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# Corporate Accountability and the Role of the State:

Requirements for improving corporate Human Rights Due Diligence (HRDD)  
after the endorsement of the UN Guiding Principles on Business and Human  
Rights (UNGP)

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## **Abstract**

Since their adoption in 2011, the United Nations Guiding Principles on Business and Human Rights (UNGPs) have become a focal point for the debate on corporate liability, as they articulate the role of States and corporations for human rights adverse impacts. However, the UNGPs present clear shortcomings in developing corporate accountability. They do not fully reflect the existing debate on States' extraterritorial obligations; fail to refine the legal status of corporations as duty bearers; and as a result, they do not extend a parent company's liability to the supply chain. In this regard, this research aims at ascertaining the changing role of the States in improving corporate responsibility after endorsing the UNGPs.

The absence of corporate legal obligations decreases the effectiveness of Human Rights Due Diligence (HRDD) capable of ensuring corporate responsibility, as indicated in the Corporate Human Rights Benchmark's analysis. Despite the limitations of the UNGPs, some States are taking action to identify existing gaps and establish policy coherence, support mechanisms and relevant legislation. However, legislative efforts are seen as the weakest part among State actions.

This thesis emphasizes the importance of corporate mandatory due diligence; regular monitoring of the HRDD process by independent organizations; and the development of an integral approach in different legal fields. Moreover, this research emphasizes the importance of international cooperation to improve access to remedy in host States and the need to create an enabling environment to solve corporate internal and external challenges to the practical implementation of HRDD.

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## Abbreviations

CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHRB	Corporate Human Rights Benchmark
ComRC	Committee on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities
CSR	Corporate Social Responsibility
CSV	Creating Shared Value
ECHR	European Convention on Human Rights
ESC rights	Economic, Social and Cultural rights
EU Directive	Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertaking and groups
FCO	Foreign & Commonwealth Office (United Kingdom)
HRBA	Human Rights-Based Approach
HRDD	Human Rights Due Diligence
HRIA	Human Rights Impact Assessment
ICJ	International Court of Justice
IFIs	International Financial Institutions
IGOs	Inter Governmental Organizations
ILO	International Labour Organization
ISO	International Organization for Standardization
MNCs	Multi-National Corporations
NAP	National Action Plans on Business and Human Rights
NCPs	National Contact Points
NGOs	Non-Governmental Organizations
NHRIs	National Human Rights Institutions
IGWG	Open-ended Inter-Governmental Working Group on transnational corporations and other business enterprises with respect to human rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
RAFI	Human rights Reporting and Assurance Frameworks Initiative

RBC	Responsible Business Conduct
SME	Small and Medium sized Enterprise
SOE	State-Owned Enterprises
SRSG	Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises
UDHR	Universal Declaration of Human Rights
UN Guidance	UN Guidance on National Action Plan on Business and Human Rights
UN Norms	UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights
UNGP	UN Guiding Principles on the Business and Human Rights
UNHRC	Human Rights Council of the United Nations
UNWG	UN Working Group on Business and Human Rights

# Chapter 1: Introduction

## 1.1. Brief overview of Business and Human Rights

### 1.1.1. From CSR to Business and Human Rights

Business and Human Rights became one of the most urgent and significant global issues in international society. It is undeniable that corporations considerably affect various aspects of society both in negative and positive ways. However, despite the apparent significance of such impact, the development of social and legal norms to address the corporate human rights impacts continues to be slow. As it is well known, there is no international legal instrument imposing direct human rights obligations on non-state actors, including corporations. The only exception is jurisdiction in international criminal law over corporations alleged in complicity in war crimes such as genocide. As such, reaching a consensus in the global governance system on the international legal accountability and responsibility of corporation is a significantly difficult task. In this regard, the UN Guiding Principles on Business and Human Rights (UNGPs) unanimously endorsed in 2011 by the Human Rights Council of the United Nations (UNHRC), are the most evolved system so far.

Before the Business and Human Rights field emerged, corporate social responsibility (CSR) was mainly considered as a corporate voluntary principle by the international society. At the beginning, Howard Bowen who was called ‘the father of CSR’ regarded it as a way for the systematic engagement with business to society.<sup>1</sup> Generally, the idea of CSR comes from the notion that “business has responsibilities beyond profit

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<sup>1</sup> Howard R. Bowen, *Social Responsibilities of the Businessman* (Univ. of Iowa Press, 1953) (as cited in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights From Principles to Practice* (Routledge, New York 2016) 78).

maximization towards a society at large.”<sup>2</sup> It is the concept of creating value of philanthropy based on voluntarism and it has a wider scope than Business and Human Rights.<sup>3</sup> In 2006, the European Commission defined CSR as “fundamentally voluntary business behavior”.<sup>4</sup>

When the concept of CSR first emerged, Milton Friedman, the prominent economist advocating for free market, had reiterated that “[t]here is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.”<sup>5</sup> Even though Friedman’s idea about free market may seem obsolete in contemporary society, free market economists occasionally defend his position against regulations and protection measures as part of State duty. Nevertheless, critical voices from civil society and the wider public have openly criticised business conduct as a cause of social problems. With this in mind, corporations since early 1990s have strategically focused on CSR as a new approach for creating value to overcome adverse impacts of business activities.

This trend was backed up by academics such as Michael Porter who is leading a recent CSR trend based on Creating Shared Value (CSV). According to Porter, “Companies could bring business and society back together if they redefined their purpose as creating ‘shared value’ - generating economic value in a way that also produces value for society by addressing its challenges.”<sup>6</sup> As such, the initial concept of CSR based on charitable actions has expanded to include a shared value approach, which reconnects company’s commercial interests with social value. Growing from the long-standing debates which characterised CSR, the Business and Human Rights emerged at international level. It is important to understand the key differences between Business

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<sup>2</sup> Brent D. Beal, *Corporate Social Responsibility Definition, Core Issues, and Recent Developments* (SAGE, London 2014), 2 (as cited in Nadia Bernaz, *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap* (Routledge, New York 2017) 3).

<sup>3</sup> Florian Wettstein, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?’ in Pauly and Nolan (eds) 80.

<sup>4</sup> Commission of the European Communities, ‘Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility’ (Brussels 2006), 2.

<sup>5</sup> Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1962), 133 (as cited in Bernaz (n 2), 4).

<sup>6</sup> Harvard Business Review, ‘Creating Shared Value’ (2011) <<https://hbr.org/2011/01/the-big-idea-creating-shared-value>> accessed 15 May 2017.

and Human Rights and CSR, in order to better conceptualise the limitations of the Business and Human Rights discourse itself, which are in part addressed in this thesis. Firstly, whereas CSR points out voluntary actions based on morality that lies beyond the call of duty, Business and Human Rights call for rights and duties that are interrelated in a morally obligatory sense.<sup>7</sup> In other words, CSR focuses on corporate goodwill based on morality, whereas Business and Human Rights underlines rights and obligations enshrined in international human rights standards. Secondly, while most CSR standards exclusively deal with responsibilities by company, Business and Human Rights advance a framework to address both State and corporate responsibilities in an integrated way.<sup>8</sup> Thirdly, Business and Human Rights provides targeted reference points for practical tools and instruments such as human rights impact assessments (HRIA) and human rights due diligence (HRDD) that have been missing from CSR.<sup>9</sup>

Half a century after the emergence of CSR, the concept of corporate responsibility has been expanding to the area of Business and Human Rights. Nevertheless, companies continue to avoid and deny an appropriate response to human rights abuses in their business operations. Only recently they have begun to show acknowledgement and engagement with human rights issues and with external stakeholders.<sup>10</sup> However, their human rights performance, including HRDD to prevent adverse human rights impacts, remains very limited. Accordingly, States are required to play a vital role in leading corporate change and creating an environment appropriate to the full realization of human rights.

Even though the Business and Human Rights regime could not conclude a long-standing debate between legally binding instruments and voluntary initiatives, the UNGP have quickly become a ‘common reference point in the area of Business and Human Rights.’<sup>11</sup> The thirty-one guiding principles consisting of foundational and operational principles and their commentaries elaborate multi-dimensional ways to address potential and actual human rights impacts in business relationships including

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<sup>7</sup> Wettstein (n 3), 80.

<sup>8</sup> Ibid., 81.

<sup>9</sup> Ibid., 82.

<sup>10</sup> Justin Nolan, ‘Business and human rights in context’ in Pauly and Nolan (eds), 9.

<sup>11</sup> Justin Nolan, ‘Mapping the movement: the business and human rights regulatory framework’ in Pauly and Nolan (eds), 43.

all supply chains. In this process, the UNGP emphasize the role of States and business enterprises to hold themselves accountable, and it requests the engagement of affected rights-holders based on international human rights standards. Especially, corporations should respect internationally recognized human rights, even when the host States where multinational enterprises are domiciled have not ratified some human rights treaties. However, as discussed in this thesis, the UNGP left an open question in the sense that they do not provide concrete guidance on how to ensure human rights in the process of practicing HRDD in business operations without corporate legal liability.

Since the endorsement of the UNGP in 2011, there has been much progress towards clarifying the State duty to protect against business-related human rights abuses. On 24 June 2014, the UNHRC adopted a resolution to establish an ‘Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG)’, “[w]ith the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights.”<sup>12</sup> The IGWG initially started to outline the nature, scope and elements of the new instrument. In this regard, proponents of a treaty call for clarifying that corporations should have legal obligations in international law; corporate human rights obligations should be also addressed in the context of trade and investment at the same level; treaty should not prevent the ongoing development of other national or soft-law mechanisms.<sup>13</sup> However, some critics expect the treaty process to face strong opposition from global corporations and governments in which they are headquartered. In their view “if treaty might be strong, it would fail again to secure the participation of key states.”<sup>14</sup>

On the other hand, the Committee on Economic, Social and Cultural Rights (CESCR) recently adopted General Comment No. 24. In this innovative General Comment, the CESCR delineates States’ obligations in relation to business activities that may be in breach of ESC rights. The CESCR reaffirms that State’s obligation - at three levels of to respect, to protect and to fulfil the Covenant’s rights - applies both to the State’s

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<sup>12</sup> UNHRC, ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ (14 July 2014) A/HRC/RES/26/9, 2.

<sup>13</sup> Justine Nolan, ‘A business and human rights treaty’ in Pauly and Nolan (eds), 71.

<sup>14</sup> *Ibid.*, 72.

national territory and outside of it.<sup>15</sup> Referring to the States' failures to ensure compliance with ESC rights in the context of business activities, the CESCR recommends that States adopt legislative, administrative, educational, as well as other appropriate measures to ensure effective protection against business related human rights abuses.<sup>16</sup> The CESCR also emphasizes that States should necessitate the 'direct' regulation and intervention, for example, to exercise rent control in the housing market for everyone's right to adequate housing, and to establish minimum wages consistent with a living wage and a fair remuneration.<sup>17</sup> Furthermore, the Committee is particularly concerned that goods and service for the enjoyment of basic ESC rights may become less affordable as a result of privatization, and that quality may also be sacrificed in the name of business profit, as seen in the example of the privatization of education.<sup>18</sup>

In contemporary society, numerous human rights issues are affected by business operations and there is a clear need for explicit corporate changes. This need is clear, for instance, in the context of land grabbing, freedom of association, air pollution, and access to medicines and public health services, among others. In this regard, States should make all possible efforts to develop new forms of normative frameworks to hold corporations more accountable for existing and emerging human rights issues, and to fulfill all human rights based on the reality of affected peoples.

## **1.2. Research Structure**

### 1.2.1. Research aim and methodology

This research aims at ascertaining the role of the State to improve corporate responsibility. For this purpose, this paper reviews the actions of States and corporations in line with the UNGP. Based on the findings, this thesis suggests that it is necessary to establish clear legal requirements for HRDD, and to reinforce the State

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<sup>15</sup> UNHRC (n 12), para. 14.

<sup>16</sup> *Ibid.*, para. 14.

<sup>17</sup> *Ibid.*, para. 19.

<sup>18</sup> *Ibid.*, para. 22.

positive duty to protect, especially in extraterritorial contexts. To do so, it is required for States to establish new legislations establishing mandatory HRDD, conduct periodic independent reviews of State and corporate actions, and set up effective monitoring systems in cooperation with Non-governmental organizations (NGOs) and trade unions in host countries. In developing legal frameworks, States should also take an integral approach to mainstreaming human rights into different legal fields, such as corporate human rights obligation in investment and trade law. Moreover, this research points out that by assuming this stronger role, the State would create an enabling environment as a way of solving corporate internal and external challenges found in implementing HRDD in business operations. The creation of new legislations or legal procedures is not sufficient to tackle corporate abuse, therefore this research emphasizes the importance of international cooperation and assistance in realizing the State and non-state actor's positive duty to respect human rights in the home States as well as extraterritorially. Thus, this research aims to contribute to finding concrete ways to strengthening the role of the State in establishing a more just and fairer society.

The UNGP articulate the role of States and Corporations in addressing business related human rights impacts. Nevertheless, as it is well known, civil society and academics have actively discussed the shortcomings of the UNGP. The main critical viewpoints raised are as follows. First, the UNGP do not reflect the State extraterritorial obligation to protect human rights holders transnationally.<sup>19</sup> Secondly, the UNGP do not formulate the legal status of corporation as a duty-bearer.<sup>20</sup> Third, because of the second reason, parent companies have limited legal liability in the supply chain, where human rights abuses occur more seriously.<sup>21</sup> These critical points let us wonder the present implementation of the UNGP in practice.

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<sup>19</sup> Daria Davitti, 'Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles' (29 January 2016) *Human Rights Law Review* 16 (1): 55-75; Daniel Augenstein and David Kinley, 'When human rights 'responsibilities' become 'duties': the extra-territorial obligation of states that bind corporation' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge Univ. Press 2013).

<sup>20</sup> Markos Karavias, *Corporate Obligations under International Law* (Oxford Univ. Press 2014).

<sup>21</sup> David Bilchitz and Surya Deva, 'The human rights obligations of business: a critical framework for the future' in Surya Deva and David Bilchitz (eds); Nadia Bernaz, *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap* (Routledge, New York 2017).

The research methodology adopts the literature review and secondary data analysis. When it comes to the analysis of corporate change, the secondary data were mainly collected from Corporate Human Rights Benchmark (CHRB), an organization that systematically evaluates 98 corporate human rights performances. CHRB developed this tool based on extensive multi-stakeholder consultations over two years. Over 400 experts from companies, governments, NGOs, academics and legal experts participated in the development process. CHRB published a key finding report in March 2017 based on the indicators of six measurement themes as follows: governance and policy commitments; embedding respect and HRDD; remedies and grievance mechanisms; company human rights practices; responses to serious allegations; and transparency. The results enable us to gain an overview of the strength and of corporate HRDD.

On the other hand, State actions to promote corporate responsibility could also be scrutinized through initial reviews of existing National Action Plans on Business and Human Rights (NAP). It is found that States tend to implement the UNGP through the following domestic measures: i) Identified gap and policy coherence ii) Support - Guidance and Incentive to corporation, and iii) Regulation - Passing of appropriate legislation. This thesis reviews how the plans are actually implemented as part of national legal and policy measures by looking at several examples. So far in 2017, fourteen countries<sup>22</sup> adopted a NAP following the recommendation of the UN Working Group on Business and Human Rights (UNWG), the UK being the first country to have adopted a NAP in 2013, and subsequently updated it in 2016. This thesis mainly refers to the UK, U.S., Sweden and Denmark governments' actions by assessing concrete plans comparatively to provide examples of legislations, policy and programs developed in line with the UNGP.

As explained so far, this research was conducted by desk-based research based on legal and policy documents and corporate sustainable reports rather than primary research such as surveys or interviews. This method might be limited to analyze practical application of several case examples in this paper, but the relevant information for the analysis was collected from a reputable and authoritative organization in this field such

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<sup>22</sup> Fourteen countries are the UK, Netherlands, Denmark, Spain, Finland, Lithuania, Sweden, Norway, Colombia, Switzerland, Italy, USA, Germany and France.

as the Business and Human Rights Resource Centre. With this in mind, the research data were gathered from trusted and specific sources, which contributed to achieve the aim of this research, namely identifying the role of the State in promoting corporate accountability.

## **Chapter 2: Development of the UNGP**

### **2.1. Development of the UNGP**

#### 2.1.1. The former SRSG's mandate

The UNGP were an unprecedented outcome achieved in a six-year long process led by Professor John Ruggie who was appointed on July 2005 as the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG). The former SRSG's mandate had the following objectives:<sup>23</sup>

- a. To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- b. To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- c. To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”;
- d. To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises; and
- e. To compile a compendium of best practices of States and transnational corporations and other business enterprises.

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<sup>23</sup> UN Commission on Human Rights, ‘Human Rights Resolution 2005/69’ (20 April 2005) E/CN.4/RES/2005/69, 1.

To sum up, the former SRSG's mandate was to identify the standards of corporate responsibility for human rights abuses and effective mechanism including regulation.<sup>24</sup> It was a response to growing concerns about the impacts of business activities on human rights and the lack of clarity about corporate human rights responsibilities.<sup>25</sup> In this regard, the UNGP were designed to clarify and elaborate the scope of State duties and corporate responsibilities, and the remedies to be established for human rights victims. During his mandate throughout the six years, the former SRSG conducted nearly fifty international consultations in five continents, numerous site visits and pilot projects, and several thousand pages of research reports to achieve consensus applicable to both State and business enterprise.<sup>26</sup>

As a result of this cooperative work, the UN Protect, Respect and Remedy Framework was submitted in 2008, based on the two interim reports (2006<sup>27</sup> and 2007<sup>28</sup>). The UNHRC endorsed the Framework and renewed the SRSG's mandate for him to articulate the way to operationalize it. Afterwards, Ruggie submitted to the Council a report enshrining the UNGP as the outcome of his second term (2008-2011). The UNGP were unanimously endorsed by the UNHRC in 2011.<sup>29</sup> The UNGP became "[t]he first authoritative global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity for the first time."<sup>30</sup> In other words, the UNGP marked 'a milestone' generally welcomed by the international community after decades-long debates about how to apply human rights to business.<sup>31</sup>

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<sup>24</sup> Ibid.

<sup>25</sup> OHCHR, *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*, (United Nation 2014) HR/PUB/14/3, 12 (OHCHR, *FAQ*).

<sup>26</sup> John Gerard Ruggie, *Just business* (1<sup>st</sup> edn, w.w. Norton 2013) xx (Ruggie, *Just business*).

<sup>27</sup> UNHRC, 'Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 February 2006) E/CN.4/2006/97.

<sup>28</sup> UNHRC, 'Business and human rights: mapping international standards of responsibility and accountability for corporate acts' (19 February 2007) A/HRC/4/35.

<sup>29</sup> UNHRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) A/HRC/17/31 (SRSG, 'Guiding Principles').

<sup>30</sup> OHCHR, 'Business and Human rights Overview', <<http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx>> accessed 1 May 2017.

<sup>31</sup> OHCHR, *FAQ*, 1.

### 2.1.2. From the UN Norms to the UNGP

Before the SRSG's appointment, there have been several attempts to identify the scope of corporate responsibility and its nature as a legal obligation over the last two decades. The former SRSG figuratively described the uncompleted attempts as 'a train wreck in Geneva', and resolutely dismissed the previous approach of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (UN Norms), which were discussed just before implementing the SRSG's mandate.<sup>32</sup> Between 1998 and 2003, the Sub-Commission under the UN Human Rights Commission undertook the draft proposal aiming to assign the legal obligation to non-state actors including corporations, but the UN Norms were eventually not endorsed by the UNHRC as they were found to have no legal standing, as discussed in a 2004 debate by the Sub-Commission.<sup>33</sup>

The former SRSG, recalling the failing of the UN Norms made the following statement: "Business typically dislikes binding regulations until it sees their necessity or inevitability... Governments often support the preferences of corporations domiciled in their countries and/or compete for foreign investment."<sup>34</sup> The UN Norms actually planned to assign obligations to non-state actors including corporations, but there was no appetite among States to proceed with the process because of what were perceived as confusing roles of states and non-state actors.<sup>35</sup> NGOs expressed concern about the rejection of the draft UN Norms for the following reasons: failure of establishing legally binding obligation on business through an international treaty and subsequent national laws; absence of broader obligations for companies, which were expected not only to 'respect' human rights, but also to 'promote', 'protect', 'secure' and 'ensure' human rights; and absence of monitoring and verification to be provided by international organizations such as the UN and national mechanisms.<sup>36</sup>

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<sup>32</sup> Ruggie, *Just business*, xx

<sup>33</sup> OHCHR, 'Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises', <<http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx>> accessed 1 May 2017.

<sup>34</sup> John Gerald Ruggie, 'Business and Human Rights – The Evolving International Agenda', Working Paper No. 38 (2007) John F. Kennedy School of Government, Harvard Univ., 5.

<sup>35</sup> IHRB, 'the state of paly of human rights due diligence: Anticipating the next five years' (2011), 11.

<sup>36</sup> Surya Deva and David Bilchitz (eds) (n 21), 8.

Bilchitz and Deva (2013) note that the former SRSG's approach in the UNGP is quite different from the UN Norms. First, the former SRSG conducted broad consultation with a wide range of stakeholders such as corporations, NGOs and academics.<sup>37</sup> Secondly, this bottom-up approach led business organizations to play an important role in defining the contours of rules that apply to company.<sup>38</sup> Thirdly, 'the principled pragmatism', announced by Ruggie as the underlying approach in drafting the UNGP, was underpinned by "[a]n 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."<sup>39</sup> His idea of principled pragmatism led to a strong consensus amongst States and business, which were pleased to welcome the UNGP. The UNGP suggest that the State should use a combination of measures to ensure adequacy and effectiveness of the measures adopted.<sup>40</sup> This was called 'the Smart mix' approach, which eventually resulted in endorsement of the UNGP by business enterprises.

Learning from previous failures in the business and human rights area, the former SRSG was well aware of the challenges of his mandate and the of the potential criticisms he would have faced during the consultation phase. As a result, however, the "Protect, Respect and Remedy" Framework and the Guiding Principles for its implementation became a common global normative platform and authoritative policy guidance.<sup>41</sup> The fact that multinational enterprises may cause adverse human rights impact on local communities is now widely acknowledged and it has almost become a worn-out cliché. The key question, now, is how to address such impact and apply the result to business operations according to international standards. In this regard, the creation of an effective corporate accountability mechanism is thus urgently required to avoid a lack of corporate responsibility for human rights harm. The UNGP undoubtedly represent a step forward from previous efforts, but there is still much room for improvement in the longer term.

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<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> OHCHR (n 27), para. 81.

<sup>40</sup> OHCHR, *FAQ*, 21.

<sup>41</sup> Ruggie, *Just business*, 81.

### 2.1.3. The UNGP and the “Protect, Respect, Remedy” framework

The former SRSG pointed out that “[t]he Framework addresses *what* should be done; the Guiding Principles *how* to do it, grounded in the recognition of three pillars.”<sup>42</sup> As explained above, the UNGP consist of thirty-one principles to operationalize the Protect, Respect and Remedy Framework. Three pillars of the UNGP elaborate clearly the different roles of the State and corporations, and thus articulate the differentiated responsibility and obligation for human rights abuses between these two actors. The three pillars are articulated as follows:

1. The **State duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
2. The **corporate responsibility to respect** human rights, which means to act with due diligence to avoid infringing on the rights of others; and
3. Greater **access for victims to effective remedy**, judicial and non-judicial.

#### i. State Duty to Protect

According to the UNGP, the State’s duty to protect human rights is the first pillar, from the principle 1 to 10. Under pillar one, “The State should protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication.” As part of its duty, the State must prevent, investigate, punish and redress human rights abuses that take place in domestic business operations.<sup>43</sup> Accordingly, the State would be in breach of its international human rights law obligations, whenever that they fail to take appropriate steps to prevent human rights violations or whenever they fail to act towards the progressive realization of human rights.

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<sup>42</sup> Ibid.

<sup>43</sup> OHCHR, *FAQ*, 19.

A State duty is traditionally conceptualized in both positive and negative terms, although there is an argument that “the negative/positive dichotomy does not offer an accurate picture of the array of measures necessary to enable an individual to be secured against threats to his rights.”<sup>44</sup> The negative obligation is to refrain from acting, namely following the ‘do no harm’ principle. The positive obligation, on the other hand, requires States to take measures to prevent human rights violations by third parties. In contrast, it is regarded that corporations do not have a positive obligation beyond their responsibility to respect human rights, but they can conduct HRDD as a preventative measure aimed at avoiding human rights harm.

Pillar one, however, “[d]oes not just require more regulation per se, but rather focuses on having in place the *right kind* of regulation that is adequate and effective in requiring companies to respect human rights.”<sup>45</sup> With this in mind, the UNGP point out a variety of smart mix measures in combination such as national and international, mandatory and voluntary actions.<sup>46</sup> In addition, the commentary of guiding principle 3 emphasizes, “the failure to enforce existing laws that directly or indirectly regulate business respect for human rights are often a significant legal gap in State practice.” In this regard, the UNGP suggest to States that they meet their duty to protect human rights in ways of general State regulatory and policy functions, State-business nexus, supporting business respect for human rights in conflict-affected areas, and ensuring policy coherence.<sup>47</sup>

## ii. Corporate Responsibility to Respect

As the second pillar, the UNGP account for the corporate responsibility to respect human rights over the principles from 11 to 21. This pillar is based on the fact that international law instruments do not postulate corporate legal obligation, so the former SRSG used the term ‘responsibility’ rather than ‘obligation’ or ‘duty’. He clearly stated that the term ‘responsibility’ was intended to signal that it differs from legal duties.<sup>48</sup> He emphasized that ‘the social norms’ having an impact on the corporate social license

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<sup>44</sup> Markos Karavias (n 20), 167.

<sup>45</sup> OHCHR, *FAQ*, 21.

<sup>46</sup> SRSG, ‘Guiding Principles’, Commentary on Principle 3.

<sup>47</sup> OHCHR, *FAQ*, 19.

<sup>48</sup> Ruggie, *Just business*, 91.

to operate business exist above compliance with laws. ‘The social expectation’ enables corporations to accept the content of the responsibility to respect international human rights instruments even when host States where multinational enterprises domicile or operate ratify only some of the existing human rights treaties.<sup>49</sup> Principle 11 affirms, “Business enterprises should respect human rights... This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>50</sup> As adequate ways of realizing corporate commitments to respect human rights, the UNGP suggest that corporation should ensure ‘policy commitment’, conduct ‘human rights due diligence’, and ‘remediation’.<sup>51</sup>

As a core principle for business enterprises, according to UNGP 17, the HRDD “[s]hould include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.” HRDD is conducted as part of a broader enterprise risk-management system, but it goes beyond simply identifying and managing material risks by including risks to rights-holders.<sup>52</sup> In this regard, HRDD is important not only in the assessments of internal procedures and systems, but also in terms of meaningful consultation involving external engagement with potentially affected groups.<sup>53</sup> Accordingly, as a consequence of conducting the HRDD, corporation can prevent human rights abuses and integrate the findings from this process into their operations.

### iii. Access to Remedy

As ways of ensuring access to remedy in pillar 3, the UNGP elaborate ‘state-based judicial’, ‘state-based non-judicial’, and ‘non-state-based’ grievance mechanisms by State and non-state actors including business enterprises.<sup>54</sup> In order to ensure the effectiveness of remediation, both State and non-State actor’s grievance mechanisms

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<sup>49</sup> Ibid., 101.

<sup>50</sup> SRSR, ‘Guiding Principles’, Principle 11.

<sup>51</sup> Ibid., Principle 15.

<sup>52</sup> Ibid., Commentary on Principle 17.

<sup>53</sup> Ibid., Principle 18.

<sup>54</sup> Ibid., Principle 26-28.

should fulfill following standards: they should be “legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.”<sup>55</sup>

To fulfill the State duty to remedy under international human rights law, the State as a duty-bearer should take steps to “investigate, punish, and redress corporate-related abuses within their territory and/or jurisdiction.”<sup>56</sup> The former SRSG emphasised that state-based non-judicial mechanisms, alongside judicial ones, can very often be overlooked. In this vein, he stressed the role of National Human Rights Institutions (NHRIs) and their complaint-handling mechanisms in UNGP 27. Especially, the National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines) were described as an effective remediation in the UNGP. The OECD MNE Guidelines firstly adopted in 1976 were updated to include human rights provisions in 2011. At that time, Ruggie’s recommendations on due diligence were reflected in their human rights provisions in the renewed document with regard to the articles on trade in conflict mineral.<sup>57</sup>

Likewise, business enterprises should establish effective grievance mechanism for adversely affected rights-holders. As UNGP 22 delineates, “Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes based on engagement and dialogue.”<sup>58</sup> More specifically, the former SRSG pointed out the importance of grievance mechanisms, indicating that company’s operational level grievance mechanism is the most underdeveloped in the Business and Human Rights field.<sup>59</sup>

## **2.2. Literature review on the UNGP from critical legal perspectives**

Since the unanimous endorsement in 2011, the UNGP have been a focal point to advance Business and Human Rights at the international level. Nevertheless, civil society and academics have criticized the UNGP for their shortcomings, and in

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<sup>55</sup> Ibid., Principle 31.

<sup>56</sup> Ibid., Commentary on Principle 25 (as cited in Ruggie, *Just business*, 102).

<sup>57</sup> SRSG, ‘Updating the Guidelines for multinational enterprises discussion paper’ (30 June 2010) 3.

<sup>58</sup> SRSG, ‘Guiding Principles’, Principle 22.

<sup>59</sup> Ruggie, *Just business*, 104.

particular because some of the more controversial aspects of the debate were left unaddressed to reach a unanimous consensus and satisfy the business sector.<sup>60</sup> This chapter will review commonly found arguments presented in the relevant scholarly literature. Firstly, the State duty as articulated in the UNGP did not include extraterritorial obligations, which according to some scholars are already enshrined in international human rights instruments. Secondly, it failed again to hold corporation accountable as a duty-bearer. Lastly, corporate limited liability cannot ensure corporate good practices in the supply chain when companies are operating abroad. These three critiques to the UNGP are analyzed in turn in the following sections.

### 2.2.1. Omission of extraterritorial State obligations

During the development process of the UNGP, NGOs and scholars were very vocal about a lack of focus on State's extraterritorial obligations. In the UNGP, extraterritoriality is not explicitly included as a clear legal obligation. When it came to the argument during the process, the former SRSG concluded, after reviewing the treaty body commentaries and existing jurisprudence under the core UN human rights instruments, that the extraterritorial dimension of the state duty in relation to business entities was not settled in international law.<sup>61</sup> In his 2008 report, the former SRSG mentioned, “[e]xperts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory.”<sup>62</sup> On the other hand, in 2010 he returned to the issue when discussing direct and indirect obligations:

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<sup>60</sup> Surea Deva, ‘Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles’ in Deva and Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Respect?* (Cambridge Univ. Press 2013) 87.

<sup>61</sup> UNHRC, ‘Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy Framework’ (22 April 2009) A/HRC/11/13, para. 15 (as cited in Daniel Augenstein and David Kinley, ‘When human rights ‘responsibilities’ become ‘duties’: the extra-territorial obligation of states that bind corporation’ in Surya Deva and David Bilchitz (eds) 273).

<sup>62</sup> UNHRC, ‘Clarifying the Concepts of “Sphere of influence” and “Complicity” Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie’ (5 May 2008) A/HRC/8/6, paras. 19-21 (SRSG, ‘2008 Report’) (as cited in Radu Mares, ‘Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress’ in Radu Mares(ed), *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation* (Leiden, Boston 2012) 31).

“In the heated debates about extraterritoriality regarding business and human rights, a critical distinction between two very different phenomena is usually obscured. One is jurisdiction exercised directly in relation to actors or activities overseas, such as criminal regimes governing child sex tourism, which rely on the nationality of the perpetrator no matter where the offence occurs. The other is domestic measures that have extraterritorial implications; for example, requiring corporate parents to report on the company’s overall human rights policy and impacts, including those of its overseas subsidiaries. The latter phenomenon relies on territory as the jurisdictional basis, even though it may have extraterritorial implications.”<sup>63</sup>

As explained in the preceding quote, the former SRSG affirmed the indirect implications of the State extraterritorial obligation through domestic regulation, but did not support the possibility of State direct jurisdiction. The Commentary of the UNGP 2 also explains that States are not required to regulate the extraterritorial activities of companies in their territory and/or jurisdiction under international human rights law.<sup>64</sup> To complement this view, the UNGP suggest several policies for gradual changes implicating extraterritorial obligation, especially in relation to State-owned business (SOE) such as export credit agencies and official investment insurance agencies.<sup>65</sup> Because States are direct duty bearers in SOE, the State should take additional steps “[w]ith the greatest means to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented.”<sup>66</sup> As such, due to political and ‘pragmatic’ difficulties in formulating the extraterritorial liability in international law, “[t]he former SRSG shifted the emphasis of debate from State’s extraterritorial obligation under human rights laws to States’ policy rationales to protect human rights in their international relations.”<sup>67</sup>

This conclusion implies that the developmental trajectory of the norm on the State obligation to regulate the Multi-National Corporations (MNCs) extraterritorially was,

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<sup>63</sup> SRSG, ‘2010 Report’, para. 48.

<sup>64</sup> OHCHR, *FAQ*, 21.

<sup>65</sup> SRSG, ‘Guiding Principles’, Commentary on Principle 4.

<sup>66</sup> *Ibid.*

<sup>67</sup> Augenstein and Kinley in Deva and David Bilchitz (eds), 273.

in fact, retreated in the process of elaborating the new norm. In fact, State's extraterritorial obligations have been affirmed several times in international human rights instruments. UN treaty bodies such as the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Rights of the Child (ComRC) have developed the scope of States' extraterritorial obligations over the years through General Comments and Concluding Observations, as further explained below.

Unlike the ICCPR, the ICESCR does not limit the criteria of territory or jurisdiction for the scope and application of the treaty.<sup>68</sup> It has been argued that the absence of a jurisdiction clause means that “[a] certain extraterritorial (in the sense of international) scope was intended by the drafters and is part of the treaty.”<sup>69</sup> General comment 3 on the nature of State Party's obligation (1990) also emphasizes the importance of international cooperation aimed at realizing economic, social and cultural rights (ESC rights) in other countries, and assuming to entail positive measures requiring the allocation of resources.<sup>70</sup> These interpretations expanded to thematic human rights issues in General Comment 14 on the Right to Health (2000) and General Comment 15 on the Right to Water (2002), in a way of affirming the State obligation to protect individuals from third parties in other countries toward the full realization of the ESC rights beyond the concept of territoriality. For example, paragraph 39 of General Comment 14 states that “States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.”<sup>71</sup> In addition, paragraph 40 of General Comment 14 empathizes the importance of a “joint and individual responsibility” to cooperate beyond borders.<sup>72</sup> Likewise, General Comment 15 on the Right to Water points out which “[s]teps should

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<sup>68</sup> Fons Coomans, ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights’ (29 January 2011) *Human Rights Law Review* 11(1): 1-35, 7.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, 9.

<sup>71</sup> UN CESCR, ‘General Comment No 14: The right to highest attainable standard of health’ (4 July 2000) E/C.12/2000/4, para. 39 (as cited in *Ibid.*, 29).

<sup>72</sup> *Ibid.*, para. 40.

be taken by states parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.”<sup>73</sup>

Similarly, General Comment 16 on State’s obligations regarding the impact of business on children’s rights (2013) affirms the importance of a State’s obligation to regulate business operating transnationally, stating that “[d]uties and responsibilities to respect the rights of children...apply to private actors and business enterprises.”<sup>74</sup> It points out that voluntary actions by corporations such as codes of conduct and initiatives should not be a substitute for State regulation of business activity.<sup>75</sup> Home States should also develop and implement laws and regulations that address specific risks to children’s rights affected by MNCs.<sup>76</sup> Thus, legislative, regulatory and enforcement measures such as strengthening regulatory agencies, disseminating law and access to remedy can be crucial requirements to raise the State obligation to ensure corporate responsibility.

In this sense, the Maastricht Principles on Extraterritorial Obligations of States in the area of the ESC rights adopted by a group of experts in international law and human rights in September 2011 can be meaningfully considered. Even if the Maastricht Principles are not an international legal instrument, they represent an authoritative interpretation by international legal experts on the basis of existing international law.<sup>77</sup> The Maastricht Principles specify further steps on extraterritoriality by recognizing the gaps in human rights protection in the context of globalization. The Maastricht Principles affirm the lack of human rights regulation and accountability of transnational corporation in Principle 24, which states as follows:

“[a]ll States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of the

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<sup>73</sup> UN CESCR, ‘General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)’ (20 January 2003), E/C.12/2002/11, para. 33.

<sup>74</sup> ComRC, ‘General comment No. 16 on State obligations regarding the impact of the business sector on children’s rights’ (17 April 2013). CRC/C/GC/16, para. 8.

<sup>75</sup> *Ibid.*, para. 9.

<sup>76</sup> *Ibid.*, para 50.

<sup>77</sup> ETO Consortium, ‘Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (January 2013), 3.

ESC rights. These include administrative, legislative, investigative, adjudicatory and other measures...<sup>78</sup>

In addition to the above statements on the lack of adequate regulation of private individuals and transnational corporations, the Maastricht Principles indicated the following substantive gaps, which become more severe in the context of globalization. These gaps are especially found in the absence of accountability in Intergovernmental Organizations (IGOs), in particular international financial institutions (IFIs); the ineffective application of human rights law to investment and trade laws; and the lack of implementation of duties to protect and fulfill ESC rights abroad, through the obligations of international cooperation and assistance.<sup>79</sup> These principles clearly show that regulation by home states is justified. In doing so, they seek to influence conduct that may otherwise result in the violation of human rights of rights holder abroad.<sup>80</sup>

As stated above, the UNGP do not explicitly articulate the State extraterritorial obligation but explain strong policy reasons for home States to clearly set the expectations for corporate responsibility.<sup>81</sup> By following the advanced interpretation of the CESCR and other UN Treaty Bodies as mentioned above, the former SRSG could have elaborated on the scope of State's extraterritorial obligations, to present a more comprehensive view in the UNGP well beyond adopting a compromised policy dimension.

### 2.2.2. Failure to refine the legal status of corporations as duty-bearers

As briefly explained before, international law stipulates that States are the primary duty-bearers. The state is regarded as a subject of international law governing the relationships between states.<sup>82</sup> In this sense, Philip Allott (1970) stated, “[t]he present conceptual structure of international law attaches rights and duties to the category ‘state’.”<sup>83</sup> As such, international law addresses the rights of individuals and the

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<sup>78</sup> Ibid., para. 24.

<sup>79</sup> Ibid.

<sup>80</sup> Davitti (n 19), 66.

<sup>81</sup> SRSG, ‘Guiding Principles’, Commentary on Principle 2.

<sup>82</sup> Bernaz (n 2), 86.

<sup>83</sup> P Allott, ‘State Responsibility and the Unmaking of International Law’ (1988) 29 Harv ILJ 14 (as cited in Karavias (n 20), 164).

corresponding obligations of States, thus corporations cannot be understood as a duty bearer.<sup>84</sup> Under international criminal law, however, corporations are prohibited from committing acts of genocide, slavery and war crimes. This prohibition applies to both natural and judicial individuals.<sup>85</sup> Article 4 of the Genocide Convention states, “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”<sup>86</sup> Common Article 3 of the Geneva Conventions also binds all parties to an armed conflict, including non-State actors.<sup>87</sup>

It has been argued that corporations have obligations to a certain extent. The International Court of Justice (ICJ) recognized organizations as subjects of international law in early 1949.<sup>88</sup> The ICJ stated that “the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.”<sup>89</sup> This has been interpreted as implying that organizations, including corporations, could also be subjects of international law.<sup>90</sup> On the other hand, some argue that the term ‘everyone’ in Article 29 of the Universal Declaration of Human Rights (UDHR) might be able to encompass corporations as the UDHR is seen as “[t]he legal foundation of corporate human rights obligations under international customary law.”<sup>91</sup> The UDHR as part of the customary law focuses on the duties of persons in article 29(1), which states as follows: “Everyone has duties to the community in which alone the free and full development of his personality is possible.” However, in the research undertaken by the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities about the scope of the Article 29 of the UDHR, it was found that a number of States were not

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<sup>84</sup> Dinah L. Shelton, *Advanced Introduction to International Human Rights Law* (Edward Elgar, 2014) 203.

<sup>85</sup> *Ibid.*, 204.

<sup>86</sup> UN General Assembly, ‘Convention on the Prevention and Punishment of the Crime of Genocide’ (9 December 1948) art. 4.

<sup>87</sup> International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949) art. 3.

<sup>88</sup> F Rigaux, ‘Transnational Corporation’ in M Bedjaoui (ed), *International Law: Achievement and Prospects* (1991) 129 (as cited in Karavias (n 20), 163).

<sup>89</sup> *Ibid.*

<sup>90</sup> Bernaz (n 2), 87.

<sup>91</sup> Karavias (n 20), 79.

willing to affirm the human rights obligations of non-state actors.<sup>92</sup> In this regard, it is hard to say that the UDHR binds corporate obligations under customary international law.<sup>93</sup>

Admittedly, the above-mentioned arguments were undertaken over 30 years ago, and several Treaty Bodies have moved away from the above traditional interpretation. For example, the ComRC has emphasized that non-state actors as well as state parties have legal obligations to respect the rights of children. In 2002, the ComRC already states, “States have a legal obligation to respect and ensure the rights of children as stipulated in the Convention, which includes the obligation to ensure that non-State service providers operate in accordance with its provisions by assigning the indirect obligations on such actors.”<sup>94</sup> General Comment 5 of the ComRC also states that “[t]here should be a permanent monitoring mechanism or process aimed at ensuring that all State and non-State service providers respect the Convention.”<sup>95</sup> In addition, in the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, the concept about direct regulation of legal persons such as a company is delineated.<sup>96</sup> According to article 3(4) of the Optional Protocol, “[e]ach State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.”<sup>97</sup>

As such, corporate obligation is already enshrined in existing legal instruments. It is therefore legitimate to ask why the UNGP did not clarify the different parts of these legal contexts. It is a well-known fact that the former SRSG has been widely criticized by civil society because the UNGP do not ensure legal accountability for corporate abuse. He concluded that companies do not have any binding human rights obligations

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<sup>92</sup> E-I Daes, ‘Freedom of the Individual under Law: An Analysis of Article 29 of the Universal Declaration of Human Rights’ (as cited in *Ibid.*, 80); UN Economic and Social Council, ‘Commission on Human Rights: Report on the Thirty-Seven Session’ (1981) E/CN.4/1475.

<sup>93</sup> International Council on Human Rights Policy, ‘Taking Duties Seriously: Individual Duties in International Human Rights Law: A Commentary’, 25.

<sup>94</sup> ComRC, ‘Report on the thirty-first session’ (11 December 2002) CRC/C/121, para. 653 (as cited in Andrew Clapham, *Human rights obligation of Non-State Actors* (Oxford Univ. Press 2006) 324).

<sup>95</sup> ComRC, ‘General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child’ (27 November 2003) CRC/GC/2003/5, para. 44 (as cited in *Ibid.*, 323).

<sup>96</sup> Shelton (n 84), 204.

<sup>97</sup> UN General Assembly, ‘Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography’ (16 March 2001) A/RES/54/263, art. 3(4).

under international law, except for international crimes.<sup>98</sup> In this regard, the former SRSG thought that the new framework should correspond to the current state of customary international law that does not bind corporations.<sup>99</sup> Looking back to the concept of duty under international law and the legal status of corporation, it is necessary to re-define corporations as duty-bearers. About this point, it needs to be reminded that “[t]he fact that they do not assume customary international human rights obligations doesn’t mean that positive international human rights law is blind to the deleterious consequences of corporate power for human rights.”<sup>100</sup>

### 2.2.3. Parent Company’s liability in the supply chain

As explained before, the UNGP emphasize that corporations have a ‘responsibility’ to respect human rights based on ‘social norms’ that exist over and above compliance with laws and regulations.<sup>101</sup> To fulfill this responsibility, corporation should respect the “[i]nternationally recognized human rights at a minimum” contained in the International Bill of Human Rights (consisting of the UDHR, ICCPR and ICESCR) and the ILO Declaration on Fundamental Principles and Rights at Work.<sup>102</sup> The ILO declaration specifies the following four categories: freedom of association and effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labour; effective abolition of child labour; and elimination of discrimination in respect of employment and occupation.<sup>103</sup> When it came to the latter concept, the former SRSG seemed to compromise on the demands by NGOs. He explicitly stated that the corporate responsibility to respect human rights is intended to signal that it is distinct from issues of legal liability and enforcement.<sup>104</sup> However, the UNGP affirm that corporations have an impact on the entire spectrum of all human rights, so respecting core international human rights instruments is necessary. Furthermore, no matter how corporations shape their governance through their contracts or management systems, they should respect human rights in practice.

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<sup>98</sup> Deva and Bilchitz (eds) (n 21), 12.

<sup>99</sup> Karavias (n 20), 83.

<sup>100</sup> Ibid., 89.

<sup>101</sup> Ruggie, *just business*, 91.

<sup>102</sup> SRSG, ‘Guiding Principles’, Commentary on Principle 12.

<sup>103</sup> ILO, ‘ILO Declaration on Fundamental Principles and Right at Work’ (18 June 1998).

<sup>104</sup> SRSG, ‘Guiding Principles’, Commentary on Principle 12.

Nevertheless, the absence of corporate obligations in the UNGP also reflect the problem that there is very little liability for corporations when human rights abuses take place along the supply chain. Accordingly, the parent company's responsibility for harm caused by their subsidiaries or collaborators in the supply chain could be limited even further if HRDD was properly carried out.<sup>105</sup> It is interesting to note that the UN Norms originally tried to establish a corporate obligation to promote, secure the fulfillment of, respect ensure respect of, and protect human rights recognized in international as well as national law.<sup>106</sup> With regard to this limitation, it is well known that the former SRSG emphasized the social expectation as a key rationale for corporate responsibility. However, this pragmatic decision did not advance the debate on direct obligations. In this regard, Popova argues that it remains difficult to understand what a social expectation entails. She asks, in fact, “[w]hat precisely does society expect? *how* was the content of this expectation determined?”<sup>107</sup>

As a newly developed approach for corporate responsibility in the UNGP, the former SRSG suggested that conducting HRDD can prevent adverse human rights ‘impacts’. HRDD outlines the essential features of embedding human rights into business operations, beyond simply managing risks and based on voluntary practices by corporations. However, these types of self-regulatory systems may present difficulties in terms of implementation and effectiveness. Moreover, there remain gaps in terms of ensuring access to remedy when human rights violations occur despite HRDD being conducted. The monitoring of HRDD, for instance, can be of limited efficiency if suppliers have strong financial incentives in disregarding it when dealing with a multinational company.<sup>108</sup>

In international law as it stands, parent companies are unlikely to be held liable for human rights abuses by their subsidiaries, except in the very limited circumstances. If human rights abuses occur in the supply chain, the likelihood is that the domestic law

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<sup>105</sup> Carlos Lopez, ‘The ‘Ruggie process’: from legal obligations to corporate social responsibility?’ in Deva and David Bilchitz (eds), 61.

<sup>106</sup> UN 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’ (2003) Doc. E/CN.4/Sub.2/2003/12/Rev.2, art. 1.

<sup>107</sup> Alexandra Popova, ‘Business and Human Rights after Ruggie’s Mandate: Feasible Next Steps’ in Jena Martin and Karen E. Bravo (eds), *The Business and Human Rights and Landscape: Moving Forward, Looking Back* (Cambridge Univ. Press 2016) 112.

<sup>108</sup> Bernaz (n 2), 215.

of the relevant jurisdiction will determine where liability rests.<sup>109</sup> However, subsidiaries are often located in developing countries, and potentially in states with a weak rule of law system. Accordingly, alleged human rights abuses may be overlooked due to political reasons, and it might be difficult to address corporate silent complicity. Furthermore, the UNGP do not clarify the concept of legal complicity of companies, when they remaining silent despite having knowledge of human rights violations occurring behind the corporate veil.

As a legal concept, the corporate veil means that a company' shareholders are not legally responsible for corporate actions, so shareholders may hide behind the corporate veil, assured that their liability does not extend beyond the value of their shares.<sup>110</sup> It is very rare that “[j]udges are allowed to lift the ‘corporate veil’ and find the parent company liable for acts or omissions of the subsidiary.”<sup>111</sup> This is because of the principle of separate legal personality between parent companies and subsidiaries within a corporate group, an aspect common to the corporate law of various jurisdiction. In this situation, if the parent company and the subsidiaries are located in different jurisdictions, it is hard to obtain effective remedies for the harms caused by the subsidiaries.<sup>112</sup> The victims may be able to seek remedy within the jurisdiction of the subsidiary, but only in very limited circumstances they would be able to seek judicial remedies against the parent company.<sup>113</sup>

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<sup>109</sup> Ibid.

<sup>110</sup> Cambridge Dictionary, ‘Corporate Veil’

<<http://dictionary.cambridge.org/dictionary/english/corporate-veil>> accessed 7 July 2017.

<sup>111</sup> Parker and Howe, ‘Ruggie’s Diplomatic Project and its Missing Regulatory Infrastructure’ in Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (2012) 296 (as cited in Davitti (n 19), 72).

<sup>112</sup> ICJ, ‘Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises’ (October 2016), 24.

<sup>113</sup> Business & Human Rights Resource Centre, ‘Annual Briefing: Corporate Legal Accountability’ (November 2013) 1.

## Chapter 3: The Background and Process of HRDD

### 3.1. HRDD as defined by the UNGP

#### 3.1.1. Definition of HRDD and how it differs from the risk management approach

It is important to know that the HRDD evolved from the existing risk management approach. This is useful to understand the scope of the corporate responsibility to respect human rights as presented in pillar 2 of the UNGP. In the Black's Law Dictionary, due diligence is originally defined as “[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.”<sup>114</sup> In the U.S. Securities Act of 1933, the original concept of due diligence was used to defend broker-dealers who were accused of having disclosed inadequate information to investors.<sup>115</sup> However, due diligence has been more practically used in Merger or Acquisition (M&A). Starting in the 1990s, corporations began to consider due diligence for the purposes of their ongoing risk management, in order to assess risk to both the company and the stakeholders. This was mainly for internal purposes, for example, to prevent employment discrimination, environmental pollution, or criminal misconduct by employees.<sup>116</sup>

In the UNGP, HRDD is officially defined as “[a]n ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility

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<sup>114</sup> *Black's Law Dictionary* (6th ed. 1990) (as cited in OHCHR, *Interpretive Guide*, 6).

<sup>115</sup> Mark B. Taylor, Luc Zandvliet and Mitra Forouhar, ‘Due Diligence for Human Rights: A Risk-Based Approach’, Working Paper No. 53 (John F. Kennedy School of Government, Harvard Univ. 2009), 2.

<sup>116</sup> Ruggie, *Just business*, 98-100.

to respect human rights.”<sup>117</sup> According to principle 15 of the UNGP, business enterprises are required to have the following systems in place: i) a human rights policy commitment; ii) a HRDD process; and iii) remediation of any adverse human rights impacts. These three activities aim to promote corporate responsibility to respect human rights. Especially Guiding Principle 17 elaborates on how HRDD should be carried out. According to its provisions, HRDD:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.<sup>118</sup>

As such, HRDD is a process to “[i]dentify, prevent, mitigate and account for how [companies] address their adverse human rights impact.”<sup>119</sup> In the first year of the former SRSG’s 2005-2008 mandate, the ICJ firstly proposed the idea of applying the concept of due diligence in the dimension of State duty.<sup>120</sup> During the consultation, the former SRSG found that due diligence was broadly used in the financial management of business. He therefore introduced the concept of ‘human right’ due diligence, emphasizing that the aim was to ensure that corporate responsibility to respect human rights goes “[b]eyond identifying and managing material risks to the company itself.”<sup>121</sup> In doing so, HRDD in the UNGP is understood to permeate all policies and operations of the corporation appropriately.

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<sup>117</sup> OHCHR, *Interpretative Guide*, 6.

<sup>118</sup> SRSG, ‘Guiding Principles’, Principle 17.

<sup>119</sup> *Ibid.*

<sup>120</sup> Karin Buhmann, ‘Navigating from ‘train wreck’ to being ‘welcomed’: negotiation strategies and argumentative patterns in the development of the UN Framework’ in Deva and Bilchitz (eds) 35.

<sup>121</sup> Ruggie, *Just business*, 98-99.

As seen in UNGP 17(a), business enterprises should be responsible for ‘all’ relevant impacts on human rights that they may cause or contribute to, connected to the enterprise’s own activities and to its business relationships.<sup>122</sup> In this regard, the key point about the scope of HRDD is to identify all human rights ‘impacts’ occurred in company’s activities and their business relationships including in the supply chain. With this in mind, the HRDD process “should uncover risks of non-legal (or perceived) as well as legal complicity, and generate appropriate responses.”<sup>123</sup> In doing so, HRDD aims to prevent or mitigate such adverse impacts as reiterated in UNGP 31(b): “Business enterprises should seek to prevent or mitigate adverse human rights impacts by their business relationships, even if they have not directly contributed to those impacts.”<sup>124</sup>

As explained so far, before HRDD was introduced, due diligence was used as a risk management tool in areas such as anti-corruption and M&A of the business activities.<sup>125</sup> These types of due diligence processes are underpinned by a risk management approach, that is, they only considered the persons (such as shareholders) who have an interest in the business’ success.<sup>126</sup> In doing so, company would be able to comply with the applicable laws to obtain a ‘social license’ and their legitimacy in society.<sup>127</sup> However, HRDD goes further as it addresses the ‘human rights risk’ of people who do not only have a stake in the business, but also may be affected by corporate activities. Accordingly, it pursues the realization of internationally recognized human rights for relevant rights-holders, and enables corporations to figure out potential victims of human rights abuses to ongoing and future business activities. Although the terms ‘human rights’ and ‘risk’ can be used in different ways – for instance, giving more importance to the risk to the company rather than to the risk to the people who might be affected by it – the UNGP claim that they work well together in practice.<sup>128</sup> In this sense, HRDD aims to ensure human rights both in and out of business operations, and to reduce corporate-related harm.<sup>129</sup> As such, conducting HRDD is a prerequisite for

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<sup>122</sup> OHCHR, *Interpretative guide*, 32.

<sup>123</sup> *Ibid.*, 5.

<sup>124</sup> SRSG, ‘Guiding Principles’, para. 31.

<sup>125</sup> Mark B. Taylor, ‘Human Rights Due Diligence: The Role of States’ (ICAR 2013) 3.

<sup>126</sup> Björn Fasterling, ‘Human Rights Due Diligence as Risk Management: Social Risk versus Human Rights Risk’ (11 October 2016) *Business and Human Rights Journal* 1: 1-23, 7.

<sup>127</sup> Ruggie, *Just business*, 90.

<sup>128</sup> Fasterling (n 126), 5.

<sup>129</sup> Ruggie, *Just business*, 101.

corporations to meet their human rights responsibility: it is an ongoing management process based on human rights.<sup>130</sup>

### 3.1.2. Complicity as described in HRDD

The concept of ‘complicity’ was reviewed importantly during the UNGP’s development process to elaborate on the corporation’s role. At the beginning, clarifying the concept of ‘complicity’ and reconciling it with the concept of ‘sphere of influence’ was one of the former SRSG’s mandates. Through numerous consultations and research in 2008, he concluded that companies could avoid complicity by implementing HRDD, and by applying it not only to their own activities but also to their business relationships.<sup>131</sup> On the other hand, in terms of identifying the meaning of the term ‘sphere of influence’, he thought that “[i]t is too broad and ambiguous a concept to define the scope of due diligence with any rigor, and therefore he suggest[ed] an alternative approach.”<sup>132</sup> According to the former SRSG’s research, the term ‘sphere of influence’ is inappropriately based on different dimensions, so it cannot clarify the scope of due diligence and corporate responsibility.<sup>133</sup> The concept of sphere of influence was therefore dismissed when elaborating the scope of corporate responsibility, and business complicity was in a sense addressed through HRDD, which can prevent businesses from being complicit in human rights abuses.

Based on the former SRSG’s conclusion, it is thus possible to deduce the relationship between complicity and the HRDD. Literally, the concept of complicity is commonly defined in the aspect of ‘aiding and abetting’ human rights violations committed by third parties.<sup>134</sup> It concerns, “[a]n actor’s participation in wrongdoing committed by another actor.”<sup>135</sup> Wrongdoing, in this sense, may refer to “[t]he commission of any legal wrong on the basis of criminal, civil, or international law.”<sup>136</sup> Especially in the area of international criminal law, a common approach to complicity is to prescribe

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<sup>130</sup> OHCHR, *Interpretive Guide*, 6.

<sup>131</sup> SRSG, ‘2008 report’, 1.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*, para. 5.

<sup>134</sup> Florian Wettstein, ‘Making noise about silent complicity’ in Deva and Bilchitz (eds), 247.

<sup>135</sup> Miles Jackson, *Complicity in International Law* (Oxford Univ. Press 2015), 10.

<sup>136</sup> *Ibid.*, 11.

certain kinds of behavior that constitute another person's criminal act.<sup>137</sup> It comprises "[t]wo kinds of action such as internationally '*helping*' the principal to commit wrongdoing and internationally '*influencing*' the decision of the principal to commit the wrong."<sup>138</sup> Of course, it would be an overstatement to say that complicity liability under the international criminal law is explicitly articulated in the UNGP.<sup>139</sup> However, it is possible to say that, during the drafting of the "protect, respect, remedy" framework, the former SRSG followed the concept of 'aiding and abetting' already existing in international criminal law, in order to frame the concept of human rights business complicity.

The former SRSG found that most of the corporate complicity resulting in adverse human rights impacts occurs in indirect ways.<sup>140</sup> He referred to the result of a study conducted by the Office of the United Nations High Commissioner for Human Rights (OHCHR), which "[f]ound 41 per cent of the 320 cases in the sample alleged 'indirect forms' of company involvement in various human rights abuses."<sup>141</sup> This is why he focused mainly on indirect silent complicity. During their business relationships with extraterritorial and/or territorial states, corporation could be alleged to have contributed to various type of abuses, related to civil and political rights or to economic, social and cultural rights.<sup>142</sup> Generally, this type of complicity is mainly classified into two categories: active v. passive, and direct v. indirect complicity. In this regard, direct complicity is defined by a company's direct contribution to certain human rights violations and occurs when a company explicitly assists the infringement of human rights. Indirect complicity, on the other hand, is based on more subtle ways of facilitating the abuse.<sup>143</sup> In the case of passive complicity, this can be divided into 'beneficial complicity' and 'silent complicity.'<sup>144</sup> Beneficial complicity is "[r]elevant to a company that benefits directly from human rights abuses, while silent complicity refers to the situation where a company fails to raise the question of systematic or

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<sup>137</sup> Ibid., 10.

<sup>138</sup> Ibid., 11.

<sup>139</sup> Bernaz (n 2), 272.

<sup>140</sup> SRSG, '2008 Report', para. 4.

<sup>141</sup> Ibid., para. 29.

<sup>142</sup> Ibid., para. 30.

<sup>143</sup> Wettstein (n 3), 247.

<sup>144</sup> A. Clapham and S. Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) *Hasting International and Comparative Law Review* 340 (As cited in Wettstein in Deva and Bilchitz (eds), 251).

continuous human rights violations in its interactions with the appropriate authorities.”<sup>145</sup>

The former SRSG emphasized the high likelihood for corporations to be involved in ‘silent complicity’ to human rights violations in indirect ways.<sup>146</sup> In its 2008 report, he stated that “[s]ilent complicity describes the way human rights advocates see the failure by a company to raise the question of systematic or continuous human rights violations in its interactions.”<sup>147</sup> However, the former SRSG also stated that silent complicity does not necessarily imply legal liability, although it is the most widespread type of corporate complicity.<sup>148</sup> Thus, it appears that the legal implications of silent complicity are not systematically considered in developing HRDD, and as a consequence the issue of corporate legal liability in the supply chain is still left mainly unaddressed in the UNGP. Therefore, HRDD may be able to ensure full corporate accountability and remediation where a company is silently complicit. In other words, there remain an accountability gap, especially in relation to complicity in the supply chain.

A key question in this regard is how corporate indirect complicity for human rights abuses could be articulated to ensure corporate liability. This is particularly relevant when human rights abuses occur despite conducting HRDD. In this vein, there still remain the further steps in line with international legal system. The Commentary to UNGP 17 explicitly states as follows: “Business enterprises conducting such due diligence *should not assume that*, by itself, this automatically and fully absolve them from liability for causing or contributing to human rights abuses.”<sup>149</sup> In other words, the UNGP explicitly affirm that due diligence is not meant for corporations to avoid liability. Corporations cannot use HRDD to say that they are automatically not liable. With regard to this argument, first of all, it needs to be articulated why the concept of silent complicity defined by the former SRSG does not affect the legal implication in the HRDD process. Second, we need to see whether the former SRSG’s insistence on ‘social expectation’ rather than legal obligations for corporations is adequately effective to ensure human rights. Third, it is important to consider whether conducting HRDD

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<sup>145</sup> SRSG, ‘2008 Report’, para. 58.

<sup>146</sup> Wettstein (n 3), 246-247.

<sup>147</sup> Ibid., 249-250.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid., 219.

as a voluntary commitment, based on the social expectation mentioned above, is an effective measure to promote corporate human rights accountability.

This interpretation is actually derived from a viewpoint of international criminal law, affirming that an agent's silence contributed in a significant way to the human rights violation.<sup>150</sup> Among various definitions of complicity within different legal contexts, the former SRSG thought that international criminal law clearly identifies the cases of 'aiding and abetting', and these key principles can form a useful base for companies.<sup>151</sup> However, the former SRSG did not refine the concept of corporate silent complicity and international criminal tribunals have mainly applied silent complicity to natural persons, rather than legal persons. This can be clearly seen in the case law of the International Criminal Court (ICC).<sup>152</sup> The former SRSG, nevertheless, opened the possibility that the international criminal law standards could guide domestic criminal courts and allow for the criminal prosecution of companies as well as for domestic non-criminal legal proceedings involving companies.<sup>153</sup> In this sense, a much clearer and more expansive interpretation of complicity could have been formulated while developing the UNGP.

### 3.1.3. Social expectation rationale on corporate responsibility

As briefly mentioned above, the former SRSG pointed out the importance of the 'social expectation' as a non-legal rationale underpinning the corporate responsibility to respect human rights. According to him, corporation can be affected by the judgment of public and private investors, and human rights advocacy organizations keeping which monitor the activities companies alleged in direct and indirect human rights abuses.<sup>154</sup> However, his emphasis on this non-legal dimension, as explained above, seems insufficient to persuade those who favor directly binding corporate obligations.<sup>155</sup> Moreover, the social expectation rationale does not fully address the desire for a legally binding treaty, that has been discussed for a long time: it was debated

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<sup>150</sup> Ibid., 249.

<sup>151</sup> SRSG, '2008 Report', para. 33.

<sup>152</sup> Ibid., para. 34.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid., para. 54.

<sup>155</sup> Treaty alliance, 'Global Movement for a Binding Treaty statement' (June 2017).

in the context of a ‘code of conduct for transnational corporations’ in 1970s, and then revived when debating the UN Norms in 2000s. In this sense, the adoption of a resolution of the UNHRC in June 2014 reopened the uncompleted debate to regulate transnational business activities of corporations in international human rights law. To support the development of a binding instrument, NGO coalitions such as the Treaty Alliance are organizing campaigns calling for States to participate actively in the negotiation process for a binding treaty on business and human rights.<sup>156</sup>

To a certain extent, the social expectation rationale is meaningfully specified in the UNGP that business enterprises are responsible for ‘[a]ll relevant impacts’ they may have on human rights with regard to both the enterprise’s own activities and to its business relationships.<sup>157</sup> This can be read to mean that, under the UNGP, companies also have a responsibility to use all leverages available to them to address human rights abuses in their supply chain. That is, the UNGP address various aspects of corporate responsibility in all forms of business relationships. Nevertheless, because of the absence of direct obligations on corporations, it is still possible to argue that this responsibility has inherent limitations. For this reason, it is submitted that it is necessary to require due diligence processes to do more: legislation for corporate legal liability, for instance, is required to answer the multi-dimensional types of complicity occurring during various aspects of business operations, as part of business relationships, with direct negative impacts on local communities.

In fact, the self-regulatory tools based on the rationale of social expectation have already been developed in various company-sponsored code of conducts such as the ‘UN Global Compact 10 principles<sup>158</sup>’, the ‘Kimberly Process<sup>159</sup>’ and the ‘Voluntary Principles on Security and Human Rights.<sup>160</sup>’ Business associations have focused on

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<sup>156</sup> Working group members of the Treaty Alliance are CETIM, CIDSE, Dismantle Corporate Power Campaign, ESCR-Net, FIAN, FIDH, Franciscans International, Friends of the Earth International, IBFAN-GIFA, Indonesia Global Justice, International Commission of Jurists, Legal Resources Center, PAN AP, Transnational Institute, and TUCA. See also <<http://www.treatymovement.com/>>.

<sup>157</sup> OHCHR, *Interpretive Guide*, 32.

<sup>158</sup> UN Global Compact, ‘The Ten Principles of the UN Global Compact’ <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 10 July 2017.

<sup>159</sup> The Kimberly Process, ‘What is the Kimberley Process’, <<https://www.kimberleyprocess.com/en/what-kp>> accessed 10 July 2017.

<sup>160</sup> Voluntary Principles on Security and Human Rights, ‘What are the Voluntary Principles?’ <<http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>> accessed 10 July 2017.

managing social risk through such initiatives as a solution to prevent the consequences of human rights abuses because corporations are afraid of their shareholders' disapproval, of reputational damage and of decreased investment in their brand.<sup>161</sup> However, their self-regulatory efforts through various types of initiatives have not been found to be very effective.<sup>162</sup> For example, in most code of conducts about working conditions, the termination of a contract with subsidiaries is stipulated when human rights violation occurs. However, they reserve to bind corporations to monitor and audit suppliers, and don't bring strong enforcement mechanisms for workers' rights in the supply chain.<sup>163</sup>

The long-standing debates from grass-roots organizations demanding direct legal obligation on companies have been based on the fact that corporations have failed to provide effective self-regulatory measures to address their wrongdoings. It is also true that the focus on social expectations has also contributed to a blurring of the debate on corporate responsibility, since there is no evidence of how corporate human rights responsibility can improve based solely on social expectations.

## **3.2. Current developments on the implementation of HRDD**

### **3.2.1. Development of guidance on HRDD based on civil society's advocacy**

As explained earlier in this thesis, HRDD is an ongoing risk management process aimed at identifying, preventing, mitigating and accounting for the way of addressing adverse human rights impacts.<sup>164</sup> However, the UNGP do not provide concrete guidance or working methods for companies to assess, integrate, track and communicate their human rights impacts to those affected people in business operation or to the wider public. Especially Small and Medium Sized Enterprises (SMEs) experience more difficulty in conducting HRDD and putting human rights at the core of their business operations. In the UN Forum on Business and Human Rights, better engagement of

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<sup>161</sup> OHCHR, *Interpretive Guide*, 17.

<sup>162</sup> Meredith R. Miller, 'Corporate Codes of Conduct and Working Conditions in the Global Supply Chain: Accountability through Transparency in Private Ordering' in Martin and Bravo (eds) 447.

<sup>163</sup> Ibid.

<sup>164</sup> SRSG, 'Guiding Principles', Principle 17.

SMEs has been continuously addressed as a core issue, recognizing that capacity building at the regional and national levels, more government support and clearer presentation of human rights issues and expectations in an understandable language are required.<sup>165</sup>

The UNGP delineate a broad set of principles, but leave much discretion to companies in terms of their practical application.<sup>166</sup> For this reason, civil society, business associations, academics and National Human Rights Institutions (NHRIs) have been developing and providing guidance to encourage companies to conduct appropriate HRDD. Among other things, following guidance and reports have been developed since 2011:

- “UN Guiding Principles Reporting Framework”, Shift & Mazars (Feb 2015)
- “Human rights impact assessment guidance and toolbox”, Danish Institute for Human Rights (Feb 2016)
- “Doing business with respect for human rights”, Global Compact Network Netherlands, Oxfam, Shift (Nov 2016)
- “Corporate Human Rights Benchmark (CHRB)”, Aviva Investors, Business & Human Rights Resource Centre, Calvert Investments, Vigeo-Eiris, Institute for Human Rights and Business, Nordea Wealth Management, VBDO (Mar 2017)

Above pieces of guidance have a common goal to reinforce corporate practice of HRDD in business operations. This type of the guidance can mainly be categorized as different types of corporate reporting, benchmarking, and Human Rights Impact Assessment (HRIA). As an example of human rights reporting, the UNGP Reporting Framework, launched in 2015 by the Reporting and Assurance Frameworks Initiative (RAFI), provide recommendations to global companies on which information related

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<sup>165</sup> UNHRC, ‘Fifth session of the Forum on Business and Human Rights: summary of discussions’ (21 April 2017) A/HRC/FBHR/2106/2, para. 75.

<sup>166</sup> Amol Mehra and Sara Blackwell, ‘The rise of non-financial disclosure: reporting on respect for human rights’ in Pauly and Nolan (eds) 277.

to human rights is to be disclosed in their reporting framework.<sup>167</sup> The RAFI's reporting framework consists of thirty-one questions based on the UNGP and is structured in three parts: a) governance of respect for human rights; b) defining the focus of reporting; and c) management of salient human rights issues.<sup>168</sup>

On the other hand, CHRB selected 98 companies and released the results after reviewing their human rights performances based on publicly available information.<sup>169</sup> CHRB measures and ranks corporate performances according to indicators across six measurement themes on the assumption that “[w]ithout a ‘sound commitment’ to human rights through due diligence, the companies can be precarious with ongoing human rights problems such as poverty wages.”<sup>170</sup> CHRB then announces the result of its initial review to the corporation and complements the evaluation with company's additional data. During the process, CHRB considers this review as a form of guidance, as it provides measuring standards to companies in advance, and encourages them to improve their performance. In this regard, CHRB emphasizes the way in which scores have improved over time via open assessment process, rather than focusing upon how a company compares to other companies in the same industry.<sup>171</sup>

As briefly explained above, these activities are mainly led by civil society. In fact, most human rights NGOs tend to be careful of partnerships or initiatives with business and prefer to carry out their work without seeking business funding. However, collaborations between NGOs and business enterprises have become far more common in this field over the last 20 years.<sup>172</sup> Since the Vienna World Conference on Human Rights in 1993, advocacy work to frame corporate accountability as a language of human rights has been prominently expanded. Furthermore, this change was based on the importance of holding business accountable in the context of the financial crisis and of the adverse impacts that capitalism has on society, such as inequality in various

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<sup>167</sup> UN Guiding Principles Reporting Framework, ‘UN Guiding Principles Reporting Framework with implementation guidance’ (2015) 4.

<sup>168</sup> *Ibid.*, 6-7.

<sup>169</sup> CHRB, ‘Corporate Human Rights Benchmark: Key Findings 2017’ (2017) (CHRB, ‘Key Finding Report’) 6.

<sup>170</sup> CHRB, ‘Why a Benchmark?’ (2017) <<https://www.corporatebenchmark.org/why-benchmark>> accessed 4 June 2017.

<sup>171</sup> CHRB, ‘Key Finding Report’, 9.

<sup>172</sup> Chris Jochnick and Louis Bickford, ‘The role of civil society in business and human rights’ in Pauly and Nolan (eds) 188.

multiple forms. However, under the absence of regulatory frameworks for corporations under international law, NGOs have also been setting up their persuasive advocacy through partnership with business actors. Gradual changes of their strategy to solve business-related human rights abuses through partnerships with business have developed new ways of disseminating policy guidance to fill the accountability gap between State and business.<sup>173</sup>

As such, many NGOs in this field have a vital role in the process of monitoring and balancing HRDD. As the UNGP do not specify corporate practices for HRDD, these collaborative works between NGOs and businesses became crucial in implementing the UNGP. On the other hand, it is also challenging for both NGOs and businesses to verify the effectiveness of HRDD, as this process is more complex than those developed in CSR strategies and voluntary initiatives. Stock-taking exercises and lesson sharing on such efforts are increasingly being shared at multi-stakes holders' participatory platforms, such as the annual UN Forum on Business and Human Rights.<sup>174</sup>

### 3.2.2. Current state of practice of HRDD by corporations

According to a survey conducted by The Economist in 2015, “83 per cent of respondents among 853 senior corporate executives agree (74% of whom do so strongly) that human rights are a matter for business as well as government.”<sup>175</sup> The respondents also stated that they are concerned about human rights issues for the following reasons: the sustainable relationship with local community (48%); company brand and reputation (43%); expectation from employee (41%); and moral/ethical consideration (41%). Nevertheless, the survey shows that concrete steps to transform their policy into practices are slower than corporate commitment. As main barriers for implementation, companies responded that “the lack of understanding of their company's responsibilities” is the most common challenge (32%). In terms of solution, respondent companies stated that public benchmarking of company performance (39%) and access

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<sup>173</sup> Ibid.

<sup>174</sup> OHCHR, 'United Nations Forum on Business and Human Rights' <<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2017ForumBHR.aspx>> accessed in 2 July 2017.

<sup>175</sup> The Economist Intelligence Unit, 'The road from principles to practice: Today's challenges for business in respecting human rights' (2015), 4.

to reliable, independent information on country-level human rights situations (32%) would help them to carry out their responsibility. Their voices reveal that corporations need concrete support to manage their responsibility. These survey results also support the NGOs' collaborative work to guide HRDD for corporations.

HRDD encourages companies to make information publicly available on how they respect human rights, and how they address adverse human rights impacts if/when they are identified.<sup>176</sup> As indicated by the respondents of the Economist's survey, public benchmarking of company performance (39%) can be helpful in terms of implementation of HRDD. CHRB, therefore, tries to improve corporate performances through benchmarking. This chapter analyzes the current state of HRDD based on the evaluation of 98 global companies, as conducted by CHRB. The companies reviewed were selected from three industries: Agricultural Products, Apparel, and Extractives. CHRB is the first open and public benchmark of the corporate human rights performance, launched in 2013. It is a multi-stakeholder initiative, in collaboration with the investors, NGOs and benchmarking experts from eight organizations.<sup>177</sup> CHRB selected the companies to be reviewed "on the basis of the size (market capitalization) and revenues, as well as geographic and industry balance" and released the key findings in March 2017.<sup>178</sup> CHRB referred to information available from company website and related documents as resources to drive better transparency of corporations.<sup>179</sup> All companies received the initial result, and provided additional information to a dedicated CHRB discourse platform to help greater analysis.<sup>180</sup>

The methodology tool was developed based on multi-stakeholder consultations with more than 400 companies, governments, NGOs, investors, academics and legal experts for more than two years.<sup>181</sup> Corporate performance was evaluated according to six

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<sup>176</sup> CHRB, 'Why a Benchmark?' (2017) <<https://www.corporatebenchmark.org/why-benchmark>> accessed 4 June 2017.

<sup>177</sup> The eight organizations are the APG Asset Management (APG), Aviva Investors, Business & Human Rights Resource Centre, EIRIS Foundation, Institute for Human Rights and Business (IHRB), Nordea Wealth Management and VBDO (the Dutch Association of Investors for Sustainable Development). See also CHRB, <<https://www.corporatebenchmark.org/who-we-are>> accessed 4 June 2017.

<sup>178</sup> CHRB, 'Guide to the Benchmark' (2017) <<https://www.corporatebenchmark.org/guide-benchmark>> accessed 4 June 2017

<sup>179</sup> CHRB, 'Key Finding Report', 6.

<sup>180</sup> *Ibid.*, 7

<sup>181</sup> *Ibid.*, 6.

themes which have different weightings: a) governance and policies (10%); b) embedding respect and HRDD (25%); c) remedies and grievance mechanisms (15%); d) performance: company human rights practices (20%); e) performance: responses to serious allegations (20%); and f) transparency (10%).<sup>182</sup> When scoring corporate performance, CHRB awards 0, 1, or 2 points through a review of corporate information. It scores 1 if one or more of the requirements listed are met; 2 where all the requirements are met.<sup>183</sup> A score of 0, however, does not necessarily mean that the company has a bad human rights practice, but rather that it is not possible to identify their practices publicly.<sup>184</sup> Nevertheless, scoring 0 can still be an important parameter in the sense that corporate information that is not disclose to the public may have much more negative impacts on society. As a result of measuring corporate human rights performance, CHRB reached the following conclusions. The average score across three industries is recorded at a mere 28.7%. Furthermore, only three companies – BHP Billiton (Extractives), Marks & Spencer Group (Agricultural Products / Apparel) and Rio Tinto (Extractives) – scored between 60-69% among 98 companies.<sup>185</sup>

<Table 1. Weighting of CHRB Measurement Themes><sup>186</sup>

<b>The CHRB's measurement themes</b>	<b>Weighting (%)</b>	
A. Governance and policies	10	<ul style="list-style-type: none"> <li>• Board lever (5%)</li> <li>• Policy commitment (5%)</li> </ul>
B. Embedding respect and the HRDD	25	<ul style="list-style-type: none"> <li>• Embedding Respect for Human Rights in Culture and Management System (10%)</li> <li>• Human Rights Due Diligence (15%)</li> </ul>
C. Remedies and grievance mechanisms	15	

<sup>182</sup> Ibid., 7.

<sup>183</sup> Ibid., 6.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid., 8.

<sup>186</sup> Ibid., 7.

D. Performance: company human rights practices	20	
E. Performance: responses to serious allegations	20	
F. Transparency	10	

<Table 2. Average Score by Measurement Theme across Three Industries><sup>187</sup>

<b>The CHRB's measurement themes</b>	<b>Average Scores (%)</b>
A. Governance and policies	2.1 / 10
B. Embedding respect and the HRDD	4.0 / 25
C. Remedies and grievance mechanisms	2.1 / 15
D. Performance: company human rights practices	2.8 / 20
E. Performance: responses to serious allegations	14.6 / 20
F. Transparency	3.0 / 10
<b>Overall Average</b>	<b>28.7 / 100</b>

When reviewing theme B ('embedding respect and HRDD'), it is particularly useful to understand the current HRDD practices. Theme B is divided into two related sub-themes that consist of the 'Embedding Respect for Human Rights in Culture and Management System' and 'HRDD'. First of all, 38% of companies conducted 'Embedding human rights' (with 33% scoring 1's and 5% scoring 2's) by taking the approach of integrating human rights into risk management system.<sup>188</sup> In addition, 34% of companies (with 31% scoring 1's and 3% scoring 2's) took a specific monitoring and corrective action approach to their human rights commitment.<sup>189</sup> However, in moving their human rights policy commitment (70%) into practice, there is a considerable gap in the sense that communication of human rights policy commitment to business relationships reached 42% (with 12% scoring 1's and 30% scoring 2's), and

<sup>187</sup> Ibid., 10.

<sup>188</sup> Ibid., 26

<sup>189</sup> Ibid.

their communication within company's own operations is 28%, with no company scoring 2.<sup>190</sup>

It is also important to note that in each implementation phase of HRDD, scores related to corporate performance dropped considerably. According to the released results, for 'integrating and acting on risks' just 12% scored 1's and 8% scored 2's; 'tracking risks' recorded a 12% of 1's and 6% of 2's; and 'communicating on effectiveness' recorded a mere 2% of 1's, only one company scoring a 2's and 97% scoring 0's.<sup>191</sup> These results show that the current state of actual implementation of HRDD is very limited, whilst 32% (with 22% scoring 1's and 10% scoring 2's) of the companies make an effort to identify human rights risks, and 29% (with 20% scoring 1's and 9% scoring 2's) assess the most salient issues.<sup>192</sup>

<Table 3. Scores of the performing the HRDD ><sup>193</sup>

<b>Implementation phases of the HRDD</b>	<b>Score 0 (%)</b>	<b>Score 1 (%)</b>	<b>Score 2 (%)</b>
Identifying human rights risks	68	22	10
Assessing the most salient issues	71	20	9
Integrating and acting on risks	80	12	8
Tracking risks	82	12	6
Communicating on effectiveness	97	2	1

This benchmarking exercise also indicated that other general human rights performances that are emphasized in the UNGP receive limited attention. In relation to the engagement with potentially affected people such as workers and communities, the results indicate that "56% of companies score 0's for their commitments to such engagement; 84% do not have a framework for engagement; and an alarming 91% of companies do not score any points for involving rights-holders in designing their

<sup>190</sup> Ibid.

<sup>191</sup> Ibid., 27.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

grievance mechanisms.”<sup>194</sup> This result shows that corporations need to change their practices in a more realistic way to ensure rights-holders’ engagement, for example, in the design and operationalization of complaint mechanisms. Especially, corporate operational-level grievance mechanism might easily lose their transparency and trust from local community people, so meaningful engagement with external stake-holders to operate the mechanism is important.<sup>195</sup>

On the other hand, CHRB’s results also confirm that access to remedy is the weakest part of existing HRDD mechanisms, as it is already well known.<sup>196</sup> Even though it is a good thing that two-thirds of companies have some level of complaints mechanism for workers (59% scoring 1’s and 7% scoring 2’s), just more than one-third have a mechanism available for communities and other external potentially affected stakeholders (25% scoring 1’s and 13% scoring 2’s). Moreover, it was found that nine out of ten companies don’t make the information publicly available (with 92% scoring 0’s), and there is almost no company trying to align and cooperate with state-based grievance mechanisms (96% scoring 0’s). In addition, more than three-quarters of companies do not release information on how they actually remediate impacts and lessons learned (83% scoring 0’s), leaving a gap “in understanding between the mechanism advertised and how it actually works in practice.”

In conclusion, CHRB’s key findings report demonstrates that even if almost 70% of the 98 companies established a human rights policy on paper, there is a significant gap found in the way in which they try to move such policy into practice. The report states as follows: “There are clearly positive trends in companies seeking to embed human rights within the culture of the organization at the macro-level, but much more work is to be done at the day-to-day or micro-level of the company to systematically implement all components of the human rights due diligence process.”<sup>197</sup> As such, even if companies tend to achieve high performance in the area of policy commitments and high-level governance arrangements, HRDD practices acting on managing risks, tracking responses, communicating effectiveness, and remediating harms fell short of

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<sup>194</sup> Ibid., 13.

<sup>195</sup> Amol Mehra and Sara Blackwell (n 166), 270.

<sup>196</sup> Ibid., 28.

<sup>197</sup> CHRB, ‘Key Finding Report’, 17.

expectations even among high scoring companies.<sup>198</sup>This result also reveals that States have to consider the necessity of enhancing legal and policy frameworks to establish better systems and enhance capacity in practicing HRDD in a truly transformative way.

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<sup>198</sup> Ibid., 12.

## **Chapter 4: Changing the Role of the State to Improve HRDD**

### **4.1. Overview: State's Progress through National Action Plans on Business and Human Rights**

This chapter does not review all parts of the National Action Plan's (NAP) structure and its effectiveness, but rather focuses on the changes made by States to promote State action and corporate responsibility in line with the UNGP through NAP. As explained so far, HRDD is a tool to mainstream human rights into business operations in line with the UNGP. However, the non-legally binding characteristics of HRDD and the ambiguity of evaluation standards largely restricts the effectiveness of HRDD. In this regard, the role of States can be crucial in reinforcing corporate human rights performance. By reviewing the current and planned actions of States indicated in recent legislations and policies, this chapter tries to identify the trends in the actions initiated by States to realize their duty to protect and encourage corporate responsibility. State actions are mainly of three types: identifying gap and policy coherence; support mechanisms as ways of guidance, incentives and partnership; and legislations.

After the endorsement of the UNGP in 2011, the most visible change among States was the adoption of the National Action Plans on Business and Human Rights. The NAP is known as a comprehensive policy action specifying the State's commitment in business and human rights. According to the UN Guidance on Business and Human Rights (UN Guidance), the NAP is defined as an “[e]volving policy strategy developed by the State to protect against adverse human rights impacts by business enterprises in conformity with the UNGP.”<sup>199</sup> The UNWG has also strongly encouraged member States to develop, enact and update their NAP.<sup>200</sup>

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<sup>199</sup> UN Working Group on Business and Human Rights, ‘Guidance on National Action Plans on Business and Human Rights’ (UNWG, 2016) 15 (UNWG, ‘UN NAP Guidance’) ii.

<sup>200</sup> Ibid. 5.

Improvements at State's level through the adoption of a NAP was based on recommendations from the EU and the UN. At the regional EU level, efforts to implement the UNGP are found in the EU's attempt to cohesively manage their member states' national instruments. In 2011, the European Commission requested member States to produce their own action plans to promote the State role in implementing and internalizing the UNGP within the State legal order by the end of 2012 as part of the EU strategy for the CSR.<sup>201</sup> Afterwards, the European Council extended the target date to the end of 2013 in 'the EU Strategic Framework on Human Rights and Democracy' as Action 25.<sup>202</sup> Following this, the UK took the opportunity to develop its own NAP by 2013. Through the UNHRC resolution in June 2014,<sup>203</sup> the UNHRC also recommended the adoption of a NAP, and the UNWG published the UN Guidance as a reference guide. The Guidance was drafted in 2014 and finalized in 2016, targeted at States as well as at all relevant stakeholders including NHRIs and NGOs involved in the NAP process.

As of June 2017, fourteen States have adopted a NAP<sup>204</sup>: the UK (September 2013, Update 2016), Netherlands (December 2013), Denmark (April 2014), Spain (summer 2014, subject to approval by the Spanish Council of Ministers), Finland (October 2014), Lithuania (February 2015), Sweden (August 2015), Norway (October 2015), Colombia (December 2015), Switzerland (December 2016), Italy (December 2016), USA (December 2016), Germany (December 2016) and France (April 2017). In addition, around thirty States are currently developing a NAP, with the support of NHRIs and civil society. Among the fourteen to have already adopted a NAP, the USA and Colombia are the only non-EU countries. In the case of Columbia, the UK government contributed to developing the NAP as part of technical assistance partnership.<sup>205</sup>

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<sup>201</sup> European Commission, 'A renewed EU strategy 2011-2014 for Corporate Social Responsibility' (25 October 2011) 14; Humberto Cantu Rivea, 'The United Nations Guiding Principles on Business and Human Rights in the European Union: From Regional Action to National Implementation' in Martin and Bravo (eds) 499.

<sup>202</sup> Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' (25 June 2012) 19.

<sup>203</sup> UNHRC, 'Resolution 26/22 Human rights and transnational corporations and other business enterprises' (15 July 2014), A/HRC/RES/26/22, paras 2-3.

<sup>204</sup> OHCHR, 'State national action plans'

<<http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> accessed> accessed in 10 July 2017.

<sup>205</sup> UK, 'NAP', 9.

The UN Guidance suggests that the State should develop the NAP drawing on the thirty-one UNGPs through five phases: i) Initiation; ii) Assessment and Consultation; iii) Drafting of initial NAP; iv) Implementation; and v) Update.<sup>206</sup> The UNWG, on the other hand, recognized that the development process is not a ‘one-size-fits-all’ approach, so it broadly referred to state contents following five sections in the NAP: Government statement of commitment; Background and context related to existing government policies and key challenges; Government expectation towards business enterprises (UNGP 11-24, 28-31); Government response about priority areas, current and planned activities directed at States (UNGP 1-10, 25-28, and 31); Monitoring and update.<sup>207</sup> In all planned actions, government should specify “the modalities of implementation including clear responsibilities of relevant entities, a timeframe, and indicators to evaluate success.”<sup>208</sup> Recommendations were also made by various experts for the NAP to be legislated based on human rights principles such as accountability, transparency and inclusion, so that it can function as a meaningful platform for better understanding among stakeholders.<sup>209</sup>

Through the NAP governments have the potential to achieve vertical and horizontal alignment of national laws and policies in business and human rights. However, critics have pointed out that, too often, the NAP is “just a largely declaratory document of existing measures and commitments that offer no more than a description of the status quo with few hard promises to take action.”<sup>210</sup> Likewise, NGOs and think-tanks have argued that existing development processes for the NAP need to be improved, so as to include clear and evidence-based targets, milestones, and indicators to reach a specific outcome.<sup>211</sup> To a certain extent, it is a fact that the most NAP adopt a largely voluntary approach, rather than hard law or regulatory measures.

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<sup>206</sup> UNWG, ‘UN NAP Guidance’, ii.

<sup>207</sup> *Ibid.*, 15.

<sup>208</sup> *Ibid.*, ii.

<sup>209</sup> Claire O’BRIEN, Amol MEHRA, Sara BLACKWELL, and Catharine POULSEN-HANSEN, ‘National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool’ (13 November 2015) *Business and Human Rights Journal* 1: 117-126, 121.

<sup>210</sup> *Ibid.*, 118.

<sup>211</sup> *Ibid.*, 121.

It is also important to note that voluntary commitments towards mostly voluntary NAP is contrary to the UNGP which emphasize the importance of a ‘smart mix’.<sup>212</sup> There have been many suggestions from civil society that the State should pledge to develop domestic legal mechanisms in the process of adopting the NAP. In addition, civil society recommends that the NAP should be adopted after meaningful engagement with all relevant stakeholders, including prior consultations and dialogues at local level.<sup>213</sup> Likewise, it is also proposed that the NAP should provide an effective prevention and protection mechanism for human rights defenders who are increasingly exposed to danger when advocating for corporate accountability.<sup>214</sup>

With regards to the shortcomings, de Felice and Graf suggest that “[t]he process of NAP development should: (1) be based on a comprehensive baseline study/gap analysis; (2) include all relevant state agencies; (3) allow effective multi-stakeholder participation; and (4) continuously monitor implementation. In terms of content of the NAP, the State should: (5) express firm commitment to implement the UNGP; (6) conform as much as possible to the structure and substance of this UN document; (7) offer unambiguous commitments and clear deadlines for future action; and (8) envisage capacity-building initiatives.”<sup>215</sup> As such, State actions for implementing the UNGP through the NAP will have to be improved in terms of developing process, contents and effectiveness.

## **4.2. State Action to Enhance Corporate HRDD**

### **4.2.1. Identified gap and policy coherence**

The UN Guidance states that the State should ensure policy coherence over UNGP 8 to 10. ‘Vertical’ and ‘horizontal’ approaches should be considered to identify gap and

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<sup>212</sup> Ibid., 122.

<sup>213</sup> Peace Brigades International, ‘Revision of the UK National Action Plan on Business and Human Rights: Peace Brigades International Briefing’, (2016) 2-5.

<sup>214</sup> International Service for Human Rights, ‘The role of National Action Plans on Business and Human Rights in protecting human rights defenders’ <<http://www.ishr.ch/news/role-national-action-plans-business-and-human-rights-protecting-human-rights-defenders>> accessed 13 June 2017.

<sup>215</sup> Damiano de Felice and Andreas Graf, ‘The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights’ (5 January 2015) *Journal of Human Rights Practice* 7 (1): 40, 1.

reach policy coherence. A vertical approach is to implement domestic law and policies in line with international human rights law standards. A horizontal approach, on the other hand, is to commit the State duty through cross-government participation at the national and sub-national levels by supporting and equipping departments and agencies.<sup>216</sup> In this regard, as part of the horizontal approach, all relevant national policy documents about business conduct (such as national development plans, CSR-strategies, and overall human rights national action plans) are required to make coherence with each other.<sup>217</sup> In relation to this point, Deva emphasized not only the importance of cross-governmental participation but also of an assessment of the current legal and policy framework and their effectiveness.<sup>218</sup> For example, it would be important to have an holistic assessment when considering the human rights impacts of any intervention conducive to private investment-driven development, rather than just reviewing different segments of the individual legal framework through a piecemeal approach.<sup>219</sup>

Greater policy coherence is one of the valuable benefits of adopting a NAP.<sup>220</sup> Through a NAP, different public policies in business and human rights can be effectively coordinated. UNGP 10 explained that government should also seek to ensure policy coherence as a member State of multilateral institutions at the international level. These are much-needed efforts to achieve a “shared understanding and advance international cooperation in the management of business and human rights challenges”, as seen in UNGP 10(c). For example, technical assistance for policy coherence can be required as part of international cooperation. In this sense, the Commentary of UNGP 7 also points out the need for close cooperation between the home State government and development assistance agencies, foreign and trade ministries, etc.<sup>221</sup>

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<sup>216</sup> UNWG, ‘UN NAP Guidance’, 34.

<sup>217</sup> *Ibid.*, 28.

<sup>218</sup> Beata Faracik, ‘Implementation of the UN Guiding Principles on Business and Human Rights’ (European Parliament 2017) 21.

<sup>219</sup> *Ibid.*

<sup>220</sup> UNWG, ‘UN NAP Guidance’, 1.

<sup>221</sup> SRSG, ‘Guiding Principles’, Commentary on Principle 7.

i. Coherence with international instruments (Vertical approach)

As it is explained above, a vertical approach to mainstream international human rights laws and standards into national legislation is crucial to ensuring policy coherence. Through a vertical approach, the State can develop national laws and policies within a coherent framework based on the international and regional mechanisms of international organizations such as the UN, EU, OECD, etc. International institutions are also putting an effort into making their policies coherent with each other. For example, the National Contact Point (NCP) mechanism of the OECD MNE Guidelines was updated in 2011 to be consistent with the UNGP. As discussed so far, therefore, the State is required to play a leading role in advancing business and human rights at different global governance levels, and in achieving overall policy coherence, as delineated in UNGP 10. The UNWG also suggests that multilateral institutions and regional organizations can ensure business and human rights in business-related issues through various existing mechanisms, such as the Universal Periodic Review (UPR) and the UN human rights treaty monitoring bodies.<sup>222</sup>

On the other hand, it is also important to remember that the business and human rights agenda would be significantly advanced by giving priority to human rights in all relevant economic consideration, and that human rights objectives should be reflected in international trade and investment agreements. According to UNGP 9, it is crucial that the “State ensures that bilateral and multilateral investment agreements do not impede respect for human rights, and contracts for investment projects between host state and multinational enterprises foster business respect for human rights.”<sup>223</sup> In this regard, the State should establish protective measures for the human rights of peoples affected by investment treaties and trade agreements, and defend such measures through their foreign affairs and international relations activities. If we look at the current state of affairs, however, it is apparent that there is still a long way to go before States accept these prioritizations.

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<sup>222</sup> UNWG, ‘UN NAP Guidance’, 35.

<sup>223</sup> *Ibid.*, 29.

The UK was the first country to launch a NAP. The UK NAP was adopted in 2013 and updated in May 2016. During the first NAP phase, the UK government was involved in negotiations and implementation of the OECD 2012 Common Approach. In the Common Approach, relevant adverse human rights records can be considered when a company applies to the Export Credit Agency (ECA) for support through UK Export Finance (UKEF).<sup>224</sup> In addition, in its updated NAP, the UK government indicated its support for EU efforts to mitigate the human rights impacts of free trade agreements by taking appropriate steps, including the incorporation of human rights clauses.<sup>225</sup> Furthermore, the UK government committed to engaging in working with the ‘International Code of Conduct Association’ and the ‘Voluntary Principles on Security and Human Rights Initiative (VPI)’ with civil society and business associations and corporations.

Similarly, the U.S. government adopted a NAP in late 2016. As part of its vertical approach, ‘promoting the Responsible Business Conduct (RBC) globally’ and ‘utilizing the U.S. law, multilateral agreements, and diplomacy to promote and enforce high standards’ were introduced as important purposes and outcomes to be achieved with the NAP.<sup>226</sup> For example, the U.S. government encouraged the adoption of international instruments and initiatives such as the Bilateral and Multilateral RBC Statement; the Inter-American Convention against Corruption; the Asia-Pacific Economic Cooperation (APEC) Principles and General Elements; and Safeguards at the World Bank and other international financial institutions.<sup>227</sup>

In most of the NAP, States try to show leadership in global governance vis-à-vis the UNGP. However, if the NAP does not foresee concrete plans in converting their commitment or cooperation in global governance and international relations into domestic legislations and policy frameworks, there will remain significant shortcomings. For example, in the process of updating the second term of the UK NAP, civil society emphasized the need for policy coherence for realistic improvement in

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<sup>224</sup> UK Government, ‘Good Business: Implementing the UN Guiding Principles on Business and Human Rights’ (Updated May 2016), 8 (UK Government, ‘NAP’).

<sup>225</sup> *Ibid.*, 11.

<sup>226</sup> U.S. Government, ‘Responsible Business Conduct: First National Action Plan for the United States of America’, (16 December 2016) 9 (U.S. Government, ‘NAP’).

<sup>227</sup> *Ibid.*, 8-9.

national implementation and for consistency with international mechanisms such as the OECD MNE Guidelines.<sup>228</sup> More than adopting the NAP, States should prove their political willingness to implement effective mainstreaming strategies at national level to advance the business and human rights agenda, going well beyond mere declaratory statements.

ii. Inter-departmental efforts (Horizontal approach)

State should play a significant role in increasing cooperation among a wide array of governmental agencies and related departments for effectively implementing the UNGP. As part of the horizontal approach, most of the States clearly show their commitment, strengthening their organizational capacity to produce explicit outcomes narrowing the gaps in practice.

For example, in developing the U.S. NAP, more than a dozen agencies participated in the National Security Council (NSC) and led the process from the fall of 2014 until the endorsement in December 2016. They conducted open dialogues with stakeholder groups, including civil society and academia in four regions (New York, California, Oklahoma, and Washington D.C), and scoped relevant issues of particular relevance to stakeholders in these locations.<sup>229</sup> It can be known that most governments focus on capacity building programs aimed at government officials to strengthen their horizontal approach. In the case of the U.S. government, according to the plans, RBC will be introduced into relevant training tools for diplomats and other U.S. government employees stationed overseas, to ensure they will be able to deal with economic and labor issues.<sup>230</sup> In 2016, the training module to USAID staff members was also expanded to include labor issues in business relationships.

Similarly, the UK government showed its strong commitment to set out inter-departmental policy coherence by providing trainings, information sharing and support. They have renewed the Government's Business and Human Rights Toolkit, and

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<sup>228</sup> Foreign and Commonwealth Office, 'Updating the UK National Action Plan on Business and Human Rights Headline messages from workshops held in w/c 29 June' (24 March 2015) 3.

<sup>229</sup> U.S. Government, 'NAP', 24.

<sup>230</sup> *Ibid.*, 19.

developed new resources and training for the Foreign & Commonwealth Office (FCO) and the UK Trade & Investment (UKTI) staff, trade envoys and visiting delegations.<sup>231</sup> On the other hand, in the second term of UK NAP, the government revealed its willingness to focus more on the coordination with the Scottish and Northern Irish administrations, because the UK NAP was separately developed by each regional government. According to the Scottish NAP that was adopted in 2013, the Scottish government took the lead of the Action Group for the implementation of the UNGP, in collaboration with business associations and civil society.<sup>232</sup> In the case of the Northern Ireland, as part of multi-stakeholder platform, the Business and Human Forum was established in 2015.<sup>233</sup> It is based on the participation of cross-governmental departments, business and NGOs to share corporate practices and engage in the UK NAP. The Northern Ireland Human Rights Commission also published a report on 'Public Procurement and Human Rights' to advise on the applicable human rights standards in the context of procurement cooperating with the DIHR.<sup>234</sup> With regards to these local governmental initiatives, the UK government pointed out the importance of policy coherence in local government's engagement in the NAP.

#### 4.2.2. Support mechanism

States prefer to offer a support mechanism to companies rather than establishing a regulatory framework, because they remain cautious over their influence in the market system. Looking at existing NAP, it is often found that State supports corporations through incentives, guidance and partnership with corporations by providing funding, guidance tools, training and capacity building, and policy agreement with host States. This section reviews several examples of how governments have been supporting companies to conduct HRDD.

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<sup>231</sup> Ibid., 10.

<sup>232</sup> Scotland's National Action Plan for Human Rights, 'Scotland's National Action Plan for Human Rights' (2017) <<http://www.snaprights.info/>> accessed 20 May 2017.

<sup>233</sup> Northern Ireland Human Rights Commission, 'business and human rights' <<http://www.nihrc.org/business-human-rights-forum>> accessed 10 July 2017.

<sup>234</sup> Northern Ireland Human Rights Commission, 'Public Procurement and Human Rights in Northern Ireland' (November 2013) 1.

i. Guidance, Incentives, and Partnership with corporations

According to the U.S. NAP, the government does not have adequate tools and resources available to address human rights risks and impacts, whereas companies are becoming aware of the importance of conducting corporate due diligence. With this in mind, as part of the effort to facilitate the RBC, the U.S. government showed its commitment in the NAP to develop or fund user-friendly resources. For example, the Child Labor and Forced Labor Reports; Trafficking in Persons (TIP) Report; A Toolkit for Responsible Businesses; Investment Climate Statements; the U.S. and Foreign Commercial Service Country Commercial Guides; and Reporting Requirements for Responsible Investment in Burma have all been developed as part of supporting corporate practices.<sup>235</sup> Especially, with regard to investment in Burma, the U.S. government adopted Executive Order 13742 in 2016 that requires U.S. citizens undertaking new investment in Burma to make compliance with the reporting requirements voluntarily.<sup>236</sup>

In this regard, the U.S. government focuses on deploying its resources to narrow the gaps that companies experience in addressing human rights issues by providing relevant guidance. According to future plans delineated in the NAP, the U.S. government will develop Country-Level Governance Profiles and a RBC Online Resource Tool. For example, as an ongoing project, the government is developing a regular mechanism to identify, document and publicize lessons learned and best practice related to corporate actions in the Human Rights in the ICT Sector.<sup>237</sup> In addition, the U.S. government emphasizes the importance of using a rewarding strategy to encourage company's positive performances. The U.S. NAP, in fact, argues that it is important to recognize corporation's achievement seeking to implement corporate best practice for affected people, community and the company itself.<sup>238</sup> Two examples of this rewarding approach are 'the Iqbal Masih Award for the Elimination of Child Labor'<sup>239</sup>, and 'the Secretary of State's Award for Corporate Excellence'.<sup>240</sup>

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<sup>235</sup> U.S. Government, 'NAP', 17-18.

<sup>236</sup> Ibid., 'NAP', 18.

<sup>237</sup> Ibid., 22.

<sup>238</sup> Ibid.

<sup>239</sup> Bureau of International Labor Affairs, 'Iqbal Masih Award for the Elimination of Child Labor' <<https://www.dol.gov/agencies/ilab/issues/child-labor/iqbal>> accessed 10 July 2017.

<sup>240</sup> U.S. Department of State, 'the Secretary of State's Award for Corporate Excellence' <<https://www.state.gov/e/eb/ace/>> accessed 10 July 20.

The UK government has also pointed out the need for playing a ‘supporting role.’ During the first period of the NAP (2013-2015), the UK government supported industry-led initiatives as ways of reporting, benchmark performance and sectoral guidance.<sup>241</sup> For example, when ‘the Modern Slavery Act’ was legislated in 2015, government published ‘the Guidance to companies on transparency in supply chains’ to help them fulfill the reporting requirements envisaged in the Act. Other than this guidance, the government financially supported ‘the Cyber growth partnership industry guidance’ to assess human rights risks related to cyber security exports; the CHRB Initiative; the UNGP Reporting Framework; and the Economist Intelligence Unit research report.<sup>242</sup> These supports have also promoted business-led initiatives and civil society’s activities. Furthermore, in its NAP, the UK government expressed the intention to update the Overseas Business Risk (OBR) service continuously. This service aims to provide helpful information, including country-specific human rights issues in business operations, based on the UNGP.<sup>243</sup> In the updated version of the NAP in 2016, the UK government also revealed its plan to support board directors of companies on how to conduct human rights reporting in the care and security sectors.

With regard to the extraterritorial issues, the UK government emphasized the need for partnership with host States and NGOs in host countries. In the case of the UK NAP, it is found that the UK explicitly regards overseas business conducts as ‘a matter of policy in certain instances’ rather than a human rights obligation.<sup>244</sup> The UK government states: “Human rights obligations generally apply only within a State’s territory and/or jurisdiction. Accordingly, there is no general requirement for States to regulate the extraterritorial activities of business enterprises domiciled in their jurisdiction, although there are limited exceptions to this, for instance under treaty regimes.”<sup>245</sup> With this in mind, the UK focuses more on ‘diplomatic missions’ as ways of partnership with host States and relevant stakeholders and NGOs to inform companies of their human rights risks.<sup>246</sup> Moreover, the UK government expressed concerns to host States’ authorities

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<sup>241</sup> UK Government, ‘NAP’, 14.

<sup>242</sup> *Ibid.*, 15-16.

<sup>243</sup> *Ibid.*, 16.

<sup>244</sup> *Ibid.*, 6.

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*, 17.

and encouraged them to solve adverse human rights impacts where local law is incompatible with international human rights law.<sup>247</sup> Although the extraterritorial obligations to ensure the full realization of human rights have been progressively identified in several human rights treaties, including ICESCR, the UK government is passively responsible for maintaining a more conservative interpretation, bearing in mind the importance that this stance has at both political and diplomatic level.<sup>248</sup>

State actions as part of partnership with host State governments are found often in other NAP. For example, the Danish government with business associations and enterprises has agreed on a number of commitments about responsible garments production and working condition in Bangladesh.<sup>249</sup> The Danish government revealed that human rights conditions within their sphere of influence needs to be closely coordinated based on the framework of ‘the Danish Ethical Trading Initiative’ established in 2008. In the initiative, companies, business associations, NGOs, trade unions, and public institutions are cooperating to find ways to improve human rights risks with stakeholders in Bangladesh.<sup>250</sup>

## ii. International cooperation

In seeking to implement the UNGP, international cooperation has been mainly addressed by building partnership with governments and corporations abroad, in countries where business subsidiaries and supply chain partners are mainly located. For the purpose of international cooperation, the UK government reiterates its view that these actions are not an obligation but a policy initiative.<sup>251</sup> Likewise, the UK government could have led progressively their actions by recognizing a positive obligation of international cooperation and considering its application into national legislation. On the contrary, the Swedish government has initiated discussion on the

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<sup>247</sup> Ibid.

<sup>248</sup> For example, Olivier De Schutter argued the possibility of ‘corporate’ extraterritorial obligation on ESC rights more than ‘State’ extraterritorial obligation. See also ‘Corporations and Economic, Social, and Cultural Rights’ in Eibe Riedel, Gilles Giacca, and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenge* (Oxford Univ. Press 2014).

<sup>249</sup> Business and Human Rights Resource Centre, ‘Action Platforms –Denmark’ <[https://business-humanrights.org/en/denmark?actions\[\]=10826#a116898](https://business-humanrights.org/en/denmark?actions[]=10826#a116898)> assessed 15 June 2017.

<sup>250</sup> Danish Ethical Trading Initiative, ‘DIEH member’, <<https://www.dieh.dk/about-dieh/members/>> assessed 15 June 2017.

<sup>251</sup> UK, ‘NAP’, 6.

mobilization of resources with business actors that are involved in poverty reduction projects related to the Sustainable Development Goals (SDGs).<sup>252</sup> The U.S. government has focused mainly on technical assistance to corporations operating abroad, especially in relation to due diligence linked the issue of land investment and indigenous peoples' communities.<sup>253</sup>

For instance, the UK government regards international cooperation as a non-binding action in promoting human rights in host States through collaborative partnership. The UK has provided technical assistance to the Government of Colombia by supporting the development of the Colombian NAP.<sup>254</sup> The UK also engaged in international cooperation for the resilience of local community after the collapse of Rana Plaza in 2013 by supporting NGOs in public interest litigation to protect worker's rights and building awareness of worker rights on health and safety in partnership with other countries.<sup>255</sup> Furthermore, the UK has supported projects through the FCO's Human Rights and Democracy Programme Fund (1.5 million GBP) to mainstream the UNGP. This Fund, more specifically, has supported the development of human rights protection mechanisms and enhancement of remedies for victim through collaboration with local authorities in the host countries. This fund has also been provided to support civil society and trade union's advocacy programs, to reinforce access to remedy and protect human rights defenders in host countries, especially in Colombia, Mexico and Brazil.<sup>256</sup>

In the case of Sweden, the government focused more on the corruption issue in terms of the purpose of international cooperation as part of State action. The Swedish government has pointed out the great importance of international cooperation against corruption by working actively to disseminate knowledge about their practices, and to implement important agreements such as 'the United Nations Convention against Corruption' and 'the OECD Convention on Combating Bribery of Foreign Public Officials.'<sup>257</sup> They have been taking a chair of the Business Anti-Corruption Portal

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<sup>252</sup> Government Offices of Sweden, 'Action plan for business and human rights' (August 2015), 24-25 (Sweden, 'NAP').

<sup>253</sup> U.S., 'NAP', 19.

<sup>254</sup> Ibid., 9.

<sup>255</sup> Ibid., 12.

<sup>256</sup> Ibid., 22.

<sup>257</sup> Sweden, 'NAP', 21.

since 2010, which is aimed at addressing anti-corruption issues in around 100 countries by cooperating with the European Commission. On the other hand, as part of cooperation with private sectors in host countries, the Swedish International Development Cooperation Agency (Sida) has developed a variety of collaborations with business with a view to mobilize the additional resources for international development.<sup>258</sup> Sida has been working with business communities and companies that conduct human rights and poverty reduction projects, and starting the discussion in ‘the Swedish Leadership for Sustainable Development’ in which saw the involvement of twenty large Swedish corporations.<sup>259</sup>

On the other hand, according to the U.S. government’s NAP, the U.S. government plans to enhance technical support to promote an enabling environment in the area of land investment. These measures aim to help companies investing in land abroad to be responsible for local communities, including indigenous peoples. The U.S. stated that they are currently supporting programs for NGOs on land rights and tenure issues in Sierra Leone, Liberia, and Guinea (West Africa). The U.S. government also revealed its plan to support ‘stakeholder engagement in extractive industries of East Africa’, such as NGOs’ participation in business and human rights initiatives in this context.<sup>260</sup>

#### 4.2.3. Legislations

As explained earlier in this thesis, the UNGP do not impose new legal obligations in the international legal system, but are intended as reflecting existing international law. They also suggest a range of possible approaches, including the introduction of regulation. For example, domestic measures about a parent company’s requirement to report on its HRDD practice in the global operations could have a significant impact in preventing human rights abuse abroad. These actions are becoming more common as part of the State positive duty. This section mainly reviews newly introduced legislation about mandatory corporate due diligence and non-financial reporting. Other than these two criteria, several examples of the regulatory frameworks are found in relation to conflict minerals, modern slavery, human trafficking, forced labor, finance, etc. For

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<sup>258</sup> Ibid., 24.

<sup>259</sup> Ibid., 25.

<sup>260</sup> U.S., ‘NAP’, 19.

example, legislations such as ‘the U.S. Dodd-Frank Act 2010’, ‘the California Transparency in Supply Chains Act of 2010’, ‘the Brazil’s MTE Decree No. 540/2004 ‘Dirty list’’, and ‘the Brazil’s revision of Constitution of May 2012’ are mandatory measures to change corporate conduct through regulation about business-related specific issues.<sup>261</sup>

i. France: Corporate duty of vigilance law (mandatory due diligence practice)

The French government’s legislation on mandatory corporate due diligence was established in March 2017 as the latest and most comprehensive measure for covering corporate HRDD. This is regarded as the most distinguished and effective legal response so far to narrow the gap between business performance and their responsibility to respect human rights.<sup>262</sup> The UNWG also applauded the adoption of this new law as a good example of efforts to implement the UNGP based on a “smart mix” approach including regulation, policy and guidance to incentivize corporate respect for human rights.<sup>263</sup> Before this law was legislated, the French parliament has made progress in numerous discussion and dialogues. It was mainly discussed whether the law seeks to implement the legal principle of the due diligence based on the Guiding Principles or not.<sup>264</sup> It was concluded that the HRDD delineated in the UNGP can be consistent with the company’s practice, the HRDD can be also referenced in the gap where the purpose of the law is ambiguous.<sup>265</sup>

The duty of vigilance law requires parent companies to set up a vigilance plan. Companies employing more than 5,000 employees in the head office and subsidiaries in France, or employing more than 10,000 employees in the head office and subsidiaries worldwide are under the scope of law. Around 100-150 large companies are estimated

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<sup>261</sup> Beata FARACIK, ‘Study: Implementation of the UN Guiding Principles on Business and Human Rights, European Parliament’ (European Parliament 2017), 29.

<sup>262</sup> Assemblée Nationale, ‘Entreprises: devoir de vigilance des entreprises donneuses d’ordre’ (28 March 2017) (English translation by ECCJ); ECCJ, ‘French Corporate Duty of Vigilance Law: Frequently Asked Questions’ (24 March 2017), 5.

<sup>263</sup> OHCHR, ‘Information Note: UN expert group welcomes legislative efforts in France and other countries to address adverse business human rights impacts’ (23 March 2017), 1.

<sup>264</sup> Anna Triponel and John Sherman, ‘Legislating human rights due diligence: opportunities and potential pitfalls to the French duty of vigilance law’ (2017)

<<https://www.ibanet.org/Article/Detail.aspx?ArticleUid=E9DD87DE-CFE2-4A5D-9CCC-8240EDB67DE3>> accessed 2 June 2017.

<sup>265</sup> Ibid.

to meet these conditions.<sup>266</sup> The companies covered by the law should establish and implement a vigilance plan and publish it in their company's annual report. With regards to the process of due diligence to identify, prevent and mitigate human rights risks, the vigilance plan should be based on Principle 17 of the UNGP.

According to Article 1 of the law, the vigilance plan should include as follows:<sup>267</sup>

- A mapping that identifies, analyses and ranks risks;
- Procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship;
- Appropriate actions to mitigate risks or prevent serious violations;
- An alert mechanism that collects potential or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned; and
- A monitoring scheme to follow up on the measures implemented and assess their efficiency.

If one of the relevant companies breaches the law, victims and any concerned parties will be able to bring a case against the alleged company with the relevant jurisdiction.<sup>268</sup> This law allows a three-month for companies to correct their performance, but they will be punished if the situation remains unchanged after three months. According to Article 2 of the law, if the company does not comply with its obligations under the law and thus human rights abuses occur, the judge can rule that the company must compensate the victims and republish its vigilance plan. A fine of up to 10 million euros can be applied when companies breach the published plans, and it can go up to 30 million euros if this failure results in human rights abuses.<sup>269</sup>

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<sup>266</sup> ECCJ (n 262), 3.

<sup>267</sup> Ibid., 4.

<sup>268</sup> Ibid.

<sup>269</sup> ECCJ, "France adopts corporate duty of vigilance law: a first historic step towards better human rights and environmental protection" <<http://corporatejustice.org/news/393-france-adopts-corporate-duty-of-vigilance-law-a-first-historic-step-towards-better-human-rights-and-environmental-protection>> accessed 31 May 2017.

The French duty of vigilance law is the first legally binding legislation on HRDD, and civil society and academics have suggested the following points for further improvement.<sup>270</sup> First, the scope of the law is limited because it only covers around 100-150 companies in practice. The law could be expanded to all business as stated in the UNGP. Second, under the law victims must provide proof of corporate abuses by themselves, despite the power imbalance that they face vis-à-vis large companies. This burden of proof could be hard for victims who often lack the means to seek and access to remedy. Third, if companies adopt a vigilance plan and publish a suitable report would be regarded as in compliance with the law, and not liable in the event of human rights abuses. Accordingly, companies do not need to ensure the results of the vigilance plan, as it is sufficient for them to show that they have prevention plans in place to avoid negative impacts. In this regard, the UNWG also suggested that “the vigilance plans should be developed in consultation with stakeholders and include early warning mechanism established based on cooperation with the trade union representative.”<sup>271</sup> The UNWG also remarked on the limited applicability to large French companies affirming that the UNGP states, “Corporate responsibility applies to ‘all’ enterprises regardless of their size, sector, operational context, ownership and structure.”<sup>272</sup>

ii. EU Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertaking and groups (EU Directive)

The EU Directive, which entered into force in December 2014, is aimed at ensuring that large EU companies include non-financial information in their management reports. It is based on the expansive amendment of the reporting requirement in the Directive 2013/34/EU (the Accounting Directive). The EU Directive is applicable to around 6,000 large companies registered in the EU. The first reports are going to be published in 2018 (on financial year 2017).<sup>273</sup> As EU Member States were required to transpose into the national legislation by 6 December 2016, as of June 2017 all of them, except

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<sup>270</sup> Ibid.

<sup>271</sup> UNWG, ‘Information Note’, 2.

<sup>272</sup> Ibid.

<sup>273</sup> European Commission, 'Non-Financial Reporting' (2016) <[http://ec.europa.eu/finance/company-reporting/non-financial\\_reporting/index\\_en.htm#news](http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm#news)> accessed 2 June 2017.

of the Belgium, Ireland, Spain, Cyprus, and Portugal, had introduced national legislation.<sup>274</sup>

Article 1 in the EU directive addresses the key concepts of the non-financial reporting. The EU directive states that companies with more than 500 employees including public interests entities should disclose information related to environmental, social and employee matters, human rights, anti-corruption and bribery in a non-financial statement.<sup>275</sup> Furthermore, a description of the due diligence processes should be included in the reporting statement with the following contents: the business model; principal risks in the business operations and their relationships; non-financial key performance indicators relevant to the particular business; and the outcome of those policies.<sup>276</sup> Accordingly, the EU Directive is expected to improve the disclosure of the measures adopted by large companies on their non-financial information such as human rights, and to enhance the consistency and comparability of such non-financial information.<sup>277</sup>

The EU Directive supports a non-prescriptive approach. In producing the statement, companies can consider any related frameworks that they think the most useful. In this sense, companies can flexibly apply guidelines produced by international organizations to their reporting. For example, not only the UNGP but also the OECD MNE Guidelines and the Due Diligence guidance for responsible supply chains of Minerals from Conflict-Affected and High-Risk Area, and the ILO's tripartite declaration can be used for the reporting appropriately.<sup>278</sup> In terms of methodology for reporting non-financial information, the European Commission published a report in June 2017 in accordance

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<sup>274</sup> European Commission, 'National transpositions by Member State' (2016) <<http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32014L0095>> assessed 2 June 2017.

<sup>275</sup> European Commission, (EC) 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and group (22 October 2014), art. 1.

<sup>276</sup> Allen & Overy, '2017 Heralds new non-financial reporting requirements across Europe' (Feb 2017) Allen & Overy LLP, 2.

<sup>277</sup> European Commission, 'Consultation document: non-binding guidelines for reporting of non-financial information by companies' (2016) 4.

<sup>278</sup> Ibid.

with Article 2 of the Directive.<sup>279</sup> For this work, the Commission conducted public consultations and online questionnaire survey that received 346 responses.<sup>280</sup>

iii. Case example: the UK's regulations implementing the EU directive and the UNGP

As part of its attempts to implement the environment for business and human rights even before the adoption of the EU directive and the UNGP, the UK government had legislated various laws such as 'the Health and Safety at Work Act 1974', 'the Company Act 2006', 'the UK Bribery Act 2010' and 'the Modern Slavery Act 2015', which are all related to increasing corporate liability for human rights abuses. Furthermore, in the NAP, the UK government has clearly indicated its willingness to reinforce compliance with international law and standards such as the ILO's eight core conventions and principles, the UN's human rights treaties, and the ECHR.<sup>281</sup> In this regard, the UK government was already well positioned to meet the requirements of the EU Directive, and to transpose it into national legislation by amending already existing laws. For example, the Companies Act 2006 was revised based on the EU Directive in the 2013 and 2016.

The revision of the Company Act (the 2013 Regulations) states that "directors of quoted companies should provide the non-financial information in the annual strategic report." The revision is called "the Strategic Report Requirements" and is presented as necessary for an understanding of the development, performance or position of the company's business.<sup>282</sup> However, some misalignment between the UK Company Act and the EU Directive have been identified.<sup>283</sup> For example, while the EU directive requires a focus on anti-bribery and corruption matters, the Strategic Report Requirements of the Company Act do not cover such matters. Furthermore, the scope of the Company Act targets the quoted company, whilst the EU directive refers to

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<sup>279</sup> European Commission, 'Guidelines on non-financial reporting: methodology for reporting non-financial information' (26 June 2017).

<sup>280</sup> European Commission, 'Non-binding guidelines on methodology for reporting non-financial information' (2016) <[http://ec.europa.eu/finance/consultations/2016/non-financial-reporting-guidelines/index\\_en.htm](http://ec.europa.eu/finance/consultations/2016/non-financial-reporting-guidelines/index_en.htm)> accessed 2 June 2017.

<sup>281</sup> UK Government, 'NAP', 7.

<sup>282</sup> Department for Business Innovation & Skills, 'FRC Guidance on Narrative Reporting' (Letter) (30 April 2014) available at <<https://frc.org.uk/FRC-Documents/Accounting-and-Reporting/BIS-letter-guidance-on-narrative-reporting.pdf>> accessed 15 June 2017.

<sup>283</sup> UK, 'NAP', 19.

companies with more than 500 employees and ‘public interest entities’. With this in mind, ‘the Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulation’ was introduced in the amendment of Part 15 of the Companies Act, which became the 2016 Regulations. As a result, the 2016 Regulations were amended as a way of requiring the companies who are large public interest entities with more than 500 employees to provide strategic reports about non-financial information. In addition, not only large public interest entities but also quoted companies with less than 500 employees can continue to comply with the strategic report requirement. At last, all companies who are covered by the regulations can also report any relevant information for their disclosure responsibility in the Strategic Report, although the EU Directive does not require this.

As a further example of the UK’s commitment to implementing the NAP, the UK adopted the Modern Slavery Act which establishes that companies with a global annual turnover of 36 million pounds or more operating in the UK should ensure that slavery and human trafficking are not committed in their business activities and supply chains. Accordingly, the board of the company must approve and publish ‘the slavery and human trafficking statement’ for each financial year on their website.<sup>284</sup> According to Article 54(5) of the Act, the statement must include information such as:<sup>285</sup>

- a) the organization’s structure, business and supply chains;
- b) policies in relation to slavery and human trafficking;
- c) 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) training about slavery and human trafficking available to its staff.

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<sup>284</sup> Ibid., 8.

<sup>285</sup> Modern Slavery Act 2015, Art. 54(5).

If the company fails to produce and publish a statement for a particular financial year, the government (Secretary of State) may seek an injunction through the High Court requiring such compliance.<sup>286</sup> If the company still does not comply with the injunction, they will be in contempt of a court order, which is punishable by an unlimited fine.<sup>287</sup> In addition, the Independent Anti-Slavery Commissioner was appointed to review the increase in the number of victims, and prosecutions and convictions of traffickers as well as ensure appropriate support for victims.<sup>288</sup>

This legislation of the Modern Slavery Act is expected to improve the situation that around 46 million people live in slavery worldwide and 13,000 potential victims of slavery in the UK. It is also applied to at least 12,000 companies globally. According to the registry operated by the Business and Human Rights Resource Centre, as of June 2017 around 2105 statements of 27 different sectors were recorded in 33 countries.<sup>289</sup> This registry functions as a central platform supported by the UK government to keep it informed about the statements produced and the status of participating companies. On the other hand, to achieve the desired effect of the Modern Slavery Act, some have argued that central oversight of its implementation is needed, as well as an explicit independent mandate for the Anti-Slavery Commissioner to collate and analyze data on modern slavery.<sup>290</sup> The Anti-Slavery Monitoring Group, consisting of NGOs and legal experts, recommends that the UK Government develop a timetable, monitoring framework, wide data strategy and impact analysis of the Act, based on victims' voices and in collaboration with the Anti-Slavery Commissioner.<sup>291</sup>

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<sup>286</sup> UK Home Secretary, 'Transparency in Supply Chains etc: A practical guide' (2016) 6.

<sup>287</sup> Ibid.

<sup>288</sup> Modern Slavery Act 2015, Art. 40.

<sup>289</sup> Modern Slavery Registry, <<http://www.modernslaveryregistry.org/>> accessed 31 May 2017.

<sup>290</sup> The Anti Trafficking Monitoring Group, 'Class Acts? Examining modern slavery legislations across the UK' (October 2016) 9.

<sup>291</sup> Ibid.

## **Chapter 5: How to Improve Corporate HRDD**

### **5.1. Requirements to improve corporate HRDD**

#### **5.1.1. Legislation of mandatory due diligence reporting**

As discussed in Chapter 3, the key findings published by CHRB clearly evidence that current HRDD in the private sector has brought very limited results. As mentioned when reviewing the findings, corporate human rights performance, including HRDD, averagely scored a mere 28.7%, although 70% of companies reviewed had indicated a commitment to business and human rights through their human rights policy. Notably, only 7% of companies systematically tracked and mitigated their human rights risks, and only one company among 98 conducted effective communication with affected people in local communities. These figures suggest that solving the gaps found between existing business practice and real compliance with the UNGP is of fundamental importance to improve corporate responsibility.

Moving from State and corporate written commitments to practice is a significant challenge. However, it is also a fact that the State action to reinforce corporate conduct remains very limited. Although already in 2014, the UNHRC recommended the adoption of NAPs, only fourteen countries have so far established one. Moreover, as seen in these existing NAPs, States' commitments to translate these plans into binding domestic legislation are also very limited. Without a baseline study, gap analysis, timeline for completion, monitoring and effective multi-stakeholder participation, most of the NAPs were mainly a written reinforcement of the status quo. In this sense, States seem to perceive their duty as limited by only encouraging corporate voluntary action, rather than as a duty to adopt a legal framework which requires corporations to improve their human rights performance in practice.

For example, when it comes to the debate on extraterritorial obligations in international law or on whether there exists a duty to international cooperation and assistance, the UK has adopted a conservative stance in its NAP, rather than supporting the development of the legal debates at the international level or cooperating in initiatives such as the one towards a business and human rights binding treaty. In this regard, supporters of the binding treaty suggest that IGWG may consider the following requirements: states' duty to protect human rights, including extraterritorially; establishment of a new mechanism to monitor compliance of State's direct human rights obligation; and State duty of mutual legal assistance to ensure access to remedy for victims.<sup>292</sup> As explained in chapter 4, to ensure that States' actions are more effective, States' explicit role should be to require companies to carry out mandatory HRDD, to publicly report the outcomes of such HRDD and to provide remediation when human rights abuse occurs despite such HRDD efforts.

The fact that corporate human rights performance is weak both quantitatively and qualitatively forces us to consider the necessity of regulatory measures to reinforce corporate responsibility strategies for the implementation of the UNGP. In this regard, mandatory due diligence reporting laws can be a meaningful step, as seen in the examples of the French government.<sup>293</sup> Fundamentally, it is necessary to reflect how company can ensure respect for human rights with minimal or no external intervention or regulation. As argued by FASTERLING, for many corporations "[m]anaging the risks of adverse human rights impacts pursuant to UNGP requirements is conditional upon treating human rights respect as a corporate objective that determines a corporation's strategic concerns."<sup>294</sup> As a result, for many corporation HRDD is based mainly on moral commitments, which can however be easily dismissed to prioritize the interests of major shareholders and investors.<sup>295</sup>

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<sup>292</sup> Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (13 November 2015) *Business and Human Rights Journal* 1: 41-67.

<sup>293</sup> Other than France, Swiss is on the process of passing legislation. Swiss Responsible Business Initiative was launched based on the petition of over 140,000 citizens. Accordingly, it is going to be put to the popular vote for revision of art 101(a) about the 'responsibility of business' in Swiss Federal Constitution. If it is passed, Swiss based companies will be legally obliged to conduct due diligence transnationally. See also <<http://konzern-initiative.ch/initiativtext/?lang=en>>

<sup>294</sup> Björn FASTERLING (n 126), 2.

<sup>295</sup> *Ibid.*, 22.

As evidenced throughout this thesis, current challenges in implementing HRDD are related to the scope of such due diligence. The former SRSG has recognized the difficulty of conducting due diligence where business enterprises have large numbers of entities in the supply chain.<sup>296</sup> In such contexts he recommended that company prioritize the most salient issues they are facing, and reflected this recommendation in the commentary of UNGP 17. However, this measure might decrease the quality of HRDD if the prioritized issues do not coincide with the needs of the rights-holders. Of course, if considering time and available resources, it is realistic and pragmatic to prioritize the issues that appear to be more significant. Nevertheless, in selecting the issues to be prioritized for HRDD purposes, companies might strategically ignore the voices of relevant rights-holders. This, in turn, would result in a failure to effectively narrow the accountability gap. Conducting HRDD by selecting only the most salient issues chosen by corporations obstructs the original purpose of preventing human rights abuses and undermines from the outset the effectiveness of the HRDD process itself.

Accordingly, without adequate intervention or regulation, promoting corporate responsibility only through only self-regulation might be not a realistic way to change corporate conduct. It would be appropriate to state, at this point, that State action should not be dependent on or influence by corporate interests, but rather should be foster the creation of a conducive environment which can guarantee better standards. Although the UNGP emphasize regulatory measures as well as voluntary commitments, it is a known fact that the incorporation of the UNGP into national legislations has been painfully slow.<sup>297</sup> UN Treaty Bodies have also highlighted the limited influence of the UNGP on national legislation.<sup>298</sup> In this regard, legislation of mandatory HRDD can be a practical way to increase corporate participation and to improve awareness of HRDD processes. State action through legislation should therefore be expanded.

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<sup>296</sup> SRSG, 'Guiding Principles', para. 18.

<sup>297</sup> Swiss Coalition for Corporate Justice, 'This is how the Initiative works' <<http://konzern-initiative.ch/initiativtext/?lang=en>> accessed 4 July 2017.

<sup>298</sup> UNHRC, 'Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (4 January 2017) A/HRC/34/47, paras.104, 59 and 68.

### 5.1.2. Monitoring mechanisms reviewing the process of HRDD

Even when implementing HRDD, a corporation can face the challenge that its practices may not be sufficient to prevent human rights abuses. The UNGP established a premise that conducting HRDD can prevent human rights adverse ‘impacts’. However, the UNGP do not suggest any specific monitoring system to evaluate or verify that corporations effectively conduct such HRDD. Mandatory due diligence reporting laws that have been so far introduced consider the publication of a company’s prevention plans against human rights abuses sufficient for compliance with the requirements of HRDD. If most corporations were to focus on submitting their reports after an initial review, for instance, they would neglect periodical and system monitoring during the business operations. Especially, it needs to be noted that existing legislations do not ensure the monitoring of human rights impacts in ongoing business operations. This periodic monitoring would be necessarily required extraterritorially where most of the subsidiary companies are located.

On the other hand, establishing a monitoring mechanism for HRDD is different from existing non-judicial based complaint mechanisms. Most of the complaint mechanisms such as the OECD MNE guidelines mainly address remediation for victims affected by business operations. Likewise, internal grievance mechanisms by companies focus on the situation after such abuses have occurred. On the other hand, safeguard mechanisms in IFIs like the World Bank and the Asian Development Bank have the function of adopting safeguards in project planning and redressing the grievance in ‘state-led development projects’. However, in case of private business, there is no effective measure beyond submission of due diligence reports. Accordingly, an effective monitoring mechanism carried out by an independent organization and addressing the overall process of HRDD can be an effective way to address the limitations of existing mandatory due diligence reporting laws.

Monitoring mechanism for HRDD can be helpful, for instance, to address human rights issues in conflict-affected areas. UNGP 7 emphasizes that in such areas States should make sure that business pay special attention in managing human rights-related risks in their activities and business relationships. In this sense, home States should be able to provide adequate assistance so that business enterprises are not involved with human

rights abuses in conflict areas.<sup>299</sup> By directly conducting monitoring in host States, home States can provide support for companies to prevent heightened human rights risks. For example, home State's embassies abroad might be able to play a vital role in monitoring HRDD by cooperating with local NGOs and trade unions. Conducting monitoring in collaboration with civil society in host States can enable the gathering of accurate, objective and independent information.

To implement effective monitoring, it is important to evaluate whether HRDD is conducted based on human rights frameworks and principles both in terms of process and of result. In this regard, the State's role is to assess relevant corporate practice and assist companies to promote their responsibility by cooperating with NGOs, UN agencies and NHRIs. Even though mandatory law for HRDD is passed, regular monitoring in host states is a necessary further step which should be established to create a conducive environment for human rights in corporate operations.

### 5.1.3. Development of an integral approach to national legislation

In a business and human rights context, it is particularly important to develop an integral approach, based on human rights principles, to the different relevant fields of law. In particular, corporate law, investment law and tax law should be coherently based on human rights principles so as to achieve common results. This would enable State governments to effectively exercise their jurisdiction to reinforce corporate responsibility and obligations established in such legal systems.

In corporate law, corporations have five core structural characteristics of business corporations: i) legal personality; ii) limited liability; iii) transferable shares; iv) centralized management under a board structure; and v) shared ownership by contributors of equity capital.<sup>300</sup> Based on these characteristics in corporate law, corporations have a separate legal personality, as a single contracting party distinct from the firm's owner, and has a limited liability enabling the firm's owners and entity to protect their assets from shareholder claims or claims for a subsidiary's human rights

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<sup>299</sup> SRSG, 'Guiding Principles', para. 7.

<sup>300</sup> Reinier Kraakman (eds), *The Anatomy of Corporate Law – A comparative and Functional Approach* (Oxford Univ. Press 3<sup>rd</sup> ed. 2017) 5.

abuses.<sup>301</sup> In this regard, as explained in chapter 2.2.3, corporate law principles of separate personality and limited liability, may allow parent companies to escape responsibility for abuses committed by subsidiaries in host States. Accordingly, doctrine such as the ‘piercing the corporate veil’ in corporate law would resolve adverse human rights impacts as a way of achieving liability.

On the other hand, with regards to investment treaties and free trade instruments, there has been much criticism about the asymmetry between corporate rights and obligations.<sup>302</sup> In other words, companies benefit significantly from the protection of trade law and investment law but, as already discussed in this thesis, do not have corresponding duties and obligations. Furthermore, States’ duties to protect human rights often conflict with their duties to protect investors under investment law. Whilst corporations can bring their cases to international investment arbitration against states, there is no a corresponding mechanism to address corporate obligations in the same effective and binding way.<sup>303</sup> In this regard, there have been ongoing discussions in the business and human rights field. Appropriate investors’ obligations and human rights impact assessments might be able to be established in law to ensure investors’ compliance with human rights norms.<sup>304</sup>

Likewise, in the field of tax law, many States have been criticized for neglecting the problem of tax evasion and avoidance by companies “because of the belief that State must sign bilateral investment treaties in order to attract foreign direct investment”.<sup>305</sup> In this regard, NGOs are advocating to build a monitoring system to prohibit aggressive tax avoidance and tax havens to ensure transparency and accountability of corporations.<sup>306</sup> In the same context, the recent General Comment 24 of the CESCR about business activities also pointed out that lowering tax rates undermines the State ability to mobilize resources to realize ESC rights, and thus this phenomenon is inconsistent with the duties of State parties.<sup>307</sup> Furthermore, according to the CESCR,

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<sup>301</sup> Ibid., 9.

<sup>302</sup> UNHRC (n 298), para. 30.

<sup>303</sup> Ibid.

<sup>304</sup> Ibid., para. 106.

<sup>305</sup> Ibid., para. 28.

<sup>306</sup> Ibid., para. 95.

<sup>307</sup> UN CESCR, ‘General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities’ (23 June 2017) para. 37.

existing practice about bank secrecy and permissive rules on corporate tax needs to be changed, because it adversely affects the State duty to take appropriate measures to the maximum of their available resources.<sup>308</sup>

A thorough review of how to mainstream human rights principles in each field of law is out of the scope for this thesis. However, it is important to note that States will need to adopt a coherent and integral approach in different legal areas to develop effective legislation in the business and human rights context. As explained above, State should take into account their human rights obligations in the negotiation, conclusion and interpretation of the trade and investment treaties, as they ultimately have a duty to protect rights-holders from the adverse human rights impacts resulting from investment and trade flows and from tax evasion.<sup>309</sup>

## **5.2. Role of the State in reinforcing corporate responsibility**

### **5.2.1. A focus on the State positive duty rather than on social and moral obligations**

As discussed in detail at the beginning of this thesis, the UNGP have undoubtedly contributed to developing a new interpretation of the role of the State in relation to business activity and corporate responsibility. States, as primary duty-bearers, have in fact a vital role to play in overcoming the current limitations of the UNGP. Accordingly, States explicitly need to accept that they have a positive duty to protect human rights from corporate abuse both within and outside their territory. As previously discussed, in implementing the UNGP in the NAPs it is apparent that States often take a weak stance that just ‘encourages’ companies to promote human rights responsibility in HRDD, mainly through voluntary actions. However, State actions should not be limited to maintaining the status quo, but should change towards the realization of this positive duty. By affirming all reasonable measures to prevent, promote human rights and remediate corporate abuse when it occurs, both in home and host countries, States can realize a positive duty to protect human rights. General Comment no.24 of the CESCR

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<sup>308</sup> Ibid.

<sup>309</sup> Ibid., paras. 13, 25 and 29.

that also reiterates that States have a positive duty to adopt a legal framework requiring corporations to conduct HRDD.<sup>310</sup> Furthermore, the CESCR recommended that States should consider imposing criminal or administrative sanctions and penalties if corporations fail to act with due diligence.<sup>311</sup>

On the other hand, as discussed in chapter 2.2.1, according to the UNGP there is no duty under international human rights law to regulate the extraterritorial activities of corporations.<sup>312</sup> Nevertheless, without preventing corporate human rights abuses taking place extraterritorially, States would not be able to realize their positive duty to provide reasonable measures for victims under the ICESCR.<sup>313</sup> The debate on States' extraterritorial obligations as pertaining to business and human rights needs to be further developed. As explained earlier in this thesis, convincing arguments have been made that the ICESCR does not have a clause that delimits its obligations to a State's territory or jurisdiction.<sup>314</sup> State Parties' obligation to take all appropriate measures to progressively realize ESC rights is meaningfully addressed in the article 2(1) of the ICESCR, which reads as follows:

“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.”

Likewise, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) do not have clauses on jurisdictional limitation, and in the case of the Convention on the Rights of Persons with Disabilities (ICRPD), its provisions specify the ‘appropriate and effective measures’ which should

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<sup>310</sup> Ibid., para. 16.

<sup>311</sup> Ibid., para. 15.

<sup>312</sup> SRSG, ‘Guiding Principles’, Commentary on Principle 2.

<sup>313</sup> UN CESCR (n 307), para. 32.

<sup>314</sup> Malcolm Langford (ed), *Global justice, state duties: the extraterritorial scope of economic, social and cultural rights in international law* (Cambridge Univ. Press 2013) 57.

be taken in terms of international cooperation.<sup>315</sup> As such, international human rights laws point out the States' positive duty to respect, protect and fulfill human rights even extraterritorially, an obligation which stretches further than the 'do no harm' principle.

The ongoing negotiations on a binding treaty for business and human rights also focuses significantly on States' extraterritorial obligations. Since the IGWG was established in June 2014, extraterritorial obligations have been part of the debate, as a key issue for corporate legal liability. During the second session in October 2016, several panelists pointed out that a binding instrument will have to include both home and host states to protect human rights and redress violations committed by corporations.<sup>316</sup> There is of course a long way to go, as this is only the initial stage of the negotiations. It remains to be seen whether States will eventually accept that their existing duties expand beyond their territorial borders, and thus that there exists a positive duty to progressively realize human rights including in the context of business operations, as well as a duty to prevent harm by corporate actors, wherever they operate.

#### 5.2.2. International cooperation to improve access to remedy in host States

A State's obligation of cooperation and assistance with respect to human rights is basically found in articles 1, 55, and 56 of the UN Charter, the Preamble of the UDHR, and articles 2(1), 11(1), 11(2), 15(4), 22 and 23 of the ICESCR.<sup>317</sup> As an umbrella provision, article 2(1) ICESCR reiterates the need to undertake international cooperation. General Comment No. 3 of the CESCR also clarified that international cooperation for development is an obligation of all states for the realization of ESC rights.<sup>318</sup> Nevertheless, the legal nature of international cooperation remains a controversial issue. Some Western States have argued that international cooperation and assistance are not a State duty. During the travaux préparatoires of the ICESCR, the issue of international cooperation was not supported in the debate for fear that "[i]t

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<sup>315</sup> Ibid., 58.

<sup>316</sup> UNHRC (n 298), para 42.

<sup>317</sup> Takhmina Karimova, 'The Nature and Meaning of 'International Assistance and Cooperation' under the International Covenant on Economic, Social and Cultural Rights' in Eibe Riedel, Giles Giacca, and Christopher Golay (eds) *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford Univ. Press 2014) 163.

<sup>318</sup> UN CESCR, 'General Comment No.3: 'The Nature of States Parties' Obligation' (14 December 1990) E/1991/23, para. 14.

would be an excuse for countries to evade any obligation on the basis of inadequacy of international assistance.”<sup>319</sup> Likewise, in the first session of the Task Force on the Right to Development in 2004, Sweden’s representative stated as follows: “Our position is no secret, there is no legal obligation of international cooperation and assistance; we do it out of a sense of international solidarity...we have a moral obligation.”<sup>320</sup> However, although States continue to disagree on the nature of State’s obligations in relation to international cooperation, there is no doubt that it is crucial to achieve the full realization of human rights. This latter point has been consistently re-affirmed by the UN human rights treaty bodies, including the ComRC and the Committee on the Rights of Persons with Disabilities (CRPD). For example, Article 4 of the CRC points out “undertake such measures to maximum extent of their available resources and, where needed, within the framework of international cooperation.”<sup>321</sup>

In business and human rights, international cooperation can be a crucial measure to strengthen access to remedy in the host states. States should commit to implementing the UNGP by cooperating with host countries and civil society to narrow the remediation gap for victims of business-related human rights abuses. To do so, State can cooperate with host country’s police and judicial authorities in collecting evidence for the effective investigation of complaints, and enabling access to remedy for human rights abuses.<sup>322</sup> Likewise, in the process of developing a binding treaty on business and human rights, the importance of exchanging technical expertise and information among states is a key element of international cooperation.<sup>323</sup> As mentioned above, General Comment no.24, which has been recently adopted by the CESCR, also highlights that negative conflicts of jurisdiction may result in legal uncertainty and inability for victims to access to remedy, and that these can be solved through international cooperation.<sup>324</sup> The Committee also referred to the research outcome of ‘the Accountability and Remedy Project by the OHCHR’ that was launched in 2014 according to UNHRC resolution 26/22. In the outcome report published in June 2016,

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<sup>319</sup> P. Alston and G. Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (9 Human Rights Quarterly 1987), 156-229 (as cited in Takhmina Karimova (n 317), 166).

<sup>320</sup> M. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford Univ. Press 2007) 99 (as cited in Malcolm Langford (ed) 62).

<sup>321</sup> Takhmina Karimova (n 317), 171.

<sup>322</sup> UNHRC (n 298), para. 110.

<sup>323</sup> *Ibid.*, para. 83 and 90.

<sup>324</sup> UN CESCR (n 307), para. 35.

it is also emphasized that international cooperation in cross-border cases has a crucial bearing on ensuring accountability and access to remedy in practice.<sup>325</sup> In this regard, the CESCR recommends that the “use of direct communication between law enforcement agencies in mutual assistance should be encouraged in order to provide for swifter action, particularly in the prosecution of criminal offences”.<sup>326</sup>

In cooperating with the host States, meaningful participation of civil society including NGOs, trade unions and human rights defenders in host country is also essential. NGOs are in the front line in finding and monitoring adverse human rights violations by corporations in local community, providing adequate information for victims, putting public pressure on human rights abuses, and proposing relevant policies and legislations to governments. International cooperation for victims in host states should be based on the principles of participation, accountability, non-discrimination, empowerment and linkage to the human rights instruments.<sup>327</sup>

### 5.2.3. Creating an enabling environment for effective HRDD

At last, States are required to make an effort in creating an enabling environment in which corporations can conduct HRDD in a better condition. For this purpose, States should identify the reasons for which corporations do not comply with existing legislations, and should also find a way to effectively implement such legislations. To implement the UNGP in a better way, this thesis highlights the need for legislation aimed at improving corporate conduct, and the importance of focusing on the States’ positive duty, as often re-affirmed by UN Treaty Bodies. In this regard, the creation of an enabling environment for human rights-based business should become a prerequisite for both State’s and business conduct.

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<sup>325</sup> UNHRC, ‘Report of the United Nations High Commissioner for Human Rights; Improving accountability and access to remedy for victims of business-related human rights abuse’ (10 May 2016) para 25.

<sup>326</sup> UN CESCR (n 307), para 34.

<sup>327</sup> 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’ (June 2014) 28-29.

First of all, to help corporations follow the legislation, it is required for States to convince corporations that operating business based on human rights principles is justifiable and beneficial to solve the challenges that they encounter in their business activities. States also need to understand corporate internal and external challenges found in business operations. At the business management level, corporations often lack awareness and capacity for mainstreaming human rights in corporate governance. Corporations also struggle to adjust to the rapidly changing institutional environment, and within it to understand the significance of business and human rights. In these situations, the State is the primary actor responsible for creating an environment that enables corporations to solve their challenges and change their cultural mindset.

Secondly, ways for effective legal enforcement should also be considered. It is often found that international human rights law and policy have failed to improve respect for human rights.<sup>328</sup> For example, according to Freedom House's scores' results, the average global political rights score increased only slightly although 40 countries have ratified the ICCPR since 1990s.<sup>329</sup> As such, governmental legislations to implement international law have not always the desired effect in society. To improve legal impacts in practice, efforts should be made to bridge the gap between national and international laws, and in ensuring national enforcement of international laws.

Governmental agencies fundamentally need to re-consider their own social role within the context of business and human rights. Even though many legislations at national and international level are already in place, the impact of State's actions is weak if compared to power held by corporations in the market system. In this regard, more than as a regulator, States need to have the capacity to mobilize people's empowerment and to listen to their demands against corporate unfair practices and adverse human rights impacts. People's meaningful participation affects business actors positively, and thus legislations can be effective means to improve corporate responsibility. In conclusion, the State's multi-dimensional role in building an enabling environment for the effective enforcement of legislation should include a duty to ensure businesses always conduct their activities in full respect of human rights.

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<sup>328</sup> Eric A. Posner, *The Twilight of Human Rights Law* (Oxford Univ. Press 2014) 104.

<sup>329</sup> *Ibid.*, 74.

Above all, States should clarify that legislations in this field has the purpose of recognizing the fundamental purpose of economic growth and development. Article 3 of the Declaration on the Right to Development states that “States have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development”.<sup>330</sup> As such, States should strengthen their political commitment to mainstream human rights principles into all processes of development which are affected by business actors. In this regard, States have an explicit role in the sense that the fundamental purpose of development is the full realization of all human rights, affirming that economic development and social development are inter-related. In the business and human rights context, States should be leaders of change and ensure that business activities fundamentally pursue the people-centred development, and that both states’ and business resources are mobilized to eliminate all forms of inequality. Thus, States would be able to create an enabling environment for business to operate in line with shared human rights principles, by overcoming legal and political barriers in implementing the UNGP.

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<sup>330</sup>UN General Assembly, ‘Declaration on the Right to Development’ (4 December 1986) A/RES/41/128, article 3.

## **Chapter 6: Conclusion**

This thesis sets out to clarify the role of the State role in improving corporate human rights due diligence in business operations following the endorsement of the UNGP. For this purpose, this research reviewed corporate human rights performance, including HRDD as indicated in the CHRB's report. As a result, the analysis has indicated that corporate HRDD practices show visible limitations in the practice of the companies reviewed by CHRB, with a striking difference from what the same companies have declared in their policy commitments. The results urge States to play a vital role to improve the quality of HRDD in business operations. To do so, substantial measures have to be set out as part of legislations. As seen in the ongoing discussion on the binding treaty process led by the IGWG, State actions through a variety of legislations and international cooperation in and outside their territories are becoming an increasingly important issue. Going beyond mere declaratory statements in the NAPs, States should develop laws and policies to reinforce corporate responsibility. In this regard, this thesis emphasizes the crucial importance of corporate mandatory due diligence; regular monitoring carried out by independent organizations, for ongoing review of the HRDD process; and the development of an integral approach in different legal fields.

The thesis has also outlined that the UNGP have clear shortcomings in developing corporate accountability. For instance, they do not fully reflect the existing debate on States' extraterritorial obligations; fail to refine the legal status of corporations as duty bearers; and thus, limit a parent company's liability in the supply chain. Despite the limitations of the UNGP, some States have showed their willingness to implement their duty to ensure corporate responsibility by establishing NAP. So far, fourteen States have adopted a NAP. It is found that they have tried to identify gaps and achieve policy coherence, and to provide guidance and incentives through partnership with corporations, as part of their willingness to create support mechanisms for companies

to respect human rights. Some States have also tried to promote international cooperation to prevent business-related human rights abuses in host states. On the other hand, legislative efforts are seen as the weakest part among State action aimed at strengthening business and human rights, therefore it remains to be seen to what extent State action has in fact resulted in a change in corporate culture, considering the current state of HRDD in practice.

This thesis argues that the absence of the corporate legal obligation in the UNGP decreases the effectiveness of implementing a HRDD process that truly ensures corporate responsibility. In this regard, State should clarify their role with respect to their obligations to improve the current state of corporate practice. The UNGP focused on preventing the occurrence from human rights violations by eliminating complicit behaviours through HRDD practice.<sup>331</sup> However, as repeatedly mentioned, it has been revealed that corporations are only using HRDD as a preventative measure in a very limited way. It is for this reason that more effective legislation as well as political efforts to help corporations to accept regulatory frameworks are required in implementing effective HRDD.

As practical steps to reinforce corporate responsibility, this thesis recommends the establishment of laws which establish mandatory due diligence. It is a positive change that the French government has introducing a mandatory due diligence reporting law. This regulatory framework is expected to increase the number of corporations carrying out HRDD. However, the quality of the HRDD mechanisms adopted should also be considered when introducing new legislation. The thesis also recommends the adoption of a mandatory monitoring mechanism to independently review the process of HRDD in both home and host states. Meaningful participation of INGOs, trade unions and indigenous people is important throughout the monitoring process to acquire the adequate information about the practice of HRDD and the facts related to human rights abuses. In addition, it is argued that States should have an integral and coherent approach to national legislation across various fields of law, such as corporate law, investment law and trade law. Especially, corporate responsibilities and obligations

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<sup>331</sup> Sabine Michalowski, 'Due diligence and complicity: a relationship in need of clarification' in Deva and Bilchitz (eds) 224.

should be clearly included in investment treaties and trade agreements. States also have an obligation to respect human rights when carrying out investment projects, especially in the context of public contract. As an emerging issue, tax avoidance will need to be properly addressed, as it is closely related to the resources that States need to mobilize in order to fulfil all human rights.<sup>332</sup>

In conclusion, it is apparent that States should realize their positive duty to prevent business-related human rights violations through their national governance and international relations efforts. As seen in existing NAPs, it is not enough to merely ‘encourage’ corporate responsibility. If corporations continue to abuse human rights in home and host states, States would be hardly have fulfilled their duty to protect. Accordingly, States should accept their positive duty and be ready to follow the progressive interpretations of the CESCR. To do so, this thesis argues that States have an extraterritorial obligation to prevent human rights abuses in host states. International cooperation can be an effective way to promote access to remedy, in the sense that human rights abuses occur more frequently in supply chains outside the national territory. Cross-border cooperation between State agencies and judicial bodies would have to be effectively considered in host States. At last, States should create an enabling environment for the respect, protection and fulfillment of human rights during business operations, in which relevant legislations can make a crucial impact on society. Although it may be through that structural social problems such as inequality cannot be solved through legislation alone, consistent with article 28 UDHR, a State’s obligation to realize all human rights include legislation which can effectively contribute to creating a new international environment, based on social and economic justice.

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<sup>332</sup> Shane Darcy, ‘The elephant in the room’: Corporate tax avoidance & Business and Human Rights’ (12 August 2016) *Business and Human Rights Journal* 2: 1-30, 1.

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