.[95] Whether the Non-Financial Directive, or certain of its provisions, create direct effect is ambiguous. It calls for an examination of the criteria outlined in the not always consistent *Van Gend en Loos* case-law.[96] An analysis which should be done on a case-by-case basis for each provision.

It is argued that the Directive is unlikely to acquire direct effect. The following considerations come to the fore: (i) the Directive's provisions are unlikely to be considered by the CJEU as 'clear and unconditional and not contingent on any discretionary implementing measure';[97] and, perhaps more importantly, (ii) attempts to invoke the hypothetical direct effect of the Directive are likely to face the obstacle of the CJEU's refusal to recognise the so-called 'horizontal' direct effect of Directives, *i.e.*, to recognize that a Directive can impose obligations in proceedings between individuals.[98] The CJEU in *Marshall* refused direct horizontal effect for Directives, which it justified by the reason that a Directive is addressed to EU Member States, and cannot 'of itself' impose obligations on individuals.[99] The Directive may still be invoked in proceedings between individuals, however, for the purpose of creating vertical direct effect, if one of the parties is an undertaking that can be designated as an emanation of the 'State'.[100]

The absence of direct effect of the Directive does not mean that stakeholder are completely deprived from invoking it against the corporations under the Directive's reporting obligations.

First, as previously indicated, individuals can invoke the 'indirect' effect of the Directive, and of EU protected fundamental rights, to obtain an interpretation of national law in conformity with EU law. Second, national courts are under an obligation to leave unapplied national rules contrary to the Directive, in certain cases, in proceedings between individuals.[101] Professors Craig and De Búrca refer to this possibility as 'incidental horizontal effects'.[102] Third, while probably remote in practice, individuals retain the possibility, under the *Francovich* case-law of the

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[95] *See*, *inter alia*, Case 26/62, Van Gend en Loos, 1963, E.C.R. 1 (1963); Case 2/74 Reyners v Belgium, 1974, E.C.R. 631; Case 43/75, Defrenne v Sabena, 1976, E.C.R. 455; Case 36/74, Walrave v Association Union Cycliste International, 1974, E.C.R. 1405; Case 126/86, Zaera v Instituto Nacionale de la Seguridad Social, 1987, E.C.R. 3697.

[96] Lenaerts and Van Nuffel indicate that the CJEU 'has not invariably formulated the test in the same way', *see* Lenaerts & Van Nuffel, *supra* note 68, ¶ 21-056.

[97] This is how the test for direct effect was formulated in Case 44/84 Hurd ,1986, E.C. R. 29, ¶ 47.

[98] Case 91/92 Faccini Dori, 1994, E.C.R. 3325.

[99] Case 152/84 Marshall v Southampton, 1986, E.C.R. 723. *See further,* Schütze, *supra* note 67, at 98.

[100] An undertaking that is subject to the Directive may qualify as a 'State' by application of the *Foster* criteria. The CJEU in *Foster v British Gas* held that 'State' ought to be construed widely, and encompasses within its scope 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of a State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals'. *See* Case 188/89 *Foster*, 1990, E.C.R. 3313, for a recent confirmation of the test *see* Case 180/04, Vasallo, 2006, E.C.R. 7235. *See* further Schütze, *supra* note 67, at 100 and Craig & De Búrca, *supra* note 67, at 196.

[101] *See*, *e.g.*, Case 194/94 CIA Security International SA v Signalson, 1996, E.C.R. 2201 and Case 443/98, Unilever, 2000, E.C.R. 7535.

[102] *See* Craig & De Búrca, *supra* note 67, at 200, *see* further Schütze, *supra* note 67, at 101.

CJEU,[103] to sue the EU Member States for damages if they fail to give full effect to the Directive, including if they fail to obtain from the corporations subject to reporting obligations the levels of disclosure required by the Directive.

Fourth, the CJEU has held more recently that general principles of EU law can bind private parties and that the content of a general principle of EU law can be inferred from a Directive.[104] Given that the Treaties are widely perceived as having 'horizontal' direct effect,[105] and that EU protected fundamental rights have the status of both general principles of EU law and (to the extent that they have been incorporated to the CFREU) Primary legislation, the Directive could potentially be very helpful to clarify the scope of directly applicable fundamental rights (be they general principles of EU law or provisions in the CFREU).

Fifth and finally, the possible lack of direct effect of the Directive does not in any manner diminish the obligations, for all EU Member States, to give effect to it. More precisely, if EU Member States fail to require from corporations the information referred to by the Directive, the European Commission, acting on its own motion or after a complaint from a stakeholder, can bring the Member State in question before the CJEU, which can declare that the Member State has breached EU law (see Article 258 TFEU),[106] and even impose a lump sum or penalty payment on the Member State in question if the latter consistently refuses to give effect to the Directive in question (see Article 260 TFEU). Other EU Member States may also bring the matter before the CJEU (see Article 259 TFEU).

All in all, by enacting the Directive, the EU opted for a *type of legal instrument* which has potentially sweeping implications in the rights of stakeholders when it comes to the disclosure obligations of corporations. However, irrespective to the *type* of instrument chosen, and as noted in the preceding section in relation to the 'comply or explain' example, it is uncertain whether the *content* of the Directive will contribute to further the rights of stake-holders. A point which we will analyse in more detail next.

7.6 The Non-Financial Reporting Directive: Flexibility of Action and Effectiveness

The following section will examine the discretion that is left to EU Member States in the transposition of the Directive into national law and the potential effects that this discretion may have on the regulatory effects of the Directive in terms of affecting and coordinating the regulation of factors on which business disclosure in the EU depends in practice. The first section will examine the flexibilities that are built into the disclosure requirements. The second section will assess the form and type of information that companies must disclose, the audience to whom disclosure is owed and the monitoring and verification of compliance with the disclosure obligations.

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[103] *See* Cases 6/90 and C-9/90 Francovich and others, 1991, E.C.R. 5357, ¶¶ 39-41.

[104] *See* Case 144/04 Mangold v Rüdiger Helm*,* 2005, E.C.R. I-9981.

[105] *See* Case 435/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, 2007, E.C.R. I-10779. *See* further Craig & De Búrca, *supra* note 67, at 189.

[106] This was the case, *e.g.*, in Case 205/98, Commission v. Austria, 2000. *See* further K. Lenaerts, et al., EU Procedural Law, ¶ 5-05 (Sweet & Maxwell. 2014).

7.6.1 The Disclosure Requirements and Flexibility

It follows from Recital 3 in the Preamble to the Directive that the EU legislator intended to allow for 'high flexibility of action' considering that account should be had of 'the multidimensional nature of [CSR] and the diversity of the CSR policies implemented by businesses matched by a sufficient level of comparability to meet the needs of investors and other stakeholders as well as the need to provide consumers with easy access to information on the impact of businesses on society'.[107] The rationale for the EU legislator to allow flexibility in the disclosure requirements is thus to facilitate a balanced and comprehensive representation in order for different stakeholders to have a understanding of the performance of the company in relation to all various aspects of CSR and to respond to the demands for sufficient or material information in relation to these respective areas by stakeholders whose interests are engaged in these areas. The Directive provides a non-exhaustive list that includes, apart from respect for human rights, the areas environmental, social and employee matters, anti-corruption and bribery matters.

There are various provisions in the Directive that permit or require EU Member States to leave a significant degree of flexibility for companies under their national disclosure requirements, as a result of which the disclosure requirements leave considerable discretion for companies to decide how to disclose and what information to include in the non-financial statement.

One example is the 'comply or explain' policy outlined above. This provision requires that States provide business enterprises with the discretion to not disclose on human rights policies if they are not pursuing one and to provide an explanation instead. The Directive does not prescribe how this explanation should be drawn up, which leaves further discretion to companies to decide how to formulate this explanation. There may not be sufficient incentives for business enterprises to provide an informed explanation in the absence of further guidance, as experiences in the corporate governance context have shown.[108]

Another example is that the Directive permits an EU Member State to exempt an undertaking from its obligation to disclosure through a non-financial statement, provided that the undertaking publishes a separate report for the same financial year that covers the information required for the non-financial statement. Certain conditions must be met.[109] The separate report should be published with the management report or made publicly available on the undertaking's website, no later than six months after the balance sheet date.[110] This exemption should apply irrespective of whether the undertaking uses a national, Union-based or international framework. EU

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[107] *Non-Financial Reporting Directive*, *supra* note 1, Recital 3.

[108] Directive 2013/34 EC applies a similar 'comply-or-explain' principle, setting out the requirement that companies provide in their corporate governance statements an explanation of the part of the corporate governance code they depart from. Research showed that, in practice, undertakings that were subject to this requirement tended not to disclose as they should, giving invalid, general or false explanations. *See* Szabó & EngsigSørensen, *supra* note 90, at 12. This prompted the EU Commission to issue guidance and to assist companies in improving the quality of these explanations. Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting ('comply or explain'), *supra* note 91.

[109] *Non-Financial Reporting Directive*, *supra* note 1, Article 19a 4, Recital 6. In the case of the parent-undertaking, this report must refer to the whole group. *See* id. Article 29a 4.

[110] *Id*. Articles 19a.4. 29a.4.

Member States may also exempt a parent or a subsidiary undertaking subject to the Directive from its obligation to disclosure, if this undertaking is included in the consolidated financial statement or separate report of another undertaking.[111]

The Directive also allows for flexibility in the substantive disclosure requirements. This is unsurprising. The requirements to disclose formally may impose a disproportionate burden on certain undertakings. There is support for the view that the design of these requirements should give regard to the circumstances of the undertaking, in terms of its size and the complexity of its actions, the specific risk and challenges that the company faces, and the objective of disclosure. In other words, the flexibility in the disclosure requirements allows for reporting that balances and responds to the circumstances of business enterprises and stakeholder demands, which are specific to the different areas that the concept of CSR encompasses.

Where EU Member States allow too much flexibility for undertakings in meeting their disclosure requirements, this can have the adverse effects of undermining the effectiveness of the Directive in relation to human rights. There is the risk that disclosure requirements on undertakings are eased to an extent that the potential effect of the Directive on improving disclosure practices of companies in the function of human rights protection becomes diluted. I argue that the Directive can be a powerful tool in the regulation of business performance in relation to human rights, provided that certain conditions are met.

7.6.1.1 Disclosure on Positive Human Rights Impacts

While the Directive requires that business enterprises include information on their adverse human rights impact and due diligence, it does not preclude business enterprises from also including a description of their positive impacts. The Directive requires that a business enterprise disclose information that is essential for an understanding of the 'impact of activity, relating to, as a minimum [...] respect for human rights'.[112] As the formulation 'as a minimum' reflects, the Directives sets a minimum benchmark requirement. As stipulated in Article 19a(1)d, an entity subject to the Directive must disclose on, at a minimum, the adverse human rights impacts that are linked to its operations, including through its business relationships, products and services. This corresponds with the duty to disclose as it is defined by the UNGPs that requires companies to disclose on how they identify and manage their negative human rights impacts.

A non- financial statement may, however, also include a description of the policies pursued to promote or fulfil human rights. Such disclosure on positive impacts is not sufficient to meet the duty to disclose on impacts related to a company's respect for human rights, since the latter is linked to adverse human rights impacts. Positive contributions to the protection and fulfilment of human rights are laudable, but do not offset the responsibility to respect human rights as outlined in the UNGPs, or compensate for adverse human rights impacts.

Under the present Directive, there is a reasonable possibility that business enterprises will disclose on their positive human rights impacts. This is in part because the EU considers these positive impacts as integral to the concept of CSR. The EU definition of CSR, i.e. 'the

[111] *Id*. Articles 19a.3. 29a.3.

[112] *Non-Financial Reporting Directive*, *supra* note 1, Article 19a.1.

responsibility of enterprises for their impact on society' reflects this. It mentions merely 'impact', rather than 'adverse impact,' and thus does not exempt positive impacts on human rights from its scope. The purpose of CSR, as it is defined in the EU CSR Policy, also reflects this. It is defined as twofold: (1) 'maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large'; and (2) 'identifying, preventing and mitigating their possible adverse impacts'.[113] The purpose of 'maximizing the creation of shared value' suggests an approach that views the simultaneous creation of economic and social value as key to the long-term success of business, and beneficial to society at large.[114] The maximisation of the positive contributions of business enterprises to human rights is integral to CSR.

Business enterprises may have strong incentives to report on the positive, rather than the negative. Disclosing on the positive human rights impacts may be a means for business enterprises to neutralise the critique[115] and to offset the short-term costs (e.g., legal liability, reputational damage, consumer boycotts, disinvestment, etc.) that openness about adverse human rights impact may trigger. The discretion left to business enterprises to disclose their positive impacts on human rights is not desirable, because this allows business enterprises leeway to present an incomplete or misleading picture about the company's actual performance relating to their respect for human rights.[116]

7.6.1.2 Reporting Audience

A related issue is the audience to whom business enterprises owe the duty to disclose. The duty to disclose on adverse human rights impacts as it is defined by the UNGPs is, in the first instance, owed to right-holders whose rights may be adversely affected by the activities of business enterprises. This is reflected in UNGP 21, which stipulates that communication entails 'providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors'.[117] The fact that right-holders are the primary addressees has implications for the instance and content of disclosure. Arguably, a determination of what constitutes 'relevant and proportionate' in Article 19. 1 (d) depends on whether such disclosure is relevant and material to right-holders to have an understanding of a company's responsibility for human rights. Disclosure is particularly relevant if human rights risks meet a threshold of severity or significance. As mentioned previously, it needs to be further

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113 *Commission, A renewed EU CSR Strategy*, *supra* note 13, at 6.

114 Porter & Kramer, *Creating Shared Value* 89 Harvard Business Review (2011).

115 As Parker & Howe note, '[B]usinesses will always seek to neutralise critiques of their adverse human rights impacts and to bring any new initiatives to regulate business and human rights back within the rubric of the "business case" and "risk management" since this provides greater opportunity for management discretion and profit-orientation in the way they respond to human rights concerns'. C. Parker & J. Howe, Ruggie's Diplomatic Project and its Missing Regulatory Infrastructure, in The UNGPs on Business and Human Rights Foundation and Implementation, 275 (R. Mares ed., 2011).

116 This may trigger wrong responses from stakeholders. The disclosure of an accurate representation of a company's performance is essential to foster meaningful dialogue among stakeholders, through which potential human rights impacts can be identified and mitigated, as well as to achieve legitimacy and long-term trust among stakeholders.

117 UNGPs, *supra* note 4, Commentary to GP 21.

clarified what this threshold is exactly and when it is reached. Disclosure would furthermore not be proportionate if it were not accurate or sufficient to provide right-holders the measure of transparency and accountability they need to evaluate and compare the performance of business enterprises in an optimal manner.[118]

Arguably, the relevance and proportionality of disclosure is in part determined from the perspective of the target audience. Since the Directive does not specify that disclosure on human rights impacts is owed principally to right-holders, business enterprises have leeway to tailor their disclosure to provide an understanding of their impact that is relevant and sufficient to a particular audience, but not to right-holders. The disclosure may be tailored to meet the need for information by relevant stakeholders more generally, or more narrowly, i.e., by shareholders or investors. In either case, business enterprises may discharge its disclosure requirements through an approach that is not necessarily most appropriate or right from a right-holder perspective and, as a result, sufficient to meet the standard of the duty to disclose as stipulated in the UNGPs. The Directive thus does not enforce such standard by imposing on States to adopt legislation that requires business enterprises to adopt reporting practices and to provide information that is relevant and appropriate from a right-holder perspective.

7.6.1.3 Stakeholder Participation

The EU CSR policy recognises that collaboration with stakeholders is an integral part of CSR. It specifies that to discharge their responsibility, business enterprises should have in place a process to integrate human rights, amongst other public interests issues 'into their business operations and core Strategy in close collaboration with their stakeholders'.[119] A requirement of stakeholder-engagement in disclosure, however, is absent from the directives. The fact that the duty to disclose is owed to right-holders entails that right-holders must be involved in the disclosure process. Stakeholder engagement in disclosure is important to ensure that business enterprises are not only aware of and understand the human rights issues that affect them, but also the implications that these issues may have for the human rights due diligence duties of companies more generally and their responsibility to disclosure more specifically. In other words, stakeholder engagement is important in part to define the parameters of the duty to disclose from a right-holder perspective and in light of the circumstances of the company. Stakeholder engagement is important to determine the existence, nature and scope of a company's duty to disclose on its respect for human rights.

For instance, UNGP 21 suggests that the need to disclose can become more apparent if stakeholders bring concerns to the attention of the company.[120] Engagement of right-holders is important to assess whether the information disclosed is 'sufficient' to evaluate the due diligence performance of the business enterprises from a right-holder perspective.[121] Stakeholder

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[118] Sufficient information is also important for right-holders to effectively participate in processes through which human rights due diligence is shaped, as well as to hold business enterprises to account in cases of actual adverse human rights impacts.

[119] *Commission, A renewed EU CSR Strategy*, *supra* note 13, at 6.

[120] UNGPs, *supra* note 4, GP 21.

[121] *Id*.

engagement is important in prioritising the human rights issues that pose the most significant risks from a right-holder perspective for the purpose of disclosure.[122] More generally, it is also important to assess the special human rights risks faced by individuals from groups or populations that are at heightened risk of vulnerability or marginalisation and gender-specific risks and their implications for the duty to disclose. Without stakeholder engagement, identifying the parameters of human rights due diligence and their implications for disclosure may not be possible in practice.

7.6.1.4 SMEs

Another important feature of the Directive is the high minimum size threshold that is applied, which has the effect of excluding a significant percentage of large undertakings[123] and SMEs[124] from its applicable scope of disclosure obligations. The effect of exempting SMEs in particular is potentially large, since SMEs represent an approximate number of 22.3 million and make up 99.8% of EU enterprises.[125] The estimated total number of large undertakings that are subject to the disclosure requirements under the Directive is 6000. This number is lower than the 18,000 entities that were initially meant to be covered. The reason is that the applicable scope was limited to public interest entities.

The main rationale justifying the exemption of SMEs is that the disclosure requirements would place too great a burden on these entities.[126] Avoiding this burden corresponds with the think-small-first principle. The exemption is also not incompatible with the UNGPs per se, in that the UNGPs also do not require that SMEs communicate through formal means, except when certain conditions apply. A degree of flexibility is built into the human rights due diligence concept, which allows companies to discharge their responsibility through means that are proportionate to their capacity, which relates, amongst other factors, to size, management structures and resources. Size thus is a relevant factor in determining the means of disclosure; however, it is not the only factor, nor the most important factor. The primary factor in determining the form of disclosure is the nature of the human rights risks. Companies must communicate formally if formal means are most appropriate in light of the nature of the adverse human rights impacts of a company. A company must disclose formally if the circumstances of a company pose risks of severe human rights impacts.[127] The UNGPs recognise different forms of formal reporting,

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[122] *Id*. Commentary to GP 21.

[123] Also, certain large undertakings whose average number of employees falls below 500 are not subject to the non-financial disclosure requirements. For the purpose of the Directive, a large undertaking has on average 250 employees during the financial year.

[124] The Directive distinguishes between micro, small and medium-sized undertakings. The size of these undertaking is determined by reference to balance sheet, turnover and average number of employees. For the purpose of the Directive, the average number of employees for micro-undertakings is below 10, for small undertakings below 50, and for medium-sized undertakings below 250.

[125] Eurostat, Statistics on small and medium-sized enterprises, (September 2015), http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en.

[126] *Accounting Directive*, *supra* note 2, Recital 26.

[127] UNGP 21 stipulates that business enterprises have a responsibility to disclose in a formal manner if this form best reflects the human rights impacts of an enterprise. It also recognizes a responsibility to report formally if

including traditional annual reports, corporate responsibility/sustainability reports, online updates and integrated financial and non-financial reports.[128]

The Directive's exemption of SMEs from the disclosure obligations can be seen as problematic, for various reasons. First, it conveys the impression that SMEs, by mere fact of their size, have less or no human rights responsibilities, or that they are absolved from their responsibility to communicate how they address their human rights impacts, or have no reporting obligations. This does not conform to the expectations of the UNGPs, according to which the responsibility to respect applies 'fully and equally' to all business enterprises.[129] Also, the responsibility to communicate, which is integral to human rights due diligence, applies to any company, irrespective of its size. Excluding SMEs from mandatory reporting a priori exempts SMEs from having to disclose formally on their adverse human rights impacts.

Arguably, whether it is appropriate that SMEs disclose through a non-financial statement in the annual report should be determined on a case-by-case basis. The understanding is that all SMEs can have potential human rights risks, including severe risks. The potential human rights impacts of a single SME, as well as the cumulative impact of the many SMEs in the EU, can be significant and meet the threshold of severity. The principle that companies should disclosure through formal means in the presence of severe human rights risks applies to all business enterprises, irrespective of size. SMEs are no exception. If SMEs create, contribute to or are directly involved in potential severe adverse human rights risks, because the scale, scope or the irremediable character of these risks meets a certain minimum threshold, the UNGPs set out that they disclose formally.

The a priori exclusion of SMEs from the scope of the proposed regulation entails a missed opportunity to increase the quantity of reporting, as well as to effectuate significant change in improving human rights reporting and due diligence practices in the EU. This is because the overwhelming majority of companies in the EU are SMEs. Mandatory reporting requirements could incentivize SMEs to give attention to their human rights due diligence responsibility, especially if there are few market incentives that do so. They could also promote SME participation and engagement in CSR governance initiatives. They can also provide incentives for SMEs to joint CSR governance initiatives, be they sector, business or issue specific, or focused on CSR more generally, and to draw from their expertise, guidance and tools to discharge their reporting obligations. Such membership could promote the interaction, collaboration, learning and the pooling of resources among SMEs.[130]

The reporting requirements could also make SMEs more apt to anticipate and act upon new business opportunities that arise on international markets, e.g., to meet demands in developing countries. More generally, mandatory reporting requirements for all companies could be a great

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the operations or operating contexts of the company pose risks of severe human rights impacts. UNGPs, *supra* note 4, GP 21.

[128] *Id.* Commentary to GP 21

[129] *Id.* Commentary to GP 14.

[130] Business and Human Rights Initiative, Global Compact Network Netherlands, How to Do Business with Respect for Human Rights: A Guidance Tool for Companies (2010).

stride forward in fostering responsible business environments across the EU, enhancing productivity and innovation through the creation of shared values, and could propel SMEs on the international plane.

7.6.1.5 Integrated Reporting

The approach that underlies the disclosure requirements is that of 'integrated reporting', although the Directive does not expressly prescribe that companies adopt integrated reporting as developed by the International Integrated Reporting Council.[131] This approach to reporting views the integration of financial and non-financial information, in a comprehensive and coherent manner, as critical to creating value and ensuring the long-term success of the company.[132] One benefit of the approach of integrated reporting is that it can make visible the link between the due diligence processes and policies in the public interest of respect for human rights, on the one hand, and the business strategies and policies involving its economic activities and its relationships, on the other hand.[133] Disclosure can create awareness among directors and management of the company, as well as stakeholders, about potential incoherencies in processes and policies that inhibit a company from meeting both interests. As stipulated by the commentary to UNGP 16, business enterprises should strive for greater coherence.[134]

The approach of integrated reporting seems more appropriate than alternative approaches that the Commission considered for the Directive, i.e. the disclosure of information through a stand-alone report (detailed reporting) and the establishment of a mandatory EU reporting standard. First, integrated reporting could entail that disclosure on human rights impacts must meet the requirements as disclosure on financial or other public interest issues. Since the statement on human rights impacts is integrated in financial reporting obligations, disclosure on human rights impacts must be treated on par with financial disclosure, for instance, regarding accessibility and verification. A non-financial statement on human rights impacts is more likely to be subject to auditing and other types of assurance requirements. In this regard, integrated reporting seems more appropriate than reporting through a separate CSR report that may not entail such requirement for companies.[135]

Since the management is responsible for the preparation of reports and financial statements, the responsibility to disclosure on adverse human rights impacts is effectively lifted from a CSR department to management level. Management reports inform the decision-making of directors. It follows that at least in theory, integrated reporting is more prone than a stand-alone CSR report

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131 Szabó & EngsigSørensen, *supra* note 90. The International Integrated Reporting Council (IIRC) defines an integrated report as one which is a 'concise communication about how an organisation's strategy, governance, performance and prospects, in the context of its external environment, lead to the creation of value over the short, medium and long term'. *See*, http://uk.practicallaw.com/3-597-4626#a698284.

132 The European Parliament suggested that the Disclosure directives recommend that European businesses apply the UNGPs and that they should be harmonised with integrated reporting as currently being developed by the International Integrated Reporting Council (IIRC). Resolution on Corporate Social Responsibility: Promoting Society's Interests and a Route to Sustainable and Inclusive Recovery, *supra* note 19, at 73.

133 UNGPs, *supra* note 4, GP 16.

134 *Id.* GP 16.

135 Shift, Update to John Ruggie's Corporate Law Project: Human Rights Reporting Initiatives (2013).

to bring respect for human rights to the attention of the board. As a result, integrated reporting is more likely to raise the profile of adverse human rights impacts within the company and make it an issue at the board level. To the extent that integrated reporting can make visible and contribute to a better understanding of the link between human rights and business activities, it can incite directors to take action to integrate human rights more consistently into core business operations and strategies, rather than address human rights at the periphery. If respect for human rights furthermore were to be accorded a central position within the management report, it may well also take on a more central role in the change and improvement of business policies and strategies in practice.

7.6.1.6 Reporting Frameworks

Pursuant to Article 19a1, EU Member States must allow undertakings that are subject to the Directive to rely on national, Union-based or international frameworks. Consequently, an undertaking that is subject to the Directive may choose but, depending on the national transposition measures, may not be legally required to disclose on the basis of the UNGPs, or other recognised international frameworks.[136] By referring to the UNGPs, the Directive also acknowledges the value thereof, and encourages business responses to the UNGPs more generally. The Directive also implicitly incentivizes business enterprises to use this standard in meeting their disclosure obligations pursuant to the Directive. By disclosing in conformity with the UNGPs, undertakings would comply with, and go beyond the minimum requirements established under the Directive.

Recital 6 of the Preamble expressly mentions apart from the UNGPs, *inter alia*, the OECD Guidelines for Multinational Enterprises, as a framework that undertakings can take account of. Since there is alignment between the expectations set out by these frameworks on human rights due diligence, national implementation measures that permit or require disclosure in accordance with these frameworks has the same effect of encouraging business responses to the UNGPs. EU Member States should ensure that if business enterprises rely on an international framework, that they specify this. Where the reliance on the UNGPs is made explicit, this may facilitate and reinforce the tracking of responses to the UNGPs.[137] If companies do choose to rely on an international framework, and make this explicit, the Directive leaves EU Member States the option to require that the information disclosed in conformity with the respective standard specified be verified by an independent assurance service provider.[138]

The Directive also implicitly recognises the legitimacy, and encourages the uptake of the GRI by referring to this reporting initiatives as one of the international frameworks that business enterprises can rely on in the reporting under the Directive. The GRI has been widely recognised as the leading organisation in sustainability reporting. This is reflected in the sheer number of reporting organisations, totalling 7,959 (as per August 2015). In the EU context, a study shows

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[136] The European Parliament has expressly noted that the Directives for non-financial disclosure presented an opportunity 'to encourage that business enterprises apply the UN Guiding Principles'. Resolution on Corporate Social Responsibility: Promoting Society's Interests and a Route to Sustainable and Inclusive Recovery, *supra* note 19, at 73.

[137] *Non-Financial Reporting Directive*, *supra* note 1, Recital 9.

[138] *Id*. Recital 6.

that the GRI[139] is the international framework that European companies, and especially large companies, most frequently use to develop their reports.[140] The GRI's newest release, the GRI G4 Sustainability Guidelines (GRI G4), is fully aligned with, and allows for reporting performance against the UNGPs, amongst other global frameworks.[141]

By encouraging companies to rely on the GRI, the Directive reinforces its potential indirect regulatory effect in leveraging business compliance with the disclosure requirements that align with the UNGPs.[142] This potential regulatory effect could be further strengthened by the collaboration between the GRI and the 'Human Rights Reporting and Assurance Frameworks Initiative' (RAFI).[143] [144] [145] [146] Civil society voices have expressed their support for the UN Framework, while States have indicated they are considering ways to integrate the UN Reporting Framework into their policies, including through their NAPs.[147]

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[139] The GRI is a sustainability reporting framework that provides guidance to companies on how to disclose their sustainability performance. The framework consists of Sustainability Reporting Guidelines, Sector Supplements and the Technical Protocol, as well as sector supplements dealing with electrical utilities, financial services, food processing, mining and metals, and NGOs.

[140] *Commission Staff Document Impact Assessment, supra* note 23, at 6.

[141] Apart from the UNGPs, the G4 Guidelines includes links to the OECD Guidelines, the UN Global Compact and the ILO Tripartite Declaration.

[142] GRI, *supra* note 43.

[143] RAFI is a joined project by the organisation Shift and Mazars to develop a twinset of guidance frameworks. The first, the UN Reporting Framework, was launched on 24 February 2015 and provides clarity on how business enterprises can report on their progress in implementing the responsibility to respect, in a meaningful and coherent manner. The second, the Assurance Framework, will provide guidance to assurance providers and internal auditors on the verification of reporting in line with the UN Reporting Framework and is expected early 2016. Shift and Mazars, The UN Guiding Principles Reporting Framework, 2,14 (2015).

[144] The UN Working Group encourages such coordination efforts, which it considers can contribute to the coordination of efforts and help actors build upon each other's work. *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, Human Rights Council, ¶ 31, U.N. doc. A/HRC/26/25 (5 May, 2014).

[145] The GRI and RAFI institutionalised their collaboration in a MoU, which was signed in December 2013. In this Memorandum, both organizations express their commitment to seeking opportunities to dovetail the language of the RAFI reporting and assurance frameworks with the GRI Sustainability Reporting Guidelines. The aim is to provide companies with a clear roadmap on reporting on the implementation of the UNGP. GRI, *GRI and RAFI collaborate to leverage the power of business to advance respect for human rights* (2 Dec., 2013), https://www.globalreporting.org/information/news-and-press-center/Pages/GRIand-RAFI-collaborate-to-leverage-the-power-of-business-to-advance-respect-for-human-rights.aspx.

[146] This collaboration could extend the benefits of improved reporting and disclosure in reference to the UNGP to members of the GRI network, and present opportunities to move forward in the comprehensive and effective implementation of the UNGP. The GRI Deputy Chief Executive Teresa Fogelberg notes, '[T]he reporting practice built by these thousands of companies is a hugely valuable resource, which can be leveraged to measure and manage human rights impact and to scale up the contribution business makes globally to improving human rights standards.' *Id*.

[147] UN Reporting Framework, *UNGP Reporting Framework Update: Catalyzing and Accelerating Conversations* (2015), http://us7.campaignarchive1.com/?u=a193892aee5a224fa16269dcd&id=49896c6ce8&e=75f84b5d72.

Some countries already have legislation in place requiring undertakings to disclose on the basis of the GRI. Denmark has been a pioneer not only for being the first to transform the Directive into national law, but also by going beyond the minimum legal requirements therein, *inter alia*, by making reporting in accordance with the GRI mandatory.[148] Such mandatory disclosure conform the GRI indirectly has the legal effect of requiring disclosure in conformity with the UNGPs. Other EU Member States may be encouraged to do the same in response to the invitation set out in the 2014 Guidance Document on NAPs for States to adopt measures to encourage business enterprises to disclose on human rights due diligence and related impacts and to use established reporting guidance such as the GRI.[149]

7.6.1.7 Indicators

The Directive on non-financial disclosure requires that companies subject to its disclosure requirements describe non-financial key performance indicators (KPIs). While this criterion should encourage undertakings to rely on indicators in their reporting, in the absence of guidance about which indicators or types of indicators the undertaking should use, the effects on the disclosure practices of companies are uncertain. The Directive, by way of expressly referring to the GRI under Recital 6, may incentivize undertakings to join the GRI and to rely on the human rights indicators suggested in their disclosure. The GRI G4 features a list of 10 performance indicators under the category of human rights. The human rights indicators elicit comparable information, both qualitative and quantitative, about results and outcomes that indicate change over time in relation to 10 issues: Investment, Non-Discrimination, Freedom of Association and Collective Bargaining, Child Labour, Forced and Compulsory Labor, Security Practices, Indigenous Rights, Assessment, Supplier Human Rights Assessment, and Human Rights Grievance Mechanisms. A section of the GRI G4 identifies links with the UNGP.[150] Research finds that large companies are using the indicator system proposed by the GRI Framework, and are applying some or all of the suggested performance indicators. The indicators used include human rights indicators, although these are applied less frequently than indicators in other subject areas, notably the environment and labour rights.[151]

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[148] *See* Danish Business Authority, Implementation in Denmark of EU Directive 2014/95/EU on the disclosure of non-financial information (2015), http://csrgov.dk/file/557863/implementation-of-eu-directive.pdf.

[149] Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guidance on National Action Plans on Business and Human Rights, Version 1.0, 1-2 (December 2014), http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf..

[150] The GRI G4 solicit information on human rights through two types of disclosure in particular: items on the G4Disclosures on Management Approach (DMA) for human rights aspects and the G4 performance indicators in the category of human rights. Under the DMA, companies can reflect on their approach to managing human rights, more specifically how it 'identifies, analyses, and responds to' its potential and actual significant human rights impacts. DMAs require a narrative response. Apart from generic guidance, the DMA provides aspect-specific guidance inter alia on 'Supplier Human Rights Assessment' and 'Human Rights Grievance Mechanisms'. GRI, G4 Sustainability Reporting Guidelines, § 6.8 (2013), https://www.globalreporting.org/standards/g4/Pages/default.aspx.

[151] *Commission Staff Document Impact Assessment, supra* note 23, at 6. Also *see European Commission Disclosure of non-financial information by Companies (Final report)* (December 2011), *available at*:http://ec.europa.eu/finance/accounting/docs/non-financialreporting/com_2013_207-study_en.pdf.

7.6.2 Verification

The Directive stipulates that EU Member States must ensure that a statutory audit or audit firm checks the report, but only to determine whether the non-financial statement or the separate report has been provided.[152] There is no requirement for this audit to determine the conformity between the statement and the actual practices of the undertaking. The Directive confers on EU Member States an option to choose to require business enterprises to subject the information in the non-financial statement or report to verification by an independent assurance service provider.[153] The Directive does not provide sanctions, but confers on EU Member States the obligation to ensure that appropriate liability rules are in place for the purpose of liability for the drawing up and publishing of, *inter alia*, the management reports in accordance with the Directive. The Directive provides that these liability rules should be applicable to the members of the administrative, management and supervisory bodies of an undertaking, which are generally responsible for drawing up these reports. Article 33 of the Directive stipulates:

> 1. Member States shall ensure that the members of the administrative, management and supervisory bodies of an undertaking, acting within the competences assigned to them by national law, have collective responsibility for ensuring that:
>
> (a) the annual financial statements, the management report, the corporate governance statement when provided separately and the report referred to in Article 19a(4); and
>
> (b) the consolidated financial statements, the consolidated management reports, the consolidated corporate governance statement when provided separately and the report referred to in Article 29a(4),
>
> are drawn up and published in accordance with the requirements of this Directive and, where applicable, with the international accounting standards adopted in accordance with Regulation (EC) No 1606/2002.

The liability for non-financial disclosure on human rights falls to the national laws of the EU Member States, which furthermore have discretion to determine the extent of this liability.[154] If EU Member States do not go beyond the minimum requirements in their national implementation measures, liability could arise in situations where the non-financial statement or the alternative separate report is missing.

7.7 Human Rights Due Diligence and the Concept of the Group Entity

The Directive sets out disclosure requirements not only for individual business undertakings, but also for parent companies that belong to a large group. The application of disclosure requirements to groups is relevant in the context of regulating business respect for human rights. This is due to the fact that the actions of corporations often have human rights impact through

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[152] *Non-Financial Reporting Directive*, *supra* note 1, Article 19a 5.

[153] *Id.* Article 19a 6.

[154] *Accounting Directive*, supra note 2, Recital 41.

the activities of entities having the legal form of legally distinct legal entities, i.e., the group's subsidiaries. As a result, the concept of group that ends up being applied will be crucial for the effectiveness of the Directive. More precisely, the due diligence concept is linked to the group entity.

Article 29(a)1 of the Directive defines the disclosure obligations for a parent company of large groups as follows:

> 'Public-interest entities which are parent undertakings of a large group exceeding on its balance sheet dates, on a *consolidated* basis, the criterion of the average number of 500 employees during the financial year shall include in the *consolidated* management report a *consolidated* non-financial statement containing information to the extent necessary for an understanding of the group's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters.'

The subjects of the Directive are parent companies of large groups.[155] The size threshold requirement is defined by reference to the balance sheet total, net turnover and average number of employees.[156] The criterion of the average number of employees during the financial year is determinant, which, on the balance sheet dates, should exceed, on a consolidated basis, the minimum threshold of 500 employees. The disclosure requirements set out in Article 29(a) of the Directive thus intend to apply only to the parent undertakings of large groups that are public-interest entities. The obligation to draw up a consolidated management report seems to apply only to the parent undertakings that are of the type listed in Annex I and II of the Directive on annual financial statements, consolidated financial statements and related reports of certain types of undertakings.[157] This statement should be included in a consolidated management report or, alternatively, in a separate report for the whole group.[158]

The Directive requires a similar type of disclosure from parent undertakings of certain large groups under Article 29(a) as from large undertakings individually pursuant to Article 19(a). A parent should disclose the business model of the group, the human rights policies that the group has pursued, including the due diligence implemented, the outcome of these policies and how the group manages the human rights risks that are linked to the group's operations including, where relevant and proportionate, the group's business relationships, products or services.[159] For the purpose of the Directive, however, the consolidated non-financial statement should include the activities of a parent undertaking and subsidiary undertakings in consolidation of the group as a whole. The parent undertaking of a group that is subject to the disclosure obligations under Article 29(a)(1) thus must take into consideration, in a consolidated manner, its own human rights policies and due diligence processes and those of the subsidiaries of the group.

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155 *Id.* Article 7.

156 *Id.* Article 3.7.

157 *Id.* Article 21.

158 *Non-Financial Reporting Directive*, *supra* note 1, Article 29a4.

159 *Id.* Article 29a.

As a consequence, the Directive has potential indirect regulatory effects that extend to group entities. As a result of the disclosure obligations deriving from the Directive, a parent company should inquire and assess the human rights policies, outcomes and risks arising from the activities of all undertakings in its group and to reflect on these activities in the consolidation of the group as a single economic entity. This exercise can result in greater awareness by the parent company about the group's involvement in human rights risks and the applicable laws and standards. This awareness and the potential legal, reputational and financial implications for failing to respond to these risks should prompt a parent entity to be proactive in taking the necessary measures to improve not only its own performance, but also to communicate and ensure that subsidiary entities in the group are aware about the human rights risks and applicable standards in order for these risks to be managed.

With Article 29(a), the Directive thus acknowledges the significance of regulating the disclosure of group entities in a consolidated manner. The disclosure requirements thus can have positive effects on the group policies relating to human rights. In this regard, it is unsurprising that the Directive creates incentives for subsidiary and parent entities to disclose on a consolidated basis. It does so by creating an exemption for a subsidiary undertaking and its subsidiaries from their disclosure obligations under Article 19(a)(1) if the respective undertaking is included in the consolidated management report or the separate report of another undertaking. The same applies to a parent undertaking that is also a subsidiary undertaking.[160]

The concept of the single group entity is important for the regime on non-financial disclosure for a number of reasons. First and foremost, of course, the concept of group determines whether the disclosure obligations under Article 29(a)(1) apply to a parent company and, if applicable, which undertakings this parent should include in the consolidated non-financial statement. The concept of the group thus delimits the boundaries of the obligation, in that it determines which undertakings are regarded as part of the group for the purpose of the applicability of the obligations of the Directive. Second, the concept also determines the scope of the disclosure obligations of the parent undertaking under Article 29(a)(1), in terms of the human rights policies, risks and outcomes of the subsidiary entities that the parent entity must disclose on in consolidation. Finally, the concept of the group affects the applicability of the disclosure obligations to group entities with different organisational structures.

For the purposes of the Directive, a group is defined as 'a parent undertaking and all its subsidiary undertakings'.[161] Whether an undertaking is a 'parent undertaking' and whether 'a subsidiary entity' belongs to a group are determined by reference to the notion of control. A parent undertaking is defined as 'an undertaking which controls one or more subsidiary undertakings'.[162] Article 22 of this Directive further clarifies the different notions of control that bring entities within the boundaries of a group for the purpose of drawing up a consolidated management report. There is no reason to assume that the group should be considered differently in relation to the drawing up of the management report and the consolidated non-financial statement that should be included in this report.

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[160] *Id.* Article 29a(3).

[161] *Accounting Directive*, *supra* note 2, Article 2.

[162] *Id.* Article 2.9.

The Directive identifies different concepts of the group entities that EU Member States may rely on in formulating their disclosure obligations. These are the following:

Article 22

'**The requirement to prepare consolidated financial statements**

1. A Member State shall require any undertaking governed by its national law to draw up consolidated financial statements and a consolidated management report if that undertaking (a parent undertaking):

   (a) has a majority of the shareholders' or members' voting rights in another undertaking (a subsidiary undertaking);

   (b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking (a subsidiary undertaking) and is at the same time a shareholder in or member of that undertaking;

   (c) has the right to exercise a dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association, where the law governing that subsidiary undertaking permits its being subject to such contracts or provisions.

A Member State need not prescribe that a parent undertaking must be a shareholder in or member of its subsidiary undertaking. Those Member States the laws of which do not provide for such contracts or clauses shall not be required to apply this provision; or

   (d) is a shareholder in or member of an undertaking, and:

      (i) a majority of the members of the administrative, management or supervisory bodies of that undertaking (a subsidiary undertaking) who have held office during the financial year, during the preceding financial year and up to the time when the consolidated financial statements are drawn up, have been appointed solely as a result of the exercise of its voting rights; or

      (ii) controls alone, pursuant to an agreement with other shareholders in or members of that undertaking (a subsidiary undertaking), a majority of shareholders' or members' voting rights in that undertaking. The Member States may introduce more detailed provisions concerning the form and contents of such agreements.

Member States shall prescribe at least the arrangements referred to in point (ii). They may subject the application of point (i) to the requirement that the voting rights represent at least 20 % of the total.

However, point (i) shall not apply where a third party has the rights referred to in points (a), (b) or (c) with regard to that undertaking.'

The Directive thus delineates the notion of 'group' by reference to a relationship of control between the parent undertaking and a subsidiary entity, which can be inferred from the parent holding a majority of voting rights, an agreement with other shareholders or members or in certain circumstances where the parent is a shareholder in or a member of a subsidiary.[163] The definition of the group thus centres around the notion of control and designates a group as an economic entity that encompasses a parent entity and one or more subsidiary entities that relate to the parent through relationships of control.[164] A subsidiary entity is regarded as constituting part of the group by reason of the parent having control over it.

The Directive supports an approach to group entities that broadly corresponds with the way group entities have been treated commonly by different areas of the law, that is as a collective of distinct and separate legal entities, each potentially having their own distinct legal personality as determined by the domestic legislation of their country of origin or seat, and which are connected through a relationship of ownership and control.[165] This approach to the concept of group thus sets out the boundaries of the group by reference to ownership and control. As a result, those subsidiary undertakings that the parent undertaking does not have control over are excluded from the group (for the purposes of the Directive). The Directive delimits the scope of the required disclosure in that the parent undertaking will not need to report on the activities of these undertakings that it does not exercise control over in its consolidated non-financial statement.

The choice for this approach to group entities has the effect that parents of economic entities that display a more tightly integrated organisational structure, in which a controlling entity exists that has strategic or operational control over distinct and separate legal entities, are included in the scope of application of Article 29(a)1 of the Directive.[166] Crucially, the subsidiary entities that the parent has control over should be included in the consolidated account, irrespective of their location.[167]

However, this approach may not fare well in the context of the integrated networked entity, which displays complex and less hierarchical organisational structures.[168] The parents of these

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[163] *Id.* Article 22.1, Recital 31.

[164] *Id.* Recital 31.

[165] According to Eroglu, an MNE can be depicted in a strictly legal sense as 'a collection of corporate entities, each having its own juridical identity and national origin, but each in some way connected by a system of centralized management and control, normally exercised from the seat of primary ownership'. Muzaffer Eroglu, *Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination* (Edward Elgar, 2008).

[166] According to Eroglu, an MNE can be depicted in a strictly legal sense as 'a collection of corporate entities, each having its own juridical identity and national origin, but each in some way connected by a system of centralized management and control, normally exercised from the seat of primary ownership'. *Id.*

[167] *Accounting Directive*, supra note 2, Article 22.6.

[168] According to Eroglu, these structures can be characterised along five dimensions. The authority and responsibility for decision-making is *de-centralised* and *differentiated* between subsidiary entities in the group. Organisational functions and operations are *de-layered* and *dispersed* across different subsidiary units, as well

types of entities may not be subject to the requirements under Article 29(a)1 because the control structures that should bring its subsidiary entities within the bounds of the group for the purpose of the Directive may simply not exist.

This is undesirable for several reasons. The complex moderns group structures have been recognised to pose one of the main obstacles to effective regulation.[169] As the SRSG has noted, getting a multinational corporation to assume responsibility to respect human rights for the entire group, rather than to atomise it down to various constituent units in the group, is a fundamental question for business and human rights.[170] As a consequence, the Directive may not create additional incentives for the parents of these types of undertaking to concern themselves with the human rights policies and due diligence processes of other entities within the group. The potential effects of the Directive in regulating the transparency and improving the behaviour of these types of group entities is delimited by the concept of the group entity in regard. In addition, the concept of the group allows entities to rely on their organisational structure to escape the disclosure requirements under this provision. This is something the Directive expressly seeks to avoid, noting that its purpose is to not allow the possibility for an undertaking to exclude itself from the scope of the Directive 'by creating a group structure containing multiple layers of undertaking established inside or outside the Union'.[171]

In this regard, it is important that the Directive allows EU Member States to adopt a broader approach to group entities. The Directive confers on EU Member States the choice to require undertakings to draw up a consolidated management report if:

(a) that undertaking (a parent undertaking) has the power to exercise, or actually exercises, dominant influence or control over another undertaking (the subsidiary undertaking); or

(b) that undertaking (a parent undertaking) and another undertaking (the subsidiary undertaking) are managed on a unified basis by the parent undertaking.[172]

The provision permits EU Member States to require a parent undertaking to draw up a non-financial statement that encompasses not only those undertakings that it exercises dominant influence over, but also those that it has the power to exercise dominant influence over. EU Member States may also consider that if the parent undertaking pursues a common management policy for the group as a whole or has a common administrative, management or supervisory

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as geographically. Independent decision-making tends to displace formal and bureaucratic procedures, amounting to a *de-bureaucratisation* of these procedures. The organizational structure of modern group entity differs from that of group entities that are vertical and hierarchical, resembling a 'hierarchical pyramid'. Eroglu, *supra* note 165, at 52.

169 O. De Schutter et al., Human Rights Due Diligence: the Role of States, Part III (2012).

170 R. Mares, *"Respect" Human Rights: Concept and Convergence*, in Law, Business and Human Rights: Bridging the Gap, 29 (Robert C. Bird, et al. eds., 2014) (forthcoming 2014), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387345.

171 *Accounting Directive*, *supra* note 2, Recital 6.

172 *Id.* Article 22.2.

body, that this is sufficient to uphold a finding of a group entity that encompasses the parent undertaking and the other undertakings that are subject to this management policy.[173]

One may consider the value of these approaches to the group entity in function of the substance of the Directive, and the operationalisation of the human rights due diligence concept. It is not uncommon for EU law to adopt a functionalist approach to the concepts of undertaking and group. The EU Competition law regime more generally relies on such a functional approach. As noted by Jones:

> Despite the centrality of the concept of an 'undertaking' to the scope of, and relationship between, the EU competition law provisions, the term is not defined in the Treaty. Rather, the meaning of the term has been left for elucidation in the case law. It is now trite law that a functional approach is taken to the concept of an undertaking and that it encompasses any entity (including individuals, legal persons such as companies and partnerships, state and public bodies) engaged in economic activity, regardless of its legal personality or status, or the way in which it is financed. Further, it has also been long accepted that the term undertaking is not necessarily synonymous with natural or legal personality but denotes 'an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal'. It is therefore a "complex concept involving human and physical components jointed in the pursuit of a single economic activity.[174]

EU Competition law thus adopts a functional approach, in that the subject matter of the agreement determines the concept of the undertaking. The 'economic unit' thus is not defined by reference to the law of any State. The undertaking encompasses any entity 'engaged in economic activity regardless of the legal status of the entity and the way in which it is financed'[175] (i.e., it might encompass individuals, legal persons and, under certain circumstances, State and public bodies').[176] An entity engaged in economic activities may not necessarily be synonymous to a natural or legal personality.

To be noted is that the UNGPs do not provide guidance with regards to the approach to group entities that EU Member States should adopt. There is no definition of corporate groups in the UNGPs. The UNGPs also do not pronounce on how the human rights due diligence concept applies to corporate groups and/or on how responsibility should be allocated or attributed to undertakings within a group.[177] The human rights due diligence concept nevertheless provides a foundation for the regulation of group entities. The following characteristics of the human rights due diligence concept may be especially relevant in this regard.

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[173] *Accounting Directive*, *supra* note 2, Recital 31.

[174] Alison Jones, *The Boundaries of an Undertaking in the EU Competition Law*, 8 European Competition Journal 301, 302 (2012).

[175] *See* Case 42/90, Höfner and Elser v Macrotron, 1991, E.C.R. I-1979, ¶ 21.

[176] *See* Richard Whish & David Bailey, Competition Law, 86 (Oxford University Press, 2015). The Application of the Competition rules in Articles 101 and 102 of the TFUE to public undertakings often takes place through Article 106 TFEU, the study of which is outside the scope of these pages.

[177] Mares, *supra* note 170.

The parent undertaking and the subsidiary entity are distinct and independent legal entities. The responsibility to exercise human rights due diligence applies to all business enterprises, irrespective of the organisational or ownership structure.[178] All undertakings in the group thus have a responsibility to respect human rights. Parent undertakings thus should not be able to rely on their organisational structure as a means to evade responsibility for its involvement in the adverse human rights impacts that may result from the activities of a business relationship. The responsibility of an entity does not cease to exist if these entities conduct business through a corporate group, though the means through which these entities meet their responsibility may vary according to whether, and the extent to which, they do.

The human rights due diligence responsibility of a parent or another entity within a group does not end at the legal boundary of an individual entity, unlike is often presumed by a strictly legal conception of group entities.[179] The responsibilities of an undertaking transcend the legal separation between entities in the group and reaches across the operations of these entities and their business relationships to adverse human rights risks. The corporate responsibility to respect human rights gives rise to a regulatory requirement for companies to have a human rights policy and human rights due diligence processes in place. Business enterprises have a responsibility to act, for instance by exercising control or to use their leverage over a business relationship as necessary in order to cease, prevent or mitigate their contribution to adverse human rights impacts, or in the case of direct linkage, to prevent and mitigate the adverse impact.

A functional approach to the group entity, similar to the one applied within the EU Competition law regime, would refer to the subject matter of the specific area of EU law to determine the concept of the group entity. The purpose of the Directive is to increase 'the relevance, consistency and comparability' of information that certain large undertakings and groups disclose relating to, *inter alia*, respect for human rights. This information should include a description of the human rights policies, outcomes and risks of the undertaking or group, including the due diligence processes implemented in order 'to identify prevent and mitigate existing and potential adverse impacts'.[180] When selecting an approach to the group entity that keeps with the objective of the Directive, consideration thus may be given to the responsibility of a parent to exercise human rights due diligence by managing their relationship with its business partners in order to prevent or mitigate adverse human rights impacts.

The question arises how the approaches to group entities that EU Member States can adopt under the Directive, which are anchored on dominant influence or a common management policy, fare in function of the objective of the Directive where human rights are concerned.

The Directive confers on EU Member States the choice to require undertakings to draw up a consolidated management report if:

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[178] The commentary to UNGP 14 stipulates that the responsibility to respect human rights may exist irrespective of 'ownership and structure'. Also noted is that '[t]he means through which a business enterprise meets its responsibility to respect human rights may also vary depending on whether, and the extent to which, it conducts business through a corporate group or individually'. UNGPs, *supra* note 4, Commentary to GP 14.

[179] Eroglu, *supra* note 165, at 23.

[180] *Non-Financial Reporting Directive*, *supra* note 1, Recital 6.

(a) that undertaking (a parent undertaking) has the power to exercise, or actually exercises, dominant influence or control over another undertaking (the subsidiary undertaking).[181]

This approach evolves around the potential or actual strategic control that an undertaking can exercise over a subsidiary entity. One may turn to the EU competition law regime for guidance on how one can determine that a parent undertaking has the power to exercise, or actually exercises, dominant influence or control over another undertaking that the latter undertaking may be treating as part of the group.

A similar approach to the concept of group has a well-defined scope in the context of EU Competition law. For example, the concept of group is frequently resorted to in the context of Council Regulation No 139/2004 on the control of concentrations between undertakings (the 'EUMR').[182] The EUMR governs the appraisal by the Commission of the so-called 'concentrations' (a term of art encompassing mostly mergers and acquisitions but also certain joint ventures having an effect in the market similar to a merger)[183] that have a 'Community Dimension'[184] for their compatibility with the common market.[185] A concentration significantly impeding effective competition, in the common market or in a substantial part thereof, is prohibited.[186] Concentrations encompass situations involving a change in control as a result of the merger of two previously independent undertakings or the acquisition by one or more undertakings of rights that confer on these undertakings the possibility of exercising decisive influence on another undertaking.[187] The EUMR allows for the finding of an economic unity in the latter scenario, where through the acquisition of rights the parent undertaking is conferred the possibility of exercising decisive influence over another undertaking (control being defined, for the purposes of EU merger control as 'the possibility of exercising a decisive influence').[188]

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[181] *Accounting Directive*, *supra* note 2, Article 22.2.

[182] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), at 1-22, 2004 O.J. (L24)1 [hereinafter *EU Merger Regulation*]. It should be noted that the notion of group is also relevant for the purposes of the application of the prohibition of anticompetitive agreements provided for in Article 101 TFEU, *inter alia*, in that pursuant to the 'single economic entity' doctrine, the agreements between two entities belonging to a single economic entity"(i.e., to the same group) cannot be held to infringe Article 101 TFEU (*see* Whish & Bailey, *supra* note 176, at 95). The classic example would be that of an agreement between a parent entity and a fully owned subsidiary (*see* Case 73/95, Viho v. Commission*,* 1996, E.C.R. I-5457, ¶ 36). The study of whether the concept of group has the same limits under Article 101 TFEU and under the EUMR is outside the scope of these pages.

[183] *See Id*. Article 3.

[184] Measured by reference to certain turnover thresholds (*see id.*, at Article 1).

[185] *See*, for more detail, *see* Whish & Bailey, *supra* note 176, at 877 and M. Rosenthal & S. Thomas, European Merger Control (Hart/Nomos. 2010), dealing with the notions of "concentration", control and, *de facto* control at pp. 24, 29 and 31, respectively.

[186] *EU Merger Regulation*, *supra* note 182, at Articles 2.2-3 and Recital 26.

[187] *Id.* Article 3.1-2, Recital 26.

[188] *Id*. Article 3(2).

Pursuant to EU Merger Control rules, that decisive influence, which a parent may acquire on a *de jure* or *de facto* basis, can be established on the basis of shareholdings, property rights, assets, and/or through contracts and shareholder agreements.[189] The scope of the group entity extends to cover undertakings that the parent has acquired positive control over by reason of having acquired the rights to determine the entity's strategic direction. The group also encompasses undertakings that the parent has acquired negative control over by reason of having acquired the right to block important strategic decisions to be followed by the subsidiary.[190]

An application by analogy of the notions of group and, 'control' under the EUMR, (in particular the notion of 'de facto control') to the concept of group under the Directive on non-financial disclosure, would result in disclosure obligations applying not only to business enterprises that exercise such dominant influence, but also to undertakings that, by reason of having certain rights (*e.g.*, through contract agreements and shareholder agreements), have the *possibility* to (*de facto*) exercise decisive influence over another undertaking. The literality of the Directive's conception of the group is restrictive, in that the group depends for its existence on the power of the parent to exercise *dominant* influence or control over an entity. Contrarily, the due diligence responsibility that applies to a parent of a group presumes that a parent can and, where necessary, should exercise control and/or influence over a subsidiary undertaking as necessary in order to prevent and mitigate its human rights risks.

Arguably, the objective of the Directive supports a wider conception of the group as a collection of individual enterprises that are engaged in the pursuit of an economic activity, which includes those undertakings that the parent has, or should have, control or influence over in order to prevent and mitigate adverse human rights impacts.

The Directive also confers on EU Member States the choice to require undertakings to draw up a consolidated management report if:

> (a) that undertaking (a parent undertaking) and another undertaking (the subsidiary undertaking) are managed on a unified basis by the parent undertaking.[191]

The Directive notes that 'Member States should be entitled to require that undertakings not subject to control, but which are managed on a unified basis or have a common administrative, managerial or supervisory body, be included in consolidated financial statements'.[192]

This approach to group entities gives weight to the unified management policy that links a parent to other undertakings within a group. The respective approach keeps with the human rights due diligence concept, in that it gives rise to a responsibility for a parent to have risk-management processes in place in order to prevent and mitigate adverse human rights impacts that it may be involved in through its relationships. Due diligence requirements thus give rise to requirements

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[189] Jones, *supra* note 174, footnote 70. *EU Merger Regulation*, *supra* note 182, Arts. 3.1(b) and 3.2. Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, Recital 16, 2008 (C 95) 1.

[190] Jones, *id*. at 311.

[191] *Accounting Directive*, *supra* note 2, Article 22.2.

[192] *Id.* Recital 31.

related to the management of its business relationships. Human rights due diligence requirements more generally are often aimed at promoting organisational corporate cultures in order to prevent adverse human rights impacts.[193] This concept of the group also may be too restrictive for the purpose of the Directives however, in that the group depends for its existence on whether the parent and other economic entities are managed on a unified basis.

The human rights due diligence concept seems to support a wider conception of the group as a collection of individual enterprises that are engaged in the pursuit of an economic activity and these undertakings are, or should be, linked through risk-management processes that are aimed at the prevention and mitigation of adverse human rights impacts.

These approaches to the group entity as articulated under Article 22.2 resonate better with the substance of the Directive, and the regulatory responsibility of business enterprises to conduct human rights due diligence, than the approach to group entities under Article 22.1 of the Directive.

Arguably, EU Member States in transposing the disclosure obligations to national law should make their determination of the approach to group entities on the basis of their consideration of the substance of the Directive and the human rights due diligence concept. The approach should ensure that the disclosure obligations apply to all types of group entities and extend to all human rights risks that a group entity may be involved in.

One should consider that human rights due diligence gives rise to obligations for all types of group entities, irrespective of their organisational structure, including the less integrated modern group entity that displays less hierarchical organisational structures. The management structures of these modern group entities are often premised on aspects of cultural control, common group policies and extensive communication.[194] Approaches to group entities that are based on a determination of certain types or degrees of control might escape these entities.

Undertakings should draw up a consolidated non-financial statement that presents a comprehensive picture of the human rights policies and due diligence processes of all their business relations in consolidation. These non-financial statements could then capture the human rights impacts that the parent undertaking and the subsidiary undertakings are involved in, including those that are caused by the undertakings themselves and those resulting from the activities of their business relations, in consolidation of the group.[195]

I argue in favour of the application of a common concept of the group to be applied throughout national disclosure obligations, not only for the purpose of delimiting the boundaries of the corporate group for the purpose of substantive disclosure, but also for delimiting the applicable scope of these requirements. This would ensure consistency between the different provisions in

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[193] De Schutter et al., *supra* note 169, § IV. 2.

[194] Eroglu, *supra* note 165, at 23.

[195] The Directive recognises this when noting that 'the scope of this Directive should be principles-based and should ensure that it is not possible for an undertaking to exclude itself from that scope by creating a group structure containing multiple layers of undertakings inside or outside the Union'. *Accounting Directive*, *supra* note 2, Recital 6.

the Directive. It may also increase the effectiveness of the Directive in regulating the transparency of undertakings in relation to human rights. This could potentially increase the relevance of the Directive in the strengthening of the legal framework supporting business respect for human rights.

As a consequence of the linkage between the human rights due diligence concept and the group concept, the Directive through the disclosure requirements may have regulatory effects by creating incentives for group entities to improve both their disclosure practices and their actual human rights due diligence. The Directive recognises that the responsibility of the parent undertakings extends beyond the human rights impacts that the undertaking itself causes, and includes also the impacts that result from the activities of other entities in the group and business relationships, provided that the undertaking contributes to or is directly linked to these impacts.[196] The Directive entails that parent companies should be concerned with the human rights policies and impacts of subsidiary undertakings in the group and the group's business relationships in practice. This also serves the aim of capturing the human rights risks that the group is involved in, irrespective of whether these are caused by the company itself or are result of the activities of a subsidiary entity or a business relationship. Where a parent company is directly linked to adverse human rights impacts through its operations and activities, i.e., its business relationships, services or products, those adverse impacts fall within its scope of responsibility.

The linkage between the human rights due diligence concept and the group concept is also of the essence where ensuring access to remedies is concerned. The UNGPs address the corporate group within the context of the 'third' (access to remedies) pillar. There is an international legal obligation for States to ensure that those affected by business-related human rights abuse have access to an effective remedy, at least when these abuses occurred in the territory and/or jurisdiction of the State.[197] An integral element of the duty to protect is that States should ensure that the domestic judicial mechanisms through which these abuses are addressed are effective, including by reducing relevant legal barriers that could lead to a denial of access to remedies.[198]

The UNGPs note that the way in which responsibilities are attributed among members of a corporate group under domestic and civil laws can erect legal barriers that prevent legitimate cases from being brought before a court. The UNGPs expressly refer to access to information and expertise as an example of a frequent imbalance between parties to a business and human rights claim that can give, create, or compound, legal barriers more generally.[199] States can rely on mandatory disclosure regulation as one means to address these informational imbalances between parties by requiring business enterprises to make publicly available internal information that is relevant for victims seeking redress for human rights abuses. The disclosure of information on the allocation of responsibilities within the corporate group seems especially

[196] *See Id*, Article 29a 1.(d).

[197] UNGPs, *supra* note 4, GP 25.

[198] *Id.* GP 26.

[199] *Id.* Commentary to GP 26.

relevant.[200] Transparency on the level of control or leverage that a business is required to exercise in order to meet its human rights due diligence responsibility might be sufficient to serve as a basis for liability. According to Backer, such a level of control may 'suggest a degree of intertwining sufficient to trigger the application of equitable considerations of joint effort and thus, potentially joint liability, under a broad reading of traditional municipal veil-piercing rules'.[201]

The links between mandatory disclosure and transnational supply chain litigation is the focus of the next section.

7.8 The Extraterritorial Dimension of the Directive: Disclosure on Respect for Human Rights in Corporate Supply Chains

7.8.1 The Extraterritorial Dimension of the Directive

The Directive provides in Article 19a(d) and Article 29a(d) that undertakings should include in their non-financial statement information on 'the principal risks related to those matters linked to the undertaking's [including, where applicable, the group to which the undertaking belongs] operations including, where relevant and proportionate, its business relationship, products or services which are likely to cause adverse impacts in those areas, and how the undertaking [including, where applicable the group to which the undertaking belongs] manages those risks'. Those undertaking subject to the disclose requirements should thus disclose on the 'principal' human rights risks that are linked to the individual undertaking's or group's operations by their business relationships, services or products. The Directive does not draw a distinction with regards the location of these 'principal' human rights risks within the EU or in a third State.

Apart from disclosing these principal risks, the undertaking must disclose how these are being managed. The Directive indicates in Recital 6 that the non-financial statement 'should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts'.[202] The requirements under Article 19a(d) and Article 29a(d) that companies disclose on how they manage their human rights risks should thus be contextualized in relation to the undertaking's or group's duty to disclose on their due diligence processes implemented.

As noted, the Directive does not indicate the geographical location of these human rights risks. Whether the impacts are located inside or outside of the jurisdiction of the EU Member State in

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[200] A Yilmaz Vastardis, *The Impact of enhanced corporate transparency on access to remedy for victims of corporate human rights abuses: Some reflections on the decision of the US Court in the Exxon Mobil case* (27 Aug, 2015), http://blogs.essex.ac.uk/hrc/2015/08/27/the-impact-of-enhanced-corporate-transparency-on-access-to-remedy-for-victims-of-corporate-human-rights-abuses-some-reflections-on-the-decision-of-the-us-court-in-the-exxon-mobil-case/

[201] Larry Catá Backer, *Rights and Accountability in Development ('Raid') v DAS AIR and Global Witness v Afrimex: Small Steps Towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 Melbourne Journal of International Law (2009).

[202] *Non-Financial Reporting Directive*, *supra* note 1, Recital 6.

which the company is incorporated, or within or outside the territory of the EU, appears not to be an issue for the applicability of the disclosure obligations. Purposive interpretation, with certain nuances outside the scope of these pages, is of paramount importance in the interpretation of EU law, including Secondary legislation such as the Directive is, by the CJEU. As noted by Professors Paul Craig and Gráinne de Búrca, 'the Court […] examines the whole context in which a particular provision is situated and gives the interpretation most likely to further what the Court considers that provision sought to achieve'.[203] According to consistent case-law of the CJEU, the scope of acts of Union institutions needs to be determined by taking into account their wording, context and objectives.[204] Moreover, where a provision of Union law is open to several interpretations, preference must be given to that interpretation which ensures the effectiveness (*effet utile*) of the provision in question.[205]

Hence and, consistent with EU case-law[206], an interpretation of the requirement set out in the Directive should take into account the context and the objectives pursued by this Directive. In this regard, undertakings should include, where 'relevant and proportionate', in their non-financial statement information about existing and potential adverse human rights impacts that are linked to its operations that occur outside the territory of the EU as well.

If the Directive were to be interpreted as drawing a distinction between the human rights impacts of companies within or outside the territory of the EU, then this would be contrary to the objective the Directive pursues in relation to human rights. It should be recalled that the objective of the Directive, as set out in Recital 21 is to 'increase the relevance, consistency and comparability of information disclosed by certain large undertakings and groups across the Union'.[207] Moreover, as can be gathered from Recital 3, such disclosure is meant to 'hel[p] the measuring, monitoring and managing of undertakings' performance and their impact on society'. As regards the extent of disclosure, according to Recital 5, in order for the purpose of the Directive to be achieved, the information included in the non-financial statement should, at a minimum, 'give a fair and comprehensive view' of the company and group's human rights 'policies, outcomes and risks'.[208]

If the company would not be required to, and therefore would not disclose on its human rights risks that are located outside the EU territory, this would suggest that the company does not have such risks, which would be inappropriate. An interpretation that would require business enterprises to report its human rights impacts that occur outside of the territory of the EU as well, and how it manages these seems necessary for the *effet utile* of the Directive. Apart from serving the *effet utile* of the Directive, a purposeful interpretation would be consistent with the expectations set out in the UNGPs, which companies may rely on to comply with the

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[203] *See* Craig & De Búrca, *supra* note 67, at 64. *See* further Hartley, *supra* note 67, at 72, 73., and Schütze, *supra* note 67, at 206-207.

[204] *See*, Case 280/04, Jyske Finans, 2005, E.C.R. I-10683, ¶¶ 31 - 44.

[205] *See*, Case 434/97, Commission v France, 2000, ECR I-1129, ¶ 21.

[206] Case 592/14, European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills, 2015 E.C.R. 081/10 [31].

[207] *Non-Financial Reporting Directive*, *supra* note 1, Recital 21.

[208] *Id.*

requirements. The UNGPs define human rights due diligence as a regulatory responsibility for business enterprises that transcends the territorial boundaries of a State and extends to the undertaking or group's business relationships, products and services and the human rights impacts linked thereto, anywhere in the world.

In order to ensure the effective application of the Directive in light of the objective that companies should provide a 'fair and comprehensive' view of their respect for human rights, the disclosure should thus include information on the companies or group's human rights policies, outcomes and risks, including the potential and actual human rights risks that are located outside the EU and how these are managed. A purposeful interpretation of the Directive in accordance with the aforementioned objective entails that the applicable scope of the disclosure requirements laid down in the Directive extends outside the EU.

The potential extension of the effects of the application of the Directive outside the EU would be consistent with a wider trend within EU law. As noted by Scott, 'extraterritoriality is a phenomenon that is both tolerated by the EU and that is increasingly practiced in its name'.[209] More precisely, commentators have noted that the CJEU has not flinched from adopting a purposeful interpretation and recognizing the extraterritorial applicability of certain EU Regulations, *inter alia*, in the area of welfare requirement for animals.

The CJEU delivered a preliminary ruling on 23 April 2015 in the case *Zuchtvieh-Expert GmbH v Stadt Kempten*[210], in which the court held that the requirements under Regulation No 1/2005 on the protection of animals during transport and related operations[211] were applicable outside the EU. The Court noted that Regulation No 1/2005 is based on Protocol (No 33) on protection and welfare of animals, which is annexed to the Treaty. The substance of this Protocol is to be found in Article 13 TFEU, which is a provision of general application of the TFEU treaty. Article 13 TFEU indicates that Community and the Member States, in formulating and implementing Community's policies on, *inter alia*, agriculture and transport, should have regard to the welfare requirements of animals. The Court also noted that the provisions of the Regulation should be interpreted and applied in accordance with the basic principle established in Recital 5 and 11 of the Regulation in question, according to which 'animals must not be transported in a way likely to cause injury or undue suffering to them, considering that, for reasons of animal welfare, the transport of animals over long journeys should be limited as far as possible'.[212]

The CJEU considered that Regulation No 1/2005 is applicable to all stages of a long journey for animals concerned that commences in the territory of the EU but ends outside that territory, including those stages of the journey that take place on the territory of one or more third countries. The Court furthermore considered that Article 14(1) of the Regulation should be

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209 Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 American Journal of Comparative Law 1 (2014). *See* further Note, *Developments in the Law of Extraterritoriality*, 124 Harvard Law Review 1226 (2011).

210 Case 424/13, Zuchtvieh-Export GmbH v Stadt Kempten, 2015 E.C.R. 259.

211 Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, 2005, O.J. (L 3) 1, at 1–44.

212 *Id*. ¶ 3

interpreted as meaning that an authority of the place of departure may grant acceptance of transport only if the journal log submitted to that authority is realistic and indicates that the provisions of the regulation will be complied with, 'including for the stages of the journey which are to take place in the territory of third countries'. The authority may require changes to those arrangements to ensure compliance with the provisions of the Regulation throughout the journey.[213]

In addition, the CJEU delivered a preliminary ruling regarding the scope of the prohibition of marketing laid down in provision 18(1)(b) of Regulation 1223/2009 on cosmetic products[214] (the 'Cosmetics Regulation'). This provision of the Cosmetics Regulation prohibits the marketing of products that incorporate ingredients that have undergone animal testing in third countries. The CJEU applied a purposive interpretation and held that this article must be interpreted as prohibiting the marketing of cosmetic products containing some ingredients that have been subject to animal testing outside the EU in order to meet the legislative requirement of third countries and to market the products in those countries.[215] The Court noted that, pursuant to case law, 'when a provision of EU law is interpreted, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part'.[216]

The aim of the Directive is to 'comprehensively harmonise the rules in the Community in order to achieve an internal market for cosmetic products while ensuring a high level of protection of human health.' The Court also noted that certain rules of the Regulation are intended to establish a level of animal protection in the cosmetic sector that exceeds that applicable in other sectors. In this light, the Court noted that article 18(1)(b) 'makes no distinction depending on where the animal testing at issue was carried out' and that '[t]he introduction, by interpretation, of such a distinction would be contrary to the objective relating to animal protection pursued by Regulation No 1223/2009 in general and by Article 18 in particular'.[217] The court held that allowing prohibited animal testing outside the EU would seriously compromise the attainment of the objective of the Regulation to actively promote the use of non-animal alternative methods to ensure the safety of products in the cosmetics sector.

7.8.2 The Scope of the Disclosure Requirements

The exact scope of the requirements to disclose on human rights risks laid down in Article 19a(d) and Article 29a(d) is not well-defined. However, such scope is important to determine what information companies should include in their non-financial statements. Undertakings may be exposed to legal liability under national law in case they failed to provide this information. The Article indicates that business enterprises should disclose their 'principal' risks and the need to

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213 *Id.* ¶ 56.

214 Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (Text with EEA relevance), O.J. (L 342), 59.

215 Case 592/14, European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills, 2015 E.C.R. 081/10.

216 *Id.* ¶ 31.

217 *Id.* ¶ 41.

disclose on the adverse human rights impacts that are linked to an undertaking's relationships that are 'relevant and proportionate'.[218] The Directive adopts an approach to delimiting the scope of the disclosure obligations, which, as outlined below, aligns with that of the UNGPs, by focusing disclosure on information about matters that pose significant human rights risks.

The UNGPs provide some guidance, but also are not unambiguous about the point where the due diligence responsibility of business enterprises ends. The SRSG has noted more generally that the scope of a company's responsibility to respect human rights is 'defined by the actual and potential human rights impacts generated through a company's own business activities and through its relationships with other parties, such as business partners, entities in its value chain, other non-State actors and State agents'.[219] The commentary to UNGP 17 recognizes that it may be 'unreasonably difficult' for business enterprises with complex supply chains involving a large number of entities to conduct human rights due diligence for all these entities.[220] In order to ensure that human rights due diligence does not impose a too heavy burden on companies, business enterprises 'should identify general areas where the risk of adverse human rights impact is most significant […] and prioritise these for human rights due diligence'.[221]

Human rights issues thus should be prioritised in accordance with the significance of the adverse human rights risks of the company. Accordingly, the duty to disclose in the context of supply chains entails a focus on human rights issues or topics. The relevance of these human rights issues must be determined according to the issues that pose the most significant risks of adverse human rights impacts. Accordingly, it follows that the responsibility to disclose in the context of supply chains, in terms of content disclosure, should be determined in light of the nature and significance of potential adverse human rights impacts.

Recital 8 of the Directive stipulates that companies must disclose on matters that are 'most likely' to bring about the materialisation or actual occurrence of 'principal' risks. The Directive aligns with the UNGPs when setting the condition that whether risks reach the threshold of 'principal´ risks and thus should be disclosed in the non-financial statement, depends on the severity of these impacts, which relates to their scale and gravity:

> 'The undertakings which are subject to this Directive should provide adequate information in relation to matters that stand out as being most likely to bring about the materialisation of principal risks of severe impacts, along with those that have already materialised. The severity of such impacts should be judged by their scale and gravity. The risks of adverse impact may stem from the undertaking's own activities or may be linked to its operations, and, where relevant and proportionate, its products, services and business relationships, including its supply and subcontracting chains'.

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218 *Non-Financial Reporting Directive*, *supra* note 1, Art. 19a. 1(d).

219 Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and human rights: further steps toward the operationalisation of the "protect, respect and remedy" framework, § 58, U.N. doc. A/HRC/14/27 (9 Apr., 2010) (by John Ruggie).

220 *Id*. Commentary to GP 17.

221 *Id*.

If the formulations of 'relevant and proportionate' would be interpreted in conformity with the concepts of the UNGPs, assessments of what would meet the threshold of 'relevant and proportionate' would be based on human rights. What counts as 'relevant' is information that reflects the human rights risks that arise through business relations and that meet a minimum threshold of 'severity' and 'significance'. The reference to the 'principal risks' suggests that, if such human rights risks exist, business enterprises must prioritise and disclose information that is *most* significant. Important is the target group, in that information must be judged based on its significance to right-holders. That what counts as 'relevant' is information on principal risks that have materialised and the human rights issues that are most likely to materialise into principal human rights risks.

7.8.3 Extraterritorial (indirect) Regulatory Effects

As a consequence of the disclosure requirement being construed on the due diligence concept and the scope of application extending to operations and adverse human rights impacts irrespective of whether these occurred at home or abroad, the Directive takes on potential *extraterritorial* (indirect) regulatory effects. This is important because the legal responsibilities of business enterprises for human rights often are delimited by national boundaries. The mismatch between the national reach of State legal systems and the activities of business enterprises that reach transnationally and are subject to the regulation of more than one jurisdiction is a well-known regulatory challenge in the area of business and human rights.[222] The extraterritorial indirect regulatory effects of the Directive can have positive impacts on the human rights performance of individual undertakings and groups. The Directive provides a regulatory response to resolving supply chain challenges that EU businesses are facing in their operations and value chains throughout the EU and third countries.[223]

The parent undertaking that is subject to the Directive must report on all operations and relationships of undertakings within the group, irrespective of geographical location. Consequently, a parent entity must not only consider their own activities, operations and human rights impacts, but also subsidiary entities and business relationships connected to its activities. The Directive in and by itself does not require that undertakings actually exercise due diligence to manage the human rights risks linked to its operations. It merely requires the disclosure of their policies and human rights due diligence or, in case the undertaking does not pursue one, to provide a clear and reasoned explanation for why this is the case.[224] The requirements to disclose human rights nevertheless confirms the existence of and expectation that companies should have a minimum level of understanding and take action as appropriate to its circumstances to manage the human rights risks that are linked to the company's or group's operations through its business relationships.

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[222] Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation,* 22 Business Ethics Quarterly 145, 145 (2012).

[223] European Commission, Responsible Supply Chain Management: Potential Success Factors and Challenges for Addressing Prevailing Human Rights and other CSR issues in Supply Chains of EU-based Companies, 88 (2011).

[224] *Non-Financial Reporting Directive*, *supra* note 1, Art. 19a.2., Art. 29a.2.

The Directive recognises that the legal duty of undertakings to disclose reaches the company's operations and the human rights risks linked thereto, irrespective of whether these operations and risks are located at home or abroad. The process of disclosure potentially promotes internal awareness and drives companies to act, especially if the parent conducts enquiries in order to obtain this minimum level of information. The public disclosure of information may expose the company to external pressure and costs may be inflicted on the company where stakeholders decide on the basis of the company's performance and impacts. In this respect, the disclosure requirements may have the effect in practice of encouraging undertakings and groups to assess and regulate the activities of subsidiary entities or other business relationships down their supply and sub-contracting chains to know the potential and actual human rights risks in which they may be involved in order to disclose these risks and how they manage these risks.

7.9 Legal Implications of Mandatory Disclosure on Due Diligence

The Directive in and by itself does not create any legal consequences for companies that do not abide by the reporting requirements. The Directive confers on EU Member States the obligation to ensure that appropriate liability rules are in place for the purpose of liability for the drawing up and publishing of, *inter alia*, the management reports in accordance with the Directive. There are other legal implications to the mandatory disclosure requirement that may seem less obvious. The mandatory disclosure of business enterprises on human rights due diligence may expose companies to increased liability risks under other areas of law. A company that has publicly misrepresented its human rights due diligence may be exposed to liability risks when that fact becomes known, for instance.[225] The disclosed information may expose business enterprises to greater liability risks under other sources of national and EU law, *inter alia*, the law of negligence and company law. The following scenarios are explored further below:

a) The disclosure indicates that a company has knowledge about potential human rights violations that it may contribute to, or may be involved through its business relationships and fails to respond by taking appropriate measures.[226] The disclosed information may be used as evidence in a legal claim against a company.

b) The disclosed information may be relied on to evidence a breach of director's duties, as a result of which a director(s) may incur legal liability in certain circumstances.[227] Shareholders may rely on specific information on human rights due diligence disclosed in a non-financial statement in order to discharge their stewardship role and hold directors to account for acting in breach of their directors' duties.

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[225] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework*, § 82, U.N. doc. A/HRC/11/13 (April 22, 2009) (by John Ruggie). An example is the case *Kasky v Nike*, which concerned a complaint brought by Mike Kasky, an anti-sweatshop activists, against Nike in 1998 for unfair and deceptive practices under California's Unfair Competition Law and False Advertising Law. Nike was accused of having made 'false statements and/or material omission of fact' related to the working conditions in its overseas supplier factory. After an unsuccessful attempt by Nike to have the claims dismissed on the basis of the proceedings amounting to a violation of the US Constitution's First Amendment guarantee of freedom of speech, the parties to the case reached a settlement in 2003.

[226] *Id.* § 82.

[227] IHBR, State of Play Human Rights in the Political Economy of States: Avenues for Application, 26 (2014).

The aim of this section is to identify possible legal implications of mandatory disclosure on human rights due diligence. The discussion takes into account other laws that set out requirements for mandatory disclosure of human rights due diligence, and that these can have similar legal implications. A brief analysis follows of two supply chain transparency legislations that are aimed at enhancing company transparency and disclosure on slavery and human trafficking-related risks in a company's business and supply chains, UK Modern Slavery Act of 2015[228] and the California Supply Chain Act.[229]

The Directive introduced general requirements for the disclosure of information on human rights by certain large companies, which are applicable irrespective of the sector in which these companies operate. The EU has also adopted disclosure requirements for companies that are active in the extractive industry or the logging of primary forests, which are furthermore combined with due diligence requirements.[230] Such disclosure requirements have not been extended to other sectors,[231] though the EU Commission has recently issued a political understanding and declaration indicating that it will consider mandatory due diligence in the minerals sector, however, combined with voluntary disclosure.[232] EU Member States may consider introducing more specific mandatory disclosure obligations on human rights due

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[228] The Modern Slavery Act, 2015 (c. 30) (U.K.).

[229] Senate Bill No. 657, CHAPTER 556 An act to add Section 1714.43 to the Civil Code, and to add Section 19547.5 to the Revenue and Taxation Code, relating to human trafficking.

[230] The EU Accountancy Directive notes:

> In order to provide for enhanced transparency of payments made to governments, large undertakings and public-interest entities which are active in the extractive industry or logging of primary forests (2) should disclose material payments made to governments in the countries in which they operate in a separate report, on an annual basis. Such undertakings are active in countries rich in natural resources, in particular minerals, oil, natural gas and primary forests. The report should include types of payments comparable to those disclosed by an undertaking participating in the Extractive Industries Transparency Initiative (EITI). The initiative is also complementary to the Forest Law Enforcement, Governance and Trade Action Plan of the European Union (EU FLEGT) and the provisions of Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (3), which require traders of timber products to exercise due diligence in order to prevent illegal wood from entering the Union market.

Accounting Directive, supra note 2, Recital 44. Also *see*, Directive 2013/50/EU, of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC, Recital 7, 2013 O.J. (L 294) 13. Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, *Id*. Recital 15-17. The due diligence requirements introduced by the EU Timber Regulation do not cohere with the UNGPs 'as regards the substance or normative sources for the exercise of due diligence'. K Buhmann, *Defying territorial limitations: regulating business conduct extraterritorially through establishing obligations, in* EU law and national law in Human Rights and Business: Direct Corporate Accountability for Human Rights, 296 (Jernej Letnar Černič & Tara Van Ho eds., 2015).

[231] Benedek, W. et al., Improving EU Engagement with Non-State Actors, FRAME Deliverable 7.2, at 69-71 (Mar. 31, 2015) , available at http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf.

[232] For further details, *see* section 8.7.2.

diligence that are tailored to certain issues or sectors.[233] The NAPs indicate that States have already adopted such specific mandatory disclosure requirements. In addition to general or specific disclosure requirements, EU Member States could consider adopting regulatory measures that enable stakeholders to obtain the information they need to hold business enterprises to account, and additional guidance.[234]

7.9.1 The UK Modern Slavery Act 2015[235]

The UK Modern Slavery Act 2015 requires commercial organisations that supply goods and services to prepare an annual public slavery and human trafficking statement. This statement should describe the steps that the organisation has taken during the preceding financial year to ensure there is no slavery and human rights trafficking in its organisation or supply chains, or that it has taken no such steps.[236] The 'commercial organisation' is defined broadly for the purpose of the Act, encompassing within its scope partnerships and corporate bodies that carry on any part of their business in the UK.[237] The Act applies to commercial organisations that have a total turnover of at least £36 million,[238] which in practice amounts to an estimated 12.000 active UK companies.[239] The statement should be approved and signed by the senior management of the company, which may be a director or an equivalent, depending on whether the organisation is a corporate or a limited liability partnership. The business must publish the statement on the website of the organisation and a link to this statement on a prominent place on the website's home page. If the business does not have a website, it must provide a copy of the statement upon written request within 30 days upon receipt of this request.[240]

This Act provides a non-exhaustive list of issues that a company can include in the statement:

(a) the organisation's structure, its business and its supply chains;

(b) its policies in relation to slavery and human trafficking;

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233 European Commission, *supra* note 223, at 89.

234 *See* Steering Committee for Human Rights, Explanatory memorandum to Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, § 36, 1249th meeting, CM(2016)18-addfinal (2 Mar., 2016).

235 The Modern Slavery Act, 2015, (c. 30) (U.K).

236 *Id.* (c. 30) S 54 (U.K.).

237 *Id.* (c. 30) S 54(12) (U.K.).

238 *Id.* (c. 30) S 54(2)(b) (U.K.). *See* also, Altschuller, *U.K. Modern Slavery Act: New Disclosure Requirements for Companies Operating in the United Kingdom* (18 August, 2015), http://www.csrandthelaw.com/2015/08/18/u-k-modern-slavery-act-new-disclosure-requirements-for-companies-operating-in-the-united-kingdom/.

239 Shift, Mapping the Provisions of the Modern Slavery Act Against the Expectations of the UN Guiding Principles on Business and Human Rights (2015), http://shiftproject.org/sites/default/files/Shift_Mapping%20Modern%20Slavery%20Act%20Against%20UNGPs%20Note_July2015.pdf.

240 The Modern Slavery Act, 2015 (c. 30) S 54(7) (U.K.).

(c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

(d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;

(e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and

(f) the training about slavery and human trafficking available to its staff.

As is the case for the EU Directive on non-financial disclosure, this Act requires business enterprises to make publicly available information that reflects the expectations set out in the UNGPs, as applicable in the specific context of slavery and human trafficking-related risks in a company's business and supply chains.[241]

7.9.2 California's Transparency in Supply Chain Act of 2010

Another regulatory initiative that sets disclosure requirements on risk-based due diligence in supply chains is the California Transparency in Supply Chains Act of 2010, which went into effect in 2012.[242] This Act requires retail sellers and manufacturers to disclose their efforts, if any, to eradicate human trafficking and slavery from their direct product supply chains. The applicable scope of the Act is limited to sellers and manufacturers doing business in the state of California. Only businesses that have annual worldwide gross receipts of $100 million or more are subject to the Act. The Act seeks to ensure that consumers have the information to distinguish between companies on the merits of their efforts to supply products that are not tainted by slavery and trafficking and, through their purchasing decisions, to exercise leverage over companies to assume responsibility for managing the slavery- and trafficking-related risks in their product supply chains. The companies must disclose by means of a post on their Internet website specifying '[a] conspicuous and easily understood link to the required information placed on the business's homepage'. Alternatively, if the business does not have a website, the company must provide the written disclosure upon request by a consumer, within 30 days of having received the request.

The companies that are subject to the Act must disclose at minimum to what extent, if any, the company verifies its product supply chains to evaluate and address risks of human rights trafficking and slavery and the nature of these risks. If a third party did not carry out this verification, the company should disclose this. The companies should also provide information on the supplier audits it conducts to evaluate compliance by these suppliers to the company's standards for trafficking and slavery in supply chains. It should be specified if the audit were not independent and unannounced. The Act requires companies to disclose on the certification by

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[241] *See* Shift, *supra* note 239.

[242] Senate Bill No. 657CHAPTER 556 An act to add Section 1714.43 to the Civil Code, and to add Section 19547.5 to the Revenue and Taxation Code, relating to human trafficking.

direct suppliers whether the materials that are incorporated into the product comply with laws of the country in which they are doing business. In addition, the disclosure should cover information on internal accountability standards and procedures for employees or contractors and training of employees and management on human trafficking and slavery, in particular with respect to mitigating risks within the supply chain of products.

7.9.3 Mandatory Disclosure on Human Rights Due Diligence and Transnational Supply Chain Cases

The EU Directive on non-financial disclosure and the afore-mentioned supply chain transparency legislations in the UK and US set out the requirement that business enterprises disclose their level of understanding about the human rights risks in their supply chains. It is not inconceivable that the information about human rights policies and due diligence processes that business enterprises disclose may be used as a basis for initiating, or may be given weight as evidence in transnational supply chain litigation. The information disclosed may serve as evidence of 'knowledge' that is constitutive of 'aiding and abetting' human rights violations in their supply chains and, thus, may trigger the application of potential legal liability for companies. An example of a case illustrating this connection between transparency legislations and allegations of knowingly 'aiding and abetting' human rights violations is *Hershey*.

In *Hershey*, a US court denied a motion to dismiss a complaint by a stockholder of the Hershey Company ('Hershey'), the largest chocolate producer in the US, seeking an order to permit the inspection of certain books and records of Hershey under section 220 of Delaware corporate law. The purpose of the demand was the investigation of mismanagement or wrongdoing by Hershey's corporate officers or directors, in relation to violations of laws related to slavery and human trafficking. The plaintiffs contended that Hershey may be complicit in violations of federal, state or international law by purchasing large amounts of cocoa and cocoa-related products from Ghana and the Ivory Coast, where the use of illegal child labour on cocoa producing farms is pervasive. Relevant facts of the case were Hershey's large market share in the US, the company's long-standing awareness of the problem, the fact the company was unable to represent that it only sourced certified cocoa from these countries, and Hershey's undertaking to do so by 2020. The court held that it was reasonable to infer from these facts that there was a probability that at least some of Hershey's products were tainted.

The plaintiffs contended violations of the national laws of these countries prohibiting the use of exploitive child labour and human trafficking. They also raised the US Trafficking Victims Protection and Reauthorization Act of 2008 (the 'VPRA'), which makes it a crime to 'knowingly benefit [...], financially, or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining [of] labor or services' by means of force, threats or intimidation, and also includes a duty to inform. The plaintiffs also contended that Hershey had violated the California Transparency Supply Chain Act of 2010 by making misleading disclosures about the true effectiveness of its supplier code of conduct in addressing illegal child labour. The court held that the evidence provided a credible basis from which the court could reasonably infer possible violations of law that Hershey may be involved in, that qualified as wrongdoing or mismanagement.

The court noted that Hershey's sustainability efforts (monitoring suppliers, and programs, and ending supplier contracts) supported the finding that 'Hershey's has deep involvement in and control over its supply chain'. The court thereby also gave consideration to Hershey's market-leading status and dominant market share.[243] The court held that 'Hershey's relationships with its suppliers could support a finding of the use of labor for an aiding and abetting claim'.[244]

The court held that Hershey's cocoa sustainability efforts support the idea that Hershey was related to, and had knowledge about, instances of child trafficking on cocoa farms in Ghana, from which it can be inferred that Hershey may have acted in breach of the VPRA. More specifically, the court notes that 'one possible inference from the complaint is that Hershey's cocoa sustainability efforts, which admittedly and necessarily put Hershey in contact with farmers in West Africa, results in Hershey knowing of instances involving the use of trafficked children on cocoa farms in Ghana that would have triggered the duty to inform'.[245]

The non- financial information disclosed by a company also may serve as evidence of the company having assumed a 'legal duty of care' in relation to the activities of a subsidiary entity or business relationship. As examined in greater detail in Chapter 6, the three-stage test developed in Caparo industries plc v Dickman that has been applied in the UK in order to determine whether a legal duty of care attached to a company requires: (a) the foreseeability of the harm; (b) the existence of a relationship characterized by law as one of 'proximity' or 'neighborhood' between the party owing the duty and the party to whom the duty is owed; and (c) whether the situation is one in which it is fair, just or reasonable that the law should impose a duty of care.[246] The disclosure requirements expect companies to disclose information that might expose a company to increased liability risks, more specifically where this information indicates that the parent company had 'superior' knowledge about relevant aspects of the industry or some operational control over a subsidiary entity in the particular circumstances of the case. As noted by Zerk, 'information on intra-group management systems, organizational structures and lines of communication are all potentially relevant.'[247]

Access to information on business performance in relation to respect for human rights can help individuals to overcome the legal obstacles that the evidentiary duties currently poses to individuals in their efforts to obtain civil remedies before a national court in direct tort liability cases. To be noted is the commentary to UNGP 3, indicating that States should encourage, and where appropriate require business enterprises to communicate on their respect for human rights, for instance through 'provisions to give weight to such self-reporting in the event of any judicial or administrative proceedings'.[248] The responses of companies to the use of disclosure in litigation and extent to which substantive disclosure on human rights due diligence will be given

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[243] Hershey, C.A. No. 7996-ML (Del. Ch. November 8, 2013), at 9-10.

[244] *Id*. at 20

[245] *Id*. at 19.

[246] *Id.* at 32.

[247] Jennifer A. Zerk, *Legal Aspects of corporate Responsibility Reporting: Panacea, Polyfilla or Pandora's Box*, 3 New Academy Review 3, 22 (2004).

[248] UNGPs, *supra* note 4, Commentary to GP 3.

weight in court proceedings remains to be seen. As noted previously, there are concerns that tensions between company's objective of mitigating legal liability risks and undertaking due diligence to manage risks to human rights might instill a sense of caution within companies as to what information to include in their disclosures.[249]

7.9.3.1 A Rebuttable Presumption of a Legal Duty of Human Rights Due Diligence and the EU Directive on Non-Financial Disclosure

In the previous chapter, I set out the case for a legal duty of human rights due diligence concept as a standard of negligence under national tort law. More specifically, I proposed the creation of a legal duty of human rights due diligence that would impose strict liability on a company for causing adverse human rights impacts and negligence liability for a company's involvement in the human rights impacts resulting from the activities of a business relationship through either contribution or direct linkage. The standard of negligence liability would entail a rebuttable presumption and a company would be able to present a convincing defense by providing credible evidence of human rights due diligence.

Arguably, the creation of this rebuttable presumption of a legal duty of human rights due diligence could strengthen mandatory disclosure regimes. The creation of a legal duty of human rights due diligence could address the tensions and counterbalance the disincentives that currently have an adverse effect on the disclosure practices of business enterprises, for at least two reasons.

First, the internal information that a business enterprise discloses in its annual report could be a source of evidence from which the court could infer that the company has not acted in breach of the proposed legal duty of human rights due diligence.

Second, there would be greater consequences for a company that would provide in its non-financial statement an uninformative explanation, or an explanation merely indicating that it does not have human rights processes or policies in place. If a legal duty of human rights due diligence were to be created, this would entail that human rights due diligence is the legal standard and that the company should have a certain level of understanding about its human rights risks resulting from the actions of its business relationships. A court could imply from the statement that the company does not have the level of understanding it should have.

Consequently, if the disclosure by a company in its non-financial statement could serve as evidence from which a court could reasonably infer unawareness on the part of the company, this could expose the company to greater liability risks and should incentivize active knowledge acquisition on the part of such a company in order to obtain a certain legal of awareness about its own actions and those of its subsidiary entities.

The proposed rebuttable presumption of a legal duty of human rights furthermore would entail a reversed burden of proof. Nevertheless, legal and practical obstacles would continue to exist in the absence of national laws that ensure companies publicly disclose information on their human

[249] Gibson Dunn 2015 Year-end Transnational Litigation Update (Feb. 16, 2016), http://www.gibsondunn.com/publications/documents/2015-Year-End-Transnational-Litigation-Update.pdf.

rights impacts and due diligence as required by the human rights due diligence concept under the UNGPs, or that enable individuals to obtain such information on request.

7.9.4 Mandatory Disclosure and the Link to Director's Duties

A duty to act in the interest of the company may imply that companies must give consideration to the human rights risks of the company, because not doing so may entail legal or reputational risks for the company. The information that companies disclose in their non-financial statement may be relied on to evidence a breach of director's duties, as a result of which a director(s) may incur legal liability in certain circumstances.[250] Shareholders may rely on specific information on human rights due diligence disclosed in a non-financial statement in order to discharge their stewardship role and hold directors to account for acting in breach of their directors' duties.

7.9.4.1 UK Companies Act

The UK Companies Act 2006 requires directors to act so as to promote the success of the company. More specifically, a director should act 'in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole'.[251] This duty corresponds to acting in the best interests of the company, to which the director owes this duty. The UK Companies Act 2006 endorses an enlightened shareholder approach. In acting in the best interest of the company, the company must give proper consideration to wider interests, which are reflected in the matters that are listed under section 172 of the Company Act. This list indicates that directors should have regard to, inter alia: (i) 'the interests of the company's employees'; (ii) 'the need to foster the company's business relationships with suppliers, customers and others' and, in particular, (iii) 'the impact of the company's operations on the community and the environment'.

The factor last mentioned, 'the impact of the company's operations on the community and the environment' has been interpreted as being capable of including human rights considerations.[252] A reading of this provision of section 172 of the UK Companies Act 2006 suggests that 'to have regard to' these factors entails that 'directors must give proper consideration to these factors, but does not mean that directors have to give primacy to, or cannot act consistently with, these non-shareholder interests' and that 'the impact of decisions on the company's long-term interests continues to be key'.[253]

There is a special mandatory disclosure regime regulating directors' duties in the UK. Directors may incur liability for non-compliance with the disclosure requirements or for false or misleading statements that are included in these reports.

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[250] IHBR, *supra* note 127, at 26.

[251] The UK Companies Act 2006, (c. 46) S 172(1) (U.K.).

[252] Muchlinski, *supra* note 222, at 159.

[253] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum: Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special Representative, 18, A/HRC/17/31/Add.2. (23 May, 2011) (by John Ruggie).

In the UK, this disclosure is regulated by the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, which was integrated into the UK Companies Act 2006, and entered into force on 1 October 2013.[254] This regulation introduced legal requirements for directors of a parent company to disclose each financial year.[255] This Act imposes a duty on directors to produce annual accounts of the individual company and of the undertakings included in the company group through a consolidated report, a so-called 'group strategic report'.[256] These accounts should give 'a true and fair view of the assets, liabilities, financial position and profit or loss' of these companies.[257] The accounts and reports must be audited.[258] The auditor should in carrying out this function have regard to the duty of directors not to approve accounts unless they give 'a true and fair view'. The UK Companies Act 2006 imposes different disclosure requirements on different kinds of companies.[259] [260] An exemption may apply to companies that belong to a small companies regime for the purpose of the Regulation.[261]

The requirements are shareholder-oriented in that they are designed and intended to enhance the disclosure of information that is material to 'the members of the company'.[262] The purpose of the requirements is, as stipulated in section 414C, to ensure that members of the company have sufficient information to understand and to assess the performance of directors in discharging their duty under section 172 (duty to promote the success of the company). The content of this disclosure, which must include, as stipulated in section 414C, an analysis of the performance, development and position of the company is responsive to this purpose.

While the disclosure is most likely to relate to the economic affairs of the company, it may also require the disclosure of the performance of the company in relation to human rights. The scope of disclosure is defined by the scope of the directors' duty to promote the success of the company, which, as elaborated above, is capable of including human rights considerations.[263] The disclosure requirements placed on quoted companies, which are more extensive, explicitly refer to human rights. Quoted companies[264] must, as stipulated in section 414C, disclose on

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254 The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, available at http://www.legislation.gov.uk/ukdsi/2013/9780111 540169/contents

255 The UK Companies Act 2006, (c. 46) Art. 414 (U.K.).

256 *Id.* S 393 (U.K.).

257 The UK Companies Act 2006, (c.46) S 393 (U.K.)

258 *Id.*

259 *Id.* Parts 15 - 16 (U.K.).

260 For instance, the reporting obligations of companies that belong to the small companies regime are less excessive that those fr companies that fall outside this regime, in particular quoted companies. The UK Companies Act 2006, (c. 46) S 381 - 385 (U.K.). Gullifer & Payne, *supra* note 41, at 544.

261 The UK Companies Act 2006 (Strategic Report and Directors Report) Regulations 2013, Art. 414B, available at http://www.legislation.gov.uk/ukdsi/2013/9780111 540169/contents.

262 Gullifer & Payne, *supra* note 41, at 548.

263 Muchlinski, *supra* note 222, at 159.

264 For the purpose of the UK Companies Act 2006, a 'quoted company' is a company whose equity share capital is officially listed in an EEA State or admitted to dealing on either the New York Stock Exchange or the Nasdaq exchange. The UK Companies Act 2006 (c. 46) Art. 385(1) (U.K.).

human rights issues and describe the policies and their effectiveness related to these issues.[265] They must rely thereto on the analysis of key performance indicators relating to human rights. The requirement to disclosure on human rights issues and policies, and the effectiveness of these policies applies 'to the extent necessary for an understanding of the development, performance or position of the company's business'.[266]

There is considerable discretion for companies to determine when human rights impacts reach the threshold that reporting on these impacts becomes 'necessary'. This threshold is not clearly defined. If the strategic report does not contain information on human rights, there must be a statement indicating this is the case. No obligation is imposed on quoted companies to obtain and provide this information, or to give an explanation for why this information is missing. The regulation thus follows a model of reporting that is less stringent than the 'comply or explain' model.

The disclosure in the strategic report is subject to similar verification requirements as other financial reporting. The strategic report must be audited,[267] although exceptions from the audit or the requirements apply for certain companies. The audit report should state whether the strategic report gives a true and fair view and has been prepared in accordance with the relevant financial reporting framework.[268] The audits are also shareholder-oriented in that the audit report is addressed to the members of the company. Additionally, the audit report must reflect on the consistency between the information in the strategic report and the company's annual account.[269]

The Regulation provides a liability regime for failure to submit the required report, for non-compliance with the applicable requirements for reporting more generally, and for false or misleading statements.[270] Liability may arise for every director in case no strategic report has been filed for the respective financial year, unless the director took all reasonable steps for securing compliance with this requirement.[271] The director that has acted in breach of this duty has committed an offence and is liable to pay a fine.

If the group strategic report has been prepared and approved by the board of directors and signed on its behalf, but does not comply with the requirements of the Regulation, each director of the company may incur liability. Liability of directors can arise for having approved the strategic report knowing that the report did not comply, or was reckless as to whether it complied, and having omitted to take reasonable steps to secure compliance with those requirements, or to

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265 *Id.* (c. 46) S 414C(7)(b) (U.K.)**.**

266 *Id.* (c. 46) S 414C (5) - (7) (U.K.)

267 The UK Companies Act 2006 (c. 46) S 495 (U.K.) as amended by the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, Consequential amendment 18, available at http://www.legislation.gov.uk/ukdsi/2013/9780111 540169/contents.

268 The UK Companies Act 2006 (c. 46) S 495 (U.K.)

269 The UK Companies Act 2006 (c. 46) S 495 (U.K.) as amended by The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, Consequential amendment 21, available at http://www.legislation.gov.uk/ukdsi/2013/9780111 540169/contents.

270 *Id*. Consequential amendment 14.

271 *Id*. Art. 414A (5).

prevent the report from being approved.[272] This breach of directors' duties also amounts to an offence, liability for which may be imposed on each of the directors in the form of a fine.[273]

The director may incur liability if the director's report contains a false statement to the auditor and the director (i) 'knew that the statement was false, or was reckless as to whether it was false', and (ii) 'failed to take reasonable steps to prevent the report from being approved'. A director that is found to have committed this offence may be liable for imprisonment or a fine.[274]

The Regulation also provides a liability regime for false or misleading statements made in the strategic report. A director may be held liable to compensate for any loss suffered as a result of any untrue or misleading statement in the strategic report or any omission from the report. Directors may also incur liability for fraudulent behaviour in regard to statements in the strategic report that directors knew to be untrue or misleading, or omissions that directors knew to be dishonest concealment of material fact.[275]

To the extent that disclosure on human rights is required, a director that acts in breach of their duties by failure to comply with this disclosure requirement may be subject to derivative action by shareholders in certain circumstances. The provisions governing this derivative action are set out in Part 11 of the UK Companies Act. A derivative claim entails that a shareholder brings proceedings against a director or another person in respect of a cause of action vested in the company in order to seek relief on behalf of the company. A two-stage procedure applies for the court to determine whether to allow a derivative claim to proceed. While shareholders make a prima facie case for obtaining permission in the first phase, the court reviews evidence and, upon hearing the claim, may grant permission for the claim to continue in the second phase.[276] A court may refuse the continuation of the derivative claim where the person acting in accordance with the duty of a director to promote the success of the company would not seek to continue the claim.

The enlightened shareholder management approach permits directors to have regard for human rights impacts as part of their duty to act in the promotion of the success of the company. This duty is primarily owed to the members of the company, rather than society at large. Directors can give consideration to wider interests in their decision-making, provided that doing so is in the best interests of the company. That human rights is amongst these wider interests that directors should consider is not expressly mentioned, but can, and arguably should, be implied from the list of matters that directors should have regard for in their decision-making.[277] The UK Companies Act 2006 falls short in imposing a clear obligation on directors have regard to human rights, however.

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[272] The UK Companies Act 2006 (c. 46) S 414D (2)-(3) (U.K.)

[273] The UK Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, Art. 414D, available at http://www.legislation.gov.uk/ukdsi/2013/9780111 540169/contents.

[274] *Id.* Art. 418.

[275] *Id.* Consequential amendment 17.

[276] The UK Companies Act 2006 (c. 46) S 260-269 (U.K.).

[277] Muchlinski, *supra* note 222, at 160.

There may be a corresponding duty to disclose on human rights in the strategic report. While directors of quoted companies are expressly required to disclose on human rights, this obligation stops short of an obligation to provide substantive information. Its requirement can be easily met, however, by simply stating that the strategic report does not contain information on human rights. These provisions decrease the exposure of directors to liability in relation to their duty to disclose. Consequently, the regulation and liability regime on disclosure appear to have a limited potential effect in encouraging directors to consider respect for human rights in their decision-making.

7.10 Conclusion

The Directive, in short, intends to serve as a regulatory tool that can induce business reporting and performance that corresponds with the expectations of the UNGPs.

The focus of the preceding pages was on the potential of the Directive to affect transparency and reporting on human rights by EU businesses in practice and ensure that business enterprises disclose information to which stakeholders can resort to in order to meaningfully assess human rights-compliant behaviour against internationally recognized standards, and the UNGPs in particular.[278] More precisely, this chapter explored the connections between the approaches of the Directive to defining the scope of the application, obligation and required substance and the human rights due diligence concept. The previous analysis suggests that the adoption by the EU of disclosure requirements for certain companies on human rights due diligence, while being a welcome development, nonetheless provides only a partial response to the UNGPs, and in certain aspects, may even restrict EU Member States in their implementation of the UNGPs.

The chapter analysed the so-called 'indirect' and ' direct' of the Directive. It is argued that the Directive is unlikely to acquire direct effect because its provisions on mandatory disclosure are unlikely to be considered by the CJEU as 'clear and unconditional and not contingent on any discretionary implementing measure'.[279] Perhaps more importantly, to the extent that such direct effect is framed as obligations for (non publicly-owned) corporations vis à vis stake holders (NGOs, shareholders, etc.), it would be hard for the Directive to overcome the CJEU's prohibition of direct effect of Directives.[280] Which is not to say that the Directive will not have *any* legal effects. Apart from the indirect effects referred to in the preceding paragraph, stakeholders might file a complaint for a breach of EU law before the European Commission in order for the Commission to bring an action against the Member State in question before the CJEU pursuant to Article 258 TFEU.

All in all, it is concluded that by enacting the Directive, the EU opted for a *type of legal instrument* which has potentially sweeping implications in the rights of stakeholders when it comes to the disclosure obligations of corporations. However, irrespective to the *type* of instrument chosen, and as noted in the preceding section in relation to the 'comply or explain'

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[278] UNGPs, *supra* note 4, GP 21.

[279] Case 44/84, Hurd, 1986, E.C.R. 29, ¶ 47.

[280] Case 91/92, Faccini Dori*,* 1994, E.C.R. 3325.

example, it is uncertain whether the *content* of the Directive will contribute to further the rights of stake-holders.

More precisely, the Directive does not articulate human rights due diligence to a great level of detail, leaves (too much) flexibility for companies to decide what information to disclose, and creates exceptions that allow business enterprises to abide by the minimum disclosure requirements without actually disclosing any substantive information on their respect for human rights. A prominent example of the Directive's flaws is the 'comply or explain' principle, allowing undertakings not to disclose information regarding their human rights policies in case an undertaking does not pursue one, and to provide a clear and reasoned explanation for why this is the case instead.[281] Also, as noted above, the Directive appears more responsive to mandating disclosure on human rights policies and risks than on actual outcomes. The undertakings may be exempted from their obligation to disclose on actual outcomes if they meet certain conditions.[282]

The effectiveness of the Directive in fostering business compliant conduct would be enhanced, for instance, if EU Member States would articulate the reporting obligations on human rights due diligence in more exacting language, extending their scope of application to a broader group of enterprises, and call for independent third-party verification against objectively verifiable indicators.[283]

The Directive confirms the importance of regulating and increasing the transparency of human rights due diligence within a corporate group. It was found that the Directive supports an approach to the notion of 'group' that might potentially go beyond the more traditional conception of the group entity in law that centres on notions of control and ownership. The application of such traditional approach to delineate the boundaries of the group entity for the purpose of disclosure on human rights would be unduly restrictive. This is in part because this approach has the effect of certain undertakings remaining external to business disclosure.

I argued in support of a functional approach to the group entity that is determined by reference to the subject matter of the Directive. The human rights due diligence concept was explained as a regulatory concept that gives rise to responsibilities for companies that transcend the legal boundaries of distinct legal entities and extend to the impacts resulting from the activities of (subsidiary) entities that such companies control but of also those that they have or should exercise leverage over. The human rights due diligence concept thus supports the application of a broader concept of the group entity that views a group as a collective of parent undertaking and subsidiary entities that each may have separate legal personalities, but that are, or should be, connected through risk-management processes that are aimed at the prevention and mitigation of adverse human rights impacts.

The Directive permits, but does not require, EU Member States to apply this approach to group entities when articulating their national disclosure requirements. I argue that EU Member States

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281 *Non-Financial Reporting Directive*, *supra* note 1, Article 19a.2., Article 29a.2.

282 *Id.* Recital 6.

283 UNGPs, *supra* note 4, Commentary to GP 21, indicates that 'independent verification of human rights reporting can strengthen its content and credibility'.

should apply this approach, and should do so consistently, for the purpose of defining the applicable scope of both the Directive and the substantive disclosure requirements.

This chapter also argued that the Directive, in the light of its objectives and pursuant to well established case-law supporting a purposive interpretation of secondary EU legislation should have certain extraterritorial effects. More precisely, as a consequence of the reporting requirements not drawing a distinction as regard to location of the human rights impacts and these requirements being construed on the human rights due diligence concept, the Directive carries potential *extraterritorial* (indirect) regulatory effects. The disclosure requirements can serve as a means to induce undertakings to carry out human rights due diligence, which also entails having regard to the conduct of sub-contractors and entities in their supply chains that may be causing adverse human rights impacts.[284]

The chapter also reflected on the connection between the Non-Financial Reporting Directive and the evidentiary duties under tort law relating to the parent responsibility and liability for human rights harm.

In short, the Directive has provided the conditions and conceptual anchors to foster State practices to lift transparency on human rights to higher levels, but still depends on these EU Member States to take it further. Case law suggests that international human rights law imposes a legal duty on States to do so.

[284] According to Buhmann, human rights reporting may function along the lines of 'reflexive law', meaning that 'the process of developing the report will generate insight on stakeholder views and social expectations as well as the firm's performance, which companies may apply for self-regulatory purposes'. K Buhmann, *supra* note 230, at 281, 292.

8 The EU's Contribution to the Normative Evolution of the Corporate Responsibility to Respect Human Rights: Critical Reflections on the European Commission's Strategy on CSR.[1]

8.1 Introduction

The chapter takes measure of the EU's commitment and concrete efforts to promote responses to the UNGPs. The aim is to assess the potential and actual contribution of the EU to fostering business compliance with the corporate responsibility to respect human rights in the EU and beyond. This chapter will focus on the EU CSR Strategy through which the EU coordinates its business and human rights related activities. The European Commission (the 'Commission') presented this strategy in a Communication entitled 'A renewed EU Strategy 2011-14 for Corporate Social Responsibility' (the 'EU CSR Strategy') on 25 October 2011. The EU CSR Strategy provides a policy framework for the promotion of CSR in the EU. The Commission stresses in this communication that human rights are a prominent aspect of CSR, and that the EU seeks policy consistency with global approaches, *inter alia*, the UN Guiding Principles, in promoting CSR. The EU CSR Strategy presents an updated definition of CSR, 'the responsibility of enterprises for their impact on society', and a new plan of action that advances a 'smart-mix' approach that, next to voluntary measures, envisages a role for complementary regulation.

This chapter seeks to assess the EU's approach and concrete efforts to foster respect for human rights by business enterprises in the EU and beyond. First, by assessing the new EU definition of CSR presented therein and then assessing the concrete actions taken by the EU that translate this EU CSR strategy into practice. The focus is on the activities of the EU to affect and coordinate the regulation of factors (context, content, institutional setting) that contribute to human rights compliant conduct by business enterprises in practice. The EU advances a dynamic regulatory approach that fosters responses by the EU itself, EU Member States, third countries, multi-stakeholder initiatives and business enterprises.

This chapter argues that there is scope for the EU to increase its level of engagement with the UNGPs in order to actively implement this commitment. The Charter of Fundamental Rights and the objective that the EU has set itself 'to make the fundamental rights provided for in the Charter as effective as possible',[2] may entail an obligation for the EU to seriously consider taking all actions that are within its competences to do so. The chapter also notes that the substance of the efforts of the EU and the regulatory responses by the EU, States, business enterprises and other actors to the UNGPs, provide indication of evolving practices in relation to corporate responsibility and accountability for human rights and the crystallization of corporate respect for human rights in the EU context.

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[1] This chapter is based on a report written for the FRAME Project, *see* Bijlmakers, et al., Report on tracking CSR responses FRAME Deliverable 7.4 (Nov. 2015, 2014), http://www.fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-7.4.pdf.

[2] *Communication from the Commission Strategy for the effective implementation of the Charter of Fundamental rights by the European Union*, 3, COM (2010) 573 final (Oct. 19, 2010).

8.2 The Evolution of EU CSR Policy and its Human Rights Dimension

8.2.1 The Origins of EU CSR Policy

CSR made its debut in the EU political sphere in 1993, when the then-President of the Commission, Mr. Jacques Delors, called on European business enterprises to mobilise and join the fight against social exclusion.[3] [4]

It was only in 2001, however, that CSR formally became an item in the EU political agenda. At a special meeting organised in Lisbon, 23–24 March 2000, the European Council made an appeal to the sense of social responsibility of corporations with regards to 'best practices on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development'.[5] The concept can be understood in relation to the strategic Lisbon goals set out for 2010. At a meeting in Gothenburg later that year, the European Council noted that the EU Sustainability Agenda 'completes' the political commitments set out in 2000 Lisbon Strategy by adding a third environmental dimension to this Strategy.[6] The European Council thereby recognised that 'in the long term, economic growth, social cohesion and environmental protection must go hand in hand'.[7] It appears that the idea behind the CSR concept was for business enterprises to engage in learning practices and the sharing of experiences on the implementation of the shared objectives, from which best practices may be discerned.[8]

In July 2001, the Commission issued its Green Paper, 'Promoting a European Framework for corporate social responsibility' (the 'Green Paper'). This document officially launched the EU CSR Policy.[9] In the Green Paper the Commission defined CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.[10] CSR was conceived as business driven and process oriented, in that business enterprises could manage through CSR stakeholder relations and increase their 'license to operate'.[11] Stressing the business case for CSR, the communication

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[3] *Commission Green Paper on Promoting a European framework for Corporate Social Responsibility*, COM (2001) 366 final, at 3 (July 18, 2001) [hereinafter Commission*, Green Paper*].

[4] Business networks were created in response to this call, including CSR Europe. CSR Europe, CSR Europe: A key partner for EU engagement on CSR, http://www.csreurope.org/sites/default/files/CSR%20Europe%20-%20A%20Key%20Partner%20for%20EU%20engagement%202014.pdf

[5] Presidency Conclusions, Lisbon European Council (Mar. 23-24, 2000).

[6] In Lisbon, the European Council set the strategic goals 'to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion'. *Id*. ¶ 5.

[7] *Communication from the Commission. A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*, COM (2001) 264 final (May 15, 2001) [hereinafter Commission*, A Sustainable Europe*].

[8] Olivier De Schutter, *Corporate Social Responsibility: European Style*, 14 European Law Journal, 203, 206 (2008).

[9] Commission*, Green Paper*, *supra* note 3.

[10] *Id*. at 6.

[11] *Id*. at 12.

noted that such an inclusive approach could result in 'long term strategy minimising risks linked to uncertainty'.[12] CSR was not seen as a substitute for the development of relevant regulation or legislation. The communication noted that 'in countries where such regulations do not exist, efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible practices can be developed'.[13]

The main aim of the Green Paper was to ignite innovative practices, greater transparency, new partnerships and business initiatives on CSR. CSR was presented as an instrumental value in the advancement of the strategic goal decided in Lisbon for the Union: 'to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'.[14] The Green Paper also intended to stimulate innovative thinking about the manner in which the EU could assume a meaningful role of promoting CSR, at the European and international level. The European approach was to mirror and correspond with international initiatives, *inter alia*, the OECD Guidelines for Multinational Enterprises, the active promotion to which the Commission was committed. The EU approach was aimed to 'complement and add value to existing activities' by:

- providing an overall European framework, aiming at promoting quality and coherence of corporate social responsibility practices, through developing broad principles, approaches and tools, and promoting best practice and innovative ideas,

- supporting best practice approaches to cost-effective evaluation and independent verification of corporate social responsibility practices, ensuring thereby their effectiveness and credibility.[15]

The Communication 'Corporate Social Responsibility: A business contribution to Sustainable Development', issued by the Commission in 2002, presented an EU Strategy for CSR.[16] Despite calls by trade unions and civil society for a regulatory framework to set 'minimum standards' and ensure 'a level playing field', the renewed Strategy aligned with the business case for CSR. Business enterprises had largely discarded a regulatory approach as an inapt 'one-size-fits all solution' that would 'stifle creativity and innovation' and could 'lead to conflicting priorities for enterprises in different geographical areas'.[17] In the face of an increasingly polarised debate, the EU opted for the strictly voluntary approach favoured by the business community. The tools that the EU thus introduced to put its CSR policy to practice included only non-mandatory 'soft' tools, e.g., the increase of knowledge about the positive impact of CSR, the exchange of

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[12] *Id*. at 6.

[13] *Id*. at 22. De Schutter, *supra* note 8, at 207.

[14] Commission, *Green Paper*, *id.* at 6.

[15] *Id*. at 18.

[16] *Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development*, COM (2002) 347 final (July 2, 2002) [hereinafter Commission, *A business contribution to sustainable development*].

[17] *Id*. at 4.

experiences and good practices, the facilitation of convergence and transparency, and the promotion of CSR management skills.

The Communication set the stage for the creation of an EU Multi-Stakeholder Forum (the 'MSF') on CSR. The MSF was intended to serve as a forum for dialogue that, through the exchange of good practices and experiences, the development of a common EU approach and guiding principles, and the identification of areas for action, could contribute to transparency and convergence of CSR practices and instruments. Greater transparency and convergence was desirable especially in the areas of codes of conduct, management standards, accounting, auditing and reporting, labels, and socially responsible investment.[18] [19] Convened in 2002, the MSF brought together representatives of business networks, trade unions, employer organisations and civil society to fulfil a mandate that was more restricted than the 2002 Communication initially had advocated. The objective of 'identifying and exploring areas where additional action is needed at the European level' had been omitted, hence the exclusion of the possibility to table proposals for a regulatory framework.[20] The MSF's Final Report, presented at its final High-Level Meeting in June 2004, did not push for greater commitments in the form of legal engagement.[21] The outcome left many disappointed, especially NGOs that expressed that the EU should assume 'the lead role in the development of an effective EU framework for CSR',[22] a view the EP shared. As certain NGOs did not endorse the findings in the report, no consensus was reached in the end.[23]

The Commission's 2006 communication 'Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility' redirected EU CSR

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[18] *Id*. at 17.

[19] De Schutter notes that the Commission diverged from prevailing business views to CSR by recognising a role for the EU to facilitate convergence in a proliferating body of CSR instruments in order to (i) avoid confusion and market distortions and (ii) to ensure a proper functioning of the EU internal market and a level playing field. De Schutter, *supra* note 8, at 208.

[20] *Id*. at 213. Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 Northwestern Journal of International Human Rights, 277 (2008).

[21] The report pointed to the soft-tools of awareness raising and knowledge improvement, developing capacities and competences to mainstream CSR, and ensuring an enabling environment for CSR. The report did recommend that public authorities ensure that there is both a legal framework and the right economic and social conditions in place to allow corporations that wish to go further through CSR to benefit from this in the market place, both in the EU and globally. However, as no concrete proposals were tabled as to what such a framework could entail, the legal ramifications of EU CSR policy remained ambiguous. *European Multistakeholder Forum on CSR: Final Results & Recommendations,* 12, 15 (June 29, 2004), available at http://www.indianet.nl/EU-MSF_CSR.pdf. *See* Jan Wouters & Nicolas Hachez, *The EU Corporate Social Responsibility Strategy: A Business-Driven, Voluntary and Process-Oriented Policy*, 1 Journal of European Social Policy, 19 (2009).

[22] Loew Thomas, The Results of the European Multi-stakeholder Forum on CSR in the view of Business, NGO and Science. Discussion Paper (2005), *available at* http://www.4sustainability.de/fileadmin/redakteur/bilder/Publikationen/Loew-2005-Results-of-the-EMS-Forum-in-the-View-of-Business-N..pdf. Social Platform, et al., NGOs call on Commission and Council to shift gears after Multi-Stakeholder Forum: European CSR process must move from dialogue to action (2004), *available at* http://www.corporatejustice.org/IMG/pdf/NGOCSRopenletterFINAL290604.pdf.

[23] De Schutter, *supra* note 8, at 214.

policy towards the objectives of the re-launched Lisbon Partnership, i.e., growth and jobs. The Lisbon 2005 Strategy marked the marginalisation of the EU's social dimension: as social policy was relegated to the benefit of economic growth,[24] so was EU CSR policy. The Commission's acknowledgement that 'enterprises are the primary actors in CSR' and that the Commission 'can best achieve its objectives by working more closely with European enterprises' constitute examples of this trend.[25] The 2006 communication introduced the creation of the European Alliance for CSR, a business-led initiative that sought to create a wider partnership between enterprises, States and relevant stakeholders. The creation of the Alliance prompted civil society organisations to abandon the Multi-Stakeholder Forum in 2006, and to boycott a later attempt by the EU to reconvene the forum in 2009.[26] The Alliance further narrowed interests and participants to a powerful coalition of like-minded anti-regulation actors.[27]

The EU CSR Policy since 2001 has been correctly depicted as a 'business-driven, voluntary and process-oriented' approach.[28] This approach triumphed under the 2006 communication, which set out the ambition of the Commission to further through its EU CSR Policy the priorities set by the Lisbon Strategy and at making the EU 'a Pole of Excellence on CSR in support of a competitive and sustainable enterprise and market economy'.[29] The Commission's 2006 communication also indicated that the Commission would follow the work of the SRSG.[30] When the Multi-Stakeholder Forum was reconvened in November 2010, and business enterprises and NGO representatives reunited to discuss CSR developments and ways forward towards the creation of a new communication,[31] a special session was devoted to the integration of the UN Framework on Business and Human Rights.[32]

8.2.2 EU CSR Policy and Human Rights

The communications that were presented by the Commission until 2011 and that guided its policymaking on CSR gave only marginal attention to human rights. The Green Paper

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[24] Ipek Eren Vural, Converging Europe Transformation of Social Policy in the Enlarged European Union and in Turkey, 10 (Routledge, 2011).

[25] *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, COM (2006) 136 final, 2 (March 22, 2006) [hereinafter *Commission, Partnership for Growth*].

[26] NGOs succinctly reorganised themselves in the Corporate Coalition for Corporate Justice. Benedek, W. et al., Improving EU Engagement with Non-State Actors, FRAME Deliverable 7.2, at 16-17 (Mar. 31, 2015), available at http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf

[27] J Fairbrass, *Exploring Corporate Social Responsibility Policy in the European Union: A Discursive Institutional Analysis*, 49 Journal of Common Market Studies, 962 (2011).

[28] Wouters & Hachez, *supra* note 21, at 111.

[29] *Commission, Partnership for Growth*, *supra* note 25, at 11.

[30] *Id*. at 8.

[31] For further information on the EU Multi-stakeholder forum, *see*, http://www.csr-in-commerce.eu/news.php/en/26/multistakeholder-forum-discusses-future-eu-csr-policy.

[32] *Executive Summary: EU Multi Stakeholder Forum on Corporate Social Responsibility* (February 3-4, 2015), available at http://ec.europa.eu/DocsRoom/documents/8774/attachments/1/translations/en/renditions/native.

acknowledged that CSR had 'a strong human rights aspect, particularly in relation to international operations and global supply chains'.[33] It also noted that the EU had an obligation to ensure respect for human rights in the framework of its development cooperation policy.[34] Human rights did not figure prominently in the documents that followed, however. If mentioned at all, human rights were linked to the EU external policies, notably in relation to the EU trade and development policies,[35] as tools to promote human rights protection in developing countries.[36]

The Green Paper noted that the EU has an obligation to ensure respect for human rights in the framework of its development cooperation policy.[37] The Commission's 2002 Communication on CSR presented the Cotonou Agreement on development cooperation as concrete action taken in this respect. The Commission also pledged to promote CSR in accordance with the Communications on 'The EU role in promoting human rights and democratisation in third countries'[38] and 'Promoting Core Labour Standards and improving Social Governance in the context of Globalisation'.[39] Accordingly, the Commission had various tools at its disposal to promote responsible human rights conduct by business enterprises abroad, including 'the use of bilateral dialogue with governments' and 'additional trade incentives under the EU's Generalised System of Preferences (GSP)', the promotion of 'CSR in multilateral and global fora like the OECD' and the possibility of direct engagement with multinational enterprises.[40]

EU CSR policy did not award a prominent role to the pursuit of human rights objectives through the EU internal policies, however. One reason might have been the reluctance of Member States to give the EU more leeway to act in this domain. Action could arguably have been taken by the EU internally nevertheless, under the *ERTA* case law on the EU's implied powers,[41] to the extent that it complemented public efforts for sustainability and fully respected the subsidiary principle, e.g., to further other EU policies and facilitate convergence between different CSR instruments. The fact that this has not been the case reflects the incongruence inherent in the EU's

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[33] Commission, *Green Paper*, *supra* note 3, at 52.

[34] *Id*. at 52.

[35] *European Parliament Business and Human Rights in External Relations: Making the EU a Leader at Home and Internationally*, EXPO/B/DROI/2009/2, PE407.014 (April 23, 2009), *available at*: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/407014/EXPO-DROI_ET(2009) 407014_EN.pdf.

[36] *Id.*

[37] Commission*, Green Paper*, *supra* note 3, at 52.

[38] European Commission Communication, *The European Union's Role in Promoting Human Rights and Democratization in Third Countries* (8 May 2001).

[39] European Commission Communication, *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization* (18 July 2001).

[40] Commission, *A business contribution to sustainable development, supra* note 16, at 22-23.

[41] Case 22/70, ERTA, 1971, E.C.R. 263. *See e.g.,* Jaques H. J. Bourgeois, *External Relations Powers of the European Community*, 22 Fordham International Law Journal, 149 (1998); Piet Eeckhout, EU External Relations Law (Oxford University Press. 2011).

institutional regime of human rights protection more generally, which tends to be externally focused.[42]

8.2.3 The EU Response to the Protect, Respect Remedy Framework and the UNGPs

A greater emphasis on human rights in the renewed EU Strategy for CSR was expected in response to the UNGPs that had been officially 'endorsed' by the HRC as the authoritative global standard on business and human rights earlier that same year. The mandate of the SRSG created momentum for the Commission to give new vigor to the human rights dimension of EU CSR policy. The Commission has closely followed and supported the SRSG's work throughout the latter's six-year mandate (2005-11). The Commission and (subsequently) Union delegations actively participated in consultations organised by the SRSG in Geneva and delivered statements to the HRC upon the presentation of the SRSG's annual reports.

In 2009, the EU Presidency noted that the UN 'Protect, Respect and Remedy' Framework constitutes 'a significant input to the CSR work of the EU' and recommended that the EU and its Member States further the UNSRSG's work in relation to all the three pillars.[43] In addition, the Presidency encouraged the implementation of human rights within bilateral trade and investment agreements, export credit guarantees and overseas development programmes, as well as awareness raising of and assurance that business enterprises respect human rights wherever they operate. Moreover, the Presidency recommended awareness of an adherence to international human rights instruments, enhanced access to legal and non-legal remedies and the full implementation of appropriate mechanisms, at all levels.[44]

Steps were taken to push the SRSG's work forward and promote a stronger human rights focus in CSR business activities in the years leading up to the endorsement of the GPs by the HRC in 2011, yet these were rather modest. The Commission did not divert much from the soft tools that it introduced previously in its CSR policy. Priority areas included awareness raising (*e.g*, business enterprises must respect human rights wherever they operate), improving dialogue between all stakeholders, sharing experiences internationally and measuring results. Moreover, the Commission pointed to the various European policies and initiatives that were already in

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[42] De Búrca explains this discrepancy as follows. Art. 2 TEU recognises respect for human dignity and human rights as foundational principles of the Union; 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. Whilst Art. 3(5) TEU involving human rights in external relations is formulated broadly, asserting that the protection of human rights is an overarching objective in all EU external relations, Art. 3(3) TEU dealing with human rights within internal EU policies, on the other hand, specifically names the internal EU policy fields that implicate human rights-related objectives; 'It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'. Its scope is hence delimited to 'those areas of EU power or competence which directly promote human rights – i.e., mainly anti-discrimination and social inclusion policy'. The enactment of the Charter of Fundamental Rights has changed little in this respect. The restrictive clauses of Art. 51(2), 51 and 6 TEU inhibit the Charter from modifying the powers and tasks in the Treaty in any way. *See* Gráinne de Búrca, *The Road Not Taken: The EU as a Global Human Rights Actor*, 105 American Journal of International Law, 38 (2011).

[43] European Union, *Protect, Respect, Remedy - Making the European Union Take a Lead in Promoting Corporate Social Responsibility* (2009).

[44] *Id.*

place, the importance of implementing human rights within bilateral trade and investment agreements, export credit guarantees, and overseas development programmes, the European Instrument for Human Rights and Democracy 2011-13, and its support for the addition of a human rights chapter to the OECD Guidelines, which were in the process of being updated at that time.[45] In terms of concrete action, the Commission commissioned a study on the legal requirements to facilitate an effective implementation of the UNSRSG's framework[46] and a study on responsible supply chain management practices by European enterprises, the results of which were correlated with the PRR Framework.[47] The Commission also published a guide on the integration of social considerations in public procurement [48] and launched public consultations on non-financial reporting.[49]

While the PRR Framework thus assumed a prominent role in reshaping the human rights aspect of EU CSR policy, the initial efforts of the Commission were limited to clarifying the potential of existing policies and legal structures in facilitating the implementation of the Framework. The EU's voluntary approach to CSR, in which the law had not figured, including as far as its human rights aspect was concerned, remained unaltered.[50] The EU voluntary approach to CSR resonates with the Commission's initiative on 'better regulation'[51] and its commitment towards a business-friendly environment.[52] However, it flies in the face of the regulatory approach favoured by many, including the EP.

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[45] European Multi-stakeholder Forum on CSR, *Session 5: Integrating the UN Framework on Business and Human Rights in the EU and Globally, Issue Paper* (29-30 November 2010).

[46] *Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises operating Outside the European Union* (October 2010), available at http://www.corporatejustice.org/study-of-the-legal-framework-on.html.

[47] M van Opijnen & J Oldenziel, *Responsible Supply Chain Management Potential Success Factors and Challenges for Addressing Prevailing Human Rights and Other Csr Issues in Supply Chains of EU-Based Companies* (2011).

[48] European Commission, *Buying Social: a Guide to Taking Account of Social Considerations in Public Procurement* (2010).

[49] European Commission, *Summary Report of the Responses Received to the Public Consultation on Disclosure of Non-Financial Information by Companies* (2011).

[50] If addressed at all, the official communications noted how national governments, notably developing countries, ought to promote an appropriate legal framework to support those business enterprises seeking to go further in CSR. The Final Recommendations of the MSF stipulate that the EU and public authorities have a role in promoting sustainable development to the extent that 'as it is a clear responsibility of national governments to promote democracy and human rights, governments provide the appropriate legal framework for protecting human, social and economic rights of citizens, and a climate conducive to economic, environmental and social progress particularly in developing countries. *European Multistakeholder Forum on CSR: Final Results & Recommendations*, *supra* note 21, at 16.

[51] The European Commission's Better Regulation Programme was launched in 2005 to simplify EU legislation and to enhance its effectiveness and clarity. *Communication from the Commission to the Council and the European Parliament, Better Regulation for Growth and Jobs in the European Union*, COM(2005) 97 final (Mar. 16, 2005).

[52] An approach involving additional obligations and administrative requirements for business risks are counter-productive and would be contrary to the principles of better regulation' the Commission holds. Commission, *Partnership for Growth, supra* note 25, at 13.

A staunch supporter of a regulatory framework, the EP issued a critical report on the theme of business and human rights in 2009, stipulating that a legal turn to CSR was 'most necessary' to advance the business and human rights agenda.[53] Amongst a variety of policy recommendations, the report suggested the development of a legal framework for foreign investment protection that ensures, next to investor protections, accountability for human rights violations, the mandatory reporting on human rights performance, regulated benchmarks on CSR and the establishment of accountability mechanisms in EU external relations that target business enterprises directly, rather than only States. The Parliament also emphasised that the EU should strengthen accountability for corporate human rights violations by working towards the establishment of 'victim-oriented accountability and redress mechanisms on a global scale'.[54] Nevertheless, despite these innovative approaches presented in the report, the Commission did not take concrete steps towards their implementation until recently.

The commitment of the EU to the PRR Framework was a welcome development. At the occasion of the presentation of the draft UNGPs to the HRC on 30 May 2011, the EU commended the SRSG and his team for 'the outstanding work accomplished' in elaborating the draft GPs, which it referred to as an 'admirably clear and authoritative policy framework'.[55] The EU announced that it would 'continue to explore ways to further develop its approach and practices' with respect to the implementation of the GPs. The EU's reaction on the 'smart mix' of regulatory and voluntary policy instruments outlined by the GPs in relation hereto was reserved. The 'smart mix' of instruments would pose a 'challenge for all parties concerned', it highlighted. Its effectiveness would depend on the pursuit of the multi-stakeholder dynamic in the implementation phase, the EU noted, and on '[p]olitical commitment, policy coherence and wide awareness raising will be needed'.[56]

8.3 The Renewed EU CSR Strategy 2011-2014

The Commission issued 'the renewed EU Strategy 2011-14 for Corporate Social Responsibility' ('the EU CSR Strategy') on 25 October 2011.[57] This strategy was launched against the backdrop of the financial and economic crisis, which had negative effects on the general level of trust in corporations. The crisis encouraged EU Member States to call on business enterprises to address these negative effects, including by taking responsibility for the adverse impacts of their operations on human rights, in conformity with international standards. The magnitude of these impacts had become increasingly visible through a number of high profile cases of human rights violations committed by business enterprises.[58]

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[53] European Parliament, *Business and Human Rights in EU External Relations: Making the EU Leader at Home and Internationally*, at 81 (2009).

[54] *Id.* at 87.

[55] European Union, EU Comments on the draft Guiding Principles for the implementation of the UN 'Protect, Respect and Remedy' Framework, D(2011) 702246 (Jan. 31, 2011).

[56] *Id*.

[57] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 final (Oct. 25, 2011) [hereinafter *Commission, A renewed EU CSR Strategy*].

[58] European Commission, Corporate Social Responsibility: National Public Policies in the European Union: Compendium 2014, at 7 (Oct. 31, 2014).

The EU renewed its CSR policy with the aim 'to create conditions favourable to sustainable growth, responsible business behaviour and durable employment generation in the medium and long term'.[59] The Commission 'introduces new elements which can help further extend the impact of the policy', 'and seeks to reaffirm the EU's global influence in this field, enabling the EU to better promote its interests and values in relations with other regions and countries […] to guide and coordinate EU Member State policies and so reduce the risks of divergent approaches that would create additional costs for enterprises operating in more than one Member State'.[60]

The EU coordinates its approach to business and human rights through the EU CSR Strategy.[61] There are various new elements to the EU CSR Strategy in relation to human rights.

First, the EU CSR Strategy clarifies that the EU commitments and policies on business and human rights are framed as part of this broader EU CSR Strategy and agenda for action. The first two instalments of the EU's CSR Strategy, as above mentioned, dated respectively 2002 and 2006, hardly referred to human rights. These instruments conceived of CSR as a voluntary initiative by business enterprises to 'integrate social and environmental concerns in their business operations and in their interaction with their stakeholders'.[62] The EU CSR Strategy identifies '[t]he need to give greater attention to human rights, which have become a significantly more prominent aspect of CSR'.[63] The human rights responsibilities of business enterprises are therefore approached through the comprehensive lens of CSR. This also suggests that human rights should be read in light of the afore-mentioned purpose of CSR, which is to promote sustainable growth, responsible business conduct, and durable employment generation.

The Commission seeks alignment with global approaches in its efforts to promote CSR, including its human rights aspect. The Commission lists five 'internationally recognised principles and guidelines' in this context. These instruments are the OECD Guidelines for MNEs, the UNGC, the ISO 26000, the ILO Tri-partite Declaration, and the UNGPs. According to the Commission, these instruments in combination represent 'an evolving and recently strengthened global framework for CSR'.[64] Where the promotion of the human rights aspect of CSR is concerned, the EU notes that it 'fully endorses' the UNGPs and points to the other instruments afore-mentioned as 'support for businesses in addressing the UNGPs'.[65]

Second, the EU redefined its understanding of CSR as 'the responsibility of enterprises for their impacts on society'. This definition corresponds to the expectations set out under the UNGPs

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[59] Commission, *A renewed EU CSR Strategy*, *supra* note 57, ¶ 1.3.

[60] *Id*. at 6.

[61] Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play, at 2, SWD (2015) 144 final (July 14, 2015) [hereinafter *Commission Staff Working Document*].

[62] Commission, *Green Paper*, *supra* note 3, ¶ 61, at 20.

[63] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 5. *Commission, Partnership for Growth*, *supra* note 25, at 4.

[64] *Id.* at 7.

[65] *Commission Staff Working Document*, *supra* note 61, at 22.

that business enterprises have a responsibility to respect human rights.[66] The absence of an express reference to CSR as *voluntary* marked a significant departure from the EU's previous definition of CSR.[67] In particular, the fact that the EU definition no longer expressly refers to CSR as voluntary, suggests that the EU no longer rejects, *a priori*, regulatory measures as a means to promote CSR. Indeed, the EU CSR Strategy now expressly recognises '[t]he need to acknowledge the role that complementary regulation plays in creating an environment more conducive to enterprises voluntarily meeting their social responsibility'.[68]

Third, the Commission presents a new agenda for action. This agenda reflects a greater focus on human rights, as 'a significantly more prominent aspect of CSR', and a 'smart mix' approach to promoting CSR and business respect for human rights. This 'smart mix' approach, next to voluntary measures, views a role for State regulation in promoting corporate responsibility and for human rights. This approach somewhat differs from the (also referred to as 'smart mix') approach that the UNGPs advance, in that, under the EU approach, business enterprises are expected to take the lead in the development of CSR, while States have only a complementary role.[69] The Strategy notes 'the need to acknowledge the role that complementary regulation plays in creating an environment more conducive to enterprises voluntarily meeting their social responsibility'.[70]

The Commission maintains that '[t]he development of CSR should be led by enterprises themselves', the 'mandatory' element only being complementary to business initiatives, as '[p]ublic authorities should play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability'.[71] This is the reverse of the approach promoted by the UNGPs, which is premised on the understanding that States are primarily responsible for ensuring business respect for human rights, though the UNGPs have been interpreted differently in relation to this point.[72]

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[66] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 6.

[67] Previously CSR was explained as the voluntary integration of social and environmental concerns into business operations. Commission*, Green Paper*, *supra* note 3, §20.

[68] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 5.

[69] The EU CSR Strategy points to a shift in the attitude of the Commission towards accepting a supporting role for public authorities to ensuring CSR through 'a smart mix of voluntary policy measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability'. *Id*. at 7.

[70] *Id*. at 5.

[71] *Id*. at 7.

[72] Footer notes that UNGP 18 'underscores the fact that a company or business enterprise bears primary responsibility to ensure that its activities do not cause or contribute to adverse human rights impacts'. *See* Mary E Footer, *Human Rights Due Diligence and the Responsible Supply of Minerals from Conflict-affected Areas: Towards a Normative Framework?*, *in* Human Rights and Business: Direct Corporate Accountability for Human Rights, 186 (Wolf Legal Publishers ed. 2015).

The EU promotes a multi-stakeholder approach that engages EU Member States, business enterprises and non-business stakeholders.[73] The European Multi-Stakeholder Forum on CSR that gives expression to such a multi-stakeholder approach will be discussed below.

In the following sections a more detailed examination of the new EU CSR definition and Plan for Action will be undertaken. The focus will be on the EU approach and efforts to foster human rights compliant business practices in the EU and beyond. Compliance by business enterprises depends on the concept of CSR and the impact that the substantive requirements have on companies, as well as how well States and non-State actors regulate factors that explain compliance by business enterprises to this standard, through various governance systems.

This section examines the extent to which the EU definition of CSR corresponds to the expectations set out under the UNGPs. This analysis is followed by an assessment of the EU plan of action. The aim is to examine the concrete actions that the EU has taken and their effectiveness in terms affecting and coordinating the regulation of factors that explain human rights compliant behaviour by business enterprises in practice, in the EU and beyond. The assessment reflects on the follow-up that is exercised in the EU, as well as the impact these actions have had, and are having on the actors that are addressees of these measures, *inter alia*, EU Member States, third countries, business enterprises, multi-stakeholder initiatives, societal actors etc.

The aim is to determine how well the EU's approach corresponds with the concepts and intent of the UNGPs.[74] The focus is on aspects that bring the EU's CSR Policy into greater alignment with the UNGPs. The assumption is that greater alignment with the UNGPs can optimise the EU contribution of the emerging business and human rights regime. The analysis focuses on actions that have been identified in the EU plan of action 2010-2014, and that are especially relevant for fostering business respect for human rights. The analysis draws from the EU 'Staff Working Document' that the EU published in 2015, which surveys the measures the EU has taken in order to implement the UNGPs along the three pillars.[75]

8.3.1 EU Competences in the Area of Business and Human Rights

A question that arises when examining the contribution of the EU to the promotion and implementation of the UNGPs is the competences that the EU has to act in the area of business and human rights. The defining characteristics of EU law in this domain are the principles of conferral and subsidiarity. According to Article 5(1) TEU: '[t]he limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality'. Pursuant to the principle of conferral, enshrined in Article 5(2) of the TEU, 'the EU shall only act within the confines of the competences conferred upon it by the Member States in pursuance of the objectives set out in the Treaties'. Pursuant to

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[73] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 5.

[74] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.* U.N.Doc. A/HRC/17/31, General Principles (March 21, 2011) [hereinafter *UNGPs*] (by John Ruggie).

[75] *Id.*

the principle of subsidiarity, as provided for in Article 5(3) TEU, '[…] in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.[76]

These principles are relevant for understanding how the role of the EU in advancing business and human rights objectives relates to the role of EU Member States, which have their own sphere of competence. As the Commission Staff document notes, the EU may only exercise those regulatory competences that are conferred upon it by the EU Treaties,[77] the scope and content of which furthermore varies according to different legal and political fields. The Commission recognises that business and human rights is cross-cutting and touches upon a wide range of such areas, *inter alia*, 'human rights law, investment and trade law, consumer protection law, civil law, and commercial law, corporate or penal law'.[78]

The Commission Staff Document recalls the status of EU Fundamental Rights under EU law. It refers to Article 2 of the Treaty that recognises the pre-imminence of respect for human rights as one of the values upon which the EU has been founded. According to Article 2 TEU: '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'. The document also refers to the EU Charter of Fundamental Rights, which was 'solemnly proclaimed' on 7 December 2000, and acquired the same legal value as Treaties when the Treaty of Lisbon entered into force. According to Article 6(1) TEU:

> The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

Also relevant, but not expressly referred to in the EU Staff document, is Art. 6(3) TEU that codifies the case law of the European courts according to which EU fundamental rights are general principles of EU law:[79]

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

All EU actions, including legislative proposals,[80] must thus be defined and implemented in a manner compatible with the Charter of Fundamental Rights as a legally binding instrument and

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[76] *Commission Staff Working Document*, *supra* note 61, at 4.

[77] *Id*. at 4.

[78] *Id*. at 4.

[79] Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel 1970, E.C. R. 1125.

[80] *Commission Staff Working Document*, *supra* note 61, at 17.

general principles of EU law (and in particular EU-protected human rights). This also entails that EU Member States, when implementing EU rules or acting within the scope of EU law, are bound by EU-protected human rights.[81]

The Commission Staff document furthermore specifies that the Charter 'does not extend the EU competencies' and applies only to EU member States when implementing Union law. The EU thereby places emphasis on due regard for Art. 51(2) of the Charter, which could be argued to apply the principle of subsidiarity to this field, meaning that the promotion of the application of the EU Charter by EU institutions and bodies should occur within the bounds of their respective powers. Art. 51(2) of the EU Charter on Fundamental Rights specifies that '[t]his Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'.

The Commission Staff document identified a number of fields where the EU has competences to take action to promote the implementation of the UNGPs, in the areas of external action (Art. 21 TEU), the right to equality and non-discrimination (Art. 10 TEU), trade relations and agreements (Art. 207(1) TFEU), development cooperation (Art. 208(1) TFEU), economic, financial and technical cooperation (Art. 212 TFEU), humanitarian aid (Art. 214 TFEU) and migrant workers' rights. This list of fields is not exhaustive and the EU has competences in other areas that might be relevant for business and human rights not referred to in the document, such as, e.g., the EU internal market.

8.3.2 A New Definition and Approach to CSR

The renewed EU CSR Strategy presents a new definition of CSR as 'the responsibility of enterprises for their impacts on society'.[82] There are certain aspects of the EU definition of CSR that bring this closer alignment between the EU approach and the expectations set out in the UNGPs.

A prominent example of this is that the definition does not include an express reference to its voluntary nature. This is, in and of itself, striking, in that it constitutes a clear departure from the previous EU definition of CSR, which referred to the *voluntary* integration of social and environmental concerns into business operations.[83] The new definition thus accommodates for the recognition set out in the UNGPs that CSR is not a strictly voluntary exercise by nature. Indeed, the EU CSR strategy notes that '[r]espect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility'.[84]

The core concepts that constitute the foundation of the EU's new definition of CSR, i.e., 'responsibility' and 'impact', also bring the EU definition closer to the conceptual framework of the UNGPs. The UNGPs recognise that business enterprises have a 'responsibility' to respect human rights by managing their actual or potential adverse 'impacts' on human rights.

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[81] C-617/10, Akerberg Fransson, E.C.R. (2013).

[82] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 6.

[83] Commission, *Green Paper*, *supra* note 3.

[84] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 6.

Also the two elements that the EU views as integral to CSR bring its new definition into greater alignment with the UNGPs. Apart from respect for applicable law, business enterprises should have in place a process to integrate, *inter alia*, human rights 'into their business operations and core strategy in close collaboration with their stakeholders'.[85]

The EU CSR Strategy notes that the aim of this responsibility is two-fold: (1) 'maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large'; and (2) 'identifying, preventing and mitigating their possible adverse impacts'.[86] [87]

By referring to maximising the 'creation of shared value', the EU CSR Strategy suggests an approach that views the simultaneous creation of economic and social value as key to the long-term success of business and, ultimately, beneficial to society at large.[88] This approach supports the understanding that human rights and economic objectives are compatible and can be pursued simultaneously. The EU strategy encourages business enterprises 'to adopt a long-term strategic approach to CSR, and to explore opportunities for developing innovative products, services and business models that contribute to societal wellbeing and lead to higher quality and more productive jobs'.[89]

Next to the positive, the communication also points to the negative as integral to CSR: business enterprises are expected to conduct CSR for the purpose of addressing their possible adverse impacts on society. This corresponds with the notion also set out in the UNGPs that business enterprises have a responsibility for their adverse human rights impacts, and that promoting positive impacts on human rights is desirable but in itself not sufficient for business enterprises to meet this responsibility.

The EU language of 'identifying, preventing and mitigating' is clearly inspired by and aligns with the human rights due diligence responsibility set out under UNGP 15(b). Business enterprises are encouraged 'to carry out risk-based due diligence, including through their supply chain' in order to discharge their responsibility. The Commission addresses in this regard only 'large enterprises, and enterprises at particular risk of having such impacts'. While thus consistent with the UNGPs in terms of the concepts applied, the EU's definition suggests that human rights due diligence may not be required from all companies, at least not in the absence of a 'particular risk' of having adverse human rights.

The EU CSR Policy recognises that CSR is a flexible concept that leaves discretion to companies to meet their responsibility in a manner appropriate to their circumstances.[90] While this

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[85] *Id*. at 6.

[86] *Id*. at 6.

[87] *Id*. at 5.

[88] Me Porter & Mr Kramer, *Creating Shared Value* 89 Harvard Business Review, 62-77 (2011). Eijsbouts & Kemp, Over maatschappelijk verantwoord ondernemen, waardecreatie, ondernemingsrecht en vennootschapsbelang, tijdschrift voor vennootschaps-rechtspersonenrecht (2012-5).

[89] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 6.

[90] *Id*. at 7.

responsibility is applicable to all business enterprises, the text notes that the complexity of the CSR process that enterprises should have in place to integrate human rights into their operations and core strategy 'will depend on factors such as the size of the enterprise and the nature of its operations'.[91] With regards to SMEs, this process 'is likely to remain informal and intuitive'.[92]

To be noted is that the EU definition of CSR is primarily oriented towards the responsibility of business enterprises for the prevention of potential adverse human rights impacts. There is no mentioning of corporate responsibility for the remediation of actual human rights impacts.[93]

The conceptual alignment between the corporate responsibility to respect human rights as defined by the UNGPs and the new EU CSR definition can thus be clearly discerned. However, this new EU CSR definition has not been articulated in sufficiently precise language, at least where human rights are concerned. A crucial element that the EU definition does not expressly refer to, at least beyond the specific case afore-mentioned, is the human rights due diligence process that business enterprises should have in place according to the UNGPs. The absence of an express reference to this element in the EU CSR definition is unhelpful, for at least two reasons. The concept of human rights due diligence is an essential element of the responsibility of business enterprises, partially because the character and scope of conduct that the responsibility to respect human rights requires from companies is defined by this concept. The concept furthermore links the responsibility of business enterprises to international human rights standards, which provides the benchmark that business conduct should be assessed against.

Since the EU's definition of CSR is articulated at a (too) abstract level, its normative force and likely impact on the behaviour of companies in the EU is likely to be reduced. The EU definition of CSR is insufficiently detailed to incite, in and of itself, business enterprises to be proactive and exercise human rights due diligence in accordance with the expectations set out in the UNGPs. There is scope for the EU CSR definition to be interpreted in ways that divert from the concept and intent of the UNGPs. The failure to refer to the concept of human rights due diligence or to international human rights standards could be illustrative of the EU still viewing business's responsibility for human rights through the lens of 'CSR' and, thus, primarily as a voluntary and business enterprise driven enterprise.

8.4 An Agenda for Action 2011-14

On 25 October 2011, the Commission also presented out a new agenda for action for the period 2011-2014. This agenda contains EU actions aimed at promoting CSR, as well as business respect for human rights more specifically. This section will assess the EU's approach to foster human rights-compliance conduct by business enterprises. The agenda indicates that the EU seek greater alignment between the European and global approaches to CSR. The Commission notes that it will 'promote European interests in international CSR policy developments, while at the same time ensuring the integration of internationally recognised principles and guidelines into its

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[91] *Id*. at 6.

[92] *Id*. at 6.

[93] To be noted is GP 22 stipulating that business enterprises have a responsibility to provide for or cooperate in the remediation of adverse human rights impacts that they have caused or contributed to. *UNGPs*, *supra* note 74, GP 22.

own CSR policies'.[94] The section first identifies aspects of this agenda that bring the EU's approach closer to that of the UNGPs. This will be followed by an examination of concrete EU actions that are especially relevant in term of affecting and coordinating the regulation of the factors (context, content, institutional setting) that explain business respect for human rights in practice, in and outside the EU. The addressees of EU action are the EU itself, EU Member States, third countries, business enterprises, NGOs and other relevant stakeholders.

8.5 The Impact of EU Action on Fostering Business Responses to the UNGPs

8.5.1 Fostering Business Responses to the UNGPs: the Concept of Corporate Respect for Human Rights

The Commission sets out various policy actions that can foster business responses to the UNGPs. This is first of all by giving increased recognition to the concept of the corporate responsibility to respect human rights. As mentioned above, the EU's renewed definition of CSR is broadly aligned with the UNGPs, although the former does not articulate the requirements that it imposes on companies with regards to human rights as specifically as the latter. The EU agenda for action recognises that business enterprises have a responsibility to respect human rights, and notes that this concept conforms to international principles, *inter alia*, the UNGPs. The EU sets out a clear expectation that business enterprises should respect human rights. The EU's action plan notes that it '[e]xpects all European enterprises to meet the corporate responsibility to respect human rights, *as defined in the GPs*'.[95]

The Commission furthermore seeks to provide clarity about the implications of this responsibility for companies, which can vary according to their circumstances. The Commission has thus developed human rights guidance for three business sectors: (i) 'employment and recruitment agencies'; (ii) 'information and communication technology (ICT)'; and (iii) 'oil and gas'.[96] These instruments embody an effort by the Commission to add precision to the concept and elaborate on the implications that the definition may have for business enterprises operating in the respective sectors. The guides provide practical steps for translating the UNGPs into business, without imposing a 'one-size-fits-all' approach.[97] The Commission has furthermore issued guidance for small and medium-sized enterprises,[98] and five case studies, which reflects a similar effort to leverage through the impact that this definition may have on this size-related type of enterprise.

The Commission also sets out actions aimed at promoting awareness about business respect for human rights and the capacities that may need to be developed for business enterprises to be able to abide by this norm in practice. Relevant action in this regard is the Commission's commitment

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[94] Commission, *A renewed EU CSR Strategy*, *supra* note 57.

[95] *Id*. at 14 (emphasis added).

[96] *See,* http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5752&lang=en.

[97] *Commission Staff Working Document*, *supra* note 61, at 11.

[98] European Commission, My business and human rights: A guide to human rights for small and medium-sized enterprises (2012), http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/human-rights-sme-guide-final_en.pdf.

to raise awareness about business respect for human rights in areas where the State fails to meet its duty to protect. This involves a process involving the relevant stakeholders ('enterprises, EU Delegations in partnering countries, and local civil society actors, in particular human rights organisations and defenders').[99] Other relevant actions focus on promoting business responses to CSR more generally through capacity building activities. Relevant actions are, *inter alia*, the creation of a multi-stakeholder platform in relevant industrial sectors and the launch of a European award scheme for CSR partnerships.[100] The Commission also takes action for the purpose of a better integration of CSR into education, training and research.

8.5.2 EU Action to Promote the Union's Response to the UNGPs

The EU CSR Policy articulates actions that are aimed at strengthening the Union's own responses to the UNGPs. As mentioned above, the Commission seeks a better alignment between European and global approaches to CSR. It is in this context that the plan of action notes that the Commission aims 'to advance a more level global playing field' and that it 'will step up its cooperation with Member States, partner countries and relevant international fora to promote respect for internationally recognised principles and guidelines, and to foster consistency between them'.[101]

A section of the renewed EU CSR policy agenda is thus devoted to the implementation of the UNGPs. The Commission in this section identifies 'coherence of EU policies relevant to business and human rights as a critical challenge'.[102] The Commission has pointed to the need for coherence at different levels ('within different EU institutions; between those institutions; and between the EU and its Member States). The EU promotes policy coherence through the EU CSR Strategy and the coordination of the implementation of different aspects of this strategy through various processes and procedures. The Staff document also points to the legally binding force of the EU Charter of Fundamental Rights, which applies to all the actions that the institutions and bodies of the Union undertake within their respective mandates.[103] The Commission also views the implementation of the UNGPs as instrumental in furthering the human rights objectives of EU policy (*e.g.,* 'child labour, forced prison labour, human trafficking, gender equality, non-discrimination, freedom of association and the right to collective bargaining').[104]

The EU also seeks to promote CSR through its external policies. The EU promotes coherence between internal and external EU policies, and policy consistency with human rights and fundamental freedoms, through the Action Plans on Human Rights and Democracy, which are further strengthened by the cooperative efforts of European Council's Working Group on Human Rights aimed at mainstreaming human rights in all aspects of EU external relations.[105] The

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[99] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 14.

[100] *See* http://www.csreurope.org/pages/en/european_csr_award_scheme.html.

[101] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 13.

[102] *Id.* at 14.

[103] *Commission Staff Working Document*, supra note 61, at 17.

[104] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 14.

[105] *Commission Staff Working Document*, *supra* note 61, at 17.

Commission indicated that it would 'make relevant proposals in the field of trade-and-development'.[106] A study has shown that none of the trade agreements that are in force in the EU today contain within their human rights clauses an express reference to the UNGPs (or, for that matter, any other CSR instruments). Also no such reference to the UNGPs can be found in the sustainable development chapters of the so-called 'new generation agreements', including that which has been concluded with Canada most recently.[107]

With regards to development policy, the EU has a legal commitment to promote coherence based on Art. 208(1) of the TFEU,[108] which entails 'avoiding that other policies undermine the primacy development objective of poverty eradication, and creating synergies between other policies and the objectives of development policy'.[109] The EU agenda signals the EU's support for private sector development in EU development cooperation, indicating that 'by promoting respect for human social and environmental standards, EU enterprises can foster better governance and inclusive growth in developing countries'. The Commission indicated that, where appropriate, it would 'propose to address CSR in established dialogues with partner countries and regions'.[110] An example of concrete action related to development policy is the Commission's intention to 'identify ways to promote responsible business conduct in its future policy initiatives towards more inclusive and sustainable recovery and growth in third countries'.[111]

The Staff EU Document points to various partnerships that the EU has engaged in to support responsible business practices among European companies in developing countries and responsible supply chain management. A prominent example is the 'Sustainability Compact for Continuous Improvement in Labour Rights and Factory Safety in Ready-Made Garment and Knitwear Industry in Bangladesh' (the 'Sustainability Compact'). The Sustainability Compact is a partnership between the EU, the ILO, Bangladesh and the US initiated in response to the Rana Plaza factory fire, that has as its objective 'to improve labour, health and safety conditions for workers as well as to encourage responsible businesses in the ready-made garment industry in Bangladesh'.[112] Also mentioned in the Staff EU Document is an initiative by the EU, the Government of Myanmar/Burma, the US, Japan, Denmark and the ILO to 'Promote Fundamental Labour Rights and Practices in Myanmar/Burma'.[113]

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106 *Id*. at 14.

107 The Commission published a Joint Communication with the European External Action Service on the Action Plan on Human Rights and Democracy (2015-2019) titled 'Keeping human rights at the heart of the EU agenda'. The Communication proposes to 'aim at the systematic inclusion in trade and investment agreements of references to internationally recognised principles and guidelines on [CSR]'. *Commission Staff Working Document*, *supra* note 61, at 8.

108 Article 208(1) TEU states that '[t]he Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries'.

109 *Commission Staff Working Document*, *supra* note 61, at 18.

110 Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 13.

111 *Id*. at 14.

112 *Commission Staff Working Document*, *supra* note 61, at 4.

113 This initiative focuses on labour law reforms, institutional capacity building as well as the full involvement of stakeholders, including business, employers' and workers' organisations'. *Commission Staff Working Document*, *supra* note 61, at 13.

For 2013, the Commission committed to issue a report stipulating the EU priorities in the implementation of the UNGPs. This report has not been delivered. Instead, the Commission issued the afore-mentioned Staff document that surveys the measures that the EU has taken, in order to implement the UNGPs.

8.5.3 EU Action to Promote State Responses to the UNGPs

The EU furthermore seeks to foster State responses to the UNGPs. The agenda identifies various actions that may affect and coordinate the regulation of business conduct by EU Member States through their national law and policy system. Important in this regard is the invitation by the Commission to EU Member States to develop national plans for CSR,[114] and specific national plans for the implementation of the UNGPs. The EU assumes a guiding and coordinating role in promoting the development of such NAPs. The Commission furthermore noted its intention to 'create with Member States in 2012 a peer review mechanism for national CSR policies'.[115] These actions are elaborated below.

The new agenda for action comprised, next to these voluntary measures, regulatory action. These regulatory measures by harmonising national legislations can contribute to greater coherence and convergence in State regulation of business conduct across the EU. Such regulation can foster EU Member State responses to the UNGPs,[116] as well as improve the functioning of the internal market. The legislative proposal for the (in the meantime adopted) Directive on non-financial disclosure is expressly referred to as an example of such regulatory action.[117] This Directive further harmonised at Union level the disclosure requirements for certain companies related to, *inter alia*, human rights.[118] Also expressly mentioned in the EU agenda is the 2011 review of the Public Procurement Directives and the commitment of the Commission to facilitate the better integration of social and environmental considerations into these Directives.[119] This review resulted in adoption on 11 February 2014 of a new set of public procurement Directives (see Section 8.7.1).

Other regulatory EU measures not mentioned in the agenda but relevant for regulating business and human rights are the proposed revision of the Shareholders Rights Directive (see Section 8.7.3), the new country-by-country reporting obligations for large extractive and logging

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[114] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 13.

[115] *Id*. at 12.

[116] More specifically, these regulatory measures may foster State responses to GP 3 that requires States to '[e]ncourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts`, and to UNGPs 5 and 6 that require States to promote corporate respect for human rights in their commercial transactions with business enterprises, including by exercising adequate oversight when they 'contract with, or legislate for, business enterprises to provide services'. *UNGPs*, *supra* note 74, GPs 3, 4, 6.

[117] The Commission draws attention to the international reporting frameworks, including the GRI and indicates its interest to advance towards the approach of integrated financial and non-financial reporting and the work of the International Integrated Reporting Committee in relation thereto. The Commission not only encourages business enterprises, but all organisations to improve their disclosure, including civil society organisations and public authorities. Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 11-12.

[118] For a detailed analysis of this Directive, *see* Chapter 7.

[119] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 20.

companies on payments to governments,[120] the proposed EU Regulation on conflict minerals,[121] and the new EU Directive 2011/36/EU on trafficking in human beings. The European Investment Bank ("EIB") integrated the UNGPs into the updated version of the EIB's 'Environmental and Social Handbook' that was released in 2013. This handbook sets out standards that staff and external actors should adhere to when investing in non-EU countries.[122]

8.5.4 EU Action to Promote Responses to the UNGPs through Markets and Social Pressure

The EU policy agenda furthermore includes actions that promote compliance through market and social compliance mechanisms. The plan of action notes that the EU seeks to leverage policies in the area of 'consumption, public procurement and investment to strengthen market incentives for CSR'. A prominent example that may affect business conduct in relation to human rights is the afore-mentioned commitment of the Commission to facilitate a better integration of social and environmental considerations into EU Public Procurement Directives (see Section 8.7.1).[123] Another example is the EU's invitation to European asset managers and asset owners, especially pension funds, to sign up to the UN Principles for Responsible Investment.[124] The Commission furthermore promotes various initiatives to enhance supply chain transparency, and has issued a draft Regulation to create 'a EU system of self-certification for importers of tin, tantalum, tungsten and gold which choose to import responsibly in the Union' (see Section 8.7.2).[125]

8.5.5 EU Action to Promote Business Responses to the UNGPs

The EU seeks to foster compliance by business enterprises by promoting the recognition by business enterprises of their corporate responsibility to respect human rights. The Commission invites companies to renew their efforts to respect to these internationally recognised principles and guidelines. The EU invites certain companies to commit to these initiatives and to monitor the commitments made. More specifically, the Commission asks all European-based multinational companies to make a commitment by 2014 to respect the ILO Tripartite Declaration.[126] All large European enterprises furthermore are invited to commit to take account of at least one of the afore-mentioned instruments: the UNGC, the OECD Guidelines for MNEs, or ISO26000.[127] The Commission further expresses its intention to 'monitor the commitments made by European enterprises with more than 10.000 employees to take account of internationally recognised CSR principles and guidelines'.[128]

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120 For further details, *see* chapter 8.

121 For further details, *see* chapter 8.

122 *Commission Staff Working Document*, *supra* note 61, at 14.

123 Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 20.

124 The Commission indicated it would 'consider a requirement on all investment funds and financial institutions to inform all their clients […] about any ethical or responsible investment criteria they apply or any standards and codes to which they adhere'. *Id*. at 11.

125 *Commission Staff Working Document*, *supra* note 61, at 15.

126 Commission, *A renewed EU CSR Strategy*, *supra* note 57, at 13.

127 *Id*.

128 *Id*.

In March 2013, the Commission issued a study of Policy References made by 200 randomly selected large EU companies to internationally recognised CSR Guidelines and Principles. This survey was issued as part of a project to monitor commitments made by European enterprises with more than 1,000 employees to take account of internationally recognised CSR principles and guidelines.[129] The study indicated that a very low number of 5 out of 200 sample EU companies made a policy reference to the UNGPs. A larger percentage of 23% referred to the Universal Declaration of Human Rights.[130] The study indicated that company references to any of the internationally recognised CSR Guidelines and Principles vary per country of origin. Out of the 3% of all sample companies that referred to the UNGPs, making most reference to the UNGPs were the samples from Denmark, France, the Netherlands and Sweden.[131] The EU study on Policy References made by large EU Companies indicated that companies with more than 10.000 employees are more likely to refer to internationally recognised CSR instruments. Some 5 percent of sample companies with more than 10.000 employees referred to the UNGPs, while sample companies with less than 10.000 employees referred to the UNGPs three times less.[132]

The EU agenda includes action aimed at fostering business compliance by promoting self-and co-regulatory processes. Such processes can be a powerful means for business enterprises to meet their responsibility. The EU agenda indicates that the effectiveness of such self-and co-regulatory processes depends on various factors. In the words of the agenda:

> Experience suggests that self and co-regulation processes are most effective when they: are based on an initial open analysis of the issues with all concerned stakeholders, in the presence of and if necessary convened by public authorities such as the European Commission; result, in a subsequent phase, in clear commitments from all concerned stakeholders, with performance indicators; provide for objective monitoring mechanisms, performance review and the possibility of improving commitments as needed; and include an effective accountability mechanism for dealing with complaints regarding non-compliance.

The Commission committed to improve the effectiveness of the CSR process by launching a process to develop a code of good practice for self- and co-regulation exercises in cooperation with enterprises and other stakeholders.

8.5.6 The Agenda for Action: EU Follow-Up

As indicated above, the most recent EU CSR strategy expired in December 2014, and for the moment, no new strategy is forthcoming. The follow-up to this agenda has been a joint undertaking by the different DGs having competences in the various areas touched by the agenda. DG Growth has assumed a leading role for the definition of policies. Information on development and achievements in the realisation of these priority actions have been published on

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[129] European Commission, *An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principle*s (2013).

[130] *Id*. ¶ 3.2.3.

[131] *Id*. 6–10.

[132] *Id*. 9.

the website of this DG. Status updates of implementation of the EU CSR strategy overall have been communicated through an implementation table.[133]

An inter-service coordination group was created that gathered all DGs having relevant competences relating to CSR, including on business and human rights. An interviewed official[134] confided that despite initial enthusiasm for collaboration amongst the different services, the field proved to be so fragmented that actors were discouraged and coordination returned to a minimal level. This suggests that the coherence that UNGP 8 is set out to promote, in order to ensure that different departments and agencies that shape business practices are aware and observe international human rights obligations, seems not to have translated into practice at EU operational level.

Interviews have shed light on a severe deficit of coordination and leadership in this regard, evidenced notably by the lack of a new CSR strategy to replace the expired 2011-2014 plan. Another sign of such difficulties is the fact that the 2012 Action Plan on Human Rights and Democracy foresaw in Action 25(b) to '[p]ublish a report on EU priorities for the effective implementation of the UNGPs'. This report was never published, as was confirmed by an interviewed EU official, because coordination was 'too difficult'.[135]

The coordination of the EU's implementation efforts has proceeded through the Annual Review Meetings on CSR. Initiated by the Commission in 2011, these review meetings convene the High-Level Group of Member State Representatives on CSR, representatives of organisations that are members of the multi-stakeholder Forum Coordination Committee and representatives from organisations responsible for internationally recognised CSR guidelines and principles at the end of each year to jointly monitor implementation of the EU CSR Policy.[136]

8.6 EU Action: Fostering Responses to the UNGPs

The following sections focuses on a selection of policy actions that are of special relevance for the evolution of the corporate respect for human rights into a more binding norm, including their transposition into a hard norm (i.e., 'legalisation') at the national and EU level. The aim is to determine the extent to which these EU actions foster human rights compliant behaviour conform the concepts and intent of the UNGPs.

8.6.1 National Action Plans

As noted above, the EU views it has an enabling and coordinating role for what concerns fostering State responses to the UNGPs. The EU has encouraged EU Member States to develop

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[133] European Commission, *DG Enterprise & Industry, The Corporate Social Responsibility Strategy of the European Commission: Results of the Public Consultation Carried out between 30 April and 15 August 2014, Annex III* (2014).

[134] Interview date: 10 June 2015.

[135] Interview date: 10 June 2015.

[136] In addition, the Commission and the EU Parliament have attended the Annual Review Meeting. European Commission, *Annual Review Meeting of the High-Level Group of Member States Representative on CSR and the European CSR Multi-Stakeholder Forum Coordination Committee* (Nov. 28, 2012).

national plans for CSR and for the implementation of the UNGPs.[137] More specifically, the EU has invited: [138]

> Member States to develop or update by 2012 their own plans or national lists of priority actions to promote CSR in support of the Europe 2020 strategy, with reference to internationally recognised CSR principles and guidelines and in cooperation with enterprises and other stakeholders, taking account of the issues raised in this communication.

The EU has also asked EU Member States to develop 'national plans for the implementation of the UN Guiding Principles'.[139] In 2012, the Council reiterated the call to EU Member States to issue specific action plans on the implementation of the UNGPs by 2013 in its EU Action Plan on Human Rights and Democracy.[140] The EU has furthermore organised a peer review process in 2013-14 (see Section 8.6.2) and issued a new Compendium on CSR National Public Policies in the EU (see Section 8.6.3).[141]

The UK was the first to publish a NAP on business and human rights in September 2013. Several other EU Member States have followed suit, though far passed the deadline that has been set, there is no comprehensive EU-wide coverage in this regard. According to the Commission Staff Working Document:

> Several governments have adopted CSR statements or policies that mention human rights. To date, six Member States (United Kingdom, Netherlands, Italy, Denmark, Finland and Lithuania) have published their plans and at least seven more EU Member States are currently preparing national action plans on business and human rights. Likewise, more than half of the EU Member States […] have adopted National Action Plans on CSR, which incorporate human rights issues. Several other Member States are also preparing national action plans on CSR, with final versions expected to be released in 2015 and 2016.[142]

Sweden published its NAP on business and human rights in August 2015.[143] The NAPs – either CSR or specifically on the UNGPs – are thus in different stages of development. Some are still at the stage of intentions, other are in an early drafting phase, while others would be close to finalised.[144] Some CSR NAPs have however been in existence for a while and have already

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[137] Commission, *A renewed EU CSR Strategy*, *supra* note 117, at 13.

[138] *Id*. at 13.

[139] *Id*. at 14.

[140] Council of Europe, EU Strategic Framework and Action Plan on Human Rights and Democracy, ¶ 25 (c) (Jun. 25, 2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.

[141] European Commission, *supra* note 58, at 7.

[142] *Commission Staff Working Document*, *supra* note 61, at 7.

[143] The Swedish NAP for business and human rights is available at: http://www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf.

[144] Belgium is close to completing its NAP on business and human rights.

undergone review and been updated.[145] Some NAPs on the UNGPs are also currently undergoing review, or are scheduled for review in the near future. To sum up, all EU Member States except for one have developed, formally committed to, or started to develop a NAP on CSR,[146] but timings and practices greatly diverge as to this.

The EU and its Member States are seen as precursors in the development of NAPs on the UNGPs.[147] The WG BH has invited States to consider NAPs on business and human rights on several occasions, yet only a total of 25 NAPs had been adopted in July 2015.[148] To be noted is that the WG BH has not expressed a preference with regard to the model for States to publish their NAP (e.g., as a standalone document or as a component of a broader human rights or CSR strategy). Of greater importance is their qualitative contribution to the implementation of UNGPs.[149] The WG BH has noted that NAPs have appeal because of the 'qualitative characteristics' that they can bring to the implementation of the UNGPs. NAPs are flexible instruments that enable States to implement their UNGPs in a 'holistic and integrated' manner that is furthermore responsive to 'the diversity of business and human rights problems' and 'regulatory environments' of a country, 'organic' and based on the needs of the individual community.[150]

In order to guide States in the development of their NAPs, the WG BH has issued a document entitled 'Guidance on National Action Plans on Business and Human Rights'[151] in 2014, which

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[145] The UK released an updated NAP on business and human rights on 12 May 2016. The updated NAP is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf. The original UK Plan of Action entitled '*Good Business: Implementing the UNGPs on Business and Human Rights*' is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf.

[146] Luxemburg has no formal plans to develop a formal NAP. European Commission, *supra* note 58, at 14.

[147] To date, only EU Member States have adopted NAPs specific to business and human rights. *See* OHCHR, *State national action plans*, http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

[148] Human Rights Council Res. 17/4, Human rights and transnational corporations and other business enterprises, ¶ 6(c) 17th Sess., May 30 - June 17, 2011, U.N. Doc A/HRC/RES/17/4 (Jul. 17, 2007).

[149] The UN Working Group has noted the following: 'In evolving policy strategies to implement the Guiding Principles, Governments may see fit to develop a stand-alone document dedicated to business and human rights, or include chapters in broader government strategies or action plans, for example on human rights, corporate social responsibility or national development. The UN Working Group does not offer set advice on the best option, as long as the NAP seeks to implement the Guiding Principles in a comprehensive and coherent manner and is the result of a process characterised by the elements defined in this report'. U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, ¶ 29, U.N. General Assembly, U.N. doc. A/69/263 (Aug. 5, 2014).

[150] Statement of Open Consultation on the strategic elements of National Action Plans in the implementation of the UN Guiding Principles on Business and Human Rights (Feb. 20, 2014), http://www.ohchr.org/Documents/Issues/Business/MichaelAddo_Intervention_20.02.2014.pdf.

[151] Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guidance on National Action Plans on Business and Human Rights, Version 1.0 , 1-2 (December 2014), http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf.

was subsequently updated in November 2015.[152] This guidance document presents a model process for States to develop, implement and update a NAP. This guide suggests that the effectiveness of NAPs as a vehicle for effectively implementing the UNGPs depends on their actual content, the process by which they are developed, follow-up and meaningful stakeholder engagement in this process.

As regards the content, the guide articulates certain substantive elements that should be included in a NAP. The State should give recognition to the UNGPs as the authoritative document that founds their actions, and express and further specify their expectations that business enterprises respect human rights conform the UNGPs. States should identify strategic considerations, highlight priority areas and discuss practical and actionable policy measures that the State plans to undertake in order to make progress, and to specify mechanisms and processes for monitoring the progress that has been achieved. The State should articulate measures that are 'specific and achievable'.[153]

With regards to the process of articulating the policy strategies, the guide recommends that States undertake a baseline assessment. This assessment informs the identification of gaps in State protection of human rights and of the laws, regulations and policies that are linked to these gaps. An evaluation of the extent to which business enterprises meet their responsibilities under pillars 2 and 3 of the UNGPs is part of this exercise. The assessments on adverse impacts and gaps in protection provide an evidential basis that States can build on to identify priority areas associated with the implementation of the UNGPs in the national context, in a joint effort between States and stakeholders.[154]

NAPs furthermore provide a platform for meaningful multi-stakeholder engagement in this process, including the review and follow-up. Stakeholder engagement is important, not only for the realisation of human rights in and of itself, but also as a means to enhance the quality and effectiveness of the NAPs. Stakeholder engagement in itself is constitutive of human rights protection by allowing stakeholders to have a say in and give direction to the policy strategies that affect their lives. The input and involvement by stakeholders in this process, as well as their support for both the process and output in the form of the NAP can enhance the effectiveness of NAPs. The NAP process should be ongoing in order to be responsive to the evolving circumstances.

The guidance document also identifies four principles that should underlie government responses: (i) all commitments in the NAP 'need to be directed towards preventing, mitigating and remedying current and potential adverse impacts'; (ii) 'the UNGPs should be used to identify how to address adverse impacts' and, when addressing the corporate responsibility to respect human rights, 'promote the concept of human rights due diligence as the thread ensuring coherence in Government activities'; (iii) 'Governments should identify "a smart mix" of mandatory and voluntary, international and national measures', and; (iv) 'Governments should

[152] The aim of this guide is to promote the effective NAP processes and encouraging stakeholders to develop and support such NAP processes. *Id*. at 1-2.

[153] *Id*. at 11.

[154] *Id*. at 11–12.

take into account differential impacts on women or men, and girls or boys and make sure the measures defined in their NAP allow for the effective prevention, mitigation and remediation of such impacts'.[155]

The European Group of National Human Rights Institutions has published a similar piece entitled 'Implementing the UNGPs on Business and Human Rights: Discussion paper on national implementation plans for EU Member States'. This discussion paper relates to both process and content and explicitly picks up on the Commission's invitation to EU Member States to develop NAPs for the implementation of the UNGPs.[156]

The process-related recommendations highlight amongst other aspects, that EU Member States should undertake a base-line study and gap analysis of their legislations and policies with reference to the UNGPs. The purpose is 'to provide a credible, transparent basis for national UNGPs implementation plans that set clear and strategic milestones'. EU Member States should ensure 'periodic monitoring and reporting on progress, according to verifiable criteria'. An important consideration apart from accountability, is to support 'effective mainstreaming of the UNGPs into international monitoring and reporting processes'. The process should be transparent, participatory and adequately resourced.[157]

The paper furthermore outlines a number of content-based specifications for NAPs.[158] One of these specifications is that NAPs should be comprehensive, meaning that they should address all relevant issues under all three pillars of the UN Framework. Moreover, the paper calls for NAPs to 'include reasonably precise targets and objectives, that are achievable within reasonable time frames, to which easily understandable and verifiable performance indicators are attached, and with phased milestones for delivery, wherever appropriate'.[159]

The Committee of Ministers of the Council of Europe adopted a Recommendation on human rights and business on 2 March 2016, which is addressed to the Member States of the Council of Europe.[160] The Recommendation indicates that 'if they have not yet done so, Member States should develop and adopt plans on the national implementation of the [UNGPs]'[161] and 'ensure their publication and wide distribution'.[162] States are recommended to address all three pillars of the UNGPs and the Recommendation in their NAP. The NAP furthermore should be

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[155] *Id.* at iii.

[156] European Group of National Human Rights Institutions, '*Implementing the UNGPs on Business and Human Rights: Discussion paper on national implementation plans for EU Member States*' (June 2012).

[157] *Id.* at 1,3-4.

[158] *Id*. at 2.

[159] *Id*. at 5.

[160] Committee of Ministers, Council of Europe, Appendix 4: Recommendation CM/Rec (2016)3 of the Committee of Ministers to member States on business and human rights, 1249th meeting, CM/Rec(2016)3, (Mar. 2, 2016).

[161] The Council of Europe thereby reiterated its previous call on all member States to develop NAPs on the implementation of the UNGPs. Committee of Ministers, Council of Europe, Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights, 1197th meeting (Apr. 16, 2014).

[162] *Recommendation of the Committee of Ministers to member States on human rights and business*, ¶¶ 10-12, CM/Rec(2016)3 (Mar. 2, 2016).

benchmarked not only to the UNGPs, but also to the Recommendation itself. The Recommendation further clarifies the implications of the State duty to protect human rights, including under the ECHR and the European Social Charter, the European Social Charter (revised) and its Additional Protocol.

The process-related recommendations indicate that States should refer to the guidance by the WG BH and other available guidance in the development of their NAPs. States furthermore should 'continuously monitor the implementation' of their NAPs, 'periodically evaluate and update them' and 'share their best practices concerning the development and review of [NAPs] with each other, with third countries and relevant stakeholders'.[163] The Council of Europe recommends that States engage with stakeholders in all stages of this process (e.g., 'business organisation and enterprises, NHRI, trade unions and non-governmental organisations').[164]

The usefulness of NAPs as a tool for implementing the UNGPs thus is undeniable.[165] The NAPs on business and human rights, or NAPs that address business and human rights within the context of CSR, allow for planning ahead and provide clarity on approaches and activities of EU Member States in relation to business and human rights, and in response to the UNGPs.[166] NAPs also have limitations as they are not a measure of State's actual compliance to the UNGPs. A NAP does not necessarily provide a complete picture of all activities that a State plans or undertakes, or an accurate depiction of the State's implementation measures instituted. Also NAPs may not provide an adequate depiction of the effectiveness of such measures, and the extent to which these measures foster business compliance. The fact that most NAPs have not been subject to monitoring or revision is relevant in this regard. The policy actions that EU Member States outline in these NAPs nevertheless provide an indication of the approaches, priorities and measures that EU Member States select and how and to what extent these respond to the country-specific factors and regulatory environments that shape business responses to the UNGPs.

The EU has put in place two instruments aimed at evaluating NAPs with the particular aim of evaluating their potential for implementing the UNGPs. The two initiatives are a peer review mechanism, and an EU-wide compendium of Member States' CSR practices.

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163 *Id*. ¶ 12.

164 *Id*. ¶ 12.

165 European Commission, Notes: Corporate Social Responsibility European Annual Review Meeting: EU Member States High-Level Group on CSR, EU CSR Multi-Stakeholder Forum Committee International Organisations, 6 (Dec. 20, 2013), http://www.asktheeu.org/en/request/1168/response/4544/attach/11/FINAL%20Notes%20CSR%20HLG%20meeting%2020%20December%202013.pdf.

166 The state of play has been well documented and analysed in a Compendium issued in 2014, which was preceded and informed by a peer review process on CSR and a questionnaire. European Commission, *supra* note 58.

8.6.2 Peer Review Mechanism

The Commission committed in its EU CSR Strategy to 'create with Member States in 2012 a peer review mechanism for national CSR policies'.[167] The EU organised seven peer review sessions of NAPs between October 2013 and October 2014, involving all EU Member States over the course of 7 days of meeting, involving four Member States each day. These peer reviews aimed at facilitating learning amongst EU Member States on national CSR policies and measures. While focused on CSR more broadly, it was also intended for discussion on the UNGPs.[168] The peer review process also allowed the Commission to form an understanding of the state of play in the development of national CSR policies, and to identify common and country-specific themes. Reports on the peer review were made publicly available on the Commission's website.[169]

Member States also perceived the process as useful, as it created opportunity to support the exchange of best practices, policy approaches and mutual learning.[170] One interviewed official, however, indicated that the peer-review exercise was 'not extensive' and that it 'just scratched the surface'. No commitments were made by Member States regarding future practice, and no formal recommendations or conclusions were adopted or any plans made for follow-up. Some ideas for further action have none the less been raised, for instance to consolidate the peer review process by looking at formal benchmarking or setting targets for different activities or policy areas.[171]

Next to the formal peer review, the Commission also hosts a high-level group of Member State Representatives which meets 2 or 3 times annually to share their activities. However, these two meetings typically have a very full agenda, which, by the participants' admission, does not allow much time for Member States to learn from each other.[172]

8.6.3 Compendium on CSR National Public Policies in the EU

The Commission in 2014 issued a new Compendium on CSR National Public Policies in the EU.[173] This publication follows previous editions of the EU Compendium on CSR policies, issued in 2006, 2007 and 2011, respectively.[174] The Compendium takes as a starting point the EU understanding of CSR as outlined in the EU CSR strategy, 'the responsibility of enterprises for their impacts on society'. The main objective is to analyse the state of play in the development of proposed EU Member State policy actions on CSR, including in relation to business and human

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[167] Commission, *A renewed EU CSR Strategy*, *supra* note 57, at ¶ 9.

[168] European Commission, *supra* note 165, at 5.

[169] European Commission, *supra* note 58, at 7.

[170] European Commission, *supra* note 168, at 5.

[171] Interview of EU Official, 15 April 2015.

[172] *Id*.

[173] European Commission, *supra* note 58, at 7.

[174] European Commission, *Compendium of public CSR policies in the EU 2011* (2011).

rights.[175] It provides transparent information on actions taken and progress achieved by the European Commission towards the implementation of its EU CSR Strategy, the policy approaches of EU Member States on CSR, including the state of play of their NAPs, and the rationales for the priorities set by NAPs. The following analysis focuses on human rights.

The Compendium includes thematic sections covering a wide range of CSR aspects, and reflects on common approaches and practices related to human rights. The thematic sections that are especially relevant for human rights are global CSR approaches, CSR in SME's, human rights and responsible supply chain management, social and employment policies, CSR reporting and disclosure, and sustainable public procurement.[176] The Compendium includes an Annex that provides complementary information on measures taken or planned by each EU Member State and links to relevant documents. Furthermore, it is based on the findings of the seven abovementioned CSR peer reviews, a questionnaire,[177] and the existing NAPs on CSR and the UNGPs.

The Compendium points to various country-specific factors – cultural, economic, institutional and political – that EU Member States consider in their national priority setting. Some are especially relevant for shaping policies and priorities on business and human rights.[178] One of these factors is the structure of the economy, in terms of the number and share of multinational companies, SMEs and micro-economies. States that are the seat of many multinational enterprises may focus on different problems and measures than countries that have a relatively higher number of SMEs. States that are home to business enterprises that experience higher vulnerability to brand risks due to exposure to foreign trade or because they have complex supply chains with participating units in less economically developed countries tend to have more advanced policies.[179] The level of institutionalised stakeholder engagement and awareness of CSR is another factor. States with less institutionalised and developed stakeholder structures may give priority to strengthening their stakeholder engagement structures and capacity before developing human rights policies.[180]

Also relevant is the prevailing understanding of CSR in the country in question. The Compendium indicates that legislative approaches are more common in countries that place greater emphasis on the *responsibility* of business enterprises. This suggests that a national definition of CSR that expressly refers to the *responsibility* of companies, rather than merely to CSR as a voluntary activity, may lend itself more easily to the development of a regulatory approach. With regard to existing policy and regulatory frameworks, it was noted that the presence of State-owned enterprises might affect CSR policies and approaches where the social responsibility of these enterprises tends to be treated differently than for other entities. This is the case notably, but not exclusively in Nordic countries. With regard to the structure of policy

[175] European Commission, *supra* note 58, at 7.

[176] *Id*. at 8.

[177] *Id*. at 12.

[178] *Id*. at 13.

[179] *Id*. at 13.

[180] *Id*. at 14.

making, where the policy-making structure of States is multi-layered, this can translate into more complicated CSR policies involving more levels of governance.[181]

The Compendium furthermore reflects on thematic priorities related to business and human rights that emerge across many EU Member States and elaborates on initiatives by EU Member States in these thematic areas. One finding is that EU Member States have a tendency to 'integrat[e], disseminat[e] and shap[e]' their UNGP actions within their broader CSR policy,[182] thereby mirroring the EU approach. A strong thematic area is the support to SMEs in the development of CSR approaches. Some States opt for a holistic approach and seek to support SMEs in meeting their human rights responsibilities through a combination of different types of instruments (FR, DE).[183]

EU Member States also tend to focus on company reporting and disclosure requirements.[184] This may be partly in anticipation of the new EU Directive on Non-Financial Disclosure[185] that will need to be implemented by EU Member States by 2017 (see Section 7.4). This Directive explicitly aligns with the UNGPs as it integrates an aspect of the corporate human rights due diligence requirement and is expected to further scale up and improve disclosure practices across the EU, at least in relation to the disclosure of certain large enterprises.

8.6.4 Analysis of NAPs

An examination of existing EU NAPs indicates that they already meet certain key elements outlined by the guidance with regard to both the NAP process and outcome.

For instance, the observation that the identification of priorities actions should be based on base-line assessments has found resonance with EU Member States. Denmark, for example, included in its NAP a systematic baseline survey of government measures aimed at implementing the UNGPs, with a view to identifying gaps.[186] Likewise, Germany recently conducted such a baseline study[187] for the NAP it is currently developing.[188] Some EU Member States like the

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[181] *Id*. at 14.

[182] *Id*. at 20–22.

[183] Denmark established Regional Business Development Centres that provides holistic services to regional and local businesses in the form of *inter alia* week campaigns to raise awareness, courses on supply chain management, guidance on due diligence, stakeholder dialogues, seminars and workshops. *Id.* at 16–19.

[184] *Id*. at 8.

[185] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L 330) 1.

[186] The Danish Government, Danish National Action Plan – implementation of the UN Guiding Principles on Business and Human Rights, 24 (March 2014).

[187] Deutsches Institut für Menschenrechte, National Baseline Assessment, (April 2015).

[188] *See* process description here: Auswärtiges Amt, Nationaler Aktionsplan "Wirtschaft und Menschenrechte" (Sept. 24, 2015).

Netherlands have held multi-stakeholder consultations and/or interviews at different stages of the process with more than 50 relevant stakeholder groups, including business enterprises.[189]

With regard to the substance, an EU Compendium of EU Member States Business and Human Rights practices evidence that many EU Member States have integrated the full range of the UNGPs into their national policy frameworks and commonly address the key thematic issues of supply chain management, support for SMEs, reporting and public procurement. Moreover, it would seem that EU Member States are putting the smart mix approach into practice, which the UNGPs recommend and the Commission supports and encourages. This is illustrated by the mix of different types of instruments that EU Member States employ, ranging from legal instruments to partnering instruments to promote business respect for human rights.[190]

8.7 EU Regulatory and 'Smart Mix' Measures

8.7.1 The Revision of the EU Public Procurement Directives

Public procurement[191] is an important nod in the EU's internal market fabric, as European contracting authorities spend approximately 18 per cent of GDP on procuring works, goods and services.[192] The legal public procurement regime performs a coordinating function, as it ensures that procurement procedures align with principles of the Treaty and serve the goals of effective competition, non-discrimination and the effective allocation of public funds. Public procurement has also been recognised as a 'powerful lever for achieving specific goals'.[193] On 11 February 2014, the Council adopted a new set of public procurement Directives to regulate the national public procurement laws and policies of EU Member States, which includes Directive 2014/23/EU on the award of concession contracts,[194] Directive 2014/24/EU on public

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189 Permanent Mission of the Kingdom of the Netherlands to the UN, National Action Plan on Business and Human Rights, 3 (2014).

190 The Commission distinguishes between the following types of instruments: legal instruments that require CSR practices through the application of legislative, executive and judicial power, economic and financial instruments that drive CSR practices by using financial incentives and market forces, informational instruments that disseminate knowledge on CSR, partnering instruments that aim at voluntary cooperation between stakeholders, and hybrid instruments that combine two or more of these instruments. European Commission, *supra* note 174, at 10.

191 Procurement entails 'the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose'. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, 2014, O.J. (L 94), 65. Art. 1.2.

192 *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth"*, COM (2011) 206 final, 19 (Apr. 13, 2011).

193 European Parliament News, *New EU-procurement rules to ensure better quality and value for money* (Jan. 15, 2014, 13:14pm), http://www.europarl.europa.eu/news/en/news-room/20140110IPR32386/new-eu-procurement-rules-to-ensure-better-quality-and-value-for-money.

194 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, 2014 O.J. (L 94), 1.

procurement[195] and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal sectors.[196] One of the main imperatives for the revision of the Public Procurement Directives was to leverage public procurement in support of advancing common societal goals. This section reflects on the extent to which the revised and consolidated EU Public Procurement Directives encourage States to create economic incentives for business enterprises to respect human rights as defined by the UNGPs 5 and 6.

The new Directives overhaul Directive 2004/17/EC applicable to the sectors water, energy, transport and postal services[197] and Directive 2004/18/EC for the award of public works contracts, public supply contracts and public service contracts.[198] These former Directives provided contracting authorities with the ability to consider social interests in their procurement decisions at different stages of the procurement process. The Directives permitted a contracting authority to exclude bidders for social considerations,[199] including when considering an offer abnormally low,[200] to apply social criteria in awarding a contract,[201] and to lay down special conditions of a social nature governing the performance of a contract.[202] The permissibility for meeting the social needs of the public had to be interpreted strictly. As indicated by the Court of Justice,[203] notably related to award criteria, the social criteria was to be linked to the subject-matter of the contract, not retain an 'unrestricted freedom of choice on the contracting authority',

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[195] Directive 2014/24/EU, *supra* note 191.

[196] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 2014 O.J. (L 94), 243.

[197] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004, Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors, 2004, O.J. (L 134), 1.

[198] Directive 2004/18/EC of the European Parliament and of the Council, 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004, O.J. (L 134), 114.

[199] This is explicit in Art. 45 of Directive 2004/18/EC: A bidder may be excluded if it '(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority'. Moreover, it is implicit to Recital 43 of the same directive; non-observance of national provisions implementing the Council Directives 2000/78/EC(15) and 76/207/EEC(16) concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.' *Id*.

[200] *Id*. Art. 55. *See also* Directive 2004/17/EC, *supra* note 197, Art. 57.1.

[201] *Id*. As stipulated in Art. 53 'Contract Award Criteria', the contracting authorities shall base an award either on the criteria of most economically advantageous or the lowest price only. With respect to the former, Art. 53(a) does not explicitly refer to social concerns as a criteria, however the illustrative list suggests that it is not excluded either. *See also* Directive 2004/17/EC, *Id.* Art. 55.

[202] *Id*. Directive 2004/18/EC, *Id.* Art. 26; 'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.' *Id*. *See also* Directive 2004/17/EC, *Id.* Art. 38.

[203] *See*, *e.g.,* Case 513/99, Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne, E.C.J. (A municipality which organises a tender procedure for the operation of an urban bus service is entitled to take account of ecological considerations concerning the bus fleet offered).

be mentioned explicitly, and be in compliance with the fundamental principles.[204] Also, these conditions could not make the performance of a contract directly or indirectly discriminatory.[205]

The new Directives extend the leeway for States to use public procurement in support of advancing social policies. The EU Staff document notes how 'in the future, public authorities will be able to take social, labour and environmental concerns into account, with the aim to contribute to the implementation of environmental and social policies'.[206] An analysis of the Directives suggests that procurement authorities may take social considerations into account at various stages of the procurement process. The contracting authorities may lay down technical specification for performance and/or functional requirements that concern the social characteristics of a work, service or supply, provided that these are sufficiently precise to allow for a determination of the subject matter and awarding of the contract.[207] The authorities may, in the technical specifications, require a specific label as proof that the required characteristics are adhered to, although certain conditions apply.[208] With respect to criteria for qualitative selection, a bidder may be excluded based on the awareness of any violation of obligations of EU environmental, social and/or labour law, national law, collective agreements or international law provisions listed in Annex X,[209] which lists eight ILO Labour Conventions.[210] The UNGPs are not mentioned.

With respect to the award of a public contract, contracting authorities must apply the criterion of the 'most economically advantageous tender' (MEAT). The cost-effectiveness approach may include the best price-quality ratio. Apart from price and cost, qualitative social characteristics are amongst the criteria that may be weighed into this ratio, provided that there is a link to the subject matter of the public contract.[211] The social characteristics reflecting qualitative aspects of the tender submission thus can be balanced against the other MEAT criteria when reaching an award decision. Directive 2014/24/EU also provides the option of using a cost-effectiveness approach, e.g., a life-cycle costing approach to determine the lowest bidder in a tender procedure. Whether next to environmental costs, also social costs could be linked to the life cycle over a product, service or work is not clear. Contractors may continue to set conditions

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204 Directive 2004/18/EC, *supra* note 198, Recital 1 and 46.

205 Directive 2004/18/EC, *Id*. Recital 33.

206 *Commission Staff Working Document*, *supra* note 61, at 13.

207 Directive 2014/24/EU (*supra* note 191), Art. 42. *See also* Art. 40 3(a) of Directive 2014/25/EU (*supra* note 196).

208 As such, the Directives clarify some of the legal ambiguity involving the usage of labels, stipulating the conditions that need to be fulfilled, *e.g.,* that the label requirements 'only concern criteria which are linked to the subject-matter of the contract', that these criteria 'are based on objectively verifiable and non-discriminatory criteria' and that 'the labels are established in an open and transparent procedure in which all relevant stakeholders […] may participate.' Directive 2014/24/EU, *Id.* Art. 43. *See* Directive 2014/25/EU, *Id.*. *See also* European Commission v. The Netherlands C-368/10, (2012). Art. 61.

209 Directive 2014/24/EU, *Id.* Art. 57 and Art. 18.2. *See* Directive 2014/25/EU (*Id.*), Art. 80 and Art. 36.2.

210 Directive 2014/24/EU, *Id.* Annex X. Directive 2014/25/EU, *Id.* Annex XIV.

211 Directive 2014/24/EU, *Id.* Art. 67. Directive 2014/25/EU, *Id.* Art. 82.

based on social considerations with respect to the performance of a contract.[212] Contracting authorities must furthermore ensure that subcontractors abide by the EU and national laws.[213]

Public procurement offers opportunities to leverage the purchasing power of States to incentivise business enterprises with which they contract to respect human rights.[214] The UNGP 6 affirms this potential, indicating that public procurement activities provide States – individually and collectively – with 'unique opportunities to promote awareness of and respect for human rights' by enterprises that they conduct commercial transactions with. 'States should promote respect for human rights by business enterprises with which they conduct commercial transactions'. The EP saw the revision of the Public Procurement Directives as an opportunity to create greater conformity between public procurement and the international human rights standards 'laid down in the relevant OECD and UN guidelines and principles', in order to enhance policy coherence at the EU level.[215] In this context, the EP suggested to draw on the advice of the EHRI, which amongst other aspects indicated the need to better integrate human rights considerations into public procurements procedures and laws in order to accommodate greater opportunities for public purchasers to procure from those who demonstrate the best human rights record.[216]

While compliance with human rights when undertaking public procurement is mandatory for States, the actual integration of human rights considerations into their public procurement decisions is discretionary. The EU Public Procurement Regime does not create a legal obligation for States to pursue human rights objectives through their procurement laws and policies. States may consider human rights issues in their laws and policies to the extent this does not conflict with the Directive and the principles of TFEU.

There is no legal barrier per se that inhibits the EU legislator from adopting a regulation to facilitate or to render the consideration of CSR, and the responsibility to respect human rights in particular, mandatory at different stages of the public procurement process. Such legislative act could find legal basis in article 114 TFEU in view of the harmonisation of public procurement legislation to remove potential barriers to the functioning of the internal markets. Arguably, such barriers can arise if, in the absence of uniform regulations, Member States were to experiment with stringent CSR criteria in their public procurement legislation to meet their State duty to protect human rights against corporate abuse conform the UNGPs. Moreover, a high level of protection would be appropriate not only to implement the UNGPs, but also to strengthen the protection of the fundamental rights embodied in the EU Charter. Whilst the Directives suggest that the full potential of the EU public procurement regime to promote CSR, and its human rights aspect in particular, remains untapped.

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212 Directive 2014/24/EU, *Id.* Art. 70. Directive 2014/25/EU, *Id.* Art. 87.

213 Directive 2014/24/EU, *Id.* Art. 71. Directive 2014/25/EU, *Id.* Art. 88.

214 Robert Stumberg, A. Ramasastry and M. Roggensack, Turning a Blind Eye: Respecting Human Rights in Government Purchasing, International Corporate Accountability Round Table (2014).

215 Resolution on Corporate Social Responsibility: Promoting Society's Interests and a Route to Sustainable and Inclusive Recovery, ¶ 34, Eur. Parl. Doc. P7 TA(2013)0050 (Feb. 3, 2013).

216 The European Parliament *also* expressed itself in favour of impact assessments for potential incoherence with the UNGPs as well as for coordination with the UN Working Group to ensure interpretations align with the UNGPs. *Id*. ¶ 34.

8.7.2 The EU Draft Conflict Mineral Regulation

On 5 March 2014, the EP and the Council presented a new Proposal for a Regulation regarding the creation of a Union system for due diligence self-certification by responsible importers of conflict minerals.[217] In May 2015, the EP caused an about turn by voting in support of a mandatory EU certification scheme. The discussions on this Proposed Regulation are ongoing and no regulation has been adopted thus far. On 15 June 2016, the EU announced to have reached a political understanding on the substantive components of a new conflict mineral regulation. This section focuses on the Commission's proposal to introduce a voluntary self-certification scheme, which will be followed by reflections on the proposed amendments by the EU Parliament and the political understanding.

Impetus for this EU initiative are the illegal mineral sourcing and trading supporting the activities of illegal armed groups and militia in the Eastern part of the Democratic Republic of Congo (DRC) and the associated human rights abuses and serious violations of international humanitarian law. This problem has been addressed by UN Security Council Resolution 1952 (2010), [218] the UN Group of Experts on the DRC and the G-7. There are various other legal and policy initiatives on conflict minerals that have been taken at the international, regional and national level, as well as institutional and industry backed approaches.[219] The link between armed conflict and illegal trade in minerals is not limited to the DRC and surrounding countries, but occurs in other regions of the world as well.[220] The proposed EU regulation is inspired by the US Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act)[221] and

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[217] *Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict affected and high-risk areas*, COM (2014) 111 final (Mar. 5, 2014) [hereinafter Commission, *Proposal Regulation Conflict Minerals*].

[218] S.C. Res. 1952, U.N. Doc. S/RES/1952 (Nov. 29, 2010).

[219] For an overview, *see* Footer, *supra* note 72.

[220] *Commission Staff Working Document Impact Assessment, accompanying the document Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas*, 19, SWD (2014) 53 final (5 Mar. 2014) [hereinafter *Commission Staff Working Document*] .

[221] Section 1502 of the US Dodd-Frank Act requires Securities and Exchange Commission –(SEC) reporting companies to annually disclose whether specified conflict 'mineral' (coltan, tin, tungsten and gold) originate in the Democratic Republic of the Congo or an adhering country, and if the case, to report to the SEC not only what products manufactured or contracted to be manufactured have not been found to be 'DRC conflict free', but also the due diligence steps that the company has taken in establishing the source and chain of custody of such minerals. An independent private sector audit of such a report shall be included in this report. The certification of this audit by the person submitting the report is required as part of the due diligence process. Due diligence must conform to a national or internationally recognised framework, *e.g.,* the OECD Due Diligence Guidance. DRC conflict free is defined as 'the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country'. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. No. 111-203, H.R. 4173). To be noted is the decision by the DC Circuit in *National Association of Manufacturers v. Securities and Exchange Commission* of 14 April 2014, which was reaffirmed on 18 August 2015, that the requirement to disclose whether any of their products have 'not been found to be 'DRC conflict free' is unconstitutional because it violates First Amendment of the U.S. Constitution. *See*, Sarah A. Altschuller, *Five on Friday – Five Recent*

Consumer Protection Act (DFA), adopted in 2010, which affect EU companies directly and indirectly, either because they are dually listed in the EU/US, or because they are included in the supply chain of US-listed companies and face requests for disclosure on their due diligence.[222]

The Proposed Regulation was set out to address one of the main underlying problems, which is the lack of due diligence by companies in the *upside* part of the supply chain, and by smelters/refiners in particular. A study showed that out of a total number of 300 smelters for tin, tantalum and tungsten only 16-18% conduct due diligence. The rate for an estimated number of 150 refiners of gold is higher, 40-89% respectively.[223] Smelters / refiners are a key segment in the mineral supply chain because they are at the last stage in the chain where the minerals' origin can be traced and responsible supply behaviour leveraged.[224] Their lack of due diligence complicates efforts of downstream users to comply with their due diligence responsibility as these depend on smelters and refiners for essential information on the origin of metals and trading routes.

Existing initiatives by EU Member States, third countries and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Due Diligence Guidance) have not provided a sufficient solution. The individual actions by EU Member States have not affected the due diligence performance of smelters and refiners to a sufficient extent. Their measures have been oriented downstream rather than upstream, and hence have not targeted the most effective aspect of the supply chain. These measures have also not leveraged a sufficient volume of trade. The US DFA and the voluntary OECD Due Diligence Guidance have not met with a sufficient level of compliance, in part of the difficulties facing EU downstream users in identifying and leveraging greater transparency from smelters and refiners.[225] Regional and local efforts to certify products and validate mines are fragmented and said to undermine efforts for reconstruction and social cohesion, as well as for formalising the small-scale mining sectors.[226] The EU can add value by creating a 'critical mass' and 'leverage' at the global level and ensuring harmonised treatment and clarity for business enterprises, including a better co-ordination of ongoing due diligence responses across the EU.[227]

Developments that We've Been Watching Closely (Apr. 14, 2016), *available at* http://www.csrandthelaw.com/2016/04/29/five-on-friday-five-recent-developments-that-weve-been-watching-closely-6/.

222 *Id*. at 13.

223 *Id*. at 22.

224 *Id*. at 21.

225 Detecting smelters and refiners is complicated due to, *inter alia*, the complexity of supply chains and a lack of organisational capacity among SMEs in particular to exercise due diligence. Information should furthermore be accurate and be provided in an ongoing and timely manner as supply chains change rapidly. Suppliers may furthermore not be allowed or willing to disclose information, either because they are under a contractual obligation not to provide sensitive information, or out of concern for the economic repercussions of revealing the origin of their minerals. Operators may lack leverage because smelters and refiners are in a better bargaining position, due to language barriers or a lack of awareness and/of ethical concern about human rights due diligence. *Id*. at 25.

226 *Id*. at 28.

227 *Id*. at 21.

The Proposed Regulation seeks to encourage companies to 'source responsibly' with the aim of, among other things, minimising the financing of armed groups and security forces through mineral proceeds in conflict-affected and high-risk areas.[228] The specific objectives of the Proposed Regulation are to enhance the transparency and visibility of the due diligence practices of EU global smelters/refiners through the EU list, as well as to create awareness among their governments about due diligence and the importance of improving due diligence compliance. The Proposal seeks to create certainty and transparency downstream and to enable downstream users to differentiate and switch between suppliers on the basis of *inter alia*, the 'EU responsible importer certificate', as well as to create financial incentives for promoting due diligence practices among downstream users. Other objectives are to promote the uptake of the OECD Guidelines and to foster demand for ethically and legitimately sourced minerals from due diligence compliant smelters/refiners.[229]

The Proposed Regulation establishes a voluntary self-certification system for EU importers of certain minerals and metals to source responsibly from conflict-affected and high-risk areas.[230] The types of metals and minerals covered are tin, tantalum, tungsten, their ores and metals, and gold. These minerals may originate from any 'conflict-affected and high-risk area' in the world.[231] An importer seeking self-certification as a 'responsible importer' would have to declare adherence to 'supply chain due diligence', which entails a set of obligations that draw from and align with the OECD Due Diligence Guidance.[232]

An importer, according to Art. 3-7 of the Proposed Regulation, should: (a) create a management system, including by setting out a supply chain policy that uphold the standards set out by the OECD Due Diligence Guidance, creating a company-level grievance mechanism and operating a chain of custody or supply chain traceability system for both the minerals and metals; (b) identify and assess risks in its mineral supply chain and implement a strategy to respond to the identified risks; (c) carry out independent third-party audits of supply chain due diligence; and (d) disclose annually to Member States' competent authorities information on the identity of all smelters and/or refiners supplying it and independent third-party audit assurances. In order to create transparency and certainty with regards to supply chain due diligence, the EU in consultation with the OECD would annually publish a list of responsible smelters and refiners on the basis of the information provided.

The certification scheme would allow for the monitoring of business responses. The concept of 'supply chain due diligence'[233] aligns with the UNGPs, hence the certification scheme could also

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[228] Other objectives are to end market distortions in terms of reduced demand and prices for the formal mineral sectors in the DRC and surrounding countries and to promote the uptake of the OECD Guidelines and facilitate the implementation of due diligence conform this framework by EU downstream enterprises. *Proposal for a Commission, Proposal Regulation Conflict Minerals, supra* note 217, at 6.

[229] *Id*. at 4.

[230] *Id*.

[231] The term 'conflict-affected and high-risk areas' is interpreted broadly as 'areas in a state of armed conflict, fragile post-conflict, as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systemic violations of international law, including human rights abuses. *Id*. Art. 2.

[232] OECD Due Diligence Guidance.

[233] *Commission Staff Working Document*, supra 8, SWD (2014) 53 final (Mar. 5. 2014).

contribute to the clarification and implementation of the due diligence responsibility of EU importers as defined in the UNGPs, within the particular operational context of 'conflict-affected and high-risk areas' and in relation to commercial activity of sourcing conflict minerals and metals.[234] The certification scheme would be voluntary however, hence its success would depend on the participation of business enterprises. Incentives for companies to seek certification should come from the cost/benefit ratio of due diligence of compliance.[235] Analysis suggests that due diligence compliance would not be unduly burdensome on companies and that benefits would exceed the costs of due diligence compliance, which calculated estimates indicate are relatively low.[236]

Critics have discarded the proposed voluntary EU certification scheme as too weak however. NGOs and others have pointed to several shortcomings.[237] Some have indicated that the proposed scheme would have too little impact on too few companies. According to Global Witness, the 400 EU importers (smelters/refiners, traders, and manufacturers) that would be targeted by the proposed regulation amount to only 0.05% of the total of companies using and trading these minerals in the EU. The regulation would have little impact on their sourcing behaviour it argues.[238] According to Footer, 'the fact that the EU has so far chosen to introduce a water-down form of supply chain due diligence, which is based on self-certification of responsible imports of 3T&G, is a back ward step. […] it leaves EU manufacturers and suppliers with a poor cousin of its US counterpart, §1502'.[239]

One of the main reasons for the Commission not having opted for a legal approach was that business enterprise might avoid sourcing from conflict-affected and high-risk areas, this being the least risky and burdensome in terms of the compliance costs. Some European companies indirectly affected by Section 1502 of the DFA and expected to provide evidence of due diligence had diverted away from the region.[240] Such diversion and the resultant fall in demand for minerals could be detrimental for the legitimate trade and may worsen market distortion for minerals from the Great Lakes Region.

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[234] The proposed regulation is consistent with and contributes to EU policy on CSR and its objective of mitigating potential adverse impacts on society. Commission, *Proposal Regulation Conflict Minerals, supra* note 217, at 3.

[235] *Commission Staff Working Document*, *supra* note 220, at 48.

[236] *Id*. at 47.

[237] *See e.g.*, Business and Human Rights Resource Centre, Proposed EU regulation on conflict minerals: commentaries & media coverage, http://business-humanrights.org/en/conflict-peace/conflict-minerals/proposed-eu-regulation-on-conflict-minerals-commentaries-media-coverage; Global Witness, *Proposed EU law will not keep conflict resources out of Europe, campaigners warn* (Mar. 5, 2014), *available at* http://www.globalwitness.org/sites/default/files/library/Press%20release%20-%20Proposed%20EU%20law%20will%20not%20keep%20conflict%20resources%20out%20of%20Europe.pdf; Footer, *supra* note 72.

[238] Cécile Barbière, *Parliament adopts relaxed measures on conflict minerals*, EuroActive (Apr. 16, 2015), *available at* http://www.euractiv.com/sections/development-policy/parliament-adopts-relaxed-measures-conflict-minerals-313810.

[239] Footer, *supra* note 72, at 226.

[240] Commission, *Proposal Regulation Conflict Minerals, supra* note 217, at 2. The impact assessment indicated that an estimated number of 15,000-200,000 EU companies had been affected by being in the supply chain of US-listed companies.

The EP in May 2015 voted 402 to 118 with 171 abstentions in support of a mandatory EU certification scheme. The EP requested a binding approach in line with the DFA in its previous 2010 resolution. The proposed scheme requests 'all Union importers' to get certified, including companies that use the respective minerals in their manufacturing process. It also introduces mandatory third-party audit checks of due diligence. The proposed scheme potentially affects 880,000 companies, including many SMEs. It extends beyond the amendments proposed by the International Trade Committee of the EP to create mandatory compliance for smelters and refiners only. According to some, this intervention would have been 'hopelessly ineffective', targeting a mere 20 companies.[241] The next steps are informal talks with EU Member States to seek final agreement on the proposed law and approval by the Commission.

The EU issued a political understanding on 15 June 2015, introducing the substantive components of a new regulation on conflict minerals. A key component of the expected regulation is mandatory due diligence for importers of minerals and metals of 3T&G (tin, tantalum, tungsten and gold) that originate from an indicated and non-exhaustive list of conflict-affected and high-risk areas. The requirement to conduct due diligence would be applicable to importers of the afore-mentioned minerals whose volume imports exceed a specified annual threshold. The Commission indicates that it will call upon external expertise to provide this indicated list. The companies that source from countries that are not on the list would maintain their responsibility to comply with the due diligence obligations. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict and High-Risk Areas will serve as the overarching principle of the regulation. The requirements and the recognition of existing and future due diligence schemes, which are expected to be a central element of the regulation, will be consistent with this guidance.

The declaration suggests that the intention of the EU is not to introduce new mandatory reporting requirements, but to encourage importers to disclose specific information in relating to products containing 3T&G on a voluntary basis. The Commission announced that it will develop performance indicators specific to the responsible sourcing of conflict minerals, which should encourage companies that are subject to the disclosure requirements set out under Directive 2014/95/EU to disclose such specific information. The EU furthermore declares to also create additional tools with the aim to increase the transparency on conflict minerals supply chain due diligence practices by all interested downstream companies.

In addition, the Commission will adopt a written statement indicating that 'it will consider making an additional legislative proposal targeted at EU companies with products containing 3T&G in their supply chains should it assess that the aggregate efforts of the EU market on the responsible global supply chain of minerals is insufficient to leverage responsible supply chain behaviour in producer countries, or should it assess that the buy-in of downstream operators that

[241] London Mining Network, *European Parliament surprise vote for stronger conflict minerals regulation* (May 21, 2015), *available at* http://londonminingnetwork.org/2015/05/european-parliament-surprise-vote-for-stronger-conflict-minerals-regulation/.

have in place supply chain due diligence systems in line with the OECD guidance is sufficient'.[242]

8.7.3 The EU Proposal on Shareholder Engagement and Transparency at EU Level

The decision-making by directors may also potentially be influenced by institutional shareholders, which have a significant corporate governance role in overseeing the activities of the directors of the listed companies in which they have invested and to intervene where necessary. There is increasing support for the view that the human rights impacts may affect the long-term interests of shareholders. Apart from derivative action, there are a number of mechanisms through which institutional investors can exercise influence over the corporate governance of a company. States may consider adopting rules and regulations that create incentives or require institutional investors to discharge this role, *inter alia*, to encourage directors to consider and communicate on human rights impacts.

The Commission has issued a legislative proposal to regulate shareholder engagement and transparency at the EU level.[243] This proposal is set out to amend Directive 2007/36/EC on the encouragement of long-term shareholder engagement and Directive 2013/34/EU on certain elements of the corporate governance statements. Institutional investors and asset managers own a large part of the shares of listed EU companies and therefore can play a significant role in the corporate governance of these companies. The ownership of 44% of the market value of EU-listed companies by foreign (European or other) owners adds a cross-border dimension.[244] The proposed Directive aims to encourage shareholders and asset managers to increase the level and quality of their engagement with the listed companies they invest in, to adopt a longer-term perspective to their investment, and to increase the transparency of shareholders' engagement policies and directors' remuneration.

The proposal requires institutional investors and asset managers to develop a policy on shareholder engagement ('shareholder engagement policy') and to publicly disclose on this policy and the implementation thereof. This engagement policy should determine, amongst others, how institutional investors integrate shareholder engagement in their investment strategy, monitor and conduct dialogue with investee companies and exercise their voting rights. The proposal adopts a 'comply or explain' model; when investors decide to not develop and/or disclose an engagement policy, they should give an explanation for why this is the case. This transparency can have positive impacts on investor awareness and decision-making, shareholder dialogue and engagement with the investee companies and strengthen corporate accountability to civil society.

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[242] *See* Political Understanding following the 15 June trilogue, *available at* http://mediacentrum.groenlinks.nl/sites/default/files/political%20understanding%20conflict%20minerals%2015-06-2016_0.pdf.

[243] *Proposal for a Directive of the European Parliament and the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement*, COM (2014) 213 final (Apr. 9, 2014).

[244] European Commission, Memo: Corporate governance package: frequently asked questions, 3 (Apr. 9, 2014).

The proposal also requires companies to establish a remuneration policy and a remuneration report. It also gives shareholders an approval vote on this remuneration policy every three years and an advisory vote on the remuneration report annually. The remuneration policy should be aligned with 'the business strategy, objectives, values and long term interests of the company'. The remuneration policy should describe the maximum level of executive pay, how this policy contributes to the long-term interests and sustainability of the company and takes into account the pay and employment conditions of employees. These requirements respond to a need for greater transparency and shareholder rights (a 'say on pay') to enable institutional investors to hold directors accountable for their pay, especially when this pay does not correspond with their long-term performance. These mechanisms can also be instrumental in avoiding conflicts of interest and aligning a director's interests with the long-term interests of the company. The remuneration report should be included in the corporate governance statement that companies should publish annually.

This information in order to ensure that institutional investors have the information to challenge this pay, while the requirement that shareholders should have a 'say on pay' enables these investors to control conflicts of interest and increase the accountability of directors for their performance. The proposals also regulate the identification of shareholders, the transmission of information and the facilitation of the exercise of shareholder rights.

The proposals do not expressly mention human rights as a matter that institutional investors should take into consideration in their engagement with investee companies, or in their assessment of the performance of directors. While the UNGPs do not expressly refer to institutional investors, the OHCHR has affirmed that the corporate responsibility to respect human rights applies to institutional investors, and that the adverse human rights impacts that arise from the activities of an entity in which an investor holds shares can be directly linked to the investor. The OHCHR has clarified that the investee company is a 'business relationship' because these human rights can be directly linked to the investor's operations, products or services. The investor's responsibility for these human rights risks exists irrespective of the relative size or percentage of the share it owes in the company. The OHCHR has furthermore noted that the investor should seek to prevent and mitigate these human rights risks by using or enhancing its leverage to end the harmful practices, or if unsuccessful, end the relationship.[245] [246]

The EU Parliament has proposed stronger rules that recognise the link between shareholder engagement and the non-financial long-term performance of companies. It supports a broader understanding of shareholder engagement that involves also the monitoring of non-financial performance, risks and social impacts and conducing dialogue and cooperation not only with the

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[245] Letter from OHCHR, to SOMO and OECD Watch, The issue of the applicability of the Guiding Principles on Business and Human Rights to minority shareholdings (Apr. 26, 2013), *available at*: http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/2013_WS1_2.pdf.

[246] The OHCHR notes a number of factors that can explain whether and to what extent an institutional investor has leverage over an entity: (i) the size of the shareholdings, (ii) the degree of direct control by the shareholder over the entity, (iii) the ability to incentivise the entity to improve its performance directly or indirectly by engaging other actors (governments, business associations, multi-stakeholder initiatives and other shareholders) to incentivise change, also in the entity's sector or industry, and (iv) how the existence or absence of the relationships affects the entity's reputation. *Id*.

investee company but also with other stakeholders of the company on these non-financial matters. According to the EU Parliament, the shareholder engagement policy should reflect on these aspects of engagement. The EU Parliament furthermore supports a broader definition of stakeholder, which it explains as 'any individual, group, organisation or local community that is affected by or otherwise has an interest in the operation and performance of a company'.

In the context of remuneration policies for companies, the EU Parliament notes that this policy should indicate non-financial performance criteria, 'including, where appropriate, consideration for programmes and results relating to corporate social responsibility'. The performance of directors furthermore should be assessed using also non-financial criteria, including environmental, social and governance factors. The remuneration report should reflect on how the non-financial performance criteria were applied. The EU Parliament furthermore supports the adoption of additional measures to ensure greater involvement of all stakeholders, in particular, employees, local authorities and civil society. The consideration is that 'shareholder rights are not the only long-term factor which needs to be taken into consideration in corporate governance'.[247]

8.8 Analysis

The Commission indicates in the EU CSR Strategy that the 'European policy to promote CSR should be made fully consistent with this framework'. The Commission refers to the global framework for CSR that comprises of a core set of internationally recognised principles and guidelines, including the UNGPs. This commitment by the Commission to consistency with, *inter alia*, the UNGPs may not be binding, however it is not without potential legal effects.[248] The analysis indicates that there is scope for the EU to increase its level of engagement with the UNGPs in order to actively implement this commitment.

An area of improvement is the EU definition on CSR. The EU gives recognition and acceptance to the corporate responsibility of business enterprises to respect human rights through the adoption of this common EU CSR definition, which recognises that human rights are a prominent aspect of CSR, and are thus conceptually aligned with the UNGPs. However, this EU CSR definition is not articulated in precise language where its human rights aspect is concerned, and does not articulate the general minimum requirement that companies undertake human rights due diligence.[249] What is lacking at the EU level is thus the acceptance of human rights due diligence responsibility for business enterprises, which is furthermore clearly defined and linked to international human rights standards, and conforms with the expectations set out in the UNGPs.

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[247] Recital 2a proposal EU Parliament.

[248] The Commission can only depart from its own statements of policy in a reasoned and motivated manner – and in compliance with the general principles of EU law, including equal treatment an legitimate expectations (Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S et al v Commission* [2005] I-5425, ¶ 211).

[249] As noted above, the absence of an express reference to human rights due diligence is problematic, because this concept defines the extent and limits of the responsibility of business enterprises in relation to human rights and connects this responsibility to public/law construction of international human rights law, which provide the benchmark that business conduct ought to be assessed against.

This chapter considered the extent to which the EU approach to fostering the human rights aspect of CSR aligns with the UNGPs. The adoption by the EU of the 'smart mix' approach to promoting business respect for human rights constitutes a positive development in this regard. The EU presents a combination of legally binding and voluntary measures that aim at strengthening and coordinating EU Member State responses to the EU, which are combined with voluntary measures that promote soft-law initiatives and self-regulatory measures. The EU furthermore advances a multi-stakeholder approach.

A commitment to full consistency with the UNGPs needs to be taken into consideration to the extent to which these EU measures promote responses that conform with the UNGPs. Full consistency can only be realised if the UNGPs and their core concepts are effectively integrated within such measures. The extent to which the EU relies on regulatory measures to promote business respect for human rights and the extent to which corporate respect for human rights has been integrated into such EU regulatory measures varies considerably across different areas.

The EU Directive on non-financial disclosure sets out requirements for certain companies to make disclosure on, *inter alia*, human rights, which align with the concepts of the UNGPs. The Directive expressly refers to the UNGPs as an instrument that business enterprises can use in their reporting. However, and as set out in the previous chapter, the Directive is deficient in certain important aspects. As a consequence, there may be disparities among national implementation measures, which may reduce the effectiveness of the Directive in ensuring a minimum level of disclosure that is necessary for the protection of human rights. While it is therefore particularly important that the EU proactively monitors the national implementation of the Directive, the Directive makes no provision for such a process.[250]

The EU has adopted disclosure requirements for EU companies that are active in the extractive industry or the logging of primary forest, which are furthermore combined with due diligence requirements.[251] These disclosure requirements have not been extended to other sectors.[252] The

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[250] The Commission has a duty pursuant to Art. 17.1 TEU to ensure 'the application of the treaties and of measures adopted by the Institutions pursuant to them'. To be noted also is that EU-protected fundamental rights are applicable to EU Member States not only when implementing acts of the EU, but also to all situations falling within the scope of EU law. *See*, C-617/10, *Akerberg Fransson*, E.C.R. (2013).

[251] The EU Accountancy Directive notes the following:

> In order to provide for enhanced transparency of payments made to governments, large undertakings and public-interest entities which are active in the extractive industry or logging of primary forests (2) should disclose material payments made to governments in the countries in which they operate in a separate report, on an annual basis. Such undertakings are active in countries rich in natural resources, in particular minerals, oil, natural gas and primary forests. The report should include types of payments comparable to those disclosed by an undertaking participating in the Extractive Industries Transparency Initiative (EITI). The initiative is also complementary to the Forest Law Enforcement, Governance and Trade Action Plan of the European Union (EU FLEGT) and the provisions of Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (3), which require traders of timber products to exercise due diligence in order to prevent illegal wood from entering the Union market.

Directive 2013/34/EU, of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, Recital 44, 2013 O.J. (L 182) 19. *Also see*, Directive 2013/50/EU, of the

Commission has recently issued a political understanding and declaration announcing that it will propose a regulation to introduce mandatory due diligence requirements in the minerals sector, combined with voluntary disclosure.[253] The EU has not considered adopting mandatory disclosure in other sectors, or regulatory measures that enable stakeholders to obtain the information they need to hold business enterprises to account.[254]

While the renewed and consolidated EU Public Procurement Directive allow authorities to take social concerns into account in the procurement process, the absence of an express reference to corporate respect for human rights, or the UNGPs for that matter, is a significant gap. While awareness of any violation of an international law provision may be sufficient for a bidder to be excluded, the international human rights standards mentioned are (unduly narrowly) focused on international labour standards.

The discussions on the EU Shareholder Directive are ongoing, yet there is a clear gap in engagement with human rights in these law-making processes.

This lack of engagement with human rights does not sit easily with the objective that the EU has set 'to make the fundamental rights provided for in the Charter as effective as possible'.[255] The Commission has issued a communication in which it sets out a strategy for the effective implementation of the Charter of Fundamental rights by the EU. The Communication notes that the EU Charter for Fundamental Rights should serve as a 'compass for the Union's policies and their implementation by the Member States'.[256] This entails that the EU promotes a 'fundamental rights culture' at all stages of the procedure, from the initial drafting of a proposal within the Commission to the impact analysis, and right up to the checks on the legality of the final text.[257]

European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC, Recital 7, 2013 O.J. (L 294) 13. Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, Recital 15-17, 2010 O.J. (L 295) 23. The due diligence requirements introduced by the EU Timber Regulation do not cohere with the UNGPs 'as regards the substance or normative sources for the exercise of due diligence'. K. Buhmann, *Defying territorial limitations: regulating business conduct extraterritorially through establishing obligations*, in EU law and national law in Human Rights and Business: Direct Corporate Accountability for Human Rights, 296 (Jernej Letnar Černič & Tara Van Ho eds., 2015).

252 Benedek, W. et al., Improving EU Engagement with Non-State Actors, FRAME Deliverable 7.2, at 71.

253 For further details, *see* section 8.7.2.

254 *See* Steering Committee for Human Rights, Explanatory memorandum to Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on human rights and business, § 36, 1249th meeting, COM (2016) 18-addfinal (Mar. 2, 2016).

255 *Communication from the Commission Strategy for the effective implementation of the Charter of Fundamental rights by the European Union*, *supra* note 2, at 3.

256 *Id*. at 4.

257 *Id*. at 4.

The Communication notes that the Commission 'routinely checks its legislative proposals and the acts it adopts to ensure that they are compatible with the Charter'.[258] As highlighted by Monti and Chalmers, 'there is a thin line between verifying that EU law-making does not violate fundamental rights and moving to a human rights policy in which EU institutions see EU goals as increasingly about realisation of the rights and principles in the [Charter] rather than other more discrete tasks'. Whilst a case can be made for the former, it sets a more ambitious agenda for the Union with a wider remit'.[259] As Monti and Chalmers also note:

> Beyond this debate, few would oppose the idea that legislative proposals be verified for their impact on fundamental rights. However, there remains the question of the rigour of this process. If it is simply box-ticking, fundamental rights become a rhetorical instrument to justify EU law-making. In that regard, it is a pity that the Court of Justice has not yet had the opportunity to rule on whether a procedural failure to engage sufficiently with fundamental rights in the legislative process is, by itself, a violation of fundamental rights insofar as it shows inadequate care for these.[260]

As was noted previously, all EU actions, including legislative proposals,[261] must be defined and implemented in a manner that is compatible with the Charter of Fundamental Rights and general principles of EU law (and in particular EU-protected human rights). The EU also may need to give greater attention to the UNGPs in this regard. The CJEU held in *Kadi:*

> In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. […].[262]

The UNGPs as an international instrument could thus serve as a source of inspiration for the EU courts in their interpretation of the scope of general principles of EU law, especially when considering that the EU and its Member States have actively engaged in the process of their development (see Section 8.2.3).[263]

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[258] *Id*. at 4.

[259] Chalmers, D., Davies, G., and Monti, G., European Union Law: Cases and Materials, Cambridge University Press, 2014. According to these authors, particularly noteworthy examples of judicial feebleness are Case C-540/03 *Parliament v Council* [2006] ECR 1-5769; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR 1-3633; Case C-396/ 11 *Radu*, Judgment of 29 Jan. 2013.

[260] Chalmers, et all., *Id.*

[261] *Communication from the Commission Strategy for the effective implementation of the Charter of Fundamental rights by the European Union*, *supra* note 2, at 17.

[262] Joined Cases C-402/05 and C-415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, 2008 E.C.R. I-461, ¶ 283.

[263] Also noted, Art. 3(5) TEU according to which the Union shall contribute to, among other goals, 'the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.

The focus in the EU engagement with the UNGPs has been primarily on EU external policy. This is reflected in the EU Staff document. The imbalance between internal and external competencies is likely to stem from the afore-mentioned incongruence between the internal and external dimension of EU policy, as reflected in TEU Art. 3(3) and 3(5). According to De Burca:

> Thus the strategy has been to identify the fields of EU internal policy in which human rights concerns are considered relevant by reference to the precise scope of the EU's powers in fields such as social inclusion or anti-discrimination. This strategy is not however used in the external domain, in which human rights protection is treated as a cross-cutting goal relevant to all domains of EU external action. It is certainly not the case that the EU's remit or powers are more extensive in the international domain than internally, indeed the opposite is arguably true. However, the EU and more specifically the Member States have been unwilling to treat respect for human rights as a cross-cutting concern of internal EU policies, whereas they have asserted it to be such a concern in all areas of external policy. [264]

The EU internal and external policy dimensions cannot be kept separate in a satisfactory manner however, because, according to Alston and Weiler, '[t]hey are, in fact, two sides of the same coin'. There are four reasons for this, Alston and Weiler note:

> In the case of the Union, there are several additional reasons why a concern with external policy also necessitates a careful consideration of the internal policy dimensions. Firstly, the development and implementation of an effective external human rights policy can only be undertaken in the context of appropriate internal institutional arrangements. Secondly, in an era when universality and indivisibility are the touchstones of human rights, an external policy which is not underpinned by a comparably comprehensive and authentic internal policy can have no hope of being taken seriously. Thirdly, […], a credible, human rights policy must assiduously avoid unilateralism and double standards and that can only be done by ensuring reciprocity and consistency. Finally, the reality is that a Union which is not prepared to embrace a strong human rights policy for itself is highly unlikely to develop a fully-fledged external policy and apply it with energy or consistency. As long as human rights remain a suspect preoccupation within, their status without will remain tenuous.[265]

TEU Art. 17(1) read in combination the Articles 2 and 3 of the TEU impose an obligation on the Commission to ensure secondary legislation and national implementing measures are in compliance with the Charter of Fundamental Rights, *ad intra* and *ad extra*. Arguably, these articles should be interpreted more broadly as encompassing within their applicable scope all areas of EU internal policy in which the EU has competencies, including areas that are not expressly recognised under Art. 3(3) as promoting human rights powers directly, but that can affect the enjoyment of the rights and fundamental freedoms set out in the Charter. There is nothing in the case law that expressly rejects the notion that the EU should treat human rights as a cross-cutting issue that is relevant for all areas of internal and external policy.

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[264] De Búrca, *supra* note 42, at 38.

[265] Philip Alston & J.H.H. Weiler, *An 'Ever Closer Union in Need of a Human Rights Policy*, 9 European Journal of European Law, 664 (1998).

It follows that the Commission should review all EU internal policies and laws in which the EU has competencies, in order to ensure not only their alignment with EU fundamental human rights. Due regard should be has as to whether the development and implementation of these measures is undertaken in a manner that is not merely compliant with the Charter, but also gives full effect to the rights and principles within the Charter.

Amongst the areas of EU internal policies in which the EU has competencies and that are not covered but can, and arguably should, be used to foster demand for business respect for human rights is corporate and securities law. Research has shown that there is a nexus between securities and company law and human rights, and that the existence or absence of these laws in national jurisdictions can encourage or impede companies' respect for human rights.[266] The link between the EU regimes in the area of financial regulation and respect for human rights remains to a great extent unexplored, *inter alia*, securities (prospective and trading on the security market), market safeguards and EU mergers.[267]

It is reasonable to expect that EU Member States when acting within their sphere of influence will take legislative measures to require human rights due diligence from companies. International Human Rights law imposes a positive obligation on States to adopt such legislative measures as necessary in particular circumstances.[268] EU Member States that have adopted NAPs have indicated regulatory measures as part of a smart mix. An example of a somewhat bold initiative to introduce a legally binding duty of human rights due diligence is France's *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, which was voted by the lower chamber on 23 March 2016 and is now examined by the Senate.[269] A proliferation of such legislation in the future may perhaps lead to the EU taking regulatory measures in order to avoid it creating distortions in the internal market.

8.9 Conclusion

This chapter took measure of the EU's efforts to foster responses to the UN Guiding Principles. The EU CSR Strategy introduced an EU policy framework for the promotion of CSR. It was found that the EU views human rights as an integral and prominent aspect of CSR, and seeks policy consistency with internationally recognized principles and guidelines, including the UN

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[266] Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Corporate Law Project: Overarching Trends and Observations, 1 (2010).

[267] Examining the connections between these areas of legislation and respect for human rights is beyond the scope of this chapter. Future research could examine the mandatory disclosure regimes and corresponding liability regimes set out in the EU regulations and Directives governing these areas. One may consider how these Directives can have indirect regulatory effects by requiring States to ensure that business enterprises give consideration to human rights in their disclosure under these regimes. While these regimes can contribute to promoting transparency on business respect for human rights, this is not the primary purpose of these regimes or one of their objectives even, which also explains its limits. The liability regimes that are in place for this mandatory disclosure generally do not give rise to remedies for victims of human rights abuse. These regimes can be of instrumental use, but in themselves they are not sufficient to encourage or require business enterprises to respect human rights.

[268] *See* Section 3.3.2.

[269] *See* Section 6.4.7. *Also see*, http://www.senat.fr/dossier-legislatif/ppl14-376.html.

Guiding Principles. There EU CSR Strategy features various new elements that bring the EU CSR Policy into greater alignment with the approach advanced by the UN Guiding Principles. A prominent example is the updated definition of CSR, 'the responsibility of enterprises for their impact on society`. The EU CSR Strategy also presents a plan of action that advances a 'smart-mix' approach that, next to voluntary measures, views a role for complementary regulation. This chapter analysed the concrete actions that the EU has taken and the way these actions have affected and coordinated the regulation of factors (context, content, institutional setting) that explain human rights compliant conduct by business enterprises, in or outside of the EU. The aim was to assess the EU's efforts to foster responses to the UN Guiding Principles, by the EU itself, EU Member States, third countries, multi-stakeholder initiatives, societal actors and business enterprises.

The efforts of by the EU, States, business enterprises and other actors to advance in the implementation of the UNGPs provide indication of evolving practices in relation to corporate responsibility and accountability for human rights in the EU context. There is an emerging understanding in the EU of the need for business enterprises to respect human rights. The negative effects of the financial and economic crisis and the high profile cases of human rights violations had made this need apparent. There is also an emerging understanding in the EU of international human rights standards being directly applicable to business enterprises. Illustrative is the alignment of EU policy with global approaches in its efforts to promote CSR and its 'full endorsement' of the UNGPs. There is also increased recognition of a shared understanding of the substantive requirements of the responsibility of business enterprises in relation to human rights, which, as the analysis of the EU definition and the Plan of Action suggest, corresponds with the expectations set out in the UNGPs.

The EU, EU Member States, business enterprises and other non-state actors have adopted a range of voluntary and mandatory measures in their efforts to actively promote the implementation of the UNGPs. These measures potentially affect the in fact adherence by business enterprise to implementing the corporate responsibility to respect by leveraging the factors that affect such compliance. As a consequence of the regulatory dynamics that arise out of the combined effects of this 'smart-mix' of measures, business enterprises are increasingly bound to implementing this corporate responsibility to respect human rights. Business enterprises face binding responsibility to respect human rights under a range of sources of law, ranging from transnational laws at national and EU level to soft law mechanisms by state and non-state actors at all levels.

The EU Directives in the area of non-financial disclosure, transparency, public procurement, country-by-country reporting, and access to EU courts that have been adapted. These are supplemented by, for instance, NAPs on CSR and the implementation of the UNGPs that EU Members have published at national level, EU guidance material for business enterprises operating in the key business sectors (employment and recruitment agencies, ICT companies, oil and gas companies), and EU policy documents and reports. These initiatives take on added significance when considered in combination, indicating that the corporate responsibility to respect human rights is crystalizing into a more binding norm in soft and hard law sources.[270]

[270] For a similar argument, *see* Wood, Reinforcing Participatory Governance Through International Human Rights Obligations of Political Parties, 28 *Harvard Human Rights Journal*, 147 (2015).

This chapter argued that there is scope for the EU to scale up its level of engagement with the UNGPs in order to actively implement its commitment to make the EU policy to promote CSR fully consistent with the global framework for CSR, which comprises of a core set of international recognized principles and guidelines, including the UNGPs. The Charter of Fundamental Rights and the objective that the EU has set itself 'to make the fundamental rights provided for in the Charter as effective as possible',[271] may entail an obligation for the EU to seriously consider taking all actions that are within its competences to do so.

[271] *Communication from the Commission Strategy for the effective implementation of the Charter of Fundamental rights by the European Union*, *supra* note 2.

9 The International Legal Status of Business Enterprises: Towards a New Doctrine?

9.1 Introduction

This chapter examines the legal status of business enterprises in the international system. Traditional approaches to legal personality will be placed in perspective, in part to demonstrate the need for adjustment or expansion of these theories and, potentially, for a new doctrine on international legal status, one which adequately reflects today's global governance realities in relation to business and human rights. This chapter will address the way in which CSR can be analysed in legal terms without recourse to international law in the traditional positivist sense of the concept. This will allow the identification and analysis of those characteristics that make CSR acquire 'legal status' and business enterprises have 'legal personality' in a context of global governance. The new insights gained will pave the way for the construction of a new doctrine on international legal status.

9.2 The Legal Personality of Business Enterprises: Traditional Conceptions of Legal Personality

According to Brownlie, 'a subject of International law is an entity possessing international rights and obligations and having the capacity (a) to maintain its rights by bringing international claims and (b) be responsible for its breaches of obligation by being subjected to such claims'.[1] Thus Shaw notes that ascertaining personality in international law 'necessitates the consideration of the interrelationship between rights and duties afforded under the international system and the capacity to enforce claims'. [2]

The legal personality has been addressed in contemporary international practice and doctrine. The International Court of Justice ('ICJ') decided on the legal personality of international organisations ('IOs') in its *Reparation for Injuries* Advisory Opinion. Also international tribunals and national courts have considered the legal personality of States, IO's and other entities in their rulings.[3] However, in the absence of a 'centralized law of persons'[4] or of an authoritative decision-making body in the international legal system that can constitute the legal subjectivity of an entity, the question whether an entity is a legal person or subject for the purposes of the international Westphalian legal system has been analysed mainly by doctrine.[5] Scholarly debates, however, have not produced a satisfactory answer (let alone one which takes

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1 J. Crawford, Brownly's Principles of Public International law, 115 (Oxford University Press 8th ed. 2012).

2 M.N. Shaw, International law, 143 (Cambridge University Press 7th ed. 2014).

3 According to Brownlie, '[J]udicial decisions are not strictly a formal source of law, but in many instances they are regarded as evidence of the law'. Crawford, *supra* note 1, at 37.

4 Roland Portmann, Legal Personality in International law (Cambridge University Press. 2010).

5 A. Clapham, Human Rights Obligations of Non-State Actors, 70-71 (Oxford University Press. 2006). It should be highlighted that the Statute of the International Court of Justice (Article 38(1)(d)) includes, among the 'subsidiary means for the determination of rules of law', 'the teachings of the most highly qualified publicists of the various nations' or, in the French text, 'la doctrine'.

into account the UNGPs and other recent developments[6]) to the question of whether international law treats business enterprises as subjects of international law. Moreover, there does not appear to be an uncontested doctrinal approach on the basis of which the matter may be solved conclusively.

This section conducts a literature review in order to determine the extent to which and reasons which would point to business enterprises being legal persons under international law. This section will be structured along the main five positions on international legal personality that Portman identified in his book 'Legal Personality in International law',[7] namely: the 'States-only conception' (see Section 9.2.1); the 'Recognition conception' (see Section 9.2.2); the 'Individualistic conception' (see Section 9.2.3), the 'Formal conception' (see Section 9.2.4); and the 'Actor conception' (see Section 9.2.5). This section provides a brief summary of each of these conceptions, which will be followed by a discussion of the distinguishing features that make States and non-State actors acquire legal personality in the international system. Each of these sections will shed light on the different scholarly perspectives on the legal status of business enterprises that correspond with the conception that is addressed under the heading in question. These conceptions will be confronted with the evolving reality in business and human rights. More precisely, the extent to which developments in the implementation of the UNGPs inform these debates and the validity of these conceptions in light of the current State of affairs in this field will also be examined.

9.2.1 The 'States-Only' Conception

The first conception on international legal personality identified by Portmann is the 'States-only' conception. This traditional position in legal conception holds that States are the sole subjects of international law. The State's existence as a matter of fact is key. The Statehood of States and the actual behaviour and power they have in social reality are transformed into legal prescription.[8] International law simply takes reality into account: 'the State precedes the law and becomes a 'natural', 'original' or 'absolute' international person existing a priori'.[9]

The 'States-only' conception is premised on understanding of the international legal system as organized around States as its main units.[10] International law would thus be based on the principles of State sovereignty and sovereign equality. Pursuant to the principle of State sovereignty, only States can consent to international law, and no rules exist without strict State consent. A State is thus bound only by those international norms to 'which it has explicitly or

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6 *See*, however, Pentikäinen, Merja, *Changing International 'Subjectivity' and Rights and Obligations under International law – Status of Corporations*, 8 Utrecht Law Review 145 (2012).

7 Portmann, *supra* note 4, at 13.

8 *Id.* at 265.

9 *Id.* at 248.

10 Without adhering to the 'States-only' doctrine, Cassese notes that 'the fundamental or primary subjects [of international law] are not individuals but States. [...] States [...] are the backbone of the [international] community. They posses full legal capacity, that is, the ability to be vested with rights, powers, and obligations. Were they to disappear, the present international community would either fall apart or change radically'. Antonio Cassese, International law, 71 (Oxford University Press. 2005).

tacitly agreed' and by 'those obligations in the creation of which it has participated'.[11] In accordance with the principle of sovereign equality, on the basis of which the United Nations are 'based',[12] no State is superior to another State or, for that matter, is permitted to impose its will on another State.

According to Portmann, this 'States-only' conception can be summarized in the following propositions:

(1) The international community consists only of States. No other entities form part of the international realm. Individuals do not exist as independent entities outside the borders of their State of nationality.

(2) International law solely emanates from common State will. International law is created only by States and applies alone to those States having consented to it. It cannot apply to an entity not having consented to the rule in question. Thus, only States can be bound by international law, since only they can consent to it. This represents the link between sources and personal application of international law, that is, of sources and legal personality.[13]

Portmann notes that the 'States-only' conception finds expression in, *inter alia*, the *Jurisdiction of courts of Danzig* Advisory Opinion, and the Ruling in the *Lotus* case, both by the (League of Nations) Permanent Court of International Justice ('PCIJ'),[14] and, arguably, the CJEU's *Van Gend and Loos* Ruling.[15]

Starting from the assumption of the 'States-only' view that States are the only subjects of international law, any entity other than States, and thus also business enterprises, are automatically excluded from having legal personality under international law. Business enterprises are conceived as 'juridical entities' created under domestic law, which furthermore

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11 Portmann, *supra* note 4, at 258.

12 *See* UN Charter, art. 2(1).

13 Portmann, *supra* note 4, at 47.

14 *Id.* at 42. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), ¶ 44.

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

The position of the Court arguably contrasts with the role the League of Nations assumed in relation to the protection of certain minorities (*see* Peter Hilpold,*The League of Nations and the Protection of Minorities – Rediscovering a Great Experiment*, 17 Max Planck Yearbook of United Nations Law, 87 (2013).

15 Note the reference, in *Van Gend en Loos*, to the (then) EC constituting 'a new legal order of International law […] the subjects of which comprise not only Member States but also their nationals'. *A contrario*, the CJEU thus appeared to be of the view that the subjects of traditional international law were only States (*see* Gend & Loos v Netherlands Inland Revenue Administration, case 26-62, Eur. Ct.H.R (1963)**.** Joseph H. H**.** Weiler, 'The Transformation of Europe'YLJ. 100 (1991), 2403-83, republished in Joseph H. H. Weiler, The Constiution of Europe (Cambridge University Press 1999).

have no existence outside national borders.[16] Business enterprises are only objects, but not subjects of international law. International law does not directly apply to them. Consequently, business enterprises enjoy no rights or obligations under international law.[17] States alone have human rights obligations to respect, protect and fulfil human rights obligations, which they have accepted as binding under international treaty law or customary international law. States are permitted (and, sometimes, required) to regulate business enterprises indirectly by way of national law.[18] Business enterprises may thus be indirectly bound to human rights under municipal law. According to the 'States-only' conception, the rights of business enterprises are not enforceable without State intervention.[19] Business enterprises thus engage with international law only indirectly, through their national governments.[20] Thus, Rigaux noted in 1991 that the traditional notion of 'subjects' of international law does not support the view of business enterprises as 'subjects' of international law.[21]

Scholarly literature[22] has referred to the ruling of the Court of Appeals of the US Second Circuit 2010 decision in *Kiobel v Royal Dutch Petroleum Co.*[23] as an illustrative example of an approach

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16 According to Zerk, companies have been viewed historically as conglomerations of related individual entities, the recognition and nationality of which was determined by reference to national law, hence the common view that 'multinationals had no separate status under international law, aside from that enjoyed by its constituent entities by virtue of domestic law'. J.A. Zerk, Multinationals and corporate social responsibility: limitations and opportunities in International law, 74 (Cambridge University Press. 2006).

17 Joel Slawotsky, *The Global Corporation as International law Actor*, 52 Virginia Journal of International law, 80 (2012).

18 Brief of Amicus Curiae Professor James Crawford in support of conditional cross-petitioner, Presbyterian Church of Sudan v Talisman Energy Inc., 582 F.3d 244 (2009) (no.091418), at 16.

19 Zerk, *supra* note 16, at 73 (Cambridge University Press. 2006).

20 Jonathan I Charney, *Transnational Corporations and Developing Public International law*, Duke Law Journal 748, 753(1983).

21 As Francois Rigaux indicated in 1991:

> Il faut l'affirmer avec force: Les sociétés transnationales ne sont ni des sujects ni des quasi-sujets du droit international. L'internationalization du contrat d'Etat […] est fondée sur une pétition de principe, à savoir que l'Etat contractrant avec une entreprise ayant la nationalité d'un autre Etat a accepté d'apporter à l'exercice de ses droits de souveraineté des limites que l'obligent dans l'odre juridique international. Les sociétés transnationales sont des agents jurdiques – publics ou privés, peu importe – soumis à la compétence des Etats en qui ne sont destinataires de règles de droit international que par la médiation d'un ordre juridique étatique. Si un code de conduite obligatoire devait être adopté, il ne conférerait des droits et n`imposerait des obligations aux sociétés transnationales que par sa réception dans l'ordre interne des Etats où les règles de conduite seraient directement applicables.
>
> Les groupes transnationaux de sociétés on tiré parti du morcellement des compétences étatiques pour édificier un pouvoir économique privé transnational qui a réussi à se soustraire à l'exercise de compétences étatiques concurrentes (au double sense de ce terme). Pas plus que les sociétés juridiquement distinctes dont il se compose, le groupe trans-national de sociétés n'est un sujet – ni primaire ni dérivé – de l'ordre juridique international. La puissance de ces groupes et leur capacité de négocier, souvent en position de force avec les Etats, ne sauraient leur attribuer la qualité de sujets du droit international que les volontés convergentes des Etats seraient seules en mesure de leur conférer.'

François Rigaux, *Les sociétés transnationales*, in Le droit international: bilan et perspectives, 129, 138 (M. Bedjaoui ed., 1991).

22 Slawotsky, *supra* note 17, at 269.

that supports some of the 'States-only' conception's key assumptions. In *Kiobel*, the Second Circuit court held that the US Alien Tort Claims Act ('ATCA')[24] did not provide subject matter jurisdictions for claims against corporations, because corporate liability has not been 'accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms'.[25] The Court held that customary international law created criminal liability for a limited number of crimes, but only for natural persons, not for corporations as 'juridical' persons.[26] Corporate liability for such crimes had been 'steadfastly rejected' and 'no international criminal tribunal had ever held a corporation liable for a violation of the law of nations'.[27]

The Second Circuit thus found in *Kiobel* that international law does not currently extend the scope of liability for a breach of customary international law to corporations. A supporting argument was that the corporate concept of corporate liability can only 'gradually ripen [] into a rule of international law […] by achieving universal recognition and acceptance as a norm in the relations of States *inter se*'.[28] The court relied on the delineation of customary international law provided by Judge Friendly in *Vencap*, as including only 'those standards, rules or customs (a) affecting the relationship between States or between an individual and a foreign State, and (b) used by those States for their common good and/or in dealing *inter se*'.[29] Arguably, this position correlates with the conception by the 'States-only' position of international law as concerned with the relations between States exclusively and emanating from the common will of States, as well as its rejection of rules of customary international law or general international law that are not based such on express or tacit consent by States (or 'universal' practice expressing the common will of the international community).[30]

The 'States-only' conception also finds support in some of the earlier writings of James Crawford, who has been included (perhaps not entirely fairly) among 'the old-fashioned positivists'.[31] Crawford submitted an amicus curiae brief to the Supreme Court in 2010 in support of the defendant in *Presbyterian Church of Sudan v Talisman Energy*.[32] In this brief, Crawford noted that '[m]any rules of Customary International law do not reach this level of specificity and universal acceptance. This is true, *a fortiori*, as concerns corporate responsibility under present

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23 *Kiobel v Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010).

24 28 U.S.C. § 1350.

25 Emphasis added. *Kiobel v Royal Dutch Petroleum*, *supra* note 23, at 49.

26 *Id.* at 7, 8.

27 *Id.* at 9.

28 *Id.* at 49.

29 *Id.* at 6.

30 The 'States-only' conception thus rejects customary international law that arises out of sustained practice ('custom') and evidence of States acting out of a sense of obligation (opinion uris), and general rules of international law, including norms of a preemptory character (jus cogens norms) that transcend custom and that have been accepted by the international community as norm that cannot be derogated from. Portmann, *supra* note 4, at 258.

31 J. Alvarez, *Are Corporations "Subjects" of International law?*, 9 Santa Clara Journal of International law, 3 (2011).

32 Presbyterian Church of Sudan v Talisman Energy, INC. 244 F.Supp. 2d 289 (Schwartz, D.C. Cir. 2003).

International law'.[33] Crawford also notes 'Customary International law, as it stands today, does not include a corporate responsibility regime […] Corporations (except where otherwise provided by treaty) remain creatures of national legal systems. There is so far no basis in general international law for attributing international legal personality to a corporation'.[34] The point has not been addressed by the US Supreme Court, which denied a petition for a writ of certiorari in *Presbyterian Church of Sudan v Talisman Energy* after a Second Circuit had upheld a lower court's decision to dismiss the case.[35]

The traditionalist 'States-only' view may not have disappeared in current day practice, however the strength of this conception has eroded, and key assumptions on which this conception is based have been discarded by international law.[36] There are ample examples of developments in the business and human rights domain, which put this 'States-only' conception into perspective and serve as a reference point to challenge and, eventually, disprove some of its core premises. I will highlight two developments which are often referred to in the literature for these purposes.

The *first* development relates to point, inherent to the 'States-only' conception, that business enterprises as creations of national law have no existence in the international system. The by now well established influence that business enterprises have come to wield in the international arena questions the validity of this assertion. Scholarship has noted this influence in economic, social, political and legal terms. The wealth that companies accumulate, which may exceed that of some States,[37] the engagement of these entities in cross border activities and their share in the movement of capital and technology across States is illustrative.[38] Companies impact international decision-making processes through their lobbying activities, and exercise political roles in the enactment[39] of a number of international standards.[40] All these are indicative of the

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33 Brief of Amicus Curiae Professor James Crawford in support of conditional cross-petitioner, Presbyterian Church of Sudan v Talisman Energy Inc., 582 F.3d 244 (2009) (no.091418), at 16.

34 *Id.* at 2. Crawford also notes, '[I]n principle international law operates only horizontally, *i.e.,* between entities recognised as having international legal personality such as States and international organizations. The effect of international law as binding upon individuals is an exception that has to be formulated explicitly, as is done in the instruments imposing international criminal responsibility on natural persons. As it stands, international law does not purport to regulate corporations directly but allows or sometimes obliges States to do so and, in the course of doing so, to criminalize certain corporate behaviours'. *Id.* at 4.

35 Sarah Altschulier, *Supreme Court Denies Certiorari in Presbyterian Church of Sudan v Talisman Energy, Inc.,* Corporate Social Responsibility and the Law (Oct. 4, 2010), http://www.csrandthelaw.com/2010/10/04/supreme-court-denies-certiorari-in-presbyterian-church-of-sudan-v-talisman-energy-inc/.

36 Portmann, *supra* note 4, at 257.

37 Slawotsky, *supra* note 17, at 83.

38 *Id.* at 84.

39 These phenomena have caused some to argue that business enterprises have emerged as *de facto* rule-makers in international law. Alvarez, *supra* note 31, at 6.

40 Business enterprises participate in international standard-setting processes, have voting rights in the ILO and have contributed to the adoption of international agreements. K. Nowrot, *New approaches to the international legal personality of multinational corporations towards a rebuttable presumption of normative responsibilities*, 1 (1993).

'international scale and importance' of business enterprises, as a result of which 'scholars have argued that corporations deserve international legal personality'.[41]

A *second* example relates to the presumption of the 'States-only' conception that a clear division exists between the public and the private sphere.[42] The line that separates these spheres has become increasingly blurred in practice.[43] This erosion is apparent in the activities that are being carried out by private corporations in various areas of the public sphere that were previously the sole concern of States. As a result of traditional State services having been outsourced and privatised, business enterprises are nowadays active in areas ranging from education and policing to defence operations and construction of public infrastructures. Conversely, States often operate in the private sphere and exercise roles that traditionally belong to the private sector, carrying out activities such as 'providing investment capital, trading in the equity and debt markets, long-term ownership of shares in publicly traded corporations, venture capital, commodity extraction, real estate development and large scale farming'.[44] Also State owned enterprises are acting globally and carry out commercial activities in various sectors, including finance.[45] According to Slawotsky, '[g]iven the blurring of the [public / private] distinction, there is no reason to treat corporations differently from States'.[46]

The SRSG' narrative on multifaceted globalization, which encompasses and describes the developments referred to in the preceding paragraphs, and his idea of polycentric governance, that acknowledges the presence of non-State actors and their governance systems in the public domain, as well as their social roles in the progressive realization of human rights, further support the notion that the 'States-only' conception has lost touch with existing social realities and that alternative perspectives on the legal status of business enterprises are warranted and, probably, necessary.

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41 Julian G. Ku, *The Limits of Corporate Rights Under International law*, 12 Chicago Journal of International law, 737 (2012).

42 The exclusion of non-State actors, and business enterprises in particular, as subjects of international law has been explained partially in reference to this divide.

43 Slawotsky, *supra* note 17*,* at 85.

44 *Id*, at 86-88.

45 The UNGPs recognize the significance of these entities, which are addressed under the heading of the 'State-business nexus', which refers to situations in which a 'State acts as an economic actor in its own right, when it contracts or otherwise engages with companies to provide services that may impact on human rights, or when it conduct commercial transactions (procurement) with companies'. U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Human Rights Council, § 21, U.N. doc. A/HRC/32/45 (May. 4, 2016).

46 Slawotsky, *supra* note 17, at 86. According to Slawotsky:

> Moreover, because of unprecedented changes in our world, including but not limited to: aggregation of substantial financial resources into large MNCs; globalization wherein large corporations maintain bases and operate in nations far from "home"; the partnering between such large corporations and various governments; the outsourcing of historically public governmental functions to private corporations and the increasing prominence of sovereigns acting in the private sphere, large global corporations and States should be treated similarly.

Id. at 8.

9.2.2 The 'Recognition' Conception

9.2.2.1 Summary

The 'Recognition' conception emerged in response to changing social realities that challenged the 'States-only' conception, and, more precisely, as a result of the expanding role of international organisations in the international legal system. While accepting the basic analytical framework of the 'States-only' conception, the 'Recognition' conception has been posited as a corrective doctrine in order to reconcile the 'States-only' conception with these changing social realities.[47] The 'Recognition' conception is premised in the understanding that, while States are the primary subjects of international law and have full personality, other entities can acquire limited international legal personality through their recognition by States. According to this conception, States are the highest public authority and the only legislators in the international arena and, therefore, the only actors competent to recognize international persons. Consequently, the existence of a non-State actor as a limited international legal person and the scope of its international personality depends entirely on the will of States. States thus determine which entities can participate in the international system and have full discretion in discharging this legislative function.[48]

According to Portmann, the 'Recognition' conception can be summarised in the following propositions:

(1) States are, as a matter of historical fact, the highest authorities in international relations. Individuals and entities created by national law are represented by their home State in the international arena.

(2) States being the highest authorities in the international arena, International law can only emanate from States will and is only binding on those States having consented to it. In their function as international legislators, States can recognize, at their full discretion, the entities taking part in the international legal system.

(3) There is a presumption that only States are international persons. However, States can overcome this presumption by (creating and) recognizing non-State entities as limited international persons. In the case of non-State entities being subject to the sovereign power of one particular State (e.g., individuals), they can only acquire international personality with the consent of the State of nationality.[49]

Like the 'States-only' conception, the 'Recognition' conception of international personality thus views States as the primary subject of international law.[50] Unlike the 'States-only' conception, the 'Recognition' conception no longer regards States as the only international legal subject. Entities other than States can acquire the status of international legal subjects, provided that

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47 Portmann, *supra* note 4, at 85, 98-99.

48 *Id.* at 83-4.

49 *Id.* at 84.

50 Alvarez, *supra* note 31, at 8.

States have consented thereto.[51] The 'Recognition' conception allows for the possibility that business enterprises could have limited international legal status, distinct from States.[52] Pursuant to this conception, international law may treat business enterprises as subjects of international law if States have recognized them as such.[53] Companies depend on such personality for their existence in the international legal arena and would thus be pre-empted from acting in the international system without having acquired international personality.

There is increasing support for the view that the international community has come to accommodate certain categories of actors with a distinct and autonomous international legal status, for instance international organizations and individuals. Most scholars, according to Clapham, also consider certain types of non-State actors as subjects of International law, notably entities 'on their way to becoming States' and 'actors with State-like qualities'. Examples are '*de facto* regimes, insurgents recognized as belligerents, national liberation movements ('NLMs') representing peoples struggling for self-determination, the Holy See, and even the Order of Malta'.[54] The consideration of business enterprises as international subjects has been less forthcoming, however. States have never consented to such status for business enterprises, there is no treaty or convention regulating the international legal personality of business enterprises, nor have States expressly recognized business enterprises as international legal persons.[55]

The following section will elaborate upon some modalities and implications of the 'Recognition' conception that are of particular relevance in relation to business enterprises. Scholarship suggests that international law has recognized non-State actors as legal persons on the basis of different distinguishing features. A brief analysis follows of the features that have made such actors acquire international legal personality according to the 'Recognition' perspective, and the extent to which analogies may be drawn to business enterprises. An analysis of the opinion of the ICJ's *Reparations for Injuries* Advisory Opinion follows first, an opinion which is commonly referred to as one of the most important legal manifestations of the 'Recognition' conception.[56]

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[51] The requirement that no entity can acquire international personality without the consent by States has been seen as legitimate by virtue of sovereignty, but also of democracy. Matthias Goldman, *We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law*, 25 Leiden Journal of International law, 341 (2012).

[52] *Id.* at 68.

[53] Portmann, *supra* note 4, at 82.

[54] Clapham, *supra* note 5, at 59.

[55] Crawford, *supra* note 1, at 122.

[56] According to Portmann, the Court examined the functions and powers of the UN as contained in the UN Charter in order to determine the intention of EU Member States and concluded that States must have recognized the UN as a limited international person by implication, because this personality was indispensible for the UN to achieve its ends. The UN had a capacity to bring international claims as a consequence of this personality. Portmann notes that '[t]he only diversion from a proper application of the recognition concept was that the Court regarded the international personality of the UN as opposable to a non-member without examining whether the latter had recognized the UN'. Portmann, *supra* note 4, at 103-104.

9.2.2.2 Practice

9.2.2.2.1 The ICJ Reparation for Injuries Advisory Opinion

In its 1949 *Reparations for Injuries* Advisory Opinion, the ICJ reflected on the legal status of the UN as a subject of international law for the purposes of addressing a legal question submitted to it by the UNGA.[57] The ICJ held that the UN, as an international organization, 'is a subject of international law and capable of possessing international rights and duties, and it has capacity to maintain its rights by bringing international claims'.[58]

The following considerations come to the fore in relation to the ICJ *Reparations for Injuries* Advisory Opinion:

- The ICJ was of the view that the UN was an international subject. However, the ICJ also held that this did not entail that the UN was a State (or, for that matter, a 'super-State', 'whatever that expression may mean', the ICJ indicated), or that its legal personality and rights were the same as those of a State.[59] International legal status is thus not akin to State-hood, and entities that are not States can acquire international legal status. The legal personality that can be awarded to entities is not of the same nature as that of States, and does not necessarily entail that the same obligations that apply to States also apply to these entities.

- The ICJ noted that '*[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights'*. This suggests that international legal status has a flexible nature[60] and that the legal personality of non-State actors can differ in scope and content from the legal status that States or other recognized actors have. Non-State actors may have different degrees of legal personality depending on the international capacities they have.[61]

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[57] More precisely, the ICJ addressed the following legal question submitted to it by the UN GA for an Advisory Opinion:

> I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage cause (a) to the United Nations, (b) to the victim or to persons entitled through him?
>
> II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?'

[58] *See, Reparations for Injuries Suffiered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr 11).

[59] *See, id*. 179

[60] Adam McBeth, *Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights* 30 Journal of Public Law and Policy 33, 64 (2008-2009).

[61] Clapham, *supra* note 5, at 71.

- The ICJ noted that the 'subjects of law in any legal system' depend on 'the needs of the community' [62] and that '[t]he development of international law has been influenced by the requirements of international life'. [63] This suggests that the international legal system is a dynamic system that is responsive to the needs of the international community, which may change over time, and demand for the recognition of new legal persons at any time.[64]

- The ICJ's Opinion furthermore suggests that the personality of an entity is not of a permanent nature. The subject-hood of a non-State type of entity is not fixed, but can change over time: States can confer and withdraw rights and duties from a non-State entity.[65] Changes in the legal personality of an entity thus may be explained in relation to changes in the requirements of international life and more generally, the international legal system which is continuously evolving and responsive to the needs of the community.

- The ICJ's Opinion also suggests that the legal personality of an international Organisation ('IO') is functional; the UN has international legal personality because having this status is necessary for the UN to perform its purposes and objectives. Dixon thus notes that the 'personality of organisations is not one of 'general competence': it is not a personality for all purposes. […] the 'constitution' of the organisation will set out explicitly some of the attributes of international personality that the organisation is to enjoy […]. This may include, for example, the power to make treaties, to bring claims, etc.'[66]

- It also follows from the ICJ's Opinion that international legal status does not simply befall upon a non-State entity, but needs to be attributed to it.[67] Attribution requires State action. A State must consent to awarding such status through action, most

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62 *Reparations for Injuries, supra* note 58, at 178. Emphasis added.

63 *Id*. at 178. Emphasis added.

64 According to Díez de Velasco: 'desde una concepción dinámica del [Derecho Internacional] es preciso admitir que éste no conoce límites en cuanto a sus sujetos, pues las propias necesidades de la comunidad jurídica internacional en un momento dado pueden aconsejar, e incluso exigir, el investir de personalidad internacional a determinadas entidades' 'From a dynamic conception of [international law] it becomes necessary to recognize that it knows no bounds in its subjects, for the specific needs of the international legal community at any given time can advise, and even demand, granting legal personality to certain entities' (translation) Manuel Pérez González, *La Subjetividad Internacional (I)* in Manuel Díez de Velasco: Instituciones de Derecho Internacional Público, (C. Escobar Herhández, ed. 2012).

65 Nicola Jägers, *The Legal Status of the Multinational Corporation Under International law*, *in* Human Rights Standards and the Responsibility of Transnational Corporations, 262 (Michael K. Addo ed. 1999).

66 Martin Dixon, International law, 127 (Oxford University Press 7th ed. 2013), referring to the *Advisory Opinion on Nuclear Weapons (WHO Case*) and to the PCIJ's *Advisory Opinion on the Jurisdiction of the European Commission of the Danube, PCIJ Ser. B No. 14*.

67 The ICJ acknowledged that the UN`s Member attributed international personality to the UN by 'entrusting certain functions to it, with the attendant duties and responsibilities' and that this was essential for the UN to live up to its purposes and principles as established in the UN Charter. *Reparations for Injuries, supra* note 58, at 178-9.

notably the conferral of rights and duties on the respective entity. The UN derived its status as a subject of international law from its State members that awarded to it the competences to discharge its functions effectively.

- The ICJ held that the UN has 'objective' personality, also where non-members are concerned. In the words of Brownlie: '[o]ne attribute of the objective [character] of legal personality for international organizations is that it renders that personality opposable to third parties, even though the organization in question is normally the creation of a treaty'.[68]

The ICJ in the 1949 *Reparations for Injuries* Advisory Opinion provides a definition of a subject of international law that could be applied to assess whether international law treats an entity, including business enterprises, as a subject of international law. What one should look at is whether an entity is 'capable of possessing international rights and duties, and [whether] it has capacity to maintain its rights by bringing international claims'.[69]

Some scholars have noted the circular nature of the ICJ's definition of subjects of international law in its *Reparations for Injuries* Advisory Opinion.[70] The exhibition of the indicia by an entity presupposes that the entity is a legal person, yet it is the existence of a legal person that is considered to determine which the relevant indicia for entities are in the first place.[71] Whether an entity is a subject of international law is often discerned by implication; 'the main way of determining whether the relevant capacity exists in case of doubt is to inquire whether it is in fact exercised', notes Crawford,[72] who adds that 'all that can be said is that an entity of a type recognized by customary law as *capable* of possessing rights and duties and of bringing and being subjected to international claims is a legal person'.[73]

The ICJ's definition provides scope for the possibility that international law treats business enterprises as subjects of international law. The ICJ's *Reparations* Advisory Opinion supports the view that entities that are not States can acquire this status. As articulated by Zerk, that '[t]here is actually nothing *in principle* that prevents the international community from conferring some degree of international legal personality on multinationals'.[74] Such status can be

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[68] Crawford, *supra* note 1, at 170, 171. Brownlie considers that this is applicable to '*all* international organizations', though it is more likely that a case-by case analysis is more consistent with the text of *Reparations* and Brownlie himself notes the existence of conflicting decisions of the Italian courts on the status of the North Atlantic Treaty Organization (NATO) Branno v Ministry of War (1954) 22 ILR 756; Mazzanti v HAFSE (1954) 22 ILR 758.

[69] *See Reparations for Injuries, supra* note 58, at 179.

[70] Clapham, *supra* note 5, at 64.

[71] According to Clapham: 'International law recognizes the capacity to act at the international level of an entity that is already capable of acting at the international level. Furthermore, the needs of the community and the requirements of international life will throw up new subjects and new capabilities according to those needs; where those needs require the capacity to act, there will be recognition of that personality'. *Id.* at 64.

[72] Crawford, *supra* note 1, at 115.

[73] *Id.* at 115.

[74] Emphasis added. *Id.* at 61

conferred on business enterprises by State action.[75] Non-State entities may be attributed legal personality to varying degrees, according to the extent to which an entity is a beneficiary of international rights, bearer of international duties, and / or has a capacity to maintain its rights by bringing international claims. Business enterprises thus may be beneficiaries of legal rights that are not applicable to other types of international legal persons and vice versa.[76]

According to McBeth, relying on the ICJ's opinion in *Reparation*, 'if an entity is capable of acting on the international plane – as international organizations and private multinational enterprises clearly are – it may be considered to have international legal personality, although the extent of that capacity will be determined by the "needs of the international community" and will not be the same for every kind of entity".[77] The needs of the international community may thus demand for the recognition of business enterprises as legal persons. Partially because of this function-based recognition, the international legal personality that business enterprises can possibly acquire is distinct from that of States, and may also differ in nature and scope from the one (other) non-State entities have.

Alvarez poses the question of whether business enterprises actually are subjects of international law and finds that, applying the ICJ's definition, the answer 'is a resounding "yes"'.[78] Alvarez elaborates:

> If one applies the ICJ's (circular) reasoning from the *Reparation Case*, it is easy to conclude, based on the international investment regime, that corporations and other investors under BITs and FTAs are international legal persons or subjects of International law to no less an extent than the Court found was true of the U.N. In the same way that the U.N. Charter implicitly recognizes that the United Nations has a distinct personhood apart from its member States, investment treaties appear to recognize the distinct 'personhood' of their third party beneficiaries, whose rights appear to be delineated in these treaties as distinct from those of the State parties to such treaties. As does the U.N. Charter, which recognizes that the U.N. can conclude certain agreements under International law, many BITs' and FTAs' umbrella clauses explicitly 'internationalize' investor-State contracts, thereby elevating such contractual assurances to the level of inter-State pacts. In addition, most BITs and FTAs, unlike the U.N. Charter (which does not confer on the organization the capacity to sue), explicitly provide investors with the ability to pursue their claims vis-à-vis States at the international level. To the extent the ICJ concluded in the *Reparation Case* that the ability to act as a person is the principal determinant of personhood status, the same conclusion can even more readily be drawn

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[75] As a consequence, and as Kinley and Chambers have pointed out, it is through State behaviour that one can determine whether the respective entity is a subject of international law. According to Kinley and Chambers (2006), '[i]t is only through the behavior of the principal actors, States, that we can establish which entities have legal status'. 'The State behaviour that is required, according to the International Court of Justice, is the conferral of both rights and responsibilities on non-State entities'. David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International law*, 6 Human Rights Law Review, 33 (2006).

[76] Zerk, *supra* note 16, at 73.

[77] McBeth, *supra* note 60, at 64.

[78] Alvarez, *supra* note 31, at 3.

with respect to corporations and other investors under the international investment regime.[79]

Authors thus conclude that corporations enjoy legal personality, including also Dixon, for whom 'there are circumstances in which the contractual relationship between a State and a corporation will be governed by international law. For example, a concession agreement for the extraction of oil might be an 'internationalised' contract subject to rules of international law'.[80]

As a consequence of the circular nature of the ICJ's opinion, however, any assessment of the legal personality made on the basis of the ICJ's definition cannot provide a definite answer to the question whether business enterprises have international legal status. Alvarez thus points out that determinations of personhood based on the ICJ's definition in its *Reparations for Injuries* Advisory Opinion are 'hardly intellectually rigorous'. The ICJ's definition thus arguably complicates efforts to arrive with certainty at a determination of whether business enterprises have international legal personality.

9.2.2.3 Doctrine

9.2.2.3.1 International Organizations and Individuals as 'Derivative' Subjects

States are commonly viewed as the 'original subjects' of international law. According to Cassese, international organizations and individuals can be understood as 'derivative' subjects of international law, in the sense that they derive their existence from the formal decisions of existing subjects. Such formal decision is usually a treaty or an international resolution. Individuals and Organisations only exist as international legal persons 'if groups of States decide to grant them legal rights; in addition, these rights remain dependent on the will of those who granted them'.[81] The international legal status of 'derivative' subjects thus depends for its creation on an act of consent by States and for its continued existence on the will of States to maintain this status. Derivative subjects of international law are created in order to perform activities delegated to them by States, and can thus be considered as 'ancillary' subjects of international law.[82] [83]

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79 *Id.* at 12.

80 Dixon, *supra* note 66, at 130, quoting Texaco v Libya (1977 ILR 389).

81 Antonio Cassese, International Law in a Divided World, at 77 (1986).

82 *Id.* at 77.

83 According to Worster, International Organisations ('IO's) can be understood as 'limited' and 'functional' entities. Most commonly, their legal personality exists only with regards to its members, or in relation to those States that have chosen to recognize their personality by other means, *e.g.*, by 'special law, act or agreement'. The organization thus has 'relative personality' and thus 'can operate and is capable of having rights and obligations under international law only in its relations with the States that created or interact with it'. It may also be implied from the functions that an organization has that international law may treat an IO as a legal person, more particularly by an assessment of whether the IO has been granted 'capacities with meaningful independence'. The personality of an IO is 'limited to the functional rights acknowledged' by a State. William Thomas Worster, *Relative International Legal Personality of Non-State Actors,* at 7-8 (2015), http://ssrn.com/abstract=2682444.

States or other existing subjects of international law have not formally attributed international legal status to business enterprises through an act of formal consent. States create business enterprises under domestic law. Business enterprises are generally not considered to possess the 'derived' international legal personality that international law confers on individuals and IOs. Cassese also draws this conclusion, noting that States have not 'upgraded these entities to international subjects proper' and therefore (and reaching the opposite solution to Alvarez's), Cassese was of the view that 'multinational corporations possess no international rights and duties. '[T]hey are only subjects of municipal and 'transnational' law', Cassese argued.[84]

9.2.2.3.2 States and Insurgents as 'Original' Subjects of International law

Cassese distinguishes another category of 'original' subjects apart from States. This category encompasses 'insurgents' and peoples that are endowed with a representative organization.[85] Subjects in this category exist as a result of 'a *de facto* process'.[86] Consequently, these non-State actors do not depend on the formal decision of States for their existence, hence their characterisation as 'original' subject of international law. Insurgents derive their existence from meeting certain general conditions that qualify them as a *de facto* State-like entity. According to Cassese, the elements that are commonly required are: 'first, a central structure capable of exercising effective control over a given territory […], second, a territory which does not belong, or no longer belong to any other sovereign State, with a community whose members do not owe allegiance to other outside authorities […]'.[87]

Business enterprises typically do not exhibit the sort of representative organization and State-like criteria that could qualify them as 'original' subjects of international law in a manner similar to insurgents. This approach assesses the legal personality of a non-State actor by its assimilation to the States 'to designate it as a *de facto* State-like entity, all the while without denying that it is a State, and hold it to compliance with human rights norms just like a State'.[88] The elements set out above indicate that the capability to exercise effective control over a territory constitutes a distinguishing feature of this type of international legal personality. The existence of a non-State actor as an international legal person thus seems to depend in part on its 'territorial' existence.[89] Business enterprises typically do not have the capability to exercise effective control over a territory,[90] hence the possibility of these entities qualifying as 'original' legal persons is highly unlikely.

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84 Cassese, *supra* note 81, at 103.

85 *Id.* at 77.

86 *Id.* at 77.

87 *Id.* at 77-78.

88 Worster, *supra* note 83, at 15.

89 According to Lador Lederer, 'territrorial entities introduce into the law the logic and spirit of their territorial existence'. Charney, *supra* note 20, at 786.

90 Cassese, *supra* note 81, at 78.

9.2.2.3.3 A Functionalist Approach to Assessing International Legal Personality

An alternative functionalist approach has been employed by Worster, who arguably stays within the boundaries of the 'Recognition' conception when indicating that personality remains important and that non-State actor are increasingly enjoying relative and functional legal personality in the sense of having capacity for international rights and obligations, which fluctuate based on functions. Worster notes the following:

> A non-State entity will have personality in the international legal system to the degree to which it functions on the international legal plane. […] It appears that the existing legal persons assess the actions (or proposed actions) of certain entities and consider the need or benefit of engaging with those entities as international legal persons rather than as domestic legal persons or unincorporated entities. From this assessment, international rights and duties are assigned.[91]

According to Worster, IO's can be understood as 'limited' and 'functional' entities. Most commonly, their legal personality exists only with regards to their members, or in relation to those States that have chosen to recognize their personality by other means, *e.g*., by 'special law, act or agreement'. The organization thus has 'relative personality' and thus 'can operate and is capable of having rights and obligations under international law only in its relations with the States that created or interact with it'.[92] However, as I have noted, in the *Reparations* Advisory Opinion, the ICJ recognized legal personality to the UN also in relation to non UN members. Moreover, international law may treat an IO as a legal person by reference to the functions that an organization has, more particularly by an assessment of whether the IO has been granted 'capacities with meaningful independence'.[93] The personality of an IO is 'limited to the functional rights acknowledged' by a State.[94]

According to Worster, the personality of insurgents may also be viewed as 'functional' in that their recognition as legal persons enables their equal treatment to the States they fight, for the purposes of the effective and practical application of international law. This approach is arguably consistent with the ICJ *Reparations for Injuries* dicta according to which international legal subjectivity can be expanded depending on the needs of the international community. The personality of insurgents is thus relative in that the treatment of insurgents as legal persons in practice appears to depend on whether it fosters compliance with international (Humanitarian) law.[95] Worster notes 'a functional, pragmatic approach is taken, because what matters is whether the entity controls territory comparable to a State. The international legal personality of these entities, though, is understood as being relative to their nature, role, functions and duties'.[96]

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[91] Worster, *supra* note 83.

[92] *Id.*

[93] *Id.* at 7.

[94] *Id.* at 7-8.

[95] *Id.* at 18.

[96] *Id.* at 29.

Legal scholarship recognizes that insurgents have rights and duties under international law. States and IOs have engaged with insurgents directly through the signing of treaty-type instruments in which insurgents commonly 'reaffirm' their obligations under international Humanitarian law. Insurgents have also expressed their promise to abide by their international obligations in unilateral statements. According to Worster, State practices that give expression to the recognition of insurgents as 'original' subjects have been driven in part by a quest to limit the impact of their activities on civilian population and to ensure compliance by insurgents with international human rights obligations, to which States are also subject. The underlying consideration is that non-State armed groups 'have the capacity to undertake State-like organisational policy sufficient for crimes against humanity conviction'.[97]

Worster also concludes that there appear to be no barriers to granting legal personality to legal entities 'where the international community deems it appropriate', and these entities are increasingly considered international persons for limited, functional purposes.[98] Worster indicates that certain such entities (i.e., the Bank for International Settlements and Eurofirma) have been created by treaties, but conform agreement have been incorporated under domestic law. These entities have been considered to be '*de facto* international legal persons'.[99] Worster also noted that legal entities created under domestic law are usually not considered international persons, but developments indicate this position to be on the verge of change. There is increasing support for the view that business enterprises can be held responsible under international law for international crimes, a trend which has been noted by the SRSG.[100] Worster also refers to the decision by the Special Tribunal of Lebanon in *New TV Karma Mohamed Tashin Al Khayat*. By adopting a functionalist approach, the tribunal reached the conclusion that the nature of corporations in the international arena is changing.[101] This decision will be examined in more detail in section 9.2.5.3.1.

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97 *Id.* at 15.

98 *Id.* at 19.

99 Worster indicates the following,

> [w]here a treaty formed the basis for the agreement to incorporate under domestic law, the corporation might function as an international organization. Both the Bank for International Settlements ('BIS') and Eurofima (European Company for the Financing of Railroas Rolling Stock) are technically domestic corporations, created by treaties but incorporated under domestic law, that have been considered to be *de facto* international legal persons. The BIS unusually included private corporations as parties to the treaty alongside States, but that participation does not appear to have changed its status as a treaty. Although perhaps we can wonder whether JP Morgan Bank is now a quasi-international person.

Id. at 20.

100 Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, § 66, U.N. doc. A/HRC/8/5 (April 7, 2008) [hereinafter, *Ruggie, 2008 Report*] (by John Ruggie).

101 Worster, *supra* note 83, at 22.

9.2.2.4 The 'Recognition' Conception and the UNGPs

While the 'Recognition' conception may be considered still as 'the dominant conception of international personality today'[102], there is considerable support in scholarly debates for the notion that this conception is not entirely suitable for the purpose of appraising of the status of non-State actors more generally and, more precisely, of business enterprises.

The approaches set out above to determining whether States have recognized business enterprises as subjects of international law, including by assimilation to States and on the basis of State-like criteria, are out of touch with the reality of the international arena. This view correlates more closely with the international system as it was perceived in the 1970s when the first codes of conducts were negotiated.[103] The *de facto* presence of business enterprises in the international system is difficult to qualify in terms of State-related criteria. When a State-based approach is applied, it is often (but not always, see Alvarez, as set out above) concluded that business enterprises have not been recognized as international subjects. The existence of business enterprises as powerful players at the international level is thus ignored, leading to theories of legal personality inconsistent with the international reality. According to Clapham, '[t]rying to squeeze international actors into the State-like entities box is, at best, like trying to force a round peg into a square hole, and at worst, means overlooking powerful actors on the international stage'.[104]

Scholars that seek to ascertain the status of business enterprises as subjects of international law are bound to run into 'formalistic legal problems'.[105] An analysis of the rights and obligations that business enterprises have under international treaties leads Kinley and Junko Tadaki to conclude that 'it is possible to invest in [transnational corporations] sufficient international legal

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[102] Portmann, *supra* note 4, at 80.

[103] Examples of practices that correlate with this classical approach to international law are the original International Investment treaties signed after WWII, which provided for State-dispute settlements systems. Slawotsky, *supra* note 17, at 81. Stephanie Bijlmakers, *Effects of Foreign Direct Investment Arbitration on a State's regulatory autonomy involving the public interest,* 23 American Review of International Arbitration 245, 246 (2012).

> At that time, investors had only a single avenue at their disposal to seek protection for their assets: international customary law. A minimum standard of treatment agreed between States allowed investors to call upon their home State to exercise diplomatic action, alleging a breach under international law amounting to injuries to aliens and their property attributable to the host State. Investment disputes were settled through diplomacy or, exceptionally, through inter-State adjudication. Whilst commendable in that it kept States in the driver's seat, it largely forfeited its purpose of fostering a secure investment climate for nationals as its proceedings were heavily politicized. The investor was obliged to exhaust all effective local remedies in the State. Given the domestic courts' tainted reputation of being inefficient and bereft of fairness and impartiality, this was a burdensome process. Moreover, if the home State proved willing to bring a claim on its behalf, an action the State was not legally obliged to undertake, and the outcome accepted by its State ruled in its favor, the host State was under no legal obligation to pay compensation to the investor.

[104] Clapham, *supra* note 5*,* at 80.

[105] *Id.* at 77.

personality to bear obligations, as much as to exercise rights'.[106] There are no convincing answers as to whether States have already done so, however. The SRSG holds this view noting that '[n]othing prevents States from imposing international legal responsibility for human rights directly on corporations. But the evidence we reviewed does not indicate that they have already done so to any appreciable extent'.[107]

The 'Recognition' position of international law, according to which business enterprises are mere 'objects' of international law has been deemed 'unhelpful'.[108] Partially because of this subject/object distinction, efforts to define and appreciate the relationship of business enterprises with human rights become more complicated. According to Clapham, '[i]nternational lawyers realize that the role of non-State actors is too important to be ignored, yet feel constrained by the 'rules' on subjectivity to develop a framework to explain the rights and duties of non-State actors under international law'.[109] The SRSG has avoided dwelling on the question of the international legal personality of companies as 'unhelpful', noting that '[l]ong-standing doctrinal arguments over whether corporations could be "subjects" of international law, which impeded conceptual thinking about and the attribution of direct legal responsibility to corporations, are yielding to new realities'.[110]

The SRSG did not express his preference for the 'Recognition' position, or, for that matter, of any other doctrinal position on the legal status of business enterprises. Neither did the SRSG issue an opinion on the desirability of States extending recognition to business enterprises as legal subjects. Apart from there being a potential lack of authorities supporting such personality, it appears reasonable to assume that avoiding getting dragged into doctrinal debates was imperative for the SRSG to advance in the effective fulfilment of his mandate. In an exercise of principled pragmatism, the SRSG seems to have skilfully avoided debate getting into a quagmire of doctrinal discussions.[111]

According to the 'Recognition' conception, nothing prevents in principle States to recognize business enterprises as subjects of international law. An analysis de *lex lata* suggests that business enterprises have certain rights under international investment treaties. Such rights seem insufficient to convince some scholars that States have recognized business enterprises as 'subjects' of international law, however. According to Pentikänen, '[d]ebates on this matter are characterised by strong resistance to include corporate entities among the subjects of

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[106] Higgins has referred to the reliance on the subject-object dichotomy in much of doctrinal writings as not 'not particularly helpful'. Rosalyn Higgins, Problems and process: International law and how we use it, 77 (Clarendon Press. 1994).

[107] J. Ruggie, *Business and Human Rights: The Evolving International Agenda,* 20 (John F. Kennedy School of Government, Corporate Social Responsibility Initiative Working Paper No. 31, 2007).

[108] Higgins, *supra* note 106, at 50.

[109] Clapham, *supra* note 5, at 61.

[110] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, § 20 A/HRC/4/35 (Febr. 19, 2007) [hereinafter *Ruggie, 2007 Report*] (by John Ruggie).

[111] Pentikäinen, *supra* note 6, at 153.

international law, and until recently suggestions that corporations be considered as having international legal personality were exceptional. Many authors have simply left the question open'.[112]

This reluctance to recognize business enterprises as legal persons may thus be explained by policy considerations, and arise out of concern about the potential undesirable effects that such act of recognition may have in terms an (arguably over) extension of legitimacy and rights to companies. In defence of the traditional view, Merja Pentikäinen argues for instance that 'attempting to extend legal duties under human rights law to non-State actors bestows on such actors an unfortunate legitimacy, which will undermine the authority of the State and dilute the responsibility of States with respect to their human rights obligations. Changing the original course would allegedly cause the unravelling of the whole human rights project'.[113]

In the same vein, Alvarez has warned that, recognizing corporations as subjects of international law, 'may be a very bad idea'.[114] More precisely, Alvarez draws attention to the 'risks of deducing, from the fact of personhood or subject-hood, that corporations have certain rights and obligations under international law' and to the 'unintended consequences that may emerge when international lawyers argue in hierarchical manner, top down, that corporations are international legal persons and are to be treated legally as the functional equivalent of either States or natural persons'.[115] This position will be addressed in the next section.

There has been considerable debate about the policy (dis) advantages of 'upgrading' business enterprises as legal subjects or as quasi- subjects of international law.[116] The enhanced legitimacy that comes with such recognition and the conferral of rights, duties and capacities on corporations on the basis of such recognition may also be viewed positively. Some of the afore-mentioned concerns may be alleviated where international legal personality is approached from a 'functional' perspective. The conferral of legal status to business enterprises could have positive effects where the rights, duties and capacities that are applicable to companies correlate with the particular social role that business enterprises play in the international system, and apply only insofar and do not extent beyond that what is necessary in order to ensure the effectiveness of the system in relation to the realization of human rights. From such a functionalist perspective, it would thus also be unnecessary and, possibly inaccurate, to conceive and treat business enterprises legally as functionally equivalent to States or individuals.

The ICJ's opinion in *Reparations* supports the view that recognition of legal personality to business enterprises is allowed and may be required if this were necessary for the 'community' or 'required' for 'international life'. To be noted is the important dictum by the ICJ that the 'subjects of law in any legal system' depends on 'the needs of the community'[117] and '[t]he

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[112] *Id.* at 147.

[113] *Id.* at 147.

[114] Alvarez, *supra* note 31, at 3.

[115] *Id.* at 9.

[116] Clapham, *supra* note 5, at 60.

[117] *Reparations for Injuries, supra* note 58, at 178.

development of International law has been influenced by the requirements of international life'.[118] The question that might be useful to address is not whether recognizing business enterprises as subjects of law is desirable, but whether it is necessary. In other words, from a functionalist perspective, it may be relevant to consider whether the objective of the international legal system to ensure the effective realization of human rights leads to the normative conclusion that certain rights duties and capacities should be conferred on business enterprises.[119]

9.2.3 The 'Individual' Conception

9.2.3.1 Summary

The third conception on international legal personality identified by Portmann is the 'Individual' conception. The'Individual' conception was formulated by Lauterpacht.[120] At its core, this conceptions places the individual (and not the State) as 'as an a priori international person having certain basic rights and duties'. This claim is derived from the combination of two key assumptions: 'the first is the view that the State is a functional entity governed by individuals who are subject to the rule of law in the interest of those being governed; the second is the notion of international law as consisting of fundamental principles of law being superior to expression of State will (constitutional principles of *ius cogens* character)'.[121] This conception constitutes a rejection of the positivist doctrines of international personality, and thus also of certain key assumptions on which the 'States-only' and the 'Recognition' conceptions of legal personality are based.

Individuals are the ultimate subjects of the international system. They have a status as a-priori international legal persons. Hence, individuals do not depend on an expression of State will for their existence as legal persons. The status of individuals is closely linked to these entities having basic rights and duties. 'The justification of the international legal order, like any legal system, rests in protecting individual freedom and well-being. Hence, this law must necessarily address the individuals in direct terms'.[122]

The State is viewed in functional terms, as an entity governed by individuals. The purpose of its existence is to respresent 'certain interests of the individuals composing it' and the State 'in particular is under a duty to preserve individual freedom'.[123] The interests that the States pursue internationally are assumed to be no different from the interests of the individuals composing it:

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[118] *Id.* at 178.

[119] According to Zerk, the attribution of the international legal personality to entities, including business enterprises, is 'functional, and is influenced by the area of regulation (and the role of the particular participant in it), the powers conferred upon the 'person', and the aims and needs of the international community overall'. J Zerk, *supra* note 16, at 75.

[120] Portmann, *supra* note 4, at 127, quoting Hersch Lauterpacht, 'The Subjects of the Law of Nations', in Elihu Lauterpacht (ed.), *International law: Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press, 1947).

[121] *Id.* at 127.

[122] *Id.* at 131.

[123] *Id.* at 130.

'international norms agreed on by States will in general be intended for strengthening the well-being of individuals in some form'.[124] No strict divide is therefore presumed to exist between the public and the private sphere under the 'individual' conception.[125]

The 'Individual' conception accepts the existence of sources of law that do not emanate from the will of State, and extend beyond treaties and custom, including also natural law principles.[126] This conception presupposes the existence of general international rules that are of concern to all States, including fundamental legal principles and peremptory norms of international law (the so-called norms of *ius cogens*).[127] *Ius cogens* norms constitute a category of certain overriding principles. They have been distinguished from ordinary customary law by their source; norms of *jus cogens* are not derived from international custom or treaty.[128] They depend for their existence on *opinion iuris*, to a greater extent than ordinary customary international law. An *opinion iuris*, moreover, which is furthermore conceived in more collective terms, hence these norms resemble more closely legal fundamental principles.[129]

Portmann notes, '[o]n a level of fundamental principle, therefore, international law, like all law, can direct rights and duties towards individuals (be they acting on behalf of the State or in private matters) and entails basic rights and duties of the individual'.[130] The individual is of legal interest to all States, which owe an obligation to the international community to guarantee certain fundamental freedoms and rights of individuals.[131] The existence of general international law norms that restrict State power in the interest of the individual illustrates that individual freedom must be protected against infringements by the State.[132]

According to Portmann, the 'Individual' conception can be summarized as follows:

> (1) The State is a corporation consisting of individuals, some of them being authorized to exercise public functions. The State is not a higher organic body having a special moral status. Correspondingly, there is no difference of principle between State and individual interests. The strict distinction between international and municipal law as well as between Public and Private law essentially disappears too. On a level of fundamental principle, therefore, international law, like all law, can direct rights and duties towards individuals (be they acting on behalf of the State or in private matters) and entails basic rights and duties of the individual.

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[124] *Id.*

[125] *Id.* at 133.

[126] *Id.* at 131.

[127] *Id.* at 258. For a classic definition of *jus cogens* refer to Article 53 of the Vienna Convention on the law of Treaties of 23 May 1969.

[128] *Id.* at 263.

[129] *Id.* at 262.

[130] *Id.* at 133.

[131] *Id.* at 256.

[132] *Id.* at 257.

(2) The sources of international law include general principles of law. As a result, the international personality of the individual does not depend on expressions of State will (e.g., recognition), but is established through the general principle proclaiming individuals to be the ultimate addressees of all law. Certain fundamental international rights and duties are attached to the individual's status as an international person.[133]

The 'Individual' conception finds expression in the Nuremburg Judgements, the application of international criminal law norms to individuals and private entities at national level, litigation against private actors for violations of international human |rights law (e.g., under the US ATCA), human rights law, and the ICJ's findings in, *inter alia*, the *Barcelona Traction* case of 1970.[134]

The 'individual' conception thus provides scope for business entities created under national law to exist as international legal persons. International legal rights and obligations may be applicable to business, 'insofar as there are no logical reasons precluding analogy with international human beings'.[135] There are a number of arguments on which scholars have relied that support the notion that business enterprises can be directly bound by norms of international law, which are founded on the 'Individual' conception. Most notable is the view, which was also supported by the authors of the UN Norms, that the UDHR is addressed to '*all organs of society*', including business enterprises, and that consequently, human rights obligations, as set out in the UDHR, apply to business enterprises like any other 'organ' in society. The UDHR indicates that human rights are a manifestation of human dignity[136], though their source of obligation and means for implementation are contained elsewhere.[137] [138]

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[133] *Id.* at 133.

[134] *Id.* at 128. The Barcelona Traction, Light and Power Company, Limited (Belg v Spain), 1970 I.C.J. 3, ¶ 33-4, (Feb. 5).

> [A]ll States can be held to have a legal interest in their protection… Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from, the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

[135] *Id.* at 274.

[136] Wood, *Reinforcing Participatory Governance Through International Human Rights Obligations of Political Parties*, 28 Harvard Human Rights Journal, 158 (2015).

[137] 'While the UDHR is the most universally accepted reference point for identifying the content of inherent human rights that are guaranteed by international law, both the source of the rights and the means for their implementation – the specific obligations to respect, protect, and promote human rights in various circumstances – are contained outside the Declaration'. McBeth, *supra* note 60, at 53.

[138] Human dignity has been recognized as a source of human rights, *inter alia*, in the preambule of the UDHR: '*Whereas* the 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 world'. Article 1 stipulates: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/Res/217(III) (Dec. 10, 1948).

9.2.3.2 Practice

9.2.3.2.1 The US ATCA

This 'Individual' conception finds support in certain legal practice under the ATCA that predates the 2010 Second Circuit decision in *Kiobel*. In *Sosa,* the Supreme Court instructed[139] lower courts to consider 'whether international law extends the scope of liability […], if the defendant is a private actor such as a corporation or individual'.[140] District Judge Schwartz, in his 2003 opinion in *Presbyterian Church of Sudan v Talisman Energy* found that the Second Circuit's interpretations of international law indicate that 'corporations may be held liable for *jus cogens* violations of international law'[141] and 'that actions under the ATCA against corporate defendants for such substantial violations of international law, including *jus cogens* violations, are the norm rather than the exception'.[142] The Judge also noted that 'substantial U.S. and international precedent indicates that corporations may be responsible, in certain cases, for violations of international law'.[143] The Judge reasoned that '[g]iven that private individuals are liable for violations of international law in certain circumstances, there is no logical reason why corporations should not be held liable, at least in cases of *jus cogens* violations'.[144]

The opinion by Judge Schwarts supports the view that business enterprises may be conceived as legal persons by analogy to individuals for the purpose of corporate liability for violations of *jus cogens* norms. The 2010 Second Circuit's decision in *Kiobel*, rejecting subject matter jurisdiction in relation to corporations, may have disrupted this previous case-law. However it has not led to its revision. As noted above, the Court of Appeals of the Second Circuit held in *Kiobel* that corporate liability was an issue of subject matter jurisdiction and that one is to look to international law, not domestic law, to determine jurisdiction over corporate defendants. The court went on to conclude that international law did not provide for liability for violations of customary international law to legal persons.[145] The US Supreme Court has not yet decided on this point.[146] As a result, the 2010 *Kiobel* decision is not binding on courts of other circuits. Post-

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[139] Mattew Daforth, *Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations*, 44 Cornell International law Journal 665(2011).

[140] Sosa v. Alvarez Machain et all. 542 US 692 (Sup. Ct. 2004), ftn. 20.

[141] Presbyterian Church of Sudan v Talisman Energy INC, *supra* note 32, § III.A. 2.a.i.

[142] *Id.* § III. A. 2.c.

[143] *Id.* § III. A. 2.c.

[144] *Id.* § III. A. 2.c.

[145] The court's majority opinion found that 'imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*. Because corporate liability is not recognized as a "specific, universal, and obligatory" norm, […] it is not a rule of customary international law that we may apply under the ATS. Accordingly, insofar as plaintiffs in this action seek to hold only corporations liable for their conduct in Nigeria (as opposed to individuals within those corporations), and only under the ATS, their claims must be dismissed for lack of subject matter jurisdiction'. *Kiobel v Royal Dutch Petroleum*, *supra* note 23, at 43.

[146] The main issue under consideration by the Supreme Court in *Kiobel* was not corporate liability for violations of customary international law, but the extraterritorial applicability of the ATCA, more specifically 'whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of

2010 Kiobel rulings by the district courts in *Doe v Exxon* and *Flomo v Firestone* rejected the opinion. For example, in *Flomo v Firestone*[147] the court noted that cases at lower levels 'hold or assume [] that corporations can be liable [for violations of customary international law]'. After referring to the 2010 *Kiobel* decision as an 'outlier', the court found the factual premise of this opinion to be incorrect, which was that customary international law does not bind a corporation because it has never been prosecuted (civilly or criminally) for violating customary international law.[148]

9.2.3.3 Doctrine

One of the implications of the 'individual' conception is that there can be real effects to business enterprises having the status of international legal subjects.[149] Alvarez, argues that there may be 'risks' to equating business enterprises to persons for this purpose, providing illustrative examples of legal consequences that could emerge in the investment regime if business enterprises as new subjects of international law were to have equal standing to States.[150]

Business enterprises might be accorded equal standing alongside States, as the rights of business enterprises would no longer derive from, and be dependent upon, State consent. If international law were to treat business enterprises as legal subjects, due process and other guarantees might be seen as applicable to the investor regime. The interpretations of investor rights may extend broader protections to business enterprises as a 'person' than was the case before, when business enterprises were considered merely as 'aliens'. Depending on the circumstances, the position of business enterprises in the international investment regime vis-à-vis the State may be strengthened. This could further tip the balance in investment arbitration proceedings in favor of the rights of investors, Alvarez argues.[151]

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nations occurring within the territory of a sovereign other than the United States'. Kiobel v Royal Dutch Petroleum, 133 S.Ct. 1659 (2013), at 1.

147 The US Court of Appeals (Seventh Circuit) addressed the question 'whether a corporation or any other entity that is not a natural person (the defendant is a limited liability company rather than a conventional business corporation) can be liable under the Alien Tort Statute, and, if so, whether the evidence presented by the plaintiffs created a triable issue of whether the defendant has violated "Customary International law"'. *See*, Flomo v. Firestone Natural Rubber Co LLC, 643 F.3d 1013 (7th Cir, 2011).

148 The court furthermore indicated that the answer to the question of corporate liability is not to be found in customary international law, but is a matter of procedure or remedy for the federal judiciary to decide under national law. *See, id.*

149 Alvarez argues that there is awareness among scholars that the concept of international legal personality can be 'deconstructed' in function of the pursuit of a normative agenda, he notes. If lawyers treat the designation of business enterprises as international legal persons literally, this could have unintended and adverse consequences for human rights. Alvarez, *supra* note 31, at 9.

150 In the words of Alvarez: '[m]y point is strikingly simple, even banal. It is that even in our progressive era, when scholars acknowledge that all legal concepts are constructed and can be deconstructed to suit distinct normative agendas, when corporation are designed as "persons," many, including judges and arbitrators, may treat this literally. […] not all of the results will be progressive'. *Id*, at 23.

151 Alvarez suggests that States may no longer be able to rely on their rights to waive the rights of an investor to file a claim, to terminate or restrict previous treaty commitments, to change their minds through formal amendment or mutual subsequent practice or to terminate their BIT or to exit from ICISD arbitration where this would threaten the rights of investors. States furthermore may be no longer able to rely on the Articles of State

Business enterprises may be treated as equivalent to individuals and thus entitled to benefit from similar rights and protections as natural persons.[152] Alvarez warns about the negative effects this may have on human rights. The importation of human rights standards into investment-State disputes may foster trans-judicial communication between investor-State tribunals and human rights. There are risks of human rights getting 'lost in translation' as these are applied by arbitrators whose expertise lies mainly in Commercial law. An equally undesirable scenario would be if interpretations of rights guaranteed in investment treaties that extend extensive protections to business, for instance the right to prompt, adequate, and effective compensation to property holders, would gain traction from the international human rights systems, which, Alvarez notes 'has been notoriously reticent about accepting property rights as human rights'.[153]

The notion of the 'individual' conception according to which international law treats corporations as associations of individuals and as functionally equivalent to individuals for particular purposes has been upheld at national level for some time. An illustration is the controversial US Supreme Court decision in *Citizens United v Federal Election Commission*[154], in which the court noted, inter alia, that 'First amendment protection extends to corporations' and 'political speech does not lose First Amendment [] protection "simply because its source is a corporation"'. The court 'rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment [] simply because such associations are not "natural persons"'.[155] According to Alvarez, 'the idea that has persuaded our courts to date is that corporations are merely groups of persons and that what is illegal for one individual to do should be equally illegal for a group of them, even when this group is formed to make a profit'.[156]

From a human rights perspective, the treatment of business enterprises as international legal persons equivalent to human individuals seems less problematic. In fact, there appears to be wide approval within the academic community for recognizing corporate rights under international Human Rights law. As noted by Ku, the justification or impulse for this support is the benefits that the conferral of such rights on companies may have in terms of strengthening the recognition and commitment by companies to human rights and their responsibilities. As articulated by Professor Lucien Dhooge, 'concurrent recognition of freedoms and guarantees imbues human rights law with enhanced standing. Such recognition is essential in convincing corporations to appreciate human rights and their responsibilities'.[157]

It seems that supporters of the 'individual' conception have no strong objections to applying human rights to business enterprises in scenarios that are identical to the corresponding human

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Responsibility in their defense. Since these articles apply to the relationship of States inter se, they would loose their relevance. *Id*. at 23-24.

[152] *Id.*

[153] *Id.* at 30.

[154] Citizens United v Federal Election Commission, 558 US 310 (Sup. Ct, 2010).

[155] *Id*.

[156] Alvarez, *supra* note 31, at 4.

[157] Ku, *supra* note 41, at 737.

rights obligations of States vis à vis individuals, although this might be unnecessary according to some.[158] The recognition of international duties for companies could alleviate objections against the use of existing, or the creation of new legal mechanisms for the purpose of strengthening corporate responsibility and accountability for human rights. According to Knox, if direct duties were to apply to companies, the monitoring procedures of the HRC might be applicable to and allow the review of corporate conduct, the ATCA might be available to victims of human rights abuses in cases where a company has committed a tort in breach of customary international (Human Rights) law, and the jurisdiction of the Rome Statute could potentially be expanded in order to encompass next to natural persons, also business enterprises as legal persons.[159]

9.2.3.4 The 'Individual' Conception and the UNGPs

The UNGPs do not preclude the existence of international law obligations for corporations in relation to certain international crimes. Existing international obligations are not affected by the UNGPs, in and by themselves. The Preamble of the UNGPs expressly provides that '[n]othing in these Guiding Principles should be read as *creating* new international law obligations […]'. The UNGPs recognize that business enterprises should '[c]omply with all applicable laws and respect internationally recognized rights, wherever they operate'.[160] The UNGPs thus recognize the trend that business enterprises may be subject to international standards of criminal liability.[161] The UNGPs note that business enterprises should '[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate'.[162] The rationale is 'the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the international criminal court in jurisdictions that provide for corporate criminal responsibility.[163] In addition, the UNGPs indicate that 'corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses'.[164]

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158 McBeth, *supra* note 60, at 64.

159 John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations, in* The UN Guiding Principles on Business and Human Rights: Foundations and Implementation, 71 (R. Mares ed. 2012).

160 Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.* U.N.Doc. A/HRC/17/31, GP 23a (March 21, 2011) [hereinafter UNGPs] (by John Ruggie).

161 The SRSG thus noted in his 2007 report to the HRC;

> Corporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes, imposed through national courts.

Ruggie, *supra* note 110, § 22-23. Knox, *supra* note 159, at 71.

162 *UNGPs*, *supra* note 160, GP 23c

163 *Id.* Commentary to GP 23.

164 *Id.* Commentary to GP 23.

The SRSG seems to support the view that business enterprises can be liable under certain norms of international criminal liability. In this regard, he has noted:

> States need to specify clearly that international standards prohibiting gross human rights abuses, potentially amounting to international crimes, apply to all persons, natural and legal. Such abuses may arise in areas where the human rights regime cannot be expected to function as intended, as in conflict zones or similar sources of heightened risk, and typically the allegations involve corporate complicity in acts committed by related parties. In those situations, plaintiffs may turn to home country courts because local courts may be unable or unwilling to act.[165]

While customary international law thus may create corporate obligations for a very limited set of grave human rights violation, he holds the view that international human rights treaties generally only addressed business enterprises indirectly through States, he argued.[166]

The SRSG has refrained nonetheless from accepting some, if not most of the 'Individual' conception's core premises. This can be discerned from the objections the SRSG raised to the project of the UN Norms[167], which can be considered a manifestation of this 'Individual' conception. The SRSG considered the language of 'organs of society' in the UDHR not to have legally binding effects, because 'preambles, even to binding international instruments are not themselves legally binding'.[168] The SRSG also noted that the character and nature of the responsibilities of business enterprises should reflect the specialized role that business enterprises have in relation to human rights, which is not functionally equivalent to States. The SRSG noted that business enterprises are 'specialized economic organs, not democratic public interest institutions' and 'as such, their responsibilities cannot and should not simply mirror the duties of States'.[169]

As will be set out in detail below, the SRSG's project and the approach of 'principled pragmatism', which the UNGPs incorporate, appear to be a manifestation of the 'Actor' conception.

9.2.4 The 'Formal' Conception

9.2.4.1 Summary

Hans Kelsen elaborated the 'Formal' conception as part of his theory pure of law.[170] The 'Formal' conception is premised on the key assumption of international legal personality as an

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[165] John Ruggie, *Opinion: Business and Human Rights* – The Next Chapter (Mar 7, 2013).

[166] Pini Pavel Miretski & Sascha-Dominik Bachmann, *The UN 'Norms on the responsibility of transnational corporations and other business enterprises with regard to human rights': a requiem,* 17 Deakin Law Review Volume, 24 (2012).

[167] *See* Section 2.4.2.

[168] John Gerard Ruggie, Just Business Multinational Corporations and Human Rights, 40 (W.W. Norton & Company, 2013).

[169] Ruggie*, 2008 Report*, *supra* note 100, § 66.

[170] Hans Kelsen, Pure Theory of Law, (University of California Press Berkeley and Los Angeles 1967).

entirely open concept. There are no pre-defined assumptions in relation to which entities have international legal personality in international law.[171] Under this conception, and as noted by Portmann, 'any entity that is addressed by an international norm is an international person'.[172] According to the 'Formal' conception, legal persons are mere legal constructions, coming into existence as a result of an international norm constituting and addressing them. The 'Formal' conception furthermore holds that all international norms are ultimately addressed to individuals. Other entities are not excluded from becoming international persons, however. An entity has legal personality to the extent that it is an addressee of these norms. The legal personality of an entity is reflected in 'the sum of legal norms addressing and constituting it'.[173]

The 'Formal' conception thus rejects traditional notions of Statehood and the superiority of States to law.[174] Rather than predate legal systems, States exist as a consequence of the international legal system and of international norms constituting and addressing them. Consequently, there is no need for State recognition to acquire international legal status. Nonetheless, acts of recognition can have evidentiary value in terms of indicating that certain norms of general custom apply to the entity in question.[175] The 'Formal' conception furthermore accepts that general rules of international law exist that are relevant for all States. However, it rejects the assumption of the 'individual' conception that these general rules include fundamental legal principles and peremptory norms. These peremptory norms do not have legal validity according to the 'Formal' conception.[176]

According to Portmann, the main propositions of the 'Formal' conception can be summarised as follows:

(1) International personality is an open concept. It is used to describe which entities are addressees of international rights, duties and capacities. International personality is not a precondition for, but a consequence of being addressed by a norm of international law. There can thus be no a priori assumption for a certain entity to be an international person as personality is only acquired a posteriori.

(2) There are no further consequences attached to being an international person. In particular, international persons do not automatically possess the so-called fundamental rights and duties, nor are they automatically authorized to formally contribute to the creation of international law. [177]

Extrapolating from this description of the 'formal' conception and, more precisely, from its key assumption that international personality is an open concept, it seems that business enterprises

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171 *Id.*

172 Portmann, *supra* note 4, at 272.

173 *Id*. at 184.

174 *Id.* at 184.

175 *Id.* at 272.

176 *Id.* at 258.

177 *Id.*

can be a legal subject according to this conception. The existence of business enterprises as international legal persons can be determined on the basis of an assessment of the rights, duties or capacities that international law has conferred on these entities, if any. A company is presumed not to have any existence outside of the legal system. The actual power and influence of companies in social reality appears not to be of the essence for the formal conception. International legal personality is merely a descriptive device. Business enterprises become an international legal person when an international norm is directed to them, a posteriori to the legal system. While originally addressed to individuals, the norm can be imputed to the company in accordance with the legal system by reason of individuals being addressed in their functions as organs of the company. The company can thus be in effect the addressee of the norm and thus an international legal person. Companies exist as international legal persons only to the extent that international norms are imputed to them. Since there are no concrete legal consequences attached to the conclusion of being a legal person, no definite rights or duties can be derived from a potential finding that companies are international persons.[178]

9.2.4.2 Doctrine

An author that arguably embraces the 'formal' conception is Clapham, who reorients the debate to capacity and discrete obligations. This is in part to move beyond discussions of whether business enterprises are proper or primary[179] subjects of international law.[180] Clapham thus notes that, '[w]e need to admit that international rights and duties depend on the capacity of the entity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity'.[181] In addition, Clapham also notes the existence of panoply of possible legal rights and obligations that may be applied to non-State actors. This is irrespective of whether these entities have qualities or privileges that resemble those of States.[182] Clapham's proposal is to assess the status of non-State actors in the following contexts: 'first, does the entity have the requisite legal capacity directly to acquire rights and obligations under international law? And, second, in what circumstances do these actors have the capacity to be party to a claim (either as a claimant or as a defendant) at the international level'? [183]

Scholars have assessed the legal personality of business enterprises accordingly: if business enterprises possess international rights and obligations under international law and/or have a

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[178] *Id.* at 173-177.

[179] Cassese has drawn the distinction between States as 'primary' subjects and all other international subjects as 'secondary' subjects. This distinction is based on 'the relative importance of the subjects and the degree of their indispensability to the present structure of the international community'. Cassese, *supra* note 81, at 77.

[180] Clapham notes: 'These concerns lose much of their sting when one reorientates the issue and simply asserts that corporations have limited international legal personality rather than pretending that multinationals are proper/primary subjects of international law with the 'status' that implies. As long as we admit that individuals have rights and duties under customary international law and international humanitarian law, we have to admit that legal persons may also posses the international legal personality necessary to enjoy some of these rights, and conversely to be prosecuted or held accountable for violations of the relevant duties'. Clapham, *supra* note 5, at 79.

[181] *Id.* at 69.

[182] *Id.* at 80.

[183] *Id.* at 71.

capacity to bring international claims, then they have a degree of international legal personality.[184] Studies have identified a range of direct rights for business enterprises, notably in the area of human rights[185] and international investment law,[186] but also in civil liability conventions involving environmental pollution.[187]

These studies are helpful in recognizing that business enterprises can be considered limited international legal subjects, in the sense that they bear and exercise international *rights,*[188] though only under specific treaties and conventions, and not (necessarily) customary international law.[189] However, these studies also concede that business enterprises have not acquired international human rights *duties* and thus lack a certain degree of status. According to Gatto, business enterprises constitute an 'anomaly' in this regard, because unlike all other new subjects of international law, 'their progressive acquisition of rights has not been matched by a similar

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[184] Jan Wouters & Anna-Luise Chané, Multinational Corporations in International law (Leuven Centre for Global Governance Studies 2013). Jan Wouters & Leen Chanet, Rechten en plichten van (multinationale) ondernemingen in het internationaal recht (2007).

[185] Rights for business enterprises have been recognized under Art. 34, 6(1), 10(1), 41 and 8(1) of the ECHR.

[186] Stephanie Bijlmakers, *Effects of Foreign Direct Investment Arbitration on a State's regulatory autonomy involving the public interest,* 23 American Review of International Arbitration 245 (2012).

> International investment agreements afford foreign investors extensive protection of their economic expectations. Protections are granted in Bilateral Investment Treaties, and in regional and plurilateral international arrangements, in particular the EU (legitimate expectations being a recognized general principle of EU law, with the same force as the EU Treaties) the North American Free Trade Agreement (NAFTA, Chapter XI), the Framework Agreement on the Establishment of the ASEAN Investment Area, bilateral and trilateral free trade agreements with an investment component, the Energy Charter Treaty, economic integration agreements containing investment protection provisions, such as the agreement establishing the COMESA Common Investment Area, specialized multilateral treaties, such as the WTO's trade-related investment measures and service agreements, the OECD Code of Capital Movement, and soft-law instruments such as the FDI Guidelines of the World Bank. Key protections granted are adequate compensation in case of expropriation of investment, most favorable nation treatment, fair and equitable treatment, full protection and security, and guarantees of free transfer of funds. The majority of IIAs contain an arbitration clause allowing foreign private investors to bring a claim against a host State directly before an arbitral panel for an alleged breach of the IIA. While parties may opt for dispute settlement through *ad hoc* arbitration or a State's national court of arbitration, most IIAs opt for institutional arbitration, for example, before the World Bank's ICSID, in accordance with the ICSID Convention and its Arbitration Rules, or before commercial arbitral institutions, for instance, the International Chamber of Commerce ("ICC") Court of Arbitration, the London Court of International Arbitration ("LCIA"), or the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC").

[187] Ruggie, *2007 Report*, *supra* note 110, § 20.

[188] They propose that international law treats business enterprises as subjects of international law, despite States not having granted them legal rights through a formal decision, the autonomous standing that, according to doctrine, applies to international organizations and individuals. Cassese argues that the categories of individuals and international organizations can be styled 'ancillary' subjects of international law, because these categories 'perform activities delegated to them by States, which consider it convenient or appropriate to institute distinct centers of action for the furtherance of goals agreed upon by them'. Cassese, *supra* note 81, at 77.

[189] According to Ku, these rights have been codified in specific treaties and conventions, and therefore, do not support the notion that business enterprises are subjects of customary international law more generally. According to Ku, business enterprises have acquired such right through 'specific textual authorization in a particular treaty or convention'. This provides an insufficient basis to conclude that business enterprises can be recognized as 'subjects' of customary international law. Ku, *supra* note 41, at 729.

acquisition of duties'.[190] This literature also accepts that international law does not impose human rights obligations on business enterprises generally.[191] Clearly, companies do have certain international obligations for certain international crimes.

The 'Individual' conception accepts that business enterprises are bound under general international law to certain international norms that are of a pre-emptory character. This notion is more difficult to 'digest' for the 'Formal' conception,[192] which considers peremptory norms to have no legal validity.[193] However, the existence of peremptory norms is well-established under international treaty law. More specifically the existence of these norms has been recognised in Art. 53 of the Vienna Convention on the Law of Treaties, and in international practice and doctrine.[194] Also Clapham accepts that non-State actors can be bound by peremptory norms of general international law (*jus cogens*) rules on human rights. Clapham draws attention to the usage of the adjective 'general' in order to emphasize that these rights and obligations do not arise out of 'custom', but are rather based on the consideration by the international legal order of these rights and obligations 'as generally applicable and binding on every entity that has the capacity to bear them'.[195]

The 'Formal' conception seems to allow for the argument put forth by Clapham, and according to which, if business enterprises have sufficient international personality and capacity to enjoy rights under international human rights law, they can also be considered to have sufficient capacity to bear international human rights duties. In the words of Clapham:

> The burden would now seem to be on those who claim that States are the sole bearers of human rights obligations under International law to explain away the obvious emergence onto the international scene of a variety of actors with sufficient international personality to be bearers of rights and duties under International law. If the Sunday Times has sufficient personality and the capacity to enjoy rights under the European Convention on Human Rights, it might surely have enough personality and capacity to be subject to duties under International Human Rights law.[196]

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[190] Ruggie, *supra* note 107.

[191] According to Nowrot, business enterprises 'cannot be regarded as subjects of international law in the sense of being addressees of international legal obligations to promote the realization of the global public good'. Nowrot, *supra* note 40, at 566.

[192] Clapham, *supra* note 5, at 78.

[193] *Id*. at 258.

[194] Portmann, *supra* note 4, at 261-264.

[195] Clapham notes:

> This process started with the 1946 Nuremberg Trial of the Major War Criminals (where individuals were held to have duties under international criminal law), was developed by the International Court of Justice through advisory opinions declaring the United Nations and its agencies as entities with international rights and obligations under general international law, and now finds its application in the litigation brought against corporations in the United States for violations of the 'law of nations.

Id. at 87.

[196] *Id.* at 7.

In other words, the fact that business enterprises already have rights entails that international law treats business enterprises as a subject of international law. Hence, one can conclude that business enterprises can also have duties. In other words, a capacity of business enterprises to have international rights seems to imply that the company has international legal personality, and thus can also bear international duties. This perspective also suggests that the finding that international law already endows company with a degree of legal personality provides a legal basis and justification for attributing international human rights obligations on business enterprises. The reasoning seems to be simply that, given that business enterprises have direct rights under international human rights law, corresponding human rights duties can be implied.

9.2.4.3 The 'Formal' conception and the UNGPs

Pursuant to the 'Formal' conception, business enterprises can be considered international legal persons to the extent that international norms are addressed to them.

The UNGPs and recent developments in the field of business and human rights do not reject the view that business enterprises are addressees of international norms (and may thus be viewed as international legal persons). The UNGPs address business directly, and the corporate responsibility to respect human rights that is articulated therein is directly applicable to business enterprises. This corporate responsibility to respect human rights is not a legal obligation directly imposed on business enterprises under classic international law. The UNGPs support the view that the international human rights law generally currently do not bind business enterprises directly, at least not in a positivistic manner. The corporate responsibility to respect human rights exists nonetheless at the international level as an international 'standard of expected conduct' in voluntary and soft-law instruments related to corporate responsibility.[197]

As a result of the active efforts by many key actors to implement the UNGPs, voluntary soft-law instruments have been revisited and brought into alignment with these UNGPs. The corporate responsibility to respect human rights is now restated 'virtually verbatim' in, *inter alia*, the revised OECD Guidelines for Multinational Enterprises, the EU CSR Strategy, the international Finance Corporation's (IFC) revised sustainability framework and certain of its performance standards, the ISO 26000 and the Equator Principles.[198] These and other soft-law instruments support the view that, apart from having rights under Investment law and international human rights law, business enterprises are the addressees of the corporate responsibility to respect human rights under soft-law sources.[199]

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[197] In the words of the SRSG: 'I refer to the corporate responsibility to respect rights, rather than duty, to indicate that current international law generally does not impose human rights obligations on companies directly. At the international level, the corporate responsibility to respect is a standard of expected conduct that is acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and which has now been affirmed by the Human Rights Council. The corporate responsibility to respect human rights means to avoid infringing on the rights of others and addressing adverse impacts that may occur. This responsibility exists independently of States' human rights duties. It applies to all companies in all situations' John Ruggie, Address at the Royal Society for the Encouragement of Arts, Manufacturers and Commerce, Sir Geoffrey Chandler Speaker Series (Jan.11, 2011).

[198] J. Ruggie, *Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization* (2015).

[199] Wouters & Chané, *supra* note 184.

While this conclusion might be compatible with the 'Formal' conception, the SRSG did not adhere to his conception when developing the UNGPs. The SRSG's project deviated from the 'Formal' conception in a number of crucial aspects. More precisely, the 'formal' conception follows a top down approach to identifying and articulating the responsibility of business enterprises, which involves a deductive analysis of international norms. The SRSG adhered to a bottom-up approach to finding the corporate responsibility to respect human rights, taking the factual existence of business enterprises as a starting point and delineating the responsibilities of business enterprises on the basis an inductive process from existing policies and practices. According to Alvarez:

> Larry Backer's description of John Ruggie's innovative "protect-respect-remedy" governance project suggests yet another, even more promising and far more nuanced, approach to finding corporate responsibility. Ruggie's approach is appealing precisely because it departs from the hierarchical rigidity embedded in demarcating "subjects" and "objects" of International law. Ruggie's delineation of corporate responsibility is bottom-up, not top-down. As elucidated by Backer, it is based not on *a priori* assertions of personhood but on facts on the ground, including the reality that corporations operate under a social and not only a legal license; have unique systems of monitoring, information gathering, assessment and disclosure; may be made accountable through their own conceptions of "due diligence" to shareholders and the wider public; and may owe differing human rights obligations depending on their sphere of business, their corporate structure, or their relationships with partners and suppliers. Backer's and Ruggie's conception of corporate responsibility/accountability is evidence-based and pragmatic. It is the very antithesis of *deducing* obligations from formal subject-hood or personhood.[200]

As the next section will reflect, the UNGPs are not a manifestation of the 'Actor' conception either.

9.2.5 The 'Actor' Conception

9.2.5.1 Summary

The 'Actor' conception departs from the assumption that international law is a process of authoritative decision making. While in principle there are no international persons according to this 'actor' only conception. The more flexible notion of 'participants' is used instead. Participants are 'all entities' exercising 'effective power' in the international 'decision-making process'.[201] These 'participants' in this decision making process have relevance in the international legal system in a way that is functionally similar to being an international legal persons. 'The actor approach can thus be considered a qualified conception of international personality'.[202] Actors are qualified as 'participants' merely on the basis of the factual power they have. Their existence as 'participants' thus does not depend on any formal act of recognition or

[200] Alvarez, *supra* note 31, at 32.

[201] *Id*. at 208.

[202] *Id*. at 211.

conferral of capacity onto an entity allowing it to be a participant.[203] Legal status and relevance of an entity in the international legal system is implied from their actual participation in authoritative decision making that takes place in international arenas.[204] Also the consequences of participation are 'in principle, governed by factual observations as well'.[205]

The 'Actor' conception adopts a view of the law that differs from the 'formal' conception, which views international law as a system of legal rules 'which are merely applied by the judiciary according to legal logic'.[206] The view of the 'Actor' conception is more pragmatic, in that it pays more attention 'the practical aspects of specific problems' and views law as 'synonymous with the process in which persons authorized to do so make decisions by taking into account a multitude of factors; there is no pre-existing formal rules that determine the outcome of a legal matter'.[207] The Actor conception presumes that 'policy reasons are instantly favoured over legal rules' in this decision making process. According to Portmann, this notion 'is difficult to reconcile with the acceptance in international practice and doctrine of general and indeed peremptory norms'.[208] After all, peremptory norms may not be derogated from, and are 'non-negotiable', independent of whether there are policy considerations standing against them.[209]

The Actor proposition insists on effective power, not formal criteria, which establish that actors are qualified to participate in international decision making.[210] In doing so, this proposition takes account of the understanding among American international lawyers in the period after World War II that 'laws had to find resonance in actual behaviour in order to be valid' and that closer attention should be paid to 'the realities of international life as postulated by international realism'.[211] Seeking to reconcile the normative with the actual, and placing emphasis on the latter, these lawyers responded to the quest that Morgenthau had formulated in 1940 'to come up with a functionalist approach to international law'. According to Morgenthau, a norm only made sense if it has effect in reality, meaning that it influenced actual behaviour. According to Morgenthau's functional perspective on international law, 'one had to analyse the actual in order to find the normative content of the international order'.[212]

According to Portmann, the 'actor' conception can be summarised in the following two propositions:

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[203] *Id*. at 212.

[204] *Id.* at 212.

[205] *Id*. at 213.

[206] *Id*. at 264.

[207] *Id*. at 223.

[208] *Id*. at 213.

[209] *Id*. at 264.

[210] *Id*.

[211] *Id*. at 227.

[212] *Id*. at 226.

(1) International law is not a set of rules, but an authoritative decision-making process. In this process, goals and values of the international community and outcomes in particular circumstances are determined. The process takes place in different arenas, which range from organized to unorganized. It is authoritative and therefore to be distinguished from 'naked 'power

(2) In this authoritative decision-making process, participation is not based on legal rules or specific acts of recognition, but on effective power to participate. According to the conception, all international lawyers have to do in order to establish the personal scope of the international legal order is to analyse organized and unorganized international decision-making processes and to determine which entities effectively partake in them. The consequences of being a participant are, in principle, governed by factual observation as well.[213]

The analysis by Portmann suggests that the 'Actor' perspective accepts that business enterprises can be 'participants' like any other actor. International law can better be perceived as a decision-making process, in which business enterprises can participate alongside States, international organizations, and private actors. Their legal status is based on their *de factor* power, which can be assessed on the basis of their actual participation in authoritative decision making processes. The actor perspective also supports the understanding that the quality of a norm that articulates the duties and responsibilities of business enterprises depends on whether its substance makes sense in practice and the impact this norm may have on actual behaviour.

9.2.5.2 Doctrine

The Actor conception has been articulated by Ms Rosalyn Higgins QC, the former President of the International Court of Justice,[214] suggesting that international law can better be perceived as a decision-making process, in which non-State actors participate in international law making alongside States, international organizations, and private actors. This argument relates to the critique by Higgins of the object/subject distinction having become unhelpful. The traditional perspective on international law upholds the distinction between 'subjects' or 'objects' of international law. The 'subjects' are perceived as bearers of the elements of personhood and having been accepted as a 'subject' by a rule of international law. 'Objects' are defined by negation: they are not a 'subject'.[215] Indeed, not existing as full 'subjects' of international law, business enterprises automatically fall into the category of 'objects' of international law.

Higgins stresses that the delineation of international legal persons by the dichotomy of subjects/objects is clearly restrictive. Partially this is because an either/or approach to international legal status is adopted. She notes that there is a sense of artificiality to this binary distinction between subjects and objects. While this subject/object distinction may benefit legal clarity, she contends that it also ignores the legally relevant fact that business enterprises are not entirely absent from the international scene, as the designation as 'object' of international law

[213] *Id*. at 213.

[214] *Id*. at 208.

[215] Higgins, *supra* note 106, at 49.

suggests. The traditional positivists that uphold the subject/object distinction thus fail to recognize that business enterprises have a legally relevant 'presence' in the international community.

As noted above, there is increased recognition for the legal relevance of the role that business enterprises have come to exercise in the international community.[216] The characterization of business enterprises as mere 'objects' of international law thus becomes unhelpful, simply because it does not capture this reality. Higgins notes that the doctrinal view on international law is restrictive, in that its rigidity is insensitive to changes in international legal sphere. The subject/object distinction, as Higgins has argued, is too static, has 'no credible reality' and 'no functional purpose'. It has also captured the debate in this field: '[w]e have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint', Higgins concludes.[217]

According to Higgins, business enterprises can be considered *participants* in international law; 'making claims across State lines, with the object of maximizing various values'.[218] The SRSG supports this position, noting that 'at minimum transnational corporations have become "participants" in the international legal system, as Rosalyn Higgins, […] puts it, with the capacity to bear some rights and duties under international law'.[219] Also Alvarez supports this position, noting that:

> The realities of contemporary international law-making processes are a great deal more complex. The designation of "participants" recognizes that today, thanks to increasing participation rights in a number of international for a for many non-State actors, corporations (alongside a number of non-State actors) are now involved in the making of international law, including, as addressed below, the making of international investment law through investor-State adjudication.[220]

Also Zerk expresses its support for this perspective, noting that '[t]he idea of multinationals as "participants" in the international system provides a much more realistic picture of the role of private commercial organisations within the international system than the traditional "subject/object" dichotomy'.[221]

Alvarez provides a clear articulation of the 'actor' perspective in the article 'Are Corporations "Subjects" of international law'.[222] Therein he also distances himself from the object/subject dichotomy; 'calling a corporate entity a "subject" or "object" of international law confuses more than enlightens' and '[t]he realities of contemporary international law-making process are a great

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[216] Zerk, *supra* note 16, at 73.

[217] Higgins, *supra* note 106, at 49.

[218] *Id.* at 49.

[219] Ruggie, *supra* note 107.

[220] Alvarez, *supra* note 31, at 9.

[221] Zerk, *supra* note 16, at 74.

[222] Alvarez, *supra* note 31.

deal more complex'.[223] Alvarez holds the view that discussions of whether business enterprises are subject or international legal persons are 'at best a distraction'. Alvarez furthermore challenges a number of assumptions that are core to the traditional and positivist approach to international legal personality that have been outlined above, raising points that broadly correspond with the 'actor' conception.

First, Alvarez seems to be keeping within the actor approach when arguing that a top down approach is unsuited to deciding of international human rights obligations;

> In any case, such a top down approach to finding international corporate obligations is precisely the wrong way to figure out what obligations make sense or reflect what the principal maker of international law, namely States, actually want. Most importantly, such a top down approach loses sight of the ways that corporations are distinct from States or natural persons. It makes it more difficult to contextualize corporate obligations in light of these realities.[224]

Alvarez suggests that a top-down approach is unsuited to determine the substance of corporate obligations and responsibilities. He draws attention to need to take account of social reality, particularly the existence of business enterprises as special organs with specialized functions in society, which are different from States and other actors. Attempts to articulate international human rights obligations should take account of these realities, in part in order to ensure that these obligations to make sense within their evolving context.

This argument corresponds with assumption of the 'actor' position that norms should make sense in light of existing realities in order to have actual impact on behaviour. Also Pentikäinen notes 'the role of corporations as profit-creating actors and their different roles and capacities vis-à-vis States should be paid due regard in considerations of "translating" human rights obligations for corporate actors'.[225]

Alvarez similarly discards the approach of attributing obligations to business enterprises by analogy to individuals or States, which is supported by the 'individual' conception, indicating that such analogizing is unnecessary for corporate responsibility and accountability;

> Close readers of the work of leading advocates of such responsibility, namely Clapham and Ratner, will discover that neither relies on such equivalence. What they assert, correctly, is that given the very real differences between corporations and other participants in the international legal system, the only viable approach is to delineate corporate rights and obligations inductively from the bottom up: to define the rights and obligations of corporations by what those entities are and what they are not. This is, in effect, what Justice Stevens urged in his dissent, where he argued for case-by-case determinations of how best to regulate political speech by corporations. This careful delineation of corporate rights and obligations is made more difficult to the extent that

[223] *Id.* at 8-9.

[224] *Id.* at 26.

[225] Pentikäinen, *supra* note 6, at 153.

corporations are assumed to be 'international legal persons' (and/or 'subjects') and particular corporate responsibilities are simply derived from that assumption.

The actor-only conception holds there are no real legal effects to business enterprises having the status of legal subjects. The status of an international legal subject has been viewed as merely a social construct that has no real effect. Since international legal personality is assessed through doctrine, rather than determined by an authoritative decision-making body, it has been argued to be merely a concept, a formal proposition that lacks any real substance.[226] While it can serve, in theory, as a basis for deriving human rights and obligations, no real normative effects automatically flow from its attribution. This is suggested by Klabbers: '[A]fter all is said and done, personality in international law, like "subjectivity", is but a descriptive notion: useful to describe a State of affairs, but normatively empty, as neither rights nor obligations flow automatically from a grant of personality'.[227]

The actor perspective emphasize that entities can be qualified as 'participants' on the basis of the factual power they have to take part in authoritative decision making processes. This status is said not to depend on a formal act of recognition or the conferral of capacity on these entities. While such formal acts of recognition thus seem unnecessary for participants to exist as international legal persons, this does not negate the fact that, at a minimum, such acts can be of relevance as evidence that actors are participant in the international system. While business enterprises thus do not depend on a formal act of recognition to exists as 'participants' in the international legal system, a formal act of recognition can affirm the status of business enterprises, and possibly reinforce this status where such recognition affects the *in fact* influence that business enterprises have to partake in international decision making.

Zerk notes the relevance of examining the *degree* to which international law recognizes the existence of, *inter alia,* business enterprises in the international legal system. The impetus for such inquiry is the growth of human rights law and international economic law, which has increased scope for non-State actors to participate in international law.[228] The degree of legal status that business enterprises have can be assessed along the factors that classical approach hold to be indicative of whether an entity is a legal person, i.e., 'the ability to participate in the development of international law through custom, the capacity to enter into international treaties, the prospect of direct legal responsibility for breaches of obligations and the ability to bring legal claims'.[229] Zerk notes that there is greater appreciation of business enterprises as subjects under international law; '[c]learly companies (and, by extension, groups of companies) do possess *rights* under international law, some of which may be enforced directly (e.g., under treaty-based dispute resolution mechanisms), and to this extent can be said to enjoy some degree of 'international legal personality'.[230]

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[226] That said, as previously indicated, doctrine *constitutes* a recognized source of international law under Article 38(1) de of the Statute of the ICJ.

[227] Klabbers cited in: A. Clapham, *supra* note 5, at 70-71.

[228] *Id.* at 74

[229] Zerk, *supra* note 16, at 75.

[230] *Id.* at 75

9.2.5.3 Practice

9.2.5.3.1 New Tv Karma Mohamed Tashin Al Khayat Decision

An illustration is the decision by the Appeals panel of the Special Tribunal for Lebanon in the interlocutory appeal against *New Tv Karma Mohamed Tashin Al Khayat*[231], in which the panel held that the Tribunal had personal jurisdiction to hold contempt proceedings against 'legal entities'. This case was brought against the media company New TV S.A.L, operating as Al Jadeed TV and Ms Karma Al Khayat, Al Jadeed TV's Deputy Head of News and Political Programmes, which had been charged initially with contempt and obstruction of justice. The charges had been brought under Rule 60 *bis*, which notes that '[T]he tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with its administration of justice, upon assertion of the Tribunal's jurisdiction according to the Statute. This includes, but is not limited to the power to hold contempt any person who: […]'. The Contempt judge had rendered a decision on 24 July 2014, indicating the tribunal lacked jurisdiction to hear the cases against legal persons. The question before the Appeals panel was 'whether or not the Contempt Judge erred in his ruling preventing legal persons from being prosecuted for contempt and whether such error, if any, led to the invalidation of his decision'. The appeals panel answered in the affirmative and found that the Contempt Judge had erred in determining that the term 'person' in Rule 60 *bis* excludes legal entities.[232]

The panel indicates to have been guided by Art. 3(A) of Rule 3 (A) which calls for an interpretation of Rule 60 *bis* 'that is consonant "with the spirit of the Statute" together with the principles of interpretation laid down in customary international law, international standards on human rights, general principles of international criminal law and procedure and, as appropriate, the Lebanese Code of Criminal Procedure'.[233]

The panel argued that 'the ordinary meaning of the word "person" in a legal context can include both natural human beings and legal entities'.[234] The panel held that Rule 60 *bis* should be interpreted 'in a manner consonant with the spirit of the Statute'.[235] After having considered the object and purpose of Rule 60 *bis,* i.e. 'to hold accountable those who interfere with the administration of justice and to ensure that the exercise of the Tribunal's primary jurisdiction is not frustrated', the panel arrived at the conclusion that 'this object would be impeded should legal entities be excluded from prosecution as a rule'.[236] The panel took into consideration

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[231] New TV S.A.L. Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/AP/AR/AR126.1, Decision on Interlocutory Appeal Concerning Personal Juris in Contempt Proceedings (Special Tribunal for Lebanon Oct. 2, 2014), http://www.stl-tsl.org/en/decision-on-interlocutory-appeal-concerning-personal-jurisdiction-in-contempt-proceedings.

[232] *Id.* ¶¶ 82-83.

[233] *Id.* Headnote.

[234] *Id.* Headnote.

[235] This was explained as requiring the adoption of a theological interpretations, one that gives effect to the true intention and scope of the Statute as a whole. The Court also emphasized the principle of effectiveness 'with a view of bringing to fruition as much as possible the potential of the rule' *Id*. § 28.

[236] *Id.* Headnote.

today's social reality that corporations 'wield far more power, influence and reach than any one person', noting also that such influence may be a 'force for the positive development of the societies in which they reside' but also 'entails greater responsibility'.[237] The panel adhered to a functionalist perspective[238] when arguing the following:

> […] the prosecution and punishment of legal persons pursues different aims and interests than the punishment of national persons alone. Without the ability to address such considerations, the authority of the Tribunal to deal with contempt and obstruction of justice could be impeded. It would potentially lead to unacceptable impunity for criminal actions and effectively yield control over the Tribunal's proceedings to unaccountable legal entities. […] Therefore, it would be contrary to the interests of justice, in our view, to shield legal persons when Rule 60 *bis* does not restrict our inherent power to punish contemptuous acts. No person, natural or legal, should be placed above the law or be allowed to operate outside of the rule of law.

The Panel referred to the power of companies, the interests of justice and the need for the panel to be able to prosecute and punish legal persons in order to deal with contempt and obstruction of justice. The effective exercise of the Tribunal's primary jurisdiction resulted in the conclusion that the panel should have jurisdiction over legal persons.

The panel also expressed the view that current international standards on human rights and corporate accountability and trends in national laws 'support an interpretation that is consonant with imposing criminal liability on legal persons'.[239] These international human rights standards 'allow for interpreting the term "person" to include legal entities for the purpose of Rule 60 *bis*.[240] This argument is noteworthy also because the panel, in its examination of evolving international standards and corporate accountability, as well as trends in national laws, takes into account the UNGPs and other development in the business and human right domain. The panel considered that 'the substance of these efforts is an indicator of the evolving practice in relation to corporations at the global level'.[241]

The Panel notes 'an emerging shared international understanding of the need to address corporate responsibility'.[242] The Panel indicates that 'international human rights standards and the positive obligations arising therein are equally applicable to legal entities'. While not providing a clear answer for why this is the case, the Panel does refer to the authoritative opinion 31 of UN Human Rights Committee, which indicates that the State duty to protect will not fully be discharged unless individuals are protected against infringements of their human rights by private persons or entities.[243] This suggests that the need for greater corporate accountability

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237 *Id.* ¶¶ 82-83.

238 Worster, *supra* note 83*,* at 22.

239 New TV S.A.L. Karma Mohamed Tahsin Al Khayat, *supra* note 231, Headnote.

240 *Id.* ¶ 60.

241 *Id.* ¶ 47.

242 *Id.* ¶ 46

243 U.N. Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant,¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 80th Sess., 2187th meeting(Mar. 29, 2004).

might lead to the conclusion that international human rights standards should be applied directly to companies. The PRR Framework and the UNGPs 'represents a concrete movement on an international level backed by the United Nations for, *inter alia,* corporate accountability'. While non-legally binding, the Panel affirms that the UNGPs support the notion that criminal regimes are regarded as an available remedy.[244] The panel observes that business enterprises have been recognized subjects of International law. All these factors are 'evidence of an emerging international consensus regarding what is expected in business activity, where legal persons feature predominantly, in relation to the respect for human rights'.[245]

9.2.5.4 The 'Actor' conception and the UNGPs

The UNGPs and the process of its development can be viewed as a manifestation of the 'Actor' conception. This is evident from the participation of business enterprises in the process as a matter of objective fact. The SRSG did not pronounce on the recognition of business enterprises as legal 'subjects' or 'persons' or formal treaty provision as justification for the inclusion of business enterprises in this process. Where the SRSG mentioned the legal status of business enterprises at all, this was to indicate that doctrinal arguments about whether business could be 'subjects' of International law are 'unhelpful'.[246] Instead, it was primarily the influence of business enterprises and their functional role and importance in contributing to the realization of human rights that resulted in the conclusion that business enterprises should be included in the processes.[247] Their involvement in the development process of the PRR Framework and the UNGPs by the SRSG's affirmed and reinforced their *de facto* existence as 'participants'.

The SRSG furthermore primarily relied on policy considerations related to the effectiveness and legitimacy in order to justify business involvement in the process. The extent to which business enterprises participated in the process stood in stark contrast to the limited involvement of business enterprises in the negotiations on international codes of conducts in the 1970s-80s.[248]

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[244] The Panel also concurs with the SRSG's opinion that:

> [c]orporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes, imposed through national courts.

New TV S.A.L. Karma Mohamed Tahsin Al Khayat, *supra* note 231.

[245] *Id.* ¶¶ 46-7.

[246] Ruggie, *2007 Report*, *supra* note 110, § 20.

[247] The HRC in Resolution 8/7 noted:

> Recognizing that proper regulation, including through national legislation, of transnational corporations and other business enterprises, and their responsible operation can contribute to the promotion, protection and fulfilment of and respect for human rights and assist in channeling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms.

Human Rights Council Res 8/7, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 8th Sess, June 2-18, 2008, A/HRC/RES/8/7 (June 18, 2008).

[248] Charney, *supra* note 20, at 779.

The exclusion of business enterprises from decision making then was the result of business enterprises being perceived as a threat.[249] The lobby efforts and external pressure by business enterprises frustrated the decision making process, however.[250][251] Partially because of this external exposure, there has been an increased acceptance of these entities partaking alongside other State and non-State actors in decision-making processes, which is furthermore perceived as imperative for the effectiveness and legitimacy of such processes and outcomes.[252]

The actor perspective is also clearly visible in the 'thick' stakeholder consensus that the SRSG strived for in the development of the UNGPs. The SRSG has noted:

> Inclusive consultations also matter. All stakeholder groups must be given the opportunity to be heard; victims consulted; and the varying situations of different regions taken into account. Importantly for my particular mandate, recommendations addressed to business have to find resonance there or they will be resisted or ignored.[253]

It seems that the imperative to ensure the quality of the UNGPs and the corporate responsibility to respect human rights in particular, which is applicable to all business enterprises, led to the conclusion that business enterprises should participate in the process.

The process of developing the UNGPs demonstrates that participation of business enterprises in international decision making processes is feasible. The multi-stakeholder approach that the SRSG employed did not distinguish between different types of business enterprises, all business enterprises could participate. The identification of business enterprises as participants for the purpose of International law, which has considered as 'notoriously difficult', was circumvented.[254] [255] After all, there exists no universal definition of business enterprises that

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[249] Business enterprises were largely excluded negotiations on international codes of conducts in the 1970. States sought to control the power of enterprises in the system. *Id.* at 788.

[250] *Id*. at 788.

[251] The impact that active lobbying by companies has had on international decision making processes, including the negotiation of the UN norms, demonstrates the might that business enterprises have, which is sometimes exercised to prevent the evolution of norms in directions that are unfavourable to business interests. Business enterprises, as a study by Dunoff, Ratner and Wippman suggests, provide or withdraw financial support for politicians seeking election, lobby governments to safeguard their economic interests at the international level, and have experts sit in governmental teams at intergovernmental negotiations. Business enterprises participate for instance in standard setting in the International Telecom Union, and can vote in the ILO. Business enterprises are said to play a key role, inter alia, in the adoption of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Jeffrey J. Dunoff, et al., International law: norms, actors, process: a problem oriented approach, 216 (Aspen Publishers. 2006).

[252] According to Charney, the effectiveness of the international system depends largly upon the legitimacy of its rules, much of which is lost where powerfull actors are excluded from the development of norms that concern them. Charney, *supra* note 20, at 787-8.

[253] Ruggie, *supra* note 196.

[254] Charney, *supra* note 20, at 780.

[255] 'However, […], these 'participants' in international law are notoriously difficult to define. For international law purposes, multinationals have historically been regarded, not as single entities, but as conglomerations of related companies, 'each corporate unit operating as native within the country of its incorporation'. The 'juristic personality' of a corporate entity under international law was regarded as 'analogous to that of an individual,

could be objectively applied for this purpose. Business enterprises thus were defined by reference to the law of their country of nationality.

Addo described the significant of the SRSG's multi-stakeholder approach as follows:

> The indispensable nature of the multi-stakeholder approach to the development of the PRR Framework and GPs affirms the growing importance of non-State actors in International law making. This success of the PRR Framework and GPs when contrasted with the spectacular failure of the UN Norms may be attributed to the role played by non-State actors, especially in this context, the lobbying of the business community. As a constituency likely to be directly impacted by the emerging standards, their direct involvement in the development of the GPs led to a high level of appreciation but also affirmed the significance of the principle of subsidiarity in International law-making. The lesson for the wider International law making process of consultation and the consideration of the perspectives of affected non-State actor communities in the preparation of new standards is a compelling one. While the development of International law norms such as those concerning diplomacy and international organisations will continue to draw on the contribution of State actors, the development of norms such as international economic law, international development law or international environmental law, for example, with direct impact on non-State actors may have to be approached differently from the traditional State-centred process if their full potential is to be appreciated.[256]

The beneficial effects of business participation in decision making processes may be undermined in case of regulatory capture by business enterprises. Calls for caution against such capture have expressed by NGOs in the context of the treaty negotiation process. The Treaty Alliance advocates for the inclusion of strong provisions in the forthcoming treaty that 'prohibit the interference of corporations in the process of forming and implementing laws and policies, as well as administering justice at all national and international levels'.[257] The Treaty Alliance has also called for caution of potential corporate capture in discussion at all level in the pathway to establishing this treaty.[258] It is not clear whether the proposal is to depart from the multi-stakeholder approach to International law making all together, but at a minimum, the NGO community calls for stronger measures to ensure that power imbalances in such processes are equalized. While strategic manoeuvring in such decision making can be problematic[259], and

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that is, as a national of a State'. Questions relating to recognition and nationality of companies were settled by reference to domestic law. It was concluded, therefore, that the multinational had no separate status under international law, aside from that enjoyed by its constituent entities by virtue of domestic law'.

Zerk, *supra* note 16, at 74.

256 Michael K. Addo, *The Reality of the United Nations Guiding Principles on Business and Human Rights*, 14 Human Rights Law Review (2014).

257 Treaty Alliance, UN Treaty Must Address Corporate Capture (May 1, 2016), http://static1.squarespace.com/static/53da9e43e4b07d85121c5448/t/57354276746fb9f00f573dae/1463108241728/UN+Treaty+Must+Address+Corporate+Capture+FINAL+ENG.pdf.

258 *Id.*

259 Panagiotis Delimatsis, *Introduction: continuity and change in international standardisation in* The Law, Economics and Politics of International Standardization, 8 (Panagiotis Delimatsis ed. 2015).

require appropriate measures, these problems are not unsurmountable and it seems that business participation is more commonly viewed as positive and essential.

Avoiding entering doctrinal debate on the legal status of business enterprises corresponds with SRSG's approach of principled pragmatism and served to develop and achieve a consensus on the PRR Framework and the UNGPs that reflect the existing standards and practices of States and business enterprises. The SRSG reached this understanding of existing standards and practices without addressing the international legal status of business enterprises. The UNGPs advance the understanding that the responsibility of business enterprises should be discerned inductively from practice through which these norms develop and in a manner that reflects social reality, rather than mirror the human rights obligations of States or individuals. The UNGPs advance the view that business enterprises have responsibilities with regards to *all* human rights. The underlying imperative is that business enterprises are capable of potentially infringing all human rights.

The corporate responsibility to respect has been accepted by the HRC through their adoption of the UNGPs and by many more as the shared understanding of what is expected from companies. The substance of the corporate responsibility to respect as defined by the UNGPs reflects the social role, nature and function that business enterprises have in society. As noted, the UNGPs recognize that business enterprises are distinct organs in society that perform an economic role and have specialized functions. This role differs from that of States, individuals and other actors in the system. The primary interests of companies are commercial and the capabilities that these entities have as creations of legal persons under national law (i.e., 'limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets'), which gives them a distinct character and certain advantages over other actors. Because of these specific capacities, business enterprises have capabilities to exercise significant influence, hence also the possibility of their activities having positive and negative effects on the realization of human rights.[260] The UNGPs also recognize that business enterprises have a special capacity to regulate their business relationships, e.g., through contracting. In order to discharge their responsibility to respect human rights, business enterprises are expected to employ their capacity to manage their adverse human rights impact, including by exercising leverage and control over their subsidiaries and other business relationships to the extent necessary and as appropriate.

As the appeals panel of the Special Tribunal for Lebanon affirmed, the UNGPs constitute a global movement for enhanced standards and practices relating to corporate responsibility and accountability. The UNGPs set out to promote a continuous process of enhancing exiting standards and practices by States and business enterprises related to human rights. Arguably, the effective implementation of the UNGPs is 'transformative and disruptive' of traditional standards and practices relating to business and human rights. The implementation efforts done right should result in the further crystallisation of the corporate responsibility to respect human

[260] The Supreme Court in its 2010 decision in *Citizens United v Federal Election Commission* noted that the majority in Austin 'undertook to distinguish wealthy individuals from corporations on the ground that "[s]tate law grants corporations special advantages- such as limited liability, perpetual life, and a favourable treatment of the accumulation and distribution of assets"'. The court noted however that, '[t]his does not suffice, however, to allow laws prohibiting speech. "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment []rights"'. Citizens United v Federal Election Commission, *supra* note 154.

rights into norms of different types of obligation, and their potential transition into 'hard norms' under national, sub-international (i.e., EU), and international law. The UNGPs affirm the need and obligations of States to adopt regulatory measures as necessary and appropriate to ensure business enterprises respect human rights.

When assessment of the *degree* to which business enterprises are 'participants' in the international legal system is concerned, one should note this expanding scope of international legal system as a result of soft law. The business and human rights domain has seen a proliferation of such soft-law initiatives, which articulate international expectations for business in relation to human rights and, despite their non-legally binding nature, have a capacity to bind actors.[261] The increased density of the international legal system is in part a result of the efforts by key actors to actively implement the UNGPs. An illustration of a source of soft law are the reports by WG BH to the HRC and the UN GA that provide clarity on the application of the corporate responsibility to respect human rights in specific areas or contexts of practice.[262]

The soft-law norms and practices that articulate the corporate responsibility to respect human rights, which previous chapters have examined in detail, and the partaking of business enterprises in their development and enactment of these initiatives, are indicative of evolving practice in relation to the nature of business enterprise. These developments viewed in combination point to the increased recognition of the corporate responsibility to respect. While the UNGPs have not had such impact that this norms has become legally binding generally in national, EU, or international level, the norms seems to be crystalizing into more binding form.

9.3 Conclusion

Legal scholarship has thus advanced at least five different approaches to appreciating the legal status of entities, applying, in the case before us, to business enterprises. These doctrines include the classical Westphalian, 'State-only' conception, as well as the State-based 'Recognition' conception. On the one hand, the 'State-Only' conception is obviously incompatible with the recognition of personality for business enterprises. On the other hand, the 'Recognition' conception does not preclude States from recognizing business enterprises as legal persons. However, under the 'Recognition' conception, States have not yet formally recognized international legal personality to corporations as a general rule. It should be noted, though, that the SRSG and Philip Alston have indicated unambiguously that corporations have such personality for acts such as torture, extrajudicial executions and crimes against humanity.

The inconsistency with international reality of the 'State-only' conception became apparent already with the *Reparations for Injuries* Advisory opinion of the ICJ. Philip Alston and Ryan Goodman highlighted in 2010 that '[o]ne of the most dramatic developments within International Human Rights law over the past two decades has been the growing importance of a range of non-

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[261] *See*, for more detail, section 4.2.

[262] U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Human Rights Council, § 60, U.N. doc. A/HRC/20/29 (Apr. 10, 2012) (by Margaret Jungk).

State actors'.[263] With the clear enhanced relevance of new actors in the international arena arose the need of considering new entities as potentially having international legal personality.

One would tend to think, positivists would regard as authoritative the *Reparation for Injuries* ICJ Advisory Opinion. The ECJ indicated in this Opinion, which is frequently linked to the 'Recognition' conception, that an international legal person is an entity 'capable of possessing international rights and duties, and [whether] it has capacity to maintain its rights by bringing international claims'.[264] Moreover, this opinion appears to allow for a functional approach to legal personality that would link such personality to the needs of the international community.[265] In that sense, as Alvarez and others have noted, there is room for the recognition of the legal personality of corporations. However, the application of the State-based 'Recognition' conception results in many (although not all, see Alvarez), including Ruggie, to conclude that business enterprises are not international legal persons, at least, in the words of Ruggie, not to 'any appreciable extent'.[266] As previously noted, the SRSG and Philip Alston have indicated unambiguously that corporations have such personality for acts such as torture, extrajudicial executions and crimes against humanity.

States seem to have not yet formally recognised international legal personality to apply, on a general basis, to corporations. Business enterprises are created under national law and States have not 'upgraded' them to international legal persons proper, which entails that they do not possess the type of 'derived' legal personality that IOs have. Moreover, corporations also don't have the representative organisation and meet the State-like criteria to qualify business enterprises as 'original' legal personality in a way similar to insurgents. After all, business enterprises do not act or function as a State and their existence may not be captured in 'territorial terms'. The growing influence of these entities in the international system points to this conception, because of its adherence to 'State-like' criteria, to defeat existing realities. As Clapham notes, '[t]rying to squeeze international actors into the State-like entities box is, at best, like trying to force a round peg into a square hole, and at worst, means overlooking powerful actors on the international stage'.[267]

From a 'Formalist' perspective, Wouters and Chané indicate, '[l]enghty debates about the international legal subjectivity of [multinational corporations] […] cannot hide the fact that MNCs already enjoy considerable rights under international investment law and under international Human Rights law'.[268] Wouters and Chané are of the view that MNCs 'do not have

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263 Phillip Alston & Ryan Goodman, International Human Rights, 1461 (Oxford University Press, 2010).

264 *See, Reparations for Injuries, supra* note 58, at 179.

265 Indeed, according to Díez de Velasco, '[f]rom a dynamic conception of [International law] it becomes necessary to recognize that it knows no bounds in its subjects, for the specific needs of the international legal community at any given time can advise, and even demand, granting legal personality to certain entities' (translation) Manuel Pérez González, *La Subjetividad Internacional (I) in* Manuel Díez de Velasco: Instituciones de Derecho Internacional Público, (C. Escobar Herhández, ed. 2012).

266 Ruggie, *supra* note 107, at 20.

267 Clapham, *supra* note 5, at 80.

268 Joost Pauwelyn, et al., *When structures become shackles: stagnation and dynamics in International law making*, 25 The European Journal of International law, 745 (2014).

binding obligations under international law' (presumably, other than those deriving from international investment law). Similarly, in the words of Malcolm Shaw, the 'realm [of the UNGPs] is that of 'soft-law, of expectations, of anticipation, not of binding international (as opposed to national) regulations'.[269] However, the SRSG and Philip Alston have indicated unambiguously that corporations have such obligations for acts such as torture, extrajudicial executions and crimes against humanity.

The individualist perspective, which entails a rejection of the two aforementioned 'State-based' conceptions, suggests that business enterprises already exist as international legal persons (which is not dependent on State recognition) and international duties and responsibilities can and, probably, should) be allocated to them. Moreover, from an 'Actor' perspective, the top-down approach to delineating the substance of such human rights obligation for companies, and furthermore by analogy to individuals (or States), is less appropriate. The assumption is that business enterprises exist as specialized organs in society that have a distinct role in the international (human rights) system, one that is different from, yet complementary to, that of States. Such obligations may not reflect this specialized role of business enterprises and, as a consequence, be less effective in having impact on actual business conduct.

I argue that developments in the business and human rights domain point to business enterprises already having a considerable degree of international legal status. The UNGPs have placed CSR at the centre of a system of policentric governance (in accordance with the 'Actor' conception). This system is intended to maximize the effectiveness of human rights (in accordance with the 'individual' conception), not only, but not in the least, by crystalizing in new legislation. As efforts to implement the UNGPs are done right, business enterprises are bound to have more and more legal status – and renewed (both legal and non-legal) effects.

States may decide to recognize business enterprises as international legal persons ('upgrade' them proper) through a *formal* act of recognition. From the State-based perspectives, such an act would constitute a major breakthrough. From a non-traditional perspective (i.e., under the 'Formalist' and 'Actor' Perspective), such a formal act would be of lesser significance, because no direct legal consequences would necessarily be attached to such act. From an 'Individualist' perspective, such formal act would also not be constitutive of international rights and obligations or legal capacities for companies, but could nonetheless have the positive effect of enhancing business' recognition of, and strengthening their commitment to, human rights and their responsibility to respect human rights.

I keep within the 'Actor' conception, whose view of the system corresponds most closely to the reality of the UNGPs, when arguing that such a formal act of recognition is thus not necessary, since such act is not a requirement for corporations be bearers of duties, rights and capabilities. However, I would welcome such act, which can affirm and further clarify the legal capacity that business enterprises have to bear international rights and obligations. Such act can generate (legal or non-legal) effects. For instance, as noted, it may give direction to national authorities and court when addressing the legal duties and responsibilities of companies, and lift obstacles to the use or creation of legal mechanisms for strengthening legal corporate responsibility and accountability as necessary.

[269] Shaw, *supra* note 2, at 182.

Keeping within the thrust of the UNGPs, such act may be viewed as a method and source of 'leverage' that could be used to maximize the effectiveness of efforts to realize international human rights and more sustainable globalization. The substance of this legal personality would be discerned pursuant to a bottom-up process, on the basis of an inductive analysis from existing standards and practices. Such international legal status should reflect the influence these enterprises have, their nature and function as economic organs in society and their capabilities to make (positive and negative) contributions to the realization of human rights and fundamental freedoms. The legal status of business enterprises would be functional and extends only so far as needed to perform this function.

Such understanding of international legal personality would correspond with the view of 'polycentric governance' on which the SRSG relied in relation to the UNGPs, which is premised in the understanding that the public/law and governance, national/international system is an essential component, but may not be sufficient, in and of itself, to ensure an effective human rights system.[270] As the business and human rights field is undergoing transformation, and legal duties may further crystalize under national and EU law, the clarification of such legal status within the international legal system becomes more relevant. The UN treaty initiative provides opportunity to have States formally recognize such international legal personality and clarify the corresponding international legal duties and responsibilities of business enterprises.

The UN treaty-initiative, which seems to revitalize the 'Individualist' approach, captures the view, not incompatible with the *Reparations* Advisory Opinion, that the effectiveness of the international human rights system may requires that some international human rights duties be applied directly to business enterprises. Indeed, pursuant to the dictum of the ICJ in Reparations legal personality is linked with the needs of the international community. The ICJ dictum that the 'subjects of law in any legal system' depend on 'the needs of the community'[271] and that '[t]he development of International law has been influenced by the requirements of international life'[272] may thus suggest that the needs of the international community to ensure the effectiveness of human rights may demand for the recognition of business enterprises as international legal persons with corresponding rights and duties.

What seems to be political reluctance to give this initiative greater vigor may be explained in relation to the worldview that the movement supporting this initiative adheres to, which departs from the polycentric governance approach and may not give due account to the governance role of business. Yet, key challenges in relation to business and human rights are of a systemic nature and demand a comprehensive view that appreciates the contribution of a multiplicity of actors and their governance systems to progress towards business respect for human rights in practice. There is need for the actions to reach greater scale and to better cohere (internally and externally) in order for cumulative effects to arise and progress to be achieved on a global scale. In the

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[270] John Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* (Jan. 23, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726.

[271] *Reparations for Injuries, supra* note 58, at 178.

[272] *Id.* at 178.

SRSG's quest, according to Mares 'for cumulative progress would be explained as an effort to maximize that leverage through the activation and combination of all [possible] sources'.[273]

[273] Radu Mares, *Decentering Human Rights From the International Order: The Alignment and Interaction of Transnational Policy Channels*, 23 Indiana Journal of Global Legal Studies, 173 (2016).

10 Conclusion

According to De Schutter, the might of multinational enterprises 'fascinates'. Our reaction to this power, De Schutter adds, has been influenced 'by much publicized situations in which, effectively controlled neither by their State or incorporation nor by the State where they operate, these global actors seemed to be able to commit human rights violations in complete impunity'.[1]

In a globalised world, global governance is no longer reserved to governments alone. As noted by Scherer and Palazzo, '[t]oday, [multinational corporations] as well as civil society groups participate in the formulations in policy areas that were once regarded as the sole responsibility of State agencies'.[2] Consequently, and as noted by Mares, the SRSG saw in the notion of 'polycentric governance', 'the way forward to advance the cause of human rights in the global economy'.[3] The SRSG's 'principled pragmatism" deliberately intends to transcend classic legality with a focus (consistent with the 'Individual' conception) on the effectiveness of human rights. According to the SRSG, in application of the notion of 'polycentric governance' (which is, in turn, consistent with the 'Actor' conception), there are three systems that develop CSR standards: (i) the public system, encompassing law and policy; the (ii) corporate governance system, reflecting risk management and the civil governance system, reflecting social expectations of stakeholders.[4] The SRSG thus placed business respect for human rights at the heart of the polycentric global regime, of which the public / law system is also a part.

As also noted by Mares, the SRSG aimed at moving 'to a critical mass by leveraging as many sources of authority as possible and getting them to interact in a process of cumulative progress' since 'if one would be tempted to boil down to one word [the SRSG]'s mandate, that word would be "leverage". The SRSG's quest, then, for cumulative progress would be explained as an effort to maximize that leverage through the activation and combination of all sources of leverage"'.[5] Indeed, the SRSG indicated that 'a new regulatory dynamic was required under which public and private governance systems […] each come to add distinct value for one another's weaknesses, and play mutually reinforcing roles-out of which a more comprehensive and effective global regime might evolve, including specific legal measures'.[6] Consequently, and unsurprisingly pursuant to the Commentary to UNGP 10, '[t]hese Guiding Principles provide a common reference point in this regard, and could serve as a useful basis for building a cumulative positive

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[1] Olivier De Schutter, *Transnational Corporations as Instruments of Human Development*, *in* Human Rights and Development: Towards a Mutual Reinforcement, 403, 433 (Philip Alston & Mary Robinson eds., 2005).

[2] Andreas Georg Scherer and Guido, *Introduction: Corporate Citizenship in a Globalised World*, in Handbook of Research on Global Corporate Citizenship 1, 2-3 (Andreas Georg Scherer and Guido Palazzo eds. 2008).

[3] Radu Mares, *A Rejoinder to G. Skinner's rethinking limited liability of parent corporations for foreign subsidiaries' violations of international human rights law* 73 ,Washington and Lee Law Review Online 117 (2016).

[4] *Id.*

[5] Radu Mares, *Decentering Human Rights From the International Order: The Alignment and Interaction of Transnational Policy Channels*, 23 Indiana Journal of Global Legal Studies, 173 (2016).

[6] John Gerard Ruggie, Just Business Multinational Corporations and Human Rights, 78 (W.W. Norton & Company. 2013).

effect that takes into account the respective roles and responsibilities of all relevant stakeholders'.[7] In a nutshell, the SRSG concluded, 'the [UNGPs] prescribe paths for strengthening and better aligning these governance systems in relation to business and human rights. They aim to generate a mutually reinforcing dynamic that produces cumulative change'.[8]

Also according to the SRSG, 'the successful expansion of the international human rights regime to encompass business enterprises must activate and mobilize the full array of rationales and institutional means that affect corporate conduct. That is what the [UNGPs] seek to do'.[9] The General Principles of the UNGPs thus establishes a link between the UNGPs and these objectives, by stating in its third paragraph that 'these Guiding Principles […] should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to socially sustainable globalization'.[10]

And indeed, the UNGPs are crystallizing in a number of developments at the national, supranational (EU) level and international level that endorse the approach of the SRSG. Thus, Mares notes the 'emergence of a transnational regulatory regime that, by mobilizing new sources of public and private authority, creates a new regulatory dynamic that augments the traditional State-centered and territory-based protection of human rights with the leverage brought by international economic interdependencies and multinational enterprises'.[11]

In the light of which I turn to the research questions this thesis intended to address:

1. *Have CSR, and the responsibilities of business enterprises for human rights, been legally defined in and fully adopted by International law, European law and national law? (with a particular emphasis in UK and US law).*

The answer is, for the time being, partially, but the process is on-going. The UNGPs articulate a shared definition of the corporate responsibility to respect human rights, which the HRC 'endorsed' in 2011. The corporate responsibility to respect human rights thus is recognized to exist, not as a legally binding standard founded in international human rights law, but rather as a standard of conduct founded on social expectations, more specifically 'a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility'. Consequently, strictly speaking from a formalistic positivist perspective, this responsibility lacks a legally binding nature. In legal terms the corporate responsibility should be understood as 'soft' norm that is founded on societal expectations of compliance. Non-

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[7] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.* U.N.Doc. A/HRC/17/31, GP 23a (March 21, 2011) [hereinafter *UNGPs*] (by John Ruggie).

[8] John Ruggie, *Opinion: Business and Human Rights* – The Next Chapter (Mar 7, 2013).

[9] *Id.*

[10] *UNGPs*, supra note 7.

[11] Mares, *supra* note 5, at 1.

compliance with this norm makes business enterprises accountable to the courts of public opinion, or charges in actual court occasionally. The SRSG noted:[12]

> In addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion - comprising employees, communities, consumers, civil society, as well as investors - and occasionally to charges in actual courts. Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations - as part of what is sometimes called a company's social license to operate.

In this thesis I have argued that the corporate responsibility to respect human rights, as it is currently conceived, should further evolve and acquire normative force and 'binding-ness' in practice. According to the SRSG: 'we have achieved, for the first time, broad convergence around a common set of politically authoritative and socially legitimated norms and policy guidance for business and human rights. This provides us with a strong foundation on which to build. But of course, the work of building on it has only just begun'.[13]

It is always a matter of legal obligation for States to adopt the necessary rules and regulations to ensure that business enterprises respect human rights in practice. The thesis set out the scenario of the corporate responsibility to respect human rights acquiring normative force and the translation of such responsibility into a 'hard' (legally binding) norms at the national, regional and international level. The thesis has examined the intensity of implementation efforts, identified gaps and assessed the extent to which States have an obligation to incorporate and embed the concept of human rights due diligence into existing laws and regulations.

As a result of the implementation efforts of the UNGPs by many actors, the corporate responsibility to respect human rights has been accepted in various hard and soft law sources, ranging from transnational laws at national and EU level in the area of non-financial disclosure to soft law mechanisms by State and non-State actors at all levels. These developments as referred to in the next paragraphs become particularly significant when considered in combination, thereby indicating that the corporate responsibility to respect human rights has begun to crystalize into a more binding norm.

This thesis has identified and examined a wide range of regulatory measures (voluntary and mandatory) that EU Member States, the EU and other non-State actors have adopted in their efforts to actively implement their duties and responsibilities under the UNGPs. Some of these regulatory measures entail a restatement of the human rights due diligence concept, or aspects thereof in 'hard' law.

One example is the UK Modern Slavery Act of 2015, which requires business enterprises to make publicly available information that reflects the expectations set out in the UNGPs, as applicable in the specific context of slavery and human trafficking-related risks in a company's

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[12] John G. Ruggie, Keynote Remarks at Annual Plenary Voluntary Principles on Security & Human Rights Ministry of Foreign Affairs, The Hague, Netherlands, at 3 (Mar. 13, 2013).

[13] Ruggie, *supra* note 8.

business and supply chains.[14] Another example from the US is the California Transparency in Supply Chain Act of 2010, which sets requirements for retail sellers and manufacturers to disclose their risk-based due diligence efforts, if any, to eradicate human trafficking and slavery from their direct product supply chains,[15] and selective legislation.[16]

At EU level, a number of EU Directives have been adapted (or are currently under negotiation), which are of particular relevance for regulating the conduct of business in relation to human rights in various areas: public procurement[17], access to EU courts[18], and the new country-by-country reporting obligations for large extractive and logging companies on payments to governments, the EU Directive on non financial disclosure,[19] the Shareholders Rights Directive and the new EU Directive 2011/36/EU on trafficking in human beings.

The analysis undertaken in this thesis concludes that these Directives do not define or fully adopt the corporate responsibility to respect human rights, nor are the UNGPs expressly mentioned there-in, or if the case, only in passing. This thesis has highlighted some of these gaps. This thesis has also drawn attention to the legal obligation of the EU to consider seriously taking all actions that are within its competences to promote business respect for human rights, including Company and Securities law. This obligation can be derived from the Charter of Fundamental Rights and the objective that the EU has set 'to make the fundamental rights provided for in the Charter as effective as possible'.[20]

The EU Directive on non-financial disclosure sets out requirements for certain companies to make disclosures on, inter alia, human rights. This Directive is consistent with the conceptual framework put in place by the UNGPs, and expressly refers to the UNGPs as an instrument that business enterprises can use in their reporting.[21] The proposed EU Regulation on conflict minerals has not yet been adopted.[22] According to a statement issued by the EU in June 2016, setting out the substantive components of a new Regulation on conflict minerals, this Regulation could introduce mandatory due diligence requirement for importers of minerals and metals of 3T&G that is consistent with the OECD Due Diligence Guidance for Responsible Supply Chain Minerals From Conflict and High-Risk Areas.[23]

Apart from legal obligations in 'hard' law, the corporate responsibility to respect has been recognized and restated in sources of 'soft' law. These soft-law norms are not binding from an

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[14] *See*, section 7.8.2.1.

[15] *See,* section 7.8.2.2.

[16] *See*, section 7.8.3.

[17] *See,* section 8.7.1.

[18] *See*, chapter 6.

[19] For further details, *see,* chapter 6.

[20] *See,* section 8.8.

[21] *See*, chapter 7

[22] *See,* section 8.7.2.

[23] *See, id.*

strictly positivist perspective, however they have legal relevance as articulation of international expectations, which are foundational to obligations, and can potentially have as powerful an impact as hard law on the behaviour of business enterprises.[24] This thesis has identified a number of soft-law sources that recognize and articulate the corporate responsibility to respect, e.g., the authoritative interpretations of the UN treaty monitoring bodies.[25] NAPs on CSR and the implementation of the UNGPs that EU Members[26] have published at national level, the UN reporting framework[27], EU guidance material for business enterprises operating in the key business sectors (employment and recruitment agencies, ICT companies, and oil and gas companies), EU policy documents and reports, and more.

It should also be stressed, in this regard, that the SRSG has noted that '[c]ore elements of the Guiding Principles have been incorporated by numerous other international and national standard setting bodies, each of which has its own implementation mechanisms, as well as by business and other stakeholder groups'. According to the SRSG, examples include the following:[28]

- The new OECD Guidelines for Multinational Enterprises, which have a human rights chapter drawn from the Guiding Principles, and which provide for national complaints mechanisms in the forty-two adhering states concerning the conduct of multinationals operating in or from those states;

- New provisions in the OECD Common Approaches for Export Credit Agencies, which affect access to capital at the national level;

- The new International Finance Corporation Sustainability Principles and Performance Standards, which affect access to international capital—amplified manifold because they are tracked by 80+ private sector lending institutions[29];

- ISO26000, which energizes a world-wide army of consultants eager to help companies come into compliance.

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[24] Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/35, § 6 (Febr. 19, 2007) (by John Ruggie).

[25] *See*, section 4.8.6.5

[26] *See,* section 8.3.6.

[27] *See,* section 4.8.5.1.

[28] Ruggie, *supra* note 8.

[29] De Schutter also notes that 'when the International Finance Corporation revised its Sustainability Framework, including both Sustainability Principle and Performance Standards, reference to human rights were included, reflecting core concepts of the [UNGPs] such as the responsibility for IFC clients to respect human rights and to exercise due diligence in order to ensure that they do not negatively affect human rights' Olivier de Schutter, International Human Rights Law, 462 (Cambridge University Press 2014). As the SRSG noted, these principles and standards 'affect companies' access to international capital, amplified manifold because they are tracked by private sector lending institutions party to the so-called Equator Principles, which account for more than three fourths of all project financing worldwide'. J. Ruggie, *Global Governance and "New Governance Theory": Lessons from Business and Human Rights* 20 Global Governance, 11 (2014).

- In the European Union, the Commission has asked member states to submit national plans for implementing the Guiding Principles, and the Commission itself is developing additional guidance for several industry sectors and for small and medium-sized enterprises;

- In the United States, the concept of human rights due diligence, a central component of the corporate responsibility to respect human rights, found its way into Section 1502 of the Dodd-Frank Wall Street Reform Act, in relation to conflict minerals procured in the Democratic Republic of Congo;

- The U.S. government also has referenced the Guiding Principles as a benchmark in a new reporting requirement for U.S. entities investing more than $500,000 in Myanmar, now that most economic sanctions have been suspended.

- ASEAN is exploring ways to align its new business and human rights program with the Guiding Principles; the African Union is on a similar track.

- The number of companies developing human rights policies, due diligence procedures and grievance mechanisms is rising significantly;

- International business associations and labor federations have issued user's guides to the Guiding Principles; civil society groups invoke them in their work, as do National Human Rights Institutions;

- A new global resource center for addressing conflicts between businesses and communities has been established in The Hague; it is a direct follow-up to the Guiding Principles' provisions on non-judicial remedy, and is appropriately named Access.

- The Guiding Principles have also featured in a critical U.S. Supreme Court case, Kiobel v. Royal Dutch Petroleum, brought under the Alien Tort Statute, in which I filed an amicus brief correcting mischaracterizations of my mandate's findings by Shell's attorneys.

2. *In the affirmative, have these responsibilities been defined as a new category of legal obligations with corresponding rights and obligations or as a reconceptualization of other areas of the law?*

The answer is, paradoxically, both. On the one hand, the UNGPs did not alter the existing obligations of States. The UNGPs also do not expect States to depart from their existing classic legal duties to protect in relation to human rights. In the words of the SRSG: '[f]or States the focus [of the UNGPs] is on the legal obligations they have under the international human rights regime'.[30]

[30] Ruggie, *supra* note 6, at xliv.

The SRSG has unambiguously noted that he is of the view that corporations 'may have direct responsibilities under International law for committing international crimes, including crimes against humanity, torture, genocide and slavery'.[31] These responsibilities lead to classic positivist liability under domestic law.

It goes without saying, and as noted above, these obligations remain unchanged by the UNGPs. As indicated in paragraph IV of the Preamble of the UNGPs, '[n]othing in these Guiding Principles should be read as […] limiting or undermining any legal obligations a State may have undertaken or be subject to under International law with regard to human rights'. In fact, according to UNGP 1 (a `Foundational Principle`) `States must protect against human rights abuse within their territory and / or jurisdiction, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication`.[32]

International human rights law imposes a positive obligation on States to adopt such legislative measures as necessary in particular circumstances.[33] EU Member States that have adopted NAPs have indicated regulatory measures as part of a smart mix. One example of an initiative (although not mentioned in a NAP *per se*) to introduce a legally binding duty of human rights due diligence is the France's Proposition to create a duty of vigilance, the latest version of which was voted on by the French General Assembly on 23 March 2016. An examination by the French Senate in October 2016 led to the adoption of a modified version, which does not contain such legal duty, however.[34]

On the other hand, the UNGPs have objectives that go well beyond classic legal obligations and which can only be properly ascertained by reference to the SRSG's 'principled pragmatism' (and skepticism to 'single bullets' such as, presumably, a resort alone to positivist law would be) and understanding of CSR as a key component of polycentric governance. As Mares notes, 'wrapping these elements in a credible narrative of human rights in the global economy-a multifaceted narrative that accounts for both risks and opportunities created as the world integrates economically'.[35]

The SRSG has identified the corporate responsibility to respect human rights, and forged a consensus around this concept, on the basis of a fact-based analysis of social expectations as they have been recognized in existing standards and practices, and multi-stakeholder consultations. The starting point for articulating this responsibility was the factual existence of business

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[31] *See* Esther Kiobel, et al. v. Royal Dutch Petroleum Co. et Al. (on Writ of *certiorari* to the United States Court of Appeals for the Second Circuit), Brief *Amici Cuiriae* of Former UN Special Representative for Business and Human Rights Professor John Ruggie; Professor Philip Alston; And The Global Justice Cinic at NYU School of Law in Support of Neither Party.

[32] *UNGPs, supra* note 6.

[33] *See* section 4.6.

[34] *See* section 6.4.1.2. *Also see*, http://www.senat.fr/dossier-legislatif/ppl14-376.html, and Nadia Bernaz, Unpacking the French Bill on Corporate Due Diligence: a presentation at the International Business and Human Rights Conference in Sevilla (Oct. 21, 2016), http://rightsasusual.com/?p=1087

[35] Mares, *supra* note 3, at 73.

enterprises as powerful entities with capacities to make positive and negative contributions to the realisation of human rights and freedoms. Business enterprises are specialized organs of society that have a distinct role on the international scene that is different from, yet complementary to that of States. The concept of the corporate responsibility to respect human rights reflects this reality and, as previously indicated, intends to leverage on it.

The corporate responsibility to respect, with the human rights due diligence concept as its core component, was thus carefully crafted. Human rights due diligence is understood primarily as a forward-looking management process that is aimed at the prevention of adverse human rights impacts.[36] The human rights due diligence concept has also certain unique qualities that lends itself for usage as a regulatory concept and legal standard of conduct in different areas of law.[37] The concept is universally applicable as a social/moral norm and has 'legal pedigree' in legal systems across the world.[38] The conduct of business enterprises is benchmarked against international human rights standards. And lastly, the corporate responsibility to respect human rights is central to the emerging global business and human rights regime.

The corporate responsibility to respect human rights is formulated in open-ended language.[39] This flexibility furthermore makes the human rights concept adaptable, capable of transcending different areas of law and makes the concept flexible for an effective implementation and enforcement in different areas of domestic law.[40] I have described how national authorities can refer to the human rights due diligence concept when revisiting rules and regulations for the purpose of realigning them with the expectation that business enterprises ensure the respect for human rights by reference to universally recognized human rights standards and principles. The concept can give direction to national authorities when addressing gaps in human rights protection.

The studies on the tort liability and private international and the EU Transparency Directive are illustrative of the legal (transformatory) effects that the enforcement of human rights due diligence in national law can have, in terms of driving conceptual improvements in different areas of existing law at all levels (as well as generate transnational effects).

In the light of the preceding considerations the corporate responsibility to respect human rights may be viewed as a reconceptualization of existing laws at national and international level. The corporate responsibility to respect human rights is situated at the center of the emerging regime on business and human rights. This thesis has described the transformative impact that this concept can have on law within this broader context.

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[36] Sabine Michalowski, *Due diligence and complicity: a relationship in need of clarification*, in Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, 218-242, 231 (Cambridge University Press ed. 2013).

[37] Jonathan Bonnitcha & Robert McCorquodale, *Is the concept of `due diligence` in the Guiding Principles coherent?* (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208588.

[38] Olivier De Schutter et al., Human Rights Due Diligence: the Role of States (2012).

[39] *See*, for more detail, chapter 5.

[40] *See id*, conclusion.

In short, the corporate responsibility to respect may be understood in terms of classic positivist obligations, as well as reconceptualization of existing obligations (that exists in social expectations, however and detached from legal/public law system in terms of its source of obligation and enforcement), under various areas of law at national and sub-national level. There is scope for the corporate responsibility to respect human rights to be transposed into a treaty-like legally binding norm at international level. If this were to materialize, the corporate responsibility to respect would be established as a new category of international legal obligations (in hard law).

It would be appropriate to consider this option in the overall business and human rights context, and as a method to further compliance and adherence to international human rights, as part of a system of polycentric governance.

3. *If the answer to preceding question is that a new category arises, does this constitute the breakthrough that makes business enterprises subjects of International law from a positivist legal perspective?*

By 'positivist', the question appears to refer to classic approaches to legal personality, i.e., the 'State-Only' conception and, at the most, including also the (as previously noted, State based) 'Recognition' conception. In that sense the answer is 'such responsibility is probably emerging'. On the one hand, the 'State-Only' conception is obviously incompatible with the recognition of such personality. Moreover, in principle, under the 'Recognition' doctrine, States have not yet formally recognised international legal personality to corporations.

However, as Wouters and Chané indicate, '[l]enghty debates about the international legal subjectivity of [Multinational corporations] […] cannot hide the fact that MNCs already enjoy considerable rights under International Investment law and under International Human Rights law'.[41] Wouters and Chané are of the view that MNCs 'do not have binding obligations under International law' (presumably, other than those deriving from international investment law). Similarly, in the words of Malcolm Shaw, the 'realm [of the UNGPs] is that of 'soft-law, of expectations, of anticipation, not of binding international (as opposed to national) regulations'.[42] However, the SRSG and Philip Alston have indicated unambiguously that corporations have such obligations for acts such as torture, extrajudicial executions and crimes against humanity.[43]

Moreover, as has been set out in detail in section 9.2.2.2.1 above, the Reparations Advisory Opinion of the ICJ, which is frequently linked to the 'Recognition' doctrine (and which, one would tend to think, positivists would regard as authoritative), appears to leave scope to a functional approach to legal personality that would link such personality to the needs of the international community. In that sense, as Alvarez and others have noted, there is room for the recognition of the legal personality of corporations.

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[41] Joost Pauwelyn, et al., *When structures become shackles: stagnation and dynamics in International law making*, 25 The European Journal of International law, 745 (2014).

[42] Malcolm N Shaw, International Law, 182 (Cambridge University Press, 2014).

[43] *See*, Esther Kiobel, et al. v. Royal Dutch Petroleum Co. et Al., *supra* note 31.

The reply to this question (under a purely positivist approach) becomes even blurrier with certain post-Kiobel lower courts decisions which appear to depart from Kiobel and with the trends to recognise criminal liability to corporations noted by the SRSG.

In addition, it is not clear that the recognition of legal personality to corporations would foster compliance and enhance the effectiveness of the UNGPs since, as set out above, and noted by Alvarez, such recognition could potentially detract from the effective protection of human rights in the context of investment treaties.

On the other hand, the inconsistency with international reality of the 'State-only' conception became apparent already with the Reparations, advisory opinion of the ICJ. Philip Alston and Ryan Goodman highlight that '[o]ne of the most dramatic developments within International Human Rights law over the past two decades has been the growing importance of a range of non-State actors'.[44] With the clear enhanced relevance of new actors in the international arena arose the potential need of considering new entities as having international legal personality. Which entities and with which consequences probably depends on the perspective of the international system one favors. In the words of Malcolm Shaw '[a] particular view adopted of the [international] system will invariably reflect upon the question of the identity and nature of international legal persons'.[45]

Nothing appears to preclude, in principle, the recognition as international legal persons of business enterprises. As noted by Alvarez, such recognition would be consistent with the dictum by the ICJ in Reparations indicating that the development of International law has been influenced by requirements of international life, which has resulted in 'instances of action upon the international plane by certain entities which are not States', thereby allowing for the possibility of 'new subjects of International law' that are 'not necessarily […] States or possess the rights and obligations of Statehood'. There appear to be no limits to the recognition of legal subjects.[46] As noted by Joost Pauwelyn, '[t]here is no fixed list of subjects of International law that is set in stone'.[47] Or as highlighted by Portmann, 'International law is an open system from which no entity is a priori excluded'.[48]

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44 Alston & Ryan Goodman, International Human Rights, 1461 (Oxford University Press, 2010).

45 Shaw, *supra* note 42, at 143.

46 Indeed, according to Díez de Velasco, '[f]rom a dynamic conception of [International law] it becomes necessary to recognize that it knows no bounds in its subjects, for the specific needs of the international legal community at any given time can advise, and even demand, granting legal personality to certain entities' (translation) Manuel Pérez González, *La Subjetividad Internacional (I) in* Manuel Díez de Velasco: Instituciones de Derecho Internacional Público, (C. Escobar Herhández, ed. 2012).

47 Pauwelyn, et al., *supra* note 41, at 745.

48 Roland Portmann, Legal Personality in International law (Cambridge University Press. 2010), at 283.

4. *Can new forms of international CSR regulation be analysed in legal terms, even if they are found not to be a part of International law in the legal positivist sense of the word? Why? (or why not?).*

As previously indicated, the UNGPs do not preclude (or, for that matter, directly lead to) the analysis of corporate responsibility as a part of international law in the legal positivist sense of the word.

However, even if they were to preclude such an analysis, CSR regulation could nonetheless be analysed in legal terms, given that, as set out in detail in previous sections of this chapter, positivism (and its concomitant approach to legal personality, namely, the 'State-Only' conception) is only one of the possible approaches to the notion of legal personality. As noted above, the UNGPs can be analysed in legal terms by reference to at least the 'Individual' conception (by furthering actual compliance and the effective protection of human rights) and the 'Actor' conception.

The UNGPs place CSR at the center of a system of polycentric governance (in accordance with the 'Actor' conception) which is intended to maximize the effectiveness of human rights (in accordance with the 'Individual' conception), not only, but not in the least, by crystalizing in new legislation. The SRSG acknowledged the need of legalization, however, as Mares notes, the SRSG was of the view that:

> starting with an international treaty would necessarily be the best way forward […]. Instead, he called for a narrow treaty-making effort and for changes to domestic law as first steps in a longer process of legalization. […] the legacy of Ruggie begins with a fundamental break in conceptualizing corporate responsibilities. He conceived them as neither isolated from nor dependent on State obligations, embedded in a global policy context where hierarchy and formal legal authority cannot be assumed for convenience, but where public authority and the normativity of human rights seek new ways to reassert themselves, and in a human rights context where the premium is not on lofty reaffirmation of values but on leveraging all available sources of change to make a difference for right holders[49]

From the perspective of polycentricity, the conduct of business enterprises is governed by the implementing measures of various actors, which are founded in sources and processes of different types of obligation. These measures, in isolation and combination, create a regulatory dynamic and plausibly contribute to the realization of human rights by affecting and coordinating the regulation by various actors of factors that leverage business adherence to implementing their responsibility to respect human rights.

The substance of these requirements should be discerned pursuant to a bottom up process, on the basis of an inductive analysis from existing standards and practices. The assumption is that (from a human rights perspective) business enterprises exist as specialized organs of society that have a distinct role in the international scene that is different from, and yet complementary to, that of States. From the perspective of the 'Actor' conception, the duties and responsibilities of business

[49] R. Mares, *supra* note 5.

enterprises should correspond with this social reality in order to make sense and have legal effects. It would thus seem inappropriate (and inaccurate) to designate business enterprises as subjects by assimilation to States or on the basis of State-like criteria, or by assimilation to individuals for that matter.

It is clear that many of these sources and processes do not fit the traditional sources of law as articulated under Article 38 of the ICJ Statute. The precise normative force of these standards and practices remains difficult to define in traditional legal terms. Conceptually, Joost Pauwelyn argues that there does not appear to be a reason for why International law could not evolve to include these new actors, sources and processes.[50] [51] These standards and practices should be understood qualify as soft law to the extent these articulate international principles and, despite their non-legally binding nature, have the normative potential to bind actors.

These measures potentially affect the actual adherence by business enterprise to implementing the corporate responsibility to respect by leveraging the factors that affect such compliance. As a consequence of the regulatory dynamics that arise out of the combined effects of this 'smart-mix' of measures, business enterprises are increasingly bound to implementing this corporate responsibility to respect human rights. Business enterprises face binding responsibility to respect human rights under a range of sources of law, ranging from transnational laws at national and EU level to soft law mechanisms by State and non-State actors at all levels.

5. What makes CSR have 'legal status' in a global governance context?

The SRSG himself noted that 'this unorthodox formulation initially was the most controversial conceptual move I made because it was not considered to be fully "rights-based"'.[52] However, as set out in detail throughout this chapter, 'not fully "rights-based" is far from being tantamount to 'decoupled from rights'.

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[50] Pauwelyn, et al., *supra* note 41, at 745.

[51] As Pauwelyn et al. have pointed out:

> there is general agreement that Article 38 of the ICJ Statute does *not* offer an exhaustive list of the source of International law, nor does International law require that a particular process be followed to create international norms or that International law can only emerge out of particular fora or IOs. As a result, new sources and processes (such as unilateral acts and decisions by IOs) can and have emerged. Even explicitly provided for sources and their law-ascertainment criteria remain vague and can be adapted to new developments. The constituent elements of custom and general principles are notoriously vague. Even the definition of what is a convention or treaty is contested and open to interpretation. Hence; even though it is hard to imagine, for example, that the States parties to the ICJ Statute would amend Article 38 to expand the sources of International law, or that the UN Charter be re-written to allow explicitly for new actors; no such formal decisions are required for International law to evolve. After all, whether new modes of cooperation will have an impact or persist will play out not so much at the UN or WTO, or before courts or tribunals; but in foreign ministries, national parliaments and regulatory bodies, standard-setting and procurement organisations; corporate board rooms and rating agencies, NGO or trade union strategy meetings, the media; and individual citizens'/ consumer decisions. The conceptual boundaries of how International law may look in the future are wide open.
>
> *Id.* at 745.

[52] J. Ruggie, *supra* note 6, at xliv.

On the one hand, as indicated in detail throughout this chapter, the UNGPs do not alter pre-existing (national and national) obligations binding corporations and in fact, award a primordial obligation to these when it comes to State. Though the UNGPs do not, in and of themselves, create new legal obligations, they certainly reinforce the importance of State adherence to the existing obligations.

On the other hand, to the extent the UNGPs, by placing CSR at the centre of a polycentric system of global governance, succeeds in bringing compliance – and achieving changes in the behaviour of the corporate world in relation to human rights, CSR has already had the (often legal, in the positivistic sense of the word) effects indicated at the reply to question 2 above, and is bound to have more and more, legal status – and renewed (both legal and non-legal) effects.

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