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**HUMAN RIGHTS BASED BUSINESS:  
Redefining the role of enterprises on  
the business and human rights debate**

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## **ABSTRACT**

The Guiding Principles of Business and Human Rights reformulate the duty of corporations to respect human rights in order to encompass preventing human rights abuses from direct partners. In fact, the Guiding Principles set out a new paradigm in the field of Business and Human Rights which interprets enterprises as not only possible of committing human rights abuses but also of defending and promoting human rights. Interestingly, while international initiatives consider primarily Multinational Enterprises (MNEs), at the centre of the Business and Human Rights debate, there are other business configurations which deserve attention for their potential of factual human rights' impact including Social Enterprises (SEs) and Small and Medium Enterprises (SMEs).

The emergence of this paradigm shift with regards to the perception of the role of enterprises in human rights alludes to the possible emergence or existence of enterprises which may constitute Human Rights Based Business (HRBB). But, what leads us to that assumption? And can we actually believe in their existence?

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## INTRODUCTION

An absolute state centric system in the protection of human rights at the domestic and international levels is becoming obsolete. Thus far, the state remains the sole legitimized agent which is responsible for the welfare and human rights protection of its entire population, however interactions between domestic and international actors signifies an ever increasingly difficulty of maintaining the state's effective capacity of protection. In truth, the processes of globalisation, whether economic, social or political and in spite of the many benefits they have brought to our lives, such as the increased speed of information, communication and circulation, have also permitted the impact of human rights of all actors beyond geographical and political barriers.<sup>1</sup>

The private for profit sector, particularly in its transnational form, is capable of committing serious human rights abuses. In recent years, cases regarding multinational enterprises (MNEs) and corporate violations of *non derogable* human rights have included the unlawful killing of citizens by private military companies (BlackWater, 2007); forced labour (Nippon Steel and Sumitomo Metal Corp, 2013) and torture (Quosmos, 2012).<sup>2</sup>

The acknowledgement that business has the capacity to negatively impact human rights triggers the hypothesis that perhaps business also has the capacity to improve social context and contribute towards the advancement of human rights. A paradigm shift in which business becomes not only perceived as a possible human rights threat but a human rights defender would undoubtedly enhance the field of Business and Human Rights.

An enterprise that would assume such a form and role could effectively be considered a Human Rights Based Business (HRBB). At a basic understanding a HRBB could be

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<sup>1</sup> De Feyter, K., Globalisation and Human Rights in GOMEZ ISA, F. and DE FEYTER, K. (eds.), *International Human Rights Law in a Global Context* (University of Deusto, Bilbao, 2009), pp. 51-96.

<sup>2</sup> Zerk, J., *Corporate liability for gross human rights abuses -Towards a fairer and more effective system of domestic law remedies* (OHCHR, 2013) available at: <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

formulated as an enterprise that was built to facilitate the enjoyment of a human right and that values the advancement of human rights over simple profit maximisation.

In fact, due to a panoply of factors, of which public reputation and fear of the loss of anonymity are most salient, business has gradually developed an eagerness to adopt and even to establish norms and practices conducive to human rights protection.

Business aspirations to ascend to the capacity of a human rights defenders may however prove unconvincing. While business is proactive in participating and creating norms that will help the pursuit of its private interests, namely the eagerly adopted and sometimes self-imposed *lex mercatoria*, it might be stingy in the extension of its benevolent efforts in pursuit of public interest.<sup>3</sup> Cynics also claim that a company's bottom line, as a legal entity, is to remain increasingly profitable for the benefit of its shareholders neglecting all other factors including those of humanitarian concern.<sup>4</sup>

This thesis comes as an attempt to further the understanding on a possible redefinition of the role of enterprises within the debate of Business and Human Rights by moving them from the scope of human rights threat to an understanding in which enterprises are also seen as an actor that might defend or even promote the advancement of human rights.

Chapter 1, will analyse how states, recognising their inadequacy in effectively protecting human rights in this highly globalised world and also recognising corporations' desire to be involved in the defence of human rights have resorted to international voluntary initiatives aimed at effectively inhibiting corporate human rights abuses. This chapter will mainly focus on the United Nations Guiding Principles (UNGP) and how it has been of special relevance for the effective establishment of a framework of Business and Human Rights. Chapter 1 is also aimed at the understanding of the significance of the principles contained in the UNDP with special regards to the formulation of the corporate duty to respect human rights.

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<sup>3</sup> Dilling, O., Herberg, M. and Winter, G. *Responsible business: self-governance and law in transnational economic transactions* (Hart Publishing, Oxford and Portland Oregon, 2008), pp. 1-3

<sup>4</sup> Lynn A Stout, 'The shareholder value myth', *European Financial Review* (13 April 2013) <http://www.europeanfinancialreview.com/?p=883April%2030,%202013> (consulted on 2 March 2015).

Chapter 2 will be dedicated to the exploration of the main criticism of the existing international initiatives with regards to Business and Human Rights. The chapter will explore poignant issues with regards to the voluntary nature of the duties imposed on enterprises; the absence of mechanisms for the supervision and enforcement of best practices and duties of enterprises; the international initiatives failure to properly address the government gaps and their lack of consideration of the thematic of protection of vulnerable groups. Additionally, chapter 2 is also aimed at the exploration of possible avenues for development of international law of business and human rights.

Chapter 3 will address Small, Medium Enterprises (SMEs) which, might unintentionally contribute for the betterment of society and human rights advancement through the creation of local employment which, improves the social economic situation of localities. In spite of SMEs not striving for any social impact, this chapter will explore how this business configuration can potentially constitute an actor for the advancement of human rights. Chapter 3 will also explore how SME's are supported in Europe, exploring the argument that the use of taxpayers' money for its support might allude to the possibility of SMEs being recognized as actors which benefit society.

Chapter 4 will address Social Enterprises (SEs) as they are the most interesting business configuration to advocate the existence of HRBB since they aim at the creation of social impact. Additionally chapter 4 explores criticism with regards to social enterprises, especially in its for-profit form, and it's supposed capacity valuing the creation of social impact (good) over financial profit (greed). Furthermore the chapter will also explore the Social Business Initiative as support system of SEs in Europe and the emergence of impact investment which aims at the financially supporting SEs for the creation of social impact.

Chapter 5 will conclude the thesis by formulating a more comprehensive understanding of HRBB with regards to its use of the best practices set by international initiatives and its comparison with SEs as understood in chapter 4. Chapter 5 will also entail a case-study of SE Ziqitza HealthCare Limited (ZHL) analyzing its role in the facilitation of the full realization of the right to health and its ethical conduct. Finally,



the chapter will give an understanding over the existence or not of HRBB, which would effectively be a basis for the redefinition of the role of enterprises in the field of Business and Human Rights.

## **METHODOLOGY**

Positioned in the academic discipline of law, the research methodology of the thesis is qualitative but not merely circumscribed to the legal normative approach, in fact the understanding of the duties to respect, protect and fulfil is reliant on the discipline of political science and the understanding of the proposed concept of Human Rights Based Business will entail basic knowledge of linguistics.

The jurisprudence analysis will be mainly referent to the EU law and International Human Rights Law which will entail a basic understanding of human rights as those basic human entitlements recognised in the International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic Social and Cultural Rights (ICESCR) and Universal Declaration of Human Rights.

Furthermore, academic thought with regards to the proposed field is especially relevant, for it details an understanding of the nuances of jurisprudence and international organisations initiatives that merits recognition. As well as analysing further documents authored by John Ruggie and authors commissioned by big international organisations, I will in fact seek to convey and explore theories of lesser known authors such as Gibson , Vaart and Doeringer. Reports, commentaries and observation of civil society groups will also be relevant to the understanding of the shortcomings of initiatives in the field of business and human rights.

## **1. INTERNATIONAL INITIATIVES AND DUTIES OF BUSINESS AND HUMAN RIGHTS**

Globalisation has rendered the solely domestic approach in the protection of human rights increasingly inadequate. The private for profit sector, particularly in its transnational form, possesses a hefty capacity of committing human rights transgressions.

Fearing the serious capacity of human rights transgressions by companies while also recognising their desire for inclusion in the protection of human rights, the United Nations (UN) has developed a series of initiatives to establish international rules regarding the behaviour of companies;

In this chapter I will discuss in 1.1 the international initiatives regarding human rights obligations of Business taking special notice to understand the three existing human rights duties.

In subchapter 1.2 I will mainly discuss the UNGP, attending to how they were inspired by the failure of the Draft Norms while also discussing the Guiding Principles' dimension of the *duty to respect*.

## 1.1 Initiatives regarding human rights obligations of Business

The codification of Business obligations in Human Rights is done at the domestic and international level.

The domestic level, which comprises the local and sub-national, is rich in mechanisms of establishment and enforcement of human rights standards, through criminal and civil legislation as well as the executive and judicial bodies of the state.<sup>5</sup>

The international level, which also comprises the regional level, has fewer mechanisms for their establishment and enforcement. They include treaties, commissions and courts although they possess a greater panoply of soft law instruments. These soft law instruments have sought to clarify what the obligations of business in regards to human rights.<sup>6</sup>

All international human rights obligations, specific and general, can be summarised as belonging in one of these three categories of duties: Respect, Protect and Fulfil.

The *duty to respect* is an expression of the principle of *do no harm*.<sup>7</sup> It designates the obligation of all actors, capable of impacting negatively on the enjoyment of human rights, to abstain from actions that may cause harm to other's natural entitlements. Under the obligation of *respect* all actors must oblige to national and international legislation aimed at the protection of human rights.<sup>8</sup>

A perfect example of the *duty to respect* is article 5 of *A Universal Declaration of Human Responsibilities* which reads "Every person has a responsibility to respect life. No one has the right to injure, to torture or to kill another human person."<sup>9</sup>

The *duty to protect* entails a positive obligation, which designates action opposed to the negative obligation of abstaining from action, to protect people from

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<sup>5</sup>Feyter, K. (2014) Globalization and Human Rights [Powerpoint slides] Available in EIUC Canvas <https://canvas.eiuc.org/login>

<sup>6</sup> Feyter supra footnote 5

<sup>7</sup> OHCHR (2011) Guiding Principles in Business and Human Rights. Implementing the "Respect, Protect and Remedy" Framework HR/PUB/11/04 p1 [online] available from URL: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>8</sup> Alston, P., Tomasevski, K (1987) The Right to Food [online] Available from URL: [http://www.istor.org/stable/761949?seq=1#page\\_scan\\_tab\\_contents](http://www.istor.org/stable/761949?seq=1#page_scan_tab_contents)

<sup>9</sup> InterAction Council (1977) A universal declaration of human responsibilities [online] available from URL: <http://interactioncouncil.org/sites/default/files/udhr.pdf>

third party abuses of their rights. Continuing the previous thought, the *duty to protect* entails the notion of *impeding others from doing harm*. States fulfil this obligation by setting up legal mechanisms aimed at the protection of human rights at the domestic and the international level.<sup>10</sup>

The *duty to fulfil* is the capacity related to the ability of actors to conduct their operations in a way that actively engages and encourages the *full realisation* of human rights. Actors under this positive duty, which is also associated with other positive duties such as the *duty to promote* and the aforementioned *duty to protect*, must seek to act in a way that goes beyond *do no harm* or *impede others from doing harm* to actually *do good*. Examples of the meaning for fulfilling human rights can be widely understood in the 1966 ICESCR. Through several articles it denotes the entitlement and the corresponding duty of the state to guarantee the full realisation of the entitlement. For example, Article 12 regarding the right to health, considers that all parties must provide “the creation of conditions which would assure to all medical service and medical attention in the event of sickness”.<sup>11</sup>

Despite the fact that all duties involve a certain amount of resources and expenditures, positive duties are more widely associated. Perhaps that is also one of the reasons why positive duties are considered *conditional* since compliance is dependent on the actor and his/her status.<sup>12</sup> Under international law, the state, due to its monopoly of power domestically, is the sole primary duty bearer carrying all three obligations.

The international community has used various soft law instruments.

Pioneering the efforts, the Organization for Economic Co-operation and Development (OECD) produced the 1976 Guidelines for Multinational Enterprises (OECD Guidelines) as an annex to the Declaration on National Investment and Multinational Enterprises.<sup>13</sup>

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<sup>10</sup> Alston, P., Tomasevski, K supra footnote 8

<sup>11</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 5 July 2015]

<sup>12</sup> Kolstad, I. (2007) *Human Rights and Assigned Duties: Implications for Corporations* in CMI Working Papers ISSN 0804-3639, ISBN 978-82-8062-211-2 [online] available from URL: <http://www.cmi.no/publications/file/2814-human-rights-and-assigned-duties.pdf>

<sup>13</sup> Organisation for Economic Co-operation and Development - OECD (2011)

The OECD Guidelines are composed of a set of legally non-binding recommendations aiming at achieving a responsible code of conduct of all companies operating within a signatory state territory.

Retaining robust state centric views *The OECD Guidelines* states in their *Concepts and Principles* “Obeying domestic laws is the first obligation of enterprises”<sup>14</sup>. However, it considers that: 1) national legislation should seek to be in harmony and containing all the comparable benefits and conditions to international law, and 2) in countries in which national legislations conflicts with the standards of the OECD Guidelines, the enterprise should seek to fulfil the international standards to the maximum of its capacity to the extent that it does not cause a violation of national legislation.<sup>15</sup>

Remaining a longstanding document regarding the expectations of responsible corporate behaviour *the OECD Guidelines* have already undergone five revisions, the latest being in 2011. Currently it contains recommendations in several domains, including: disclosure; human rights; employment and industrial relations; environment; combating bribery solicitation and extortion; consumer interests; science and technology; competition and; taxation.<sup>16</sup>

Another soft law instrument is the United Nations Global Compact (the Global Compact) launched in 2000. This is an initiative first proposed by the Secretary – General to the World Economic Forum in 1999.<sup>17</sup>

Corporate commitment to the Global Compact entails the acceptance and vow of upholding and promoting 10 principles which exceed mere financial pursuit. The principles contained by the Global Compact are circumscribed to the areas of human rights, anti corruption, labour rights and environmental concerns.<sup>18</sup> Being the largest voluntary initiative, the Global Compact currently counts with over 10,000 participants

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*OECD guidelines for Multinational Enterprises* [online] Available from URL <http://dx.doi.org/10.1787/9789264115415-en>

<sup>14</sup> OECD supra footnote 13

<sup>15</sup> OECD supra footnote 13

<sup>16</sup> OECD supra footnote 13

<sup>17</sup> OECD(2005) The UN global compact and the OECD guidelines for multinational enterprises: complementarities and distinctive contributions [online] Available from URL:

<http://www.oecd.org/corporate/mne/34873731.pdf>

<sup>18</sup> OECD supra footnote 17

spreading across 145 countries.<sup>19</sup> The creation of the Global Compact as an initiative that largely operates as a network that facilitates communication between enterprises, civil society and international organisations is supplemented by the creation of the Global Compact Secretariat and six UN agencies.<sup>20</sup>

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<sup>19</sup> United Nations Global Compact (2013) Overview of the UN Global Compact [online] available from URL: <https://www.unglobalcompact.org/AboutTheGC/index.html>

<sup>20</sup>OECD supra footnote 17

## **1.2 The Draft Norms and the formulation of the Ruggie Principles dimension of respect**

In 2003, with the purpose of furthering the development of international law in human rights, the UN's Sub-Commission on the Promotion and Protection of Human Rights approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the "Draft Norms").<sup>21</sup> The Draft Norms, all twenty three of them, were intended to become "the first non-voluntary initiative in the area of business and human rights accepted at the international level".<sup>22</sup> They also contained a wide set of obligations, some of which were previously interpreted as state prerogative, in fact, the dialectic of the *duty to respect*, *duty to protect* and *duty to fulfil* human rights was fully present.

Ultimately, amongst other factors, the ambiguity of the obligations proposed by the Draft Norms led this document to face much opposition from business and governments alike and without the Human Rights Commission (HRC)'s approval it lacked legal standing.<sup>23</sup> The Commission decided to request from the Secretary General the appointment of a special rapporteur who would seek sought to remedy the uncertainty and ambiguity left by the Draft Norms in clarifying business duties in the sphere of human rights.<sup>24</sup>

Professor John Ruggie was then appointed Special Representative of The Secretary General on the Issue of Human Rights and Transnational Companies (SRSG) in 2005. Ruggie opted neither to recommend nor to further develop the framework established by the Norms. Instead, when establishing the motives behind this decision, Ruggie pointed out significant theoretical and factual problematic factual claims arising from

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<sup>21</sup> United Nations (2003) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2

<sup>22</sup> Ruggie, J. (2007) Business and Human Rights the evolving International Agenda. Corporate Social Initiative. Working paper 31. Cambridge, MA John F. Kennedy School of Government, Harvard University

<sup>23</sup> Bird, Robert (2014) Human Rights and Business at the indetermined crossroads in Law Business and Human Rights: bridging the gap. Cheltenham, Edgware Elgar Publishing Limited

<sup>24</sup> Ruggie supra footnote 22



the Draft Norms including the universe of the duty holders, the rights and duties to be upheld and international standards.<sup>25</sup>

The universe of the duty holders, according to the Draft Norms, is transnational corporations and *other business* (take note that *other business* exempted purely local business, with no transnational operations whose activity does not extend beyond a national territory and did not violate the right of security of the person).<sup>26</sup> Transnational corporations, in their global form, act as the main or sole shareholder of their subsidiary companies, each of the subsidiaries, local partners, which could fall into the definition of other business, are capable of impacting human rights to the social discredit of the parent company. Public shame, however detrimental it is to the company's reputation does not necessarily comprise legal liability: Under international law, parent companies and subsidiaries are legally distinct; and parent companies as shareholders, cannot be liable for the wrongdoing of the subsidiary company unless it is proven that the parent company strictly controls the operations of the subsidiary. Each of the different separate legal identities (parent company and subsidiaries) has rights and duties under the jurisdiction of the country in which they operate; however, as a transnational company they do not have duties under international law. The aforementioned situation and the blurry lines concerning global legal corporate liability cause what is commonly referred to as *governance gaps* which Ruggie meant to remedy with his mandate.<sup>27</sup>

Secondly, Ruggie also pinpointed out as an inadequacy of the Draft Norms, the wide scope of duties that they mean to impose on business. Ruggie however did not refuse the assessment that transnational companies could be held responsible for human rights duties under international law.

However, the Draft Norms, included a wide range of duties and, more controversially, duties with respect principles that are not globally accepted, such as the "the observance of the precautionary principle" with regards to consumer and environmental protection. This principle postulates that in case of scientific

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<sup>25</sup> Ruggie supra footnote 22

<sup>26</sup> Ruggie supra footnote 22

<sup>27</sup> Ruggie supra footnote 22

disagreement in establishing if there is a possible risk of harm the burden of proof rests on whoever is taking the action.<sup>28</sup>

Due to the aforementioned reasons and in spite of an overwhelming positive reaction from the NGO's, the business community, including the International Chamber of Commerce and various governments, did not agree with the Draft Norms and sought not be under the legal influence of such far reaching and ambiguous rules.<sup>29</sup>

Correspondingly, Ruggie sought to rectify this legal vacuum and erase this polarisation by the establishment of the 2011 UN Guiding Principles on Business and Human Rights (UNGP) based on his 2008 report "Protect, Respect and Remedy: a Framework for Business and Human Rights" which did not build upon the previous Draft Norms.<sup>30</sup>

Instead, Ruggie established a set of 31 voluntary guiding principles, under the framework of "respect, protect and remedy". These principles can be summarised under three core expectations the a) the state has an obligation to protect human rights within its territory/jurisdiction by third party, including business enterprises; b) business has a duty to respect human rights (respect being the core obligation of business in regards to human rights) and c) there is a duty for states to provide access to effective remedies.<sup>31</sup>

Addressing some of the shortcomings of the Draft Norms in the Guiding Principles, Ruggie, rearranged the scope of the universe of applicability of these duties in Guiding Principle 14, and the scope of duties in Guiding Principle 12.

Guiding Principle 14, sets up a wider scope of corporate duty holders by designating that the application of these duties should be upheld by all business enterprises transnational or national "regardless of their size, sector, location, and ownership".<sup>32</sup> Intrinsic to Ruggie's new scope was the strategically ambiguous term

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<sup>28</sup> Ruggie supra footnote 22 + OECD. OECD guidelines for Multinational Enterprises, OECD publishing (2011) <http://dx.doi.org/10.1787/9789264115415-en>, article 13

<sup>29</sup> Ruggie supra footnote 22

<sup>30</sup> OHCHR supra footnote 7

<sup>31</sup> OHCHR supra footnote 7

<sup>32</sup> OHCHR supra footnote 7

*business enterprises*, for Ruggie never provided a definition, nor did the Ruggie Framework of 2008 or in the UNGP. There is therefore doubt as to whether multinational enterprises (MNEs) qualify as a business enterprise by constituting a unitary group, in accordance with theories of legal liability, or by being a business enterprise network.

Ruggie also abstains from referring to subsidiaries, notably when mentioning *business relationships* to avoid revealing his particular legal reasoning on the topic of MNEs legal liability<sup>33</sup> While the clarification of this term would be of enormous value for the emergence of a new legal doctrine, Ruggie did not want to create a legal liability model that could furthermore compromise the acceptance of the UNGP.<sup>34</sup>

In Guiding Principle 12, Ruggie assesses business to be capable of affecting all human rights but for the purpose of practicality and it is wise to understand that business is likely to affect some rights more than others. Such rights must be interpreted (only) and at a bare minimum as being the rights contained in the International Bill of Human Rights (composed by the UDHR; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work.<sup>35</sup>

Commentary to Guiding Principle 11 also establishes that business should not deter states from fulfilling their human rights obligations through judicial action.

Proving once again to be skilful with terms, the appreciation or lack thereof of the terms *impact* and *respect* is one of the strengths of the Ruggie Framework and the subsequent UNGP is the skilful use of the terms *impact* and *respect*.

The wide use of the word *impact* was used with reference to a company's duty to respect, while the word *abuse* was used almost exclusively in reference to the state's duty to protect human rights. This calculated wordplay was meant to denote that

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<sup>33</sup> Bird, R.; Cahoy, D. R. ; Prenket, J. D. ( 2014) Law Business and Human Rights: bridging the gap. Cheltenham, Edgware Elgar Publishing Limited page 18-20

<sup>34</sup> Bird, R.; Cahoy, D. R. ; Prenket, J. D. Supra footnote 33

<sup>35</sup> Bird, R.; Cahoy, D. R. ; Prenket, J. D. Supra footnote 33

companies should not only refrain from committing calculated and opportunistic human rights violations, but that they should be aware of how the way in which they function could unintentionally adversely impact human rights. The focus on violation points to the business entity that committed the abuse; the word impact focuses on its operations. This wordplay allows Ruggie to once again escape from proposing a polarising model of global enterprise liability.

Guiding Principle 13, explicates the significance of the word impact to Ruggie, when it designates that a business should:

“Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”<sup>36</sup>

Ruggie’s redefinition and strategic use of the word *respect* throughout Guiding Principles 11- 24 under the second core expectation “The corporate Responsibility to Respect Human Rights” is noteworthy: The dimension of Ruggie’s version of “respect” exceeds the classical notion of *do no harm*. In fact, this expression is completely absent from the UNGP, due to the fact that the classical understanding of respect, in international law, merely encompasses the negative obligation of abstaining from human rights infringements.<sup>37</sup>

Instead, Guiding Principles 11 and 13 elaborate the SRSG’s core notion of a company’s duty to respect human rights denoting that it pertains to a) the non-infringement of human rights<sup>38</sup>; b) addressing the adverse impacts on human rights connected to its activity<sup>39</sup>; c) preventing or mitigating the impacts connected to their activities and those of its business relationships.<sup>40</sup>

Under Guiding Principle 13, the ambiguity with regards to business enterprises becomes problematic. If a business enterprise is supposed to prevent, mitigate and

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<sup>36</sup> OHCHR supra footnote 7 p.14

<sup>37</sup> OHCHR supra footnote 7 p.1

<sup>38</sup> OHCHR supra footnote 7 p.13

<sup>39</sup> OHCHR supra footnote 7 p14

<sup>40</sup> OHCHR supra footnote 7 p14

address its own human rights impacts, but only prevent or mitigate the impacts of its business relationships, then how does an MNE proceed with regards to its subsidiaries?

Using the dialectic of *do no harm* principle 13 can be interpreted as *do no harm* by cause, contribution or association, since *addressing* human rights impacts entails a “responsibility to act” for the inhibition, alleviation and remediation of the negative impact caused by the business.<sup>41</sup>

Interestingly, the notion of the duty to respect as encompassing the redress for impacts caused by business relationships is very similar to the duty to protect which is found in International Human Rights Law and is solely confined to the state. However Ruggie is aware of the risks of imposing on companies the *responsibility to act* in favour of human rights protection over all companies they might influence, this is neither desirable nor fair. Companies have their own aspirations and while the respect for human rights is fundamental it would not be fair to forcibly attribute to them the responsibility to protect human rights under any circumstances. Unfortunately, full corporate responsibility to protect would require a vast expenditure of time, money and personnel and most importantly also include a diminishment of the state’s own *duty to protect*. The impact of such obligation could include the neglect of the state’s protection in favour of the burdening of companies who would be coerced to undertake the duty due to social pressures.<sup>42</sup>

Forcing the responsibility to act on all enterprises coupled with the fact that the UNGP are of a voluntary nature, could potentially cause their non-acceptance by companies, which would endanger the compliance with even the fundamental human rights duties. Thus, Ruggie formulates that companies’ *duty to respect in preventing others from doing harm* is limited to their sphere of influence which only contains adverse human rights “directly linked to their operations, products or services by their

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<sup>41</sup> Bird, R.; Cahoy, D. R. ; Prenket, J. D. Supra footnote 33

<sup>42</sup> Ruggie supra footnote 7

business relationships”<sup>43</sup> It is reasoned that state and corporate responsibilities must be kept in different spheres, independent from each other.

Guiding Principle 19, builds on the appropriate course of action associated with the *duty of impeding others*, in this case business partners, *from doing harm*. If the business has the ability to influence the behaviour of the impacting company it should do so. In case the business has no leverage it must either: a) continue the business relation while pursuing mitigation efforts and be willing to pay a price which may be in terms of reputation or pecuniary or legal for continuing the relation; or b) close the business relation. Commentary to Guiding Principle 19 also clarifies that leverage may be increased by the offer of capacity building or other incentives to the impacting company.<sup>44</sup>

Pushing the boundaries of the classical interpretation of the duty to respect even more the UNGP specifies which positive action business should take in order to fully realise the duty to respect. Guiding Principle 15 designates the necessity of the existence of a policy commitment, due diligence, and processes of remediation of impacts by cause or association.

A policy commitment is a statement, as specified in Guiding Principle 16 and commentary, which reaffirms the business commitment to the respect of human rights. The statement ought to be composed with expertise from internal and external sources of the business enterprise, ranging from internet sources to t experts and staff, who will help to formulate the company’s responsibilities and duties in the realm of human rights protection. The statement must be made public to the company and wider audience as well it should become immediately intrinsic to the company operational policies and procedures.

Due diligence refers to an ongoing process, as formulated in Guiding Principles 17, 18, 19 and corresponding commentaries, that allows business enterprises to “identify, prevent, mitigate and account for how they [companies] address their adverse

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<sup>43</sup> OHCHR supra footnote 7 p14

<sup>44</sup> OHCHR supra footnote 7

human rights impacts.”<sup>45</sup> Due diligence must to be an ongoing process that covers all company related human rights impacts in every branch of the business and the complexity of the mechanism of assessments should match the complexity of the business.<sup>46</sup>

The strategic use of language by Ruggie’s in the duty to respect human rights entails the classical formulation of the duty to *do no harm*, in its negative classical interpretation, and the *duty to protect* traditionally reserved to states. By managing to incorporate *impeding other from doing harm* and notions of sphere of influence in the well know expression of respect, Ruggie escaped all debates regarding global enterprise legal liability while simultaneously binding an obligation to every company including MNEs and its subsidiaries.<sup>47</sup> Rather than the simplicity that the term *respect* in its classical obligation entails, the Guiding Principles’ respect and following formulations about procedures to determine compliance introduced complexity and a corporate commitment to human rights defence.

Enterprises now have the have the duty to respect in preventing others within their sphere of influence from doing harm.

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<sup>45</sup> OHCHR supra footnote 7 p.17

<sup>46</sup> OHCHR supra footnote 7

<sup>47</sup> Bird, R.; Cahoy, D. R. ; Prenket, J. D. Supra footnote 33

## **2- WEAKNESSES OF INTERNATIONAL INITIATIVES AND AVENUES FOR THE DEVELOPMENT OF INTERNATIONAL LAW OF BUSINESS AND HUMAN RIGHTS**

The United Nations has striven for the development of an enhanced international framework for the regulation of business human rights' impact, but as of yet, it has not been adequately translated into an international legal doctrine. The recognition of the shortcoming of existent instruments regulating the conduct of business with regards to its human rights impact would entail the process of reflection regarding the development of the international legal doctrine of business and human rights. The creation of effective initiatives or a legal doctrine will depend extensively on the identification and development of existing different legal avenues from what is national and private to the development of commitments already set in the international arena.

In this chapter I will discuss in 2.1 the criticism to the current initiatives of business and human rights.

In subchapter 2.2 I will explore two avenues for a better framework of Business and Human Rights: in 2.2.1 the potential of private regulation in the form of policy statements and due diligence processes and; in 2.2.2 the potential of a treaty on business and human rights.



## **2.1 Weaknesses of the international initiatives of business and Human Rights**

An analysis of the main criticism with regards to different initiatives shows that the faults can be mainly attributed to the following factors: 1) the non-mandatory nature of duties; 2) a lack of a monitoring and enforcement mechanism; 3) failure to properly address the government gaps; and 4) the failure to address the thematic of protection of vulnerable groups.

One commonality between all the most successfully corporate accepted UN endorsed documents on business responsibilities towards human rights is that they are of a voluntary nature. The 2008 Ruggie Framework and the UNGP are all built on the premise that the recommendations and best practices set out are non-legally binding: Should the respect and compliance of human rights recommendations be left to the whims of business or does the international community have the responsibility to enforce them under all circumstances?

The purpose for which the documents were intended to be non-legally binding relies on the assumption that as international human rights law (IHRL) is a system build upon state consent and in order have different actors bound by IHRL obligations one must extend this principle to different actors. Consensus building thus becomes the aim of legal doctrine with respect to corporate abuses, the non-threatening way in which the recommendations are written should theoretically encourage company endorsement and compliance. In practical terms, however, compliance under such auspices is doubtful: In terms of corporate participation, the Global Compact is the most successful initiative of the UN, counting over 10,000 participants spread out over 145 countries in the last 15 years since the inception of the initiative.<sup>48</sup> In spite of these impressive figures, one must aware that there exist an estimate of 70 000 multinationals and millions of business enterprises all over the world so the fraction of which subscribed to the Global Compact is rather diminutive. Furthermore of the 12 000 business enterprises which subscribed there are more than 2, 400 who have already been threatened expulsion due to the non-compliance with the submission of reports regarding the improvement of

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<sup>48</sup> United Nations Global Compact (2013) Overview of the UN Global Compact [online] available from URL: <https://www.unglobalcompact.org/AboutTheGC/index.html>

their mechanisms of human rights monitoring, redress and compliance.<sup>49</sup> Business enterprises seem to be keen on being perceived as diligent partners in UN's initiatives in regards to the protection of human rights, speculatively for the appeasement of their stakeholders, however seeming respectful does not necessarily entail the factual respect of human rights.<sup>50</sup>

Worryingly, the trend of non-mandatory recommendations does not seem to be coming to an end.

While the UNGP were supported by governments and business alike, it lacked the support of Civil Society, which had previously endorsed the legally binding Draft Norms, the reason being its Civil Society discontent with the weakening of the legal pulse on business. While listing its disagreement with the UNGP, civil society remarked on the withdrawal of the mandatory obligation of states, requiring them to take regulatory action for the prevention of companies' abuse of human rights overseas as stated in the 2008 Ruggie Report, to the weaker recommendation that states should *encourage* companies to respect human rights overseas.<sup>51</sup> The weaker language applied to corporate responsibility concerning human rights also denoted in the UNGP. As previously mentioned the OECD Guidelines state that: 1) compliance with domestic law is the first obligation of business enterprises; 2) business enterprises should seek to fulfill international standards to the extent that it does not interfere with national legislation. However, these articulations could potentially be hazardous to the effective protection of human rights since business enterprises might interpret it as an authorization to downgrade their human rights duties depending on the country in which they operate.<sup>52</sup>

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<sup>49</sup> Blitt, R.C. (2012) Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance In Texas International Law Journal Volume 48, Issue 1, p.55 [ONLINE] available from URL:

<http://www.tilj.org/content/journal/48/num1/Blitt33.pdf> (consulted 13th of May 2015)

<sup>50</sup>Blitt supra footnote 49

<sup>51</sup> Amnesty International, CISED, ESCER-NET, FIDH, Human Rights Watch, International Commission of Jurists, RAID (2011) Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights [online] available from URL:

[https://www.fidh.org/IMG/pdf/Joint\\_CSOS\\_Statement\\_on\\_GPs.pdf](https://www.fidh.org/IMG/pdf/Joint_CSOS_Statement_on_GPs.pdf)

<sup>52</sup> Amnesty International supra footnote 52

The voluntary nature of recommendation also results in another exceeding weakness of the international initiatives, which is the lack of monitoring and enforcement mechanisms. The UNGP does not possess a monitoring or enforcement mechanism. Critics are of the view that “despite the moral authority inherent in the UN, insufficient attention is being paid assurance of conformity to the principles”.<sup>53</sup>

Civil Society has also criticized the UNHRC for not extending the mandate of the SRSB to include the creation of judicial international mechanisms under the third pillar of the UNGP, under the heading “Access to remedies”. Instead, the UNGP merely recommend the establishment of state and non-state based grievance mechanisms which may be more susceptible to bias in favour of the enterprise.

According to critics another weakness of international initiatives in business and human rights is the neglect of focus on vulnerable groups. The OECD Guidelines only reference vulnerable groups in the commentaries to the procedures on *employment and industrial relations* and *consumer interests*. The Global Compact sub references vulnerable groups under principle 5-abolition of child labour; and principle 6-elimination of discrimination.<sup>54</sup>

The UNGP contain a single empty reference which designates that the principles should be implemented, paying special attention to the rights, needs and challenges faced by vulnerable or marginalized groups, in spite of the fact that the SRSB’s mandate in 2008 included the following task:

“(d) To integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children.”<sup>55</sup>

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<sup>53</sup> Rasche, Andreas; Waddock S. (2014) Global Sustainability Governance and the UN Global Compact: A Rejoinder to Critics In: Journal of Business Ethics June 2014, Volume 122, Issue 2, pp 209-216 [online] Available from URL:

<http://link.springer.com/article/10.1007%2Fs10551-014-2216-6>

<sup>54</sup> OECD supra footnote 17

<sup>55</sup> Human Rights Council (2008) Resolution 8/7. Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises [online] Available from URL: [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_8\\_7.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf)

Adding insult to injury the baseline of human rights expectations that business enterprises should respect according to the UNGP only comprises the International Bill of Human Rights neglecting important human rights conventions for the protection of vulnerable groups such as the Convention of The Rights of the Child (CRC), the Convention on the Elimination of All Forms of Violence Against Women (CEDAW) or even the Convention on the Rights of Person with Disability (CRPD). The Childs Right Information Network has also critiqued the UNGP on the basis that it offered no “meaningful guidance” to business enterprises or states in regards to the protection of the rights of children.<sup>56</sup>

Finally, the international doctrine also fails at effectively pointing out ways to bridge governance gaps caused by globalisation, which was a task also included in the SRSG mandate. Due to the fact that Ruggie chose not to immerse himself in the task of creating a global enterprise liability model, which would also help to enforce the right to effective remedy, as contained in article 14 of the ICCPR, there is no absolute bridging of the governance gaps because an MNE’s, abuse of human rights, unless redressed by the company itself, is only possible under the state’s judicial umbrella in few of cases especially when considering transnational actions overseas.<sup>57</sup>

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<sup>56</sup> Childs Right Information Network (2011) Submission of the Child Rights Information Network (CRIN) on the United Nations Special Representative of the Secretary General on Transnational Corporations and other Business Enterprises’ Draft Guiding Principles [online] Available from URL [http://www.crin.org/docs/CRIN\\_Guiding\\_Principles\\_Consultation\\_Submission.pdf](http://www.crin.org/docs/CRIN_Guiding_Principles_Consultation_Submission.pdf)

<sup>57</sup> Human Rights Council supra footnote 55 + Amnesty International supra footnote 51

## **2.1 Avenues for the expansion and development of international law regarding business and human rights**

The following subchapters deal with three distinct legal avenues for the development of business and human rights initiatives. They are: 1) private regulation; 2) the follow up of the SRSG mandate and 3) the creation of a binding treaty.

### **2.2.1 The potential of private regulation: Policy statements and due diligence processes**

Private regulation might prove to be fertile ground for the development of a solid legal doctrine on business and human rights.

Through different fields of law, it is possible presently, to remedy human corporate human rights against unfulfilled self-imposed corporate human rights obligations. In fact, under certain circumstances, there is the possibility of inferring that policy commitments and due diligence processes are legally binding.<sup>58</sup> This leeway greatly legitimizes Ruggie's operational commitment principles under the pillar of Corporate Duty to respect Human rights.

Policy commitments, being publicized tools of corporate engagement with human rights protection, have an important role in commercial relations between producers, sellers and buyers, permitting the contract law to be effective in its monitoring and enforcement. As public awareness of human rights protection issues increases, many companies, due to ethical considerations and concerns regarding consumer perceptions, choose to form contractual partnerships with business partners whose production methods are in alignment with IHRL.

Thus, codes of conduct are a part of the expectations of business enterprises when entering into contractual partnerships and might be incorporated in contract law. As one of the main sources of private law, contract law is covered by judicial remedy.

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<sup>58</sup> Diling, O.; Herberg, M.; Winter, G. (2008) Responsible business. Self-Governance and Law in Transnational Economic Transactions. Hart Publishing pp.41-66

In circumstances when codes of conduct are incorporated into contractual partnerships, companies become legally bound to the statement of policy that they set out in their contracts even if it surpasses domestic requirements.<sup>59</sup>

Secondly, codes of conduct, may become judicially enforceable or be remedied through advertisement law and the relationship between buyers and sellers. If buyers are under the general impression or public expectation that the product adheres to certain moral and ethical considerations regarding human rights and/or the environment, including claims of being eco-friendly or supporting vulnerable workers, where a company oversteps the standard it might be misleading the consumer or acting unfairly both of which may be judicially remedied.

In Europe, Directive 2005/29/EC concerning misleading and comparative advertising could potentially be used for claims of this type. Even though this Directive was primarily intended to protect consumers' economic interests it might also be valuable in claims concerning consumers' social concerns as long as the company has established a connection between their human rights commitment and the advertising of its product.<sup>60</sup>

Due diligence processes are also capable of being judicially enforced or remedied under torts or civil law of obligations, due to the fact these fields of law are mainly connected to individual fault. Due diligence processes are understood as being the product of an internal or external expertise that sets out internal and technical norms that aim at avoiding impact that is predictable and avoidable. If companies fail or breach their self-imposed due diligence processes and it causes a human rights impact it can be considered corporate negligence, because of the assessment that this specific process was necessary for the avoidance of harm. In setting out due diligence processes, companies might be held to a higher standard than the one contained in domestic law, due to the general legal organizing principles of *good faith*, and *good practices*.<sup>61</sup>

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<sup>59</sup> Diling, O.; Herberg, M.; Winter, G. supra footnote 58 pp.41-66

<sup>60</sup> Diling, O.; Herberg, M.; Winter, G. supra footnote 58 pp.41-66

<sup>61</sup> Diling, O.; Herberg, M.; Winter, G. supra footnote 58 pp.41-66

The drawback of judicial remedies based on due diligence processes is that as the UNGP explain their complexity depends on the business configuration, which in practical terms means that different companies will be bound to different levels of human rights protection, which is not reconcilable with IHRL principles such as national treatment.<sup>62</sup>

Beyond the infringement of the commitments set out in self-imposed codes of conduct, companies might also infringe consumer protection laws through the manipulation of consumer's expectations. The aforementioned may occur when a commitment is commonplace through companies working in the same line of business to the extent that it creates the consumer expectation that all companies adhere to such commitments even if it is unproven.

The generalization of private regulation in terms of codes of conduct and due diligence could potentially be a great avenue to bypass concerns regarding different corporate level of human rights protection contributing to a more balanced system. It may also constitute a powerful way to extend voluntary commitments into judicially remedied obligations, which sets off a more powerful legal doctrine of business and human rights.

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<sup>62</sup> Diling, O.; Herberg, M.; Winter, G. *supra* footnote 58 pp.41-66

## **2.2.2 The potential of binding international commitments: Treaty on Business and Human Rights**

Possibly the most widely discussed and politically polarizing avenue for the development of the legal doctrine of business and human rights is the creation of a treaty.

In 2014, the HRC in accordance with Resolution 26/9 established an intergovernmental working group whose focus would be on the elaboration of a treaty reflecting the envisaged conduct of transnational and other business enterprises. Contrary to the Guiding Principles, Resolution 26/9, gives an understanding of business enterprises as companies with a transnational component to the exclusion of local business.<sup>63</sup>

The initiative was proposed by South Africa and Ecuador and supported by Bolivia, Venezuela and Cuba. The proposal entailed the discussion and subsequent creation of a treaty, which would not build on the UNGP but rather resolve all issues of business and human rights.<sup>64</sup>

If the Treaty works in its optimal capacity, it will constitute a major unprecedented leap into a strong international legal doctrine of business and human rights. A treaty of this magnitude could potentially provide an avenue for the effective state protection of human rights from corporate abuse by simultaneously strengthening corporate accountability and access to justice while lessening governance gaps. However, there are concerns as to whether it is achievable.

First, the proposal, despite being heavily supported by civil society was received with mixed reactions by member states in the Human Rights Council (HRC). Amongst the 47 members of the HRC there were 20 positive votes, 14 votes against and 13 votes

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<sup>63</sup> United Nations General Assembly (2009) Human Rights Council Resolution 26/9 A/HRC/RES/26/9 [online] Available from URL: <http://www.cetim.ch/en/documents/G1408252.pdf>

<sup>64</sup> Ruggie, J. (2015) Life in the global public domain: response to commentaries on the un guiding principles and the proposed treaty on business and human rights [online] Available from URL: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2554726](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726) p.4



abstaining.<sup>65</sup> Two prevalent issues were seen in the voting: 1) nearly all countries who are home to MNEs, with the notable exception of China voted against the resolution; and 2) amongst the states that abstained many were Latin American and their abstention instead of voting against may be due to the desire to maintain good neighborly relations with Ecuador.<sup>66</sup>

Amongst the 47 member states seven made speeches regarding their votes. The United Kingdom (UK) and the United States of America (USA) declared they would not participate in efforts to achieve a Treaty although, Ruggie thinks this will likely happen.<sup>67</sup> The European Union, represented by Italy, declared that it believed the UNGP were the correct way forward to the better protection of human rights and opposed a binding instrument. China's speech did not seem strongly convinced of the necessity of the treaty which leads to believe their support might be fickle.<sup>68</sup>

The division between supporters and opponents of Resolution 26/9 mentions the possibility that the treaty might end up not being ratified due to the business pressure on political interests and lack of consensus amongst states. Ruggie alludes to the case of the Migrant Worker Convention and the 1970 UN Code for Multinational Corporations as examples of initiatives that were proven never to concretize or to be ineffective due to the lack of political will.<sup>69</sup>

Additionally, the process of negotiating this treaty could take up to a decade and in the meantime, since the focus will not be on the strengthening of the UNGP there is a possibility that companies will have an even greater human rights impact than they do currently.<sup>70</sup>

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<sup>65</sup>United Nations General Assembly supra footnote 63

<sup>66</sup> Chen S. (2005) Towards a Business and Human Rights Treaty. Faculty of Law University of Oslo [online] Available from URL: [http://business-humanrights.org/sites/default/files/documents/Towards%20a%20Business%20and%20Human%20Rights%20Treaty%20\(NCHR%20student%20Si%20Chen\).pdf](http://business-humanrights.org/sites/default/files/documents/Towards%20a%20Business%20and%20Human%20Rights%20Treaty%20(NCHR%20student%20Si%20Chen).pdf)

<sup>67</sup> Ruggie supra footnote 64

<sup>68</sup> Chen S. Supra footnote 64

<sup>69</sup> Ruggie supra footnote 64

<sup>70</sup> Ruggie supra footnote 64

Furthermore, in order to reach a consensus amongst all member states, with different economic pressures, legal and institutional differences it is likely that “a general business and human rights treaty would have to be pitched at so high a level of abstraction that it would be of little if any use to real people in real places”.<sup>71</sup>

The success of the Treaty will depend on the extensive expertise and knowledge of the working group and governmental will. There are three issues that are likely to be central to the debate: the scope of the rights encompassed by the treaty; the scope of the state ‘s extra territorial protection of human rights; and the scope of governmental support.

In spite of possible difficulties, if successful, a Treaty, would finally establish a legal code of business and human rights which is of utmost importance.

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<sup>71</sup> Ruggie supra footnote 64 p.5

### 3. SMALL AND MEDIUM ENTERPRISES (SME)

It is estimated that Small and Medium Enterprises (SMEs) are about 90% of the world's business and more than 50% percent of the world's employer.<sup>72</sup> In the old continent, SMEs are held as the “engine of European economy” and have been favoured upon other subjects for the successful implementation of the goals set out by the 2007/2009 Lisbon Treaty.<sup>73</sup> It becomes than imperative to wonder: Why and how is it justified, under a social or human rights perspective, to use public funds for the support of this type of enterprise? Assuming that SME are not also transnationals is possible that SME uphold a greater significance to the discourse of business and human rights than its transnational counterparts? And finally, how do SMES apply the Guiding Principles and due diligence process, despite having speculatively lower levels of complexity than transnationals?

In 3.1 I will make a general understanding on the concept of SMEs while pinpointing the differences on the European and American conceptualisation of SMES.

In subchapter 3.2 I will discuss how SMEs are currently supported in Europe through the Small Business Initiative.

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<sup>72</sup> International Finance Corporation –IFC (2012) IFC and Small and Medium Enterprises [online] Available from URL: [http://www.ifc.org/wps/wcm/connect/277d1680486a831abec2fff995bd23db/AM11IFC+IssueBrief\\_SME.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/277d1680486a831abec2fff995bd23db/AM11IFC+IssueBrief_SME.pdf?MOD=AJPERES)

<sup>73</sup> European Commission (2005) The new SME definition User guide and model declaration. EN NB-60-04-773-EN-C 92-894-7909-4 [online] Available from URL: [http://ec.europa.eu/enterprise/policies/sme/files/sme\\_definition/sme\\_user\\_guide\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf)

### **3.1 SMEs: Concept disparities, potential and dangers in human rights promotion**

The focus on Small and Medium Enterprises with regards to human rights promotion has been centered around unproven assumptions of its social impact and the concretization of public interests.<sup>74</sup>

In order to understand the current focus on SMEs by different governments and specially within the EU I will seek to analyse how they might contribute, although unintentional, to the betterment of society which has repercussions in the advancement of human rights. This analysis will also facilitate the establishment of the distinctions between SMEs and other type of business enterprise configurations.

Firstly term *business enterprises*, in spite of being left undefined by the UNGP was later defined for the purposes of HRC Resolution 26/9 as *companies with a transnational component*. However, under most domestic legal systems, the term consists of any form of economic organization pursuant of financial gain, irrelevant of the organizations size or legal status.<sup>75</sup> Thus, the term SME alludes to a diminutive enterprise, in regards to market share and importance; and the term MNE refers to a company operating in different countries which is presumably large. In recent years, there has also been the popularization of the term *microenterprise*, which alludes to a very small, almost insignificant, economic organization in terms of market share.<sup>76</sup>

Each business configuration reflects a different organizational reality with associated challenges and opportunities, in terms of its operations and commitments. Thus, it is also evident that each configuration will hold and manage different and personal human rights concerns.

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<sup>74</sup> Gibson, T.; Vaart H.J. (2008) Defining SMEs: A Less Imperfect Way of Defining Small and Medium Enterprises in Developing Countries. In Brookings Global Economy and Development [online] Available from URL: [http://www.brookings.edu/~media/research/files/papers/2008/9/development%20gibson/09\\_development\\_gibson.pdf](http://www.brookings.edu/~media/research/files/papers/2008/9/development%20gibson/09_development_gibson.pdf)

<sup>75</sup> United Nations General Assembly supra footnote 63

<sup>76</sup> Gibson and Vaart supra footnote 74 pp.9,10

The SMEs' market position entails, theoretically, that they are more prone to be concerned with government transparency and policy reform when in comparison with other types of business configurations. SME often have less governmental benefits than MNEs; this is especially evident in developing countries, where MNEs often partake in BITs and receive government incentives. Thus, and due to a concern with obtaining a just playing field, SMEs provide great advocates for government transparency, which paradoxically increases public awareness of the state's commitment to the three duties of human rights.<sup>77</sup>

Additionally, large companies or MNEs in developing countries are usually circumscribed to limited areas of business such as: a) natural resource extraction; providing goods and services, which were previously provided by the state, owned companies (SOCs); b) subsidiaries of multinational operations. By creating a panoply of revenue streams, SMEs are thought to provide sustainability to the economy and strengthen states to resist political blackmail that recurs to threats of cessation of buying, selling or exporting commodities.<sup>78</sup>

While MNEs are usually addressed in human rights reports in the optic of their actual or potential adverse human rights impacts, SMEs have been praised for their actual or potential positive human rights impacts.

ILO's commissioned report corroborates that according public assumption the SME sector "provides most of the jobs, creates most of the new jobs, and has the highest employment growth rates..."<sup>79</sup>. Gibson and Vaart claim SMEs diversify economic sources of income in single commodity exporting economies which "long been victims of booms and busts".<sup>80</sup> SME's are also considered to be "involved" and aware in the process of innovation, because the entrepreneur, the actor which "starts a

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<sup>77</sup> Gibson and Vaart supra footnote 74 pp.9,10

<sup>78</sup> Gibson and Vaart supra footnote 74 pp.9,10

<sup>79</sup> ILO (2013) Is small still beautiful? Literature Review of Recent Empirical Evidence on the Contribution of SMEs to Employment Creation [online] Available from URL: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---ifp\\_seed/documents/publication/wcms\\_216909.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/publication/wcms_216909.pdf)

<sup>80</sup> Gibson and Vaart supra footnote 74 pp.9,10

business and is willing to risk loss in order to make money” understands that remaining competitive in the current market entails a drive for innovation.<sup>81</sup>

As demonstrated SMEs have been widely addressed by human rights concerned policymakers and academia. Various reports boast the importance of SMEs proclaiming it to be the *backbone of the economy* and crucial in areas related to employment, innovation and diversification of domestic economic sources of income. However, these claims may only be referred to as *assumptions* because they are not corroborated by empirical evidence. But, the analysis of these assumptions and the reasoning on which they are based might be important for considerations of their role as companies that may or not hold special significant to the theory of business and human rights.

The lack of empirical evidence backing assumptions about SMEs’ social impact is problematic because it may compromise the legitimacy of using taxpayer’s money for the advancement of these enterprises through policies, grants and fiscal incentives. Currently, within the European Union (EU) there are over 190 funds, formulated to benefit SMEs.<sup>82</sup> SMEs are less likely by 50 % to access bank loans in comparison to MNEs; they also often have difficulties in attracting investors because they are a high risk investment.<sup>83</sup> The lack of economic resources available to SMEs often creates lack of liquidity which, without financial support from governmental and international organizations, may cause the discontinuance of its operations and the termination of jobs and perceived social impact. As such the multitude of funds and grants attributed to SMEs around the world is justified its perceived benefic social impact and due to factual financial difficulties associated with their size.

Despite, all the logical reasoning behind the possibility of a *do good* capacity of SMEs through job creation , the lack of empirical evidence is due to the lack global consensus on the legal definition of SME.

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<sup>81</sup> Ismail, K; Omar, W.Z.W; Soehod, k. ; Senin, K and Akhtar, S (2014) Role of Innovation in SMEs Performance: A Case of Malaysian SMEs In *Mathematical Methods in Engineering and Economics* ISBN: 978-1-61804-230-9 p.145

<sup>83</sup> IFC supra supra footnote 72

Currently most countries and international organizations, including the World Bank, MIF, African Development Bank, Asian Development Bank and the UNDP, do not have qualitative definition of SMEs but define them quantitatively by recurring to three numeric turnover measures: maximum of employees; maximum of revenues or maximum of assets.<sup>84</sup>

The lack of qualitative definition and reliance on a solely quantitative definition of SMEs is problematic on various fronts.

Firstly, a merely numeric approach does not justify the use of taxpayer's money. The support of SMEs, which are private ventures, recurring to public funds it is tangled to the factual or imagined legitimate objective of positive social impact by SMEs. It is therefore inconceivable that an appropriate conception of SMEs does not include a qualitative consideration regarding how it benefits the public good.

One of the greatest challenges of the current SME definition is the use of absolute numbers which do not refer to any country specific formula that would take into context the economic and social situation of a country.<sup>85</sup> The lack of consideration of the domestic context may contribute to the improper classification of companies leading to the neglect of factual small and medium companies. In the title of example, according to the IMF's definition in small developing countries to the likeness of Guinea Bissau all domestic non state owned companies (SOC) would be considered SMEs despite some sharing significantly larger parts of the market and being able to access much more financial resources than others.

Merely quantitative definitions could also potentially cause the situation that in certain smaller countries subsidiaries of MNEs would be considered SMEs. MNE's subsidiaries are clearly not the type of enterprises that SME policies intend to support and this would contribute to a larger market share inequality.<sup>86</sup>

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<sup>84</sup> European Commission 04-773-EN-C 92-894-7909-4 [online] Available from URL: [http://ec.europa.eu/enterprise/policies/sme/files/sme\\_definition/sme\\_user\\_guide\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf)

<sup>85</sup> Gibson and Vaart supra footnote 74

<sup>86</sup> Gibson and Vaart supra footnote 74 p.8

In order to make sure subsidiaries do not fall into, the scope of the SME, the EU has explained in *The New SME definition User Guide and model declaration* that any enterprise whose investors own more than 25% of the company is not autonomous but rather a partner or linked company, depending on whether direct or indirect control is exerted. If companies are linked or partners their data will be combined in the three numeric turnover measures. There are exceptions to this rule, which include situations in which the investor is a public investment organization or an academia circle or a certain type of autonomous local authorities.<sup>87</sup>

Furthermore, the numerical definition does not consider the country's demographic. The employment of 200 people by an enterprise in Cape Verde, which is home to less than half a million people is in domestic terms much more significant than the employment of 200 people in Kenya, which counts with 44 million inhabitants. In this instance, the company in Cape-Verde that employs 200, despite being an SME under the WB and the UNDP would not adequately be considered a small or medium company in a domestic context or should receive incentives on equal terms as other domestic significantly smaller companies.

Also, due to restraints to maintain a number of staff, within the adequate parameters of SMEs, companies might opt to either not hire or to rely on non-paid (internship) work or to only hire temporary or part-time employees, the use of these tactics create greater social instability and affects workers' rights.<sup>88</sup>

Furthermore, outsourcing also affects the ability of conveniently defining SMEs, only by numerical standards. Outsourcing might keep the employee numbers of a company down while maintaining big operations; additionally it can also keep assets numbers down by relying on the machines of other companies.<sup>89</sup>

When faced with such a challenging problematic of SMEs definition, it is important to reflect on how to provide a more comprehensive and effective definition and characterization of SMEs. To this effect, Gibson and Vaart propose that numerical

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<sup>87</sup> European Commission supra footnote 84

<sup>88</sup> Gibson and Vaart supra footnote 74 pp.12 -13

<sup>89</sup> Gibson and Vaart supra footnote 74 pp.12 -13



definitions should be indexed to the US dollar; while employee turnover and assets are defined according to domestic appreciations, the US dollar is a measure that can be easily converted and used for the comparison between domestic and international companies.<sup>90</sup> Additionally the authors defend the use of following formula which takes into account the demographic, social and economic context of the country: “An SME is a formal enterprise with annual turnover, in U.S. dollar terms, of between 10 and 1000 times the mean per capita gross national income, at purchasing power parity, of the country in which it operates.”<sup>91</sup>

Importantly, a case has already been made regarding the necessity of a qualitative definition of SMEs for the justification using taxpayer’s money for its funding. SMEs would then stop to designate merely a diminutive enterprise, in regards to market share and importance to legally define a diminutive company that has a social impact through local job creation and therefore is eligible for public grants and incentives.

In order, to assess if a diminutive company could qualify as an SME an important tool would be the analysis of said enterprises’ self- regulatory methods such as policy statements but also due diligence processes.

In fact, in recent years and due to the Guiding Principles applicability to really all *business enterprises*, and not just MNEs, it has become of grave importance to understand how SME’s and micro enterprises would formulate their diligence processes.

While acknowledging the *do good* quality of SMEs one must not neglect the fact that SME’s are capable of gravely impacting human rights. In fact, as previously denoted if SMEs are able to create employment they are also be able to create unemployment or to endanger workers’ rights in order to achieve some self-benefit.

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<sup>90</sup> Gibson and Vaart supra footnote 74 pp.15-16

<sup>91</sup> Gibson and Vaart supra footnote 74 p.18

Additionally, as SMEs can create innovation, but also but also have the potential to impact human rights. Let's explore the hypothetical scenario: The popularity of a certain indigenous population art, entices the creation of SMEs who employ many members of said indigenous community for the production of the ornaments selling them at a profit. As the indigenous adults become increasingly employed, older children must help out more in the rearing of the younger children and the maintenance of the household, thus leading to lack of time to attend school and an increased illiteracy rate. Also troubling, indigenous populations might sell their most valuable cultural artefacts to companies that, in turn, will sell them to international buyers leading to loss of the cultural heritage of the indigenous population and the country they inhabit.

Similarly to MNEs, SMEs are capable of adversely impacting human rights and hence the importance of due diligence processes. However, the way SMEs apply these processes will differ from MNEs because, as formulated in the Guiding Principles, the due diligence processes “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”.<sup>92</sup>

While there is no specific formulation in regards to how due diligence processes should be applied in the case of SMEs, the possibly simplified processes should in any case, “identify, prevent, mitigate and account for how they address their impacts on human rights”.<sup>93</sup>

The European Commission has produced a short report containing testimonies of five companies in regards to their response to the human rights expectations set by the Guiding Principles. The companies (Sealock, StartPeople, Van Bavel, Danimex

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<sup>92</sup> OHCHR supra footnote 7 p.18

<sup>93</sup> OHCHR supra footnote 7 p.16

Company and Farmahem) have an employee turnover rate ranging from 14 to 144 employees and an annual turnover rate ranging from 3 million to 37 million.<sup>94</sup>

All the companies expressed that the Guiding Principles have provided them with a better understanding of human rights impacts and two enterprises expressed it had affect them to create changes to their codes of conducts in order to incorporate the course of action concerning business partners human rights impact.<sup>95</sup>

The following are the most common ways in which the interviewed SMEs comply with due diligence processes within their operations:

- a) four out of the five companies interviewed, communicate the existence of a code of conduct and signal the importance of compliance with the law;
- b) three out of five companies denote the existence and application of key performance indicators (KPI) in areas related to health and safety, the environment, non-discrimination and other commitments set out in its code of conduct. It is worth mentioning, however that companies do not have KPIs to address all the commitments set out by their codes of conduct;
- c) three out of five companies have some sort of complaint mechanism, whether anonymous or not and varying in complexity and redress.

With regards of their business relations:

- d) three out of five companies make sure their Codes of Conduct maintain, at the minimum expectations, for business partners ethical conduct,
- e) three out of five companies used leverage to influence a business partner or have terminated business partnerships due to human rights abuses by partners.

Concerns regarding the way in which these companies implement due diligence processes is mainly connected to the weak degree of effective victim redress mechanisms in a company's own operation. Only one enterprise mentioned a redress solution applied at the end of investigation as being the termination of the contract of

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<sup>94</sup> European Commission (2013) De-mystifying Human Rights for Small and Medium-sized Enterprises [online] Available from URL: [http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/human-rights-case-studies\\_en.pdf](http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/human-rights-case-studies_en.pdf)

<sup>95</sup> European Commission supra footnote 94

the non-compliant staff. The comprised enterprises also lacked public accountability for their human rights impact with only one referring to submission of public reports regarding its conduct due to the fact it signed on to the Global Compact.

### 3.2 Supporting SMEs: The *Small Business Initiative* in Europe

Considering SMEs as the “backbone of European economy”<sup>96</sup> and “decisive for the future prosperity of the EU”<sup>97</sup> due to its impact in job creation which has implications on the effective realization of human rights, the European Union has spared no efforts in developing mechanisms to create an environment which fosters the growth and thrive of SMEs.

In March 2008, The European Commission (EC) developed a framework entitled the Small Business Act (SBA) The SBA aims to influence EU countries’ policy and encloses several ideas and initiatives in regards to the diminishing of challenges to SME success and the improvement of the approach to entrepreneurship in Europe.<sup>98</sup>

The regard in which SMEs are held in Europe is based on its potential social impact as mentioned in the previous chapter. The SBA report remarks that globalization brought on immeasurable benefits, but also challenges to European economies and SMEs are primed as golden for the resolve of economy and social problems mainly through job creation and innovation whether in the market or social form. Due to its importance SMEs’ needs have been in the forefront of the growth and job strategy set out by the Lisbon Treaty.<sup>99</sup>

Although global assessments are mostly based on assumptions it is worth denoting that Europe is also better equipped to assess the importance of SMEs in European soil because it possesses a quantitative definition and a corporate liability model that permits a cohesive assessment of European companies in structure and size.

Considering the main burdens faced by SMEs which are primarily administrative, financial as well as difficulties related to visibility in the international and domestic context the SBA denoted the importance of improving 3 main areas: a)

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<sup>96</sup> Gibson and Vaart supra footnote 74 p.4

<sup>97</sup> European Commission (2008) Think Small First A Small Business Act for Europe COM(2008) 394 final {SEC(2008) 2101} {SEC(2008) 2102} p.2

<sup>98</sup> European Commission supra footnote 97 pp.2,3

<sup>99</sup> European Commission supra footnote 97 pp.2,3

reducing the regulatory burden; b) improving access to funding and loans and c) improving access to international markets.<sup>100</sup>

The necessity to reduce the burden set on SMEs by national legislations came at the recognition of the fact, SMEs are disproportionately disadvantaged in comparison to MNEs's as they are probing to spend up to ten times more in certain regulatory duties. In fact, 36% of SMEs have identified the regulatory burden as causing a constriction in their business in the last 2 years prior to the adoption of the SBA.<sup>101</sup> Under the “Think Small Principle”, the SBA, sets out a process, much similar to a due diligence process, in order to assess the impacts of governmental policy on SMEs. The European Commission attests its commitment to the general principles of subsidiarity and proportionality in the adoption of legislation conducing to the simplification of the regulatory environment of SMEs and requests that Member States (MS) adopt administrative measures that effectively foster the creation of a pro-entrepreneurship/pro – SME domestic context. Amongst many initiatives, MS were requested to: a) cut the costs of registering new business; b) reduce the time required for the setup of a business all the way down to one week; and b) cut the red tape around the license and permits, which should take the maximum of a month to obtain, except in justified cases. MS were also asked to improve SME participation in public procurement by the Code of Best Practice.<sup>102</sup>

Under this objective and the SBA, the European Commission has reported progress in the Regulatory Fitness and Performance Program (REFIT) denoting simplification and improvement achievements in the areas of “electronic vat invoicing, accounting/financial reporting, chemicals legislation, patents, public procurement and road transport”<sup>103</sup>

In 2015 the European Commission modified REFIT in order to include a platform in which the “government group” composed by MS experts and the

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<sup>100</sup> European Commission supra footnote 97

<sup>101</sup> European Commission supra footnote 97

<sup>102</sup> European Commission supra footnote 97 pp9-10

<sup>103</sup> European Commission (2015) REFIT – making EU law lighter, simpler and less costly [online] Available from URL: [http://ec.europa.eu/smart-regulation/refit/index\\_en.htm](http://ec.europa.eu/smart-regulation/refit/index_en.htm)

“stakeholder group” composed of business and civil society could discuss the improvement of EU legislation for SMEs.<sup>104</sup>

The second main objective of the SBA was to improve SME’s access to finance, which reflected SME’s concerns regarding the obtaining and maintaining of financial resources to further their operations. In particular the SBA referred to access of the aforementioned risk capital and micro credit, but also mezzanine finance.<sup>105</sup>

Beyond facilitating access to finance the SBA also intends to provide entrepreneurs with more knowledge on different types of financing and how to make their business seem more appealing to financiers who are generally concerned with the high risk associated with investments in this form of business.<sup>106</sup>

The European Commission is especially keen on the development of financial instruments, amongst them are the COSME Competitiveness and Innovation framework which in 2013 replaced the first established the Competitiveness and Innovation Framework Programme (CIP).<sup>107</sup>

Surprisingly, the CIP only counted with a relatively low budget of a billion Euros, however, it managed to help over 3400000 SMEs to get access to financial resources. The understanding that a relatively small sum could help a large number of enterprises bears a slight reminiscence to the idea of micro-credit.<sup>108</sup> The Cosme program, bearing the same purpose as CIP, has taken a new strategy, funding different intellectual property SME helpdesks as well as fund other three organizations: Enterprise Network Europe, Your Business Portal and SME Internationalization Portal. These organizations aid enterprises in forming new business partners, attracting investors and understanding EU business law and different national legislations. The European commission has also developed an online portal which proves to be very

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<sup>104</sup> European Commission supra footnote 103

<sup>105</sup> European Commission supra footnote 97 p.11

<sup>106</sup> European Commission supra footnote 97 pp.10-12

<sup>107</sup> European Commission supra footnote 97 pp.10-12

<sup>108</sup> European Commission (2015) CIP Financial Instruments [online] Available from URL: [http://ec.europa.eu/growth/access-to-finance/cip-financial-instruments/index\\_en.htm](http://ec.europa.eu/growth/access-to-finance/cip-financial-instruments/index_en.htm)

accessible and comprehensive in spreading information regarding different types of EU supported finance by different institutions such as banks and venture funds.<sup>109</sup>

Thirdly, the SBA has also strived to encourage and support SMEs who wish to extend its operation to other countries within the Single Market.<sup>110</sup> SMEs have recognized certain difficulties associated with this expansion, including the remarkable difficulties arising from having to deal with different national laws and regulations. For the purpose of supporting SMEs and beyond the request that MS should reduce their regulatory burden also to attract EU enterprises, the European Commission urges MS to “improve governance on single market policy”<sup>111</sup> by various means including a better representation of this group when law making. MS are also encouraged to educate SMEs on trademark law and facilitate their access to it.

The support of SMEs in Europe, through the SBA has proven to ease the difficulties this sector faces, the reproduction of this approach globally could be one of the avenues to explore in the pursuit of ways to effectively ensure certain human rights such as employment and nondiscrimination.

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<sup>109</sup> European Commission (2015) CIP Financial Instruments [online] Available from URL: [http://ec.europa.eu/growth/access-to-finance/cip-financial-instruments/index\\_en.htm](http://ec.europa.eu/growth/access-to-finance/cip-financial-instruments/index_en.htm) + European Commission Online portal [online] available from URL: [http://europa.eu/youreurope/business/funding-grants/access-to-finance/index\\_en.htm](http://europa.eu/youreurope/business/funding-grants/access-to-finance/index_en.htm)

<sup>110</sup> European Commission supra footnote 97 pp12-14

<sup>111</sup> European Commission supra footnote 97 p.12



#### **4. SOCIAL ENTERPRISES (SE)**

Social Enterprises (SE) are of special significance to the legal theory of business and human rights because they pursue the altruistic goal of the betterment of society under a commercial strategy, creating an insurmountable bond between business and human rights. Currently, social enterprises remain largely legally undefined which provides an interesting avenue for speculation about possibilities of creation of legal content. Is it possible that due to its purpose SE are bound to greater human rights responsibilities than other business? How do SEs contribute towards the betterment of society?

In 4.1 I will discuss the definition and shortcomings of the current definition of SE while also addressing criticism with regards to the assumption of their capacity to prioritize social impact over financial profit.

In subchapter 4.2 I will discuss how Europe supports its SEs and how worldwide impact investment is supporting SEs while also undertaking the goal of social impact.

#### **4.1 SE: Definition, legal vacuum and moral dilemmas**

The definition of Social Enterprise is immersed in conceptual ambiguity. Perhaps the simplest way to understand in general terms its significance is to analyse the semantics of the term. “Social” denotes *what is related to human society* and the *welfare of members of society* and “enterprise” signifies *a business organization*, the conjunction of the terms would then translate into a business organization concerned with the welfare of human society and its members.<sup>112</sup>

The ambiguity of the concept cannot be narrowly portrayed as positive or negative. A very narrow conceptualization would exclude projects that could fall in the scope, but are lacking certain trivial characteristics, however the ambiguity of the concept can pose a challenge to the sustainability of the projects for investors, whether governmental or private, need a certain amount of certainty to make what is already a high-risk investment.<sup>113</sup>

The current lack of more specific global consensus on the term however, does not signify there are no identifiable strings of thought that differ between Europe and North America. Surprisingly, non-western countries interpretations of SE are not commonly found in literature which leads to the assumption they either rely on a very general interpretation of the terms or adopt either one of the interpretation made by western countries.<sup>114</sup>

Recognizing the difficulty imposed by the aforementioned lack of clarity, the OECD has made certain efforts to clarify the term SE and related notions of social entrepreneurship, social entrepreneur and social innovation, analysing the expertise of over 38 different sources of academia, practitioners and territorial regions.

The OECD classifies social entrepreneurship as a movement, under the umbrella of social innovation, which responds to social challenges with innovative commercial solutions. The SE’s focus on a commercial strategy rejects the traditional exploitation of

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<sup>112</sup> Doeringer, M.F. (2010) Fostering social enterprises: A historical and International analysis In Duke Journal of Comparative & International Law, Vol. 20, No. 2, pp. 291-329, 2010 [online] Available from URL: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1581525](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1581525)

<sup>113</sup> Doeringer supra footonote 112

<sup>114</sup> Doeringer supra footonote 112

the market opportunities for financial profit, but rather capitalizes it for the improvement of social conditions and local communities. The OECD reflects that while social entrepreneurship is mostly a local phenomenon, it can create global repercussions and cites examples of venture philanthropy, which is the use of business investment and management techniques for the advancement of philanthropic pursuits, as an example of local investments from international sources.<sup>115</sup>

The social entrepreneur, as a non-profit, perpetually aims for the creation of social currency rather than financial currency, however social entrepreneurship *attitudes* can be found in the for-profit and public sector, under corporate philanthropy and governmental social innovative programs. The OECD, adopts a stance similar to the European impression, that the defining difference between a social entrepreneur and a commercial entrepreneur is that the social entrepreneur creates business in order to achieve social value and formulates that “social entrepreneurs create social value but are not motivated by the appropriation of this value”.<sup>116</sup>

The European consensus on the idea of SE is set out by the European Commission in the *Social Business Initiative* and *Guide to Social Innovation* reports. Rather than providing a strict, legally binding definition of set characteristics that SE must have to qualify as such, the European Commission simply builds a consensus based on generalized European understandings. Legal definitions and parameters regulating SE are left to the discretion of Member- states.<sup>117</sup>

SEs are interpreted as innovative social solutions, which are sustainable under the environmental, financial and social front. Thus, SEs contribute towards *smart*

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<sup>115</sup> Organisation for Economic Co-operation and Development- OECD (2013) Chapter 5, Social Entrepreneurship and Social Innovation. In *Guide to Social Innovation* [online] available from URL:[http://ec.europa.eu/regional\\_policy/sources/docgener/presenta/social\\_innovation/social\\_innovation\\_2013.pdf](http://ec.europa.eu/regional_policy/sources/docgener/presenta/social_innovation/social_innovation_2013.pdf)

<sup>116</sup> Organisation for Economic Co-operation and Development- OECD (2013) Chapter 5, Social Entrepreneurship and Social Innovation. In *Guide to Social Innovation* [online] available from URL:[http://ec.europa.eu/regional\\_policy/sources/docgener/presenta/social\\_innovation/social\\_innovation\\_2013.pdf](http://ec.europa.eu/regional_policy/sources/docgener/presenta/social_innovation/social_innovation_2013.pdf) p.119

<sup>117</sup> OECD *infra* footnote 116 p.4

*growth*, designating the sustainable development of communities, and actively foment social cohesion.<sup>118</sup>

The European Commission circumscribes SEs to the realm of social economy, which designates the institutional space of economic activities linked to general public interest and social betterment. Social economy encloses financial entities with a specific legal status, such as charities, foundations, cooperatives and is of great importance in Europe since it “employs over 11 million people in the EU (European Union), accounting for 6% of total employment”.<sup>119</sup> It is possible that this theoretical allocation of SEs, also explains why in Europe, there is a more restricted interpretation of the concept than in North America.

Within Europe, SEs are enterprises created for the purpose of enabling the elimination or diminishing of a societal need or a social problem. The concept excludes for-profits and enterprises whose economic activities *unintendedly* benefit local communities, as the commercial aspect of the initiative is merely the strategy adopted to reach the social goal.<sup>120</sup> “The common good is the reason for the commercial activity”<sup>121</sup> and capitalizing in social impact is the goal of SEs so they are expected to remain non-profit by reinvesting their financial gains in the project or in the community.<sup>122</sup>

Methods of organization and leadership are also crucial in the European understanding of SEs: these must reflect the SE’s purpose and social mission as well as democratic values, including the principle of solidarity. SEs must also recur to egalitarian systems of distribution of privilege, especially in voting and decision-making power, which is distinct from traditional notions of power based on capital ownership.

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<sup>118</sup> European Commission (2011) Social Business Initiative. Creating a favourable climate for social enterprises, key stakeholders in the socialeconomy and innovation. COM(2011) 682 final. [online] Available from URL:[http://ec.europa.eu/internal\\_market/social\\_business/docs/COM2011\\_682\\_en.pdf](http://ec.europa.eu/internal_market/social_business/docs/COM2011_682_en.pdf)

<sup>119</sup> European Commission supra footnote 116 p. 3

<sup>120</sup> European Commission supra footnote 116 p. 3-5

<sup>121</sup> European Commission supra footnote 116 p. 3

<sup>122</sup> European Commission supra footnote 116

Decision making privilege is shared between SE's employees, consumers and stakeholders.<sup>123</sup>

In Europe, enterprises constituting SE's, are either:

- a) A commercial activity that produces or sells products and services that directly benefit a community and marginalized or vulnerable groups (such as healthcare providers, access to housing, community leisure services etc...);
- b) A commercial activities linked to the production and sale of social or non-social goods and services, which employs members of socially marginalized or vulnerable groups, such as people belonging to ethnic and national minorities, people of poor socioeconomic background and or people of low educational level; thus contributing to the betterment of the quality of life of a population, augmenting living standards while decreasing unemployment.<sup>124</sup>

While in most Europe, SEs are generally associated with the aforementioned form b), the United Kingdom has a longstanding tradition of SEs are also associated with form a).<sup>125</sup>

While the European perspective only considers non-profits as SE's, the United States of America (the *US* or *USA*) academic thought has a wider definition of SEs. It is understood that SEs cover three types of commercial enterprises:

- a) For- profits that contribute towards the lessening of certain social problem;
- b) Enterprises that equally value the maximization of profits and social impact;
- c) Non-profit organizations that hold economic activities in order to fund their projects.<sup>126</sup>

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<sup>123</sup> European Commission supra footnote 116

<sup>124</sup> Kerlin, J. A. (2006) Social Enterprise in the United States and Europe: Understanding and Learning from the Differences in *Voluntas* 17:247–263  
DOI 10.1007/s11266-006-9016- [online] Available from URL:

[http://inovum.si/social/public/files/social\\_enterprise\\_in\\_the\\_united\\_states\\_and\\_europe.pdf](http://inovum.si/social/public/files/social_enterprise_in_the_united_states_and_europe.pdf)

<sup>125</sup> Kerlin supra footonote 124 p. 250

<sup>126</sup> Kerlin supra footonote 124 p.248

The American academic interpretation disregards the considerations on whether the enterprise was created for the achievement of social impact or not and whether or not the profits are reinvested in the social goal, the bottom-line relies on the assertion that the commercial activity improves a social issue.<sup>127</sup>

Outside academia, in practice, most SEs in the US come in the form of c) non-profits income generating commercial activity.<sup>128</sup>

Since non-profits use resources for charitable, social purposes, which in practical terms alleviate governmental social failures, the Federal, state grants the legal benefits of collection of tax-deductible donations and federal tax exemption. Due to the desirable legal benefits of being a non-profit, the Congress and US Department of Treasury conduct a rigorous 5-part test to assert the nature of any organization pursuing legal recognition as a non-profit while conducting any type of commercial activity.<sup>129</sup> The assumption that non-profits are created altruistically must be closely assessed when non-profits decide to engage in commercial activity, therefore the most relevant provision of the 5-part test relies on the assessment that “no part of the net earnings of which inures to the benefit of any private shareholder or individual”<sup>130</sup>

*Insubstantial* commercial activity is allowed as long as it does not detract but further enhance the primary social goal of the non-profit however, there is no legal certainty with regards to the term *insubstantial*.<sup>131</sup>

At this point it is clear that there are considerable differences between the European and the American conception of SEs, being that the OECD adopts a definition which is closer to European thought.

The differences between the practical form of SEs in Europe and in North America and resulting different conceptualization of SEs are a consequence of the different socioeconomic difficulties the regions have suffered due to the 1970's and

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<sup>127</sup> Doeringer supra footnote 130

<sup>128</sup> Kerlin supra footnote 142 p.248

<sup>129</sup> Doeringer supra footnote 112 p.297, 298

<sup>130</sup> Doeringer supra footnote 112 p. 297,298

<sup>131</sup> Doeringer supra footnote 112 p. 298

1980's stock market inflation and subsequent economic recession. While "welfare conscious" Europe chose to limit government spending on unemployment benefits, the United States chose to limit the support of charities. Thus, it became clear that in order to survive many American charities had to further diversify their sources of income rather than relying solely on grants and loans; eagerly American non-profits started to rely on commercial activity in order to be able to finance their charitable activities. The recession caused the European unemployment rate to increase up to 10% and more gravely, 40% of the 10% population were in a situation of long-term unemployment. Thus, European charities saw the necessity to improve the social condition by reducing unemployment rates, hence the creation of cooperatives and SEs that focused on the employment of vulnerable or marginalized groups.<sup>132</sup>

In all understandings, whether European or American the goal of social impact remains the main characteristic of a SE. One might even advocate that SEs contribute towards the advancement of human rights by facilitating their full realization within social context. In this optic, a social enterprise that creates the conditions which assure the full realization of a right seems to take a task similar to duty to fulfil which is in IHRL only applicable to states.

However, similarly to the UNGP formulation of duty to respect *in preventing others from doing harm* as being limited to enterprise' sphere of influence, there is also a hypothetical limitation to social enterprises facilitation of the full realization of human rights since it is limited to the field of the social impact of their operations and within a reasonable scope considering their financial and administrative capacities.

In spite of SEs being widely recognized as beneficial agents in society there are also many skeptics that disagree with this assertion, advocating that *the greed* of the commercial/ capitalist approach and organizations is impossible to combine with *good* of charitable organizations.<sup>133</sup>

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<sup>132</sup> Doeringer supra footnote 112 p.p. 293, 294

<sup>133</sup> QueensUBusiness (December 16, 2013) The Dark Side of Social Enterprises [video file] Retrieved from [://youtu.be/b2PTNBnb\\_aw](https://youtu.be/b2PTNBnb_aw)

Professor Dacin, of Queen's School of Business has recently addressed the morality of the existence of Social Enterprises under different fronts in a lecture.<sup>134</sup>

Under the form of for-profit equally aiming for social impact and profits, the basis of SEs altruism might be questioned when juxtaposed with a commercial logic. Producing and selling enterprises' income is increased at the same rate as they are recognized by their consumer target audience as being, not only socially responsible, but a social innovator. Thus, social branding becomes the strategy adopted by enterprises to increase their earnings under false assertions of altruistic goals.<sup>135</sup> This concern seems especially relevant in the American context where social enterprises might be for profit. The resolution of this issue could potentially lie in the creation of a legal status for the term social enterprises, which would dispel the potential of corporate actions resembling consumer fraud.

Secondly, seemingly innocuous non-profits might also use its appearance to disguise criminal activity. Professor Dacin refers to the example of social housing scams in Jamaica which profit from partnerships between social enterprises, politicians and criminal gangs to form garrison communities in social housing areas in which drug trafficking and crime run rampant away from governmental control.<sup>136</sup> In this example, it is clear that the problem does not lie in the existence of social enterprises, but its appropriation for criminal intent; the elimination of social enterprises would not rectify the problem, but rather tighter policing anti-corruption policies and national legislation could act in prevention of the appropriation of social enterprises for criminal intent.

Additionally, there are concerns with regards to social enterprises created as non-profits which its growth propels them to be increasingly torn between their social purpose and their capitalist strategy. Truthfully, even the Grameen Bank, which popularized the use of microcredit as an innovative social innovation, as shifted from being a non-profit to becoming a for-profit Bank as have other similar community

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<sup>134</sup> QueensUBusiness supra footnote 133

<sup>135</sup> QueensUBusiness supra footnote 133

<sup>136</sup> QueensUBusiness supra footnote 133



development banks such as the SKS with the increase of its success.<sup>137</sup> While it is morally incorrect to use gains, including connections and public support, to benefit an organization that later turns for-profit, the previous assertion implies that for-profit social enterprises are inherently negative and there is the assumption that non-profits operate more efficiently in the protection of social causes and human rights. The latter may be incorrect if we recall that one of the reasons for the appearance of SEs was that traditional forms of aid and non-profits carried deficiencies that endangered their social purpose. Additionally, several new theories regarding the concept of dignity and human rights assess that giving the poor the same opportunity of access to conditions, in this case bank credit, as the prosperous is central to the idea of dignity in opposition to the mere handout of resources, which is proven to be unsustainable.<sup>138</sup>

One poignant point of Dacin's discourse was regarding the dangers of the handing over to enterprises, even if they are social enterprises, the administration of certain goods, and refers to the example of the privatization of water treatment stations.<sup>139</sup>

This formulation could also allude to the example of private prisons, which is currently a trending international human rights topic: Private prisons often offer better and more dignified housing conditions to inmates due to the commercial focus on client satisfaction and facility of access to capital, which rely on investments from privates in the construction and building phase and state's payment per inmate of accommodation once the facility starts its operations. Under this perspective, one might argue that the investors of the private prisons are doing so under corporate philanthropy and that private prisons could constitute a form of social enterprise.

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<sup>137</sup> QueensUBusiness supra footnote 133

<sup>138</sup> United Nations (2013) A life of dignity for all: accelerating progress towards the Millennium Development Goals and advancing the United Nations development agenda beyond 2015 [online] Available from: <http://www.un.org/millenniumgoals/pdf/A%20Life%20of%20Dignity%20for%20All.pdf>

<sup>139</sup> QueensUBusiness supra footnote 133

However the potential of social damage by leaving this vulnerable group at the mercy of private interest could outweigh any benefits the enterprise might bring.<sup>140</sup>

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<sup>140</sup> FRASER, S. (2012) Locking Down on American Workforce. Huffington Post. [ONLINE] 20TH of June. Available from URL: [http://www.huffingtonpost.com/steve-fraser/private-prisons-\\_b\\_1439201.html](http://www.huffingtonpost.com/steve-fraser/private-prisons-_b_1439201.html)

## **4.2 Supporting SE's: The *Social Business Initiative* in Europe and *Impact Investment* around the globe**

SEs are plagued by some of the same concerns as SMEs which most often include the traditional difficulties in access to international markets and funding. Additionally, SEs are also challenged with more specific problems such as lack of recognition in society and by traditional forms of business.<sup>141</sup>

Recognizing their potential for the betterment and advancement of local realities in the social and economic scene, institutions and countries have recently become more concerned with their success. Impact Investment has emerged at the global level as a new type of investment specially formulated for the support of SEs and in Europe the *Social Business Initiative* (SBI) has made great stride in protecting the needs of SMEs within the EU space.

Within Europe the attention consecrated to SEs, by the European commission, stems from the aforementioned characteristics, but also a consideration of its role and importance within the social economy. In fact, studies show that one in every four enterprises in Europe is an SE, with that figure rising up to one in every three in Finland, Belgium and France.<sup>142</sup>

In spite of the great number of SEs operating in Europe it would be naive to assume the existence of comprehensive information regarding and amongst them. This is due to the fact that although there is a certain common European understanding of SEs, the EU leaves the responsibility of legal definitions to its MS. This autonomy of the EUMS triggers the existence of a great variety of incomparable data regarding their challenges and performance. Furthermore SEs in Europe display low levels of recognition in society and by traditional business. This difficulty starts at the schooling level and its lack of focus on conveying knowledge regarding social entrepreneurship and it extends to the lack of understanding and empathy by traditional enterprises which

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<sup>141</sup> European Commission (2011) *Social Business Initiative Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation* COM(2011) 682 final {SEC(2011) 1278 final} p.5

<sup>142</sup> European Commission supra footnotes 141 p.3

do not value the experience of social entrepreneurs. Additionally, there are low levels of cooperation between European SEs which hinders the formation of business partnerships and annuls the possibility of identifying best practices. Being that the objective of a European SE is to achieve social impact, possibly at the cost of revenue, leads financiers and banks to consider SE investments as high risk and low profit, which undermines their chances of receiving adequate funding; at the public level, red tape complicates SE's access to grants and funds.<sup>143</sup>

The SBI's assessment of the challenges of SE's brought on the identification of three areas of improvement in which EUMS and EU efforts would most make a difference. Those three areas are: a) access to finance, b) improving the legal environment and c) increasing visibility.<sup>144</sup>

Within efforts to improve finance the SBI relied on measures that would affect both access to private funding and also an augmentation of EU investments. In this realm the European Commission's greatest SBI strives were intertwined in the creation of a better regulatory framework to incentive impact investment and the creation of two financial instruments: the Progress Microfinance launched in 2010 which loans SEs and Small businesses up to 25 000 euros and the Programme for Social Change and Innovation eventually created in 2012 worth 90 million Euros to improve access of SEs to funds but also with a focus on employment.<sup>145</sup>

In order to improve the visibility of SEs the SBI encouraged the creation of a sort of SE map of Europe which enclosed all types of SEs under domestic legislation. This map would enable the identification of best practices within the field, and aid the creation of a "public database of labels and certifications"<sup>146</sup> for SEs. The European

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<sup>143</sup> European Commission supra footnotes 141 p.3

<sup>144</sup> European Commission supra footnotes 141

<sup>145</sup> European Commission supra footnotes 141 p.3 + European Observatory of Working Life EurWork (2012) Commission launches Programme for Social Change and Innovation [online] Available from URL: <http://www.eurofound.europa.eu/observatories/eurwork/articles/other/commission-launches-programme-for-social-change-and-innovation>

<sup>146</sup> European Commission supra footnotes 141 p.8,9

Commission also vouched to promote cooperation between national and regional administrations and to aid and promote SEs.<sup>147</sup>

In order to improve the legal framework in which SEs operate the SBI also proposed the simplification of the Statute for a European Cooperative Society to “reinforce independence” and facilitate the impetus of Single Market extension of domestic social cooperatives and the creation of a European Foundation Statute neither of the proposals yet have been realised.<sup>148</sup>

In regards to the global context an exciting new development in the financing of SEs has been the emergence of impact investment in the last few years.<sup>149</sup>

In spite of the term impact investment being coined in 2007 there are different interpretations in regards to its characterisation although there are some points of consensus.

Firstly, impact investment denotes an innovative approach to traditional investment within the scope of responsible investment.<sup>150</sup> In fact impact investment is thought to be at the centre of “an impactum continuum that runs from philanthropy to responsible and sustainable business”<sup>151</sup> It is important to understand this concept and conceptual differences between the elements of this impactum continuum to formulate a proper definition of impact investment. Responsible investment designates a category of investments that generally recognise the importance of long term sustainability in the environmental, economical or social front. Sustainable investment values conscious and sustainability of investments by looking at Environmental, Social and Governance criteria (ESG). Impact investment stands out for its dual goal of achieving financial

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<sup>147</sup> European Commission supra footnotes 141 p.10,11

<sup>148</sup> European Commission supra footnotes 141 p.9-10

<sup>149</sup> World Economic Forum - WEF (2013) From the Margins to the Mainstream Assessment of the Impact Investment Sector and Opportunities to Engage Mainstream Investors p.4

<sup>150</sup> WEF supra footnote 149

<sup>151</sup> Social Impact Investment Taskforce (2014) Impact Investment: The Invisible Heart Of Markets [online] Available from URL:

[http://www.socialimpactinvestment.org/reports/Impact%20Investment%20Report%20FINAL\[3\].pdf](http://www.socialimpactinvestment.org/reports/Impact%20Investment%20Report%20FINAL[3].pdf) p.1

return and *creating good* in terms of the social or environmental situation.<sup>152</sup> Similarly to the focus on intentionality *of doing good* is a defining feature of SEs in Europe, globally impact investment shares the *principle of intentionality*<sup>153</sup> to distinguish investments who only inadvertently do good. The success of impact investment is actively measured to assess financial profit and social or environmental impact.<sup>154</sup> In title of example, if a financier decides on making an impact investment in trade schools it will measure the augment of the rate of formation of the local population in various jobs.

Impact investment is also unique in the sense that the investor is willing to accept lower rates of financial return for the achievement of the impact.<sup>155</sup> The impact investor usually relies on the use of venture capital or patient capital. Often the investment constitutes traditional patient capital because the investor forgoes any type of quick profit in order to achieve better gains in the further future.<sup>156</sup> Venture capital designates money intended to finance new or small enterprises.

Currently there are estimates of growth of the impact investment sector between 500 million to a billion in 2020.<sup>157</sup> Unfortunately, financial institutions do not seem well prepared to make estimates in regards to the social impact component, but in spite of this downfall there has been remarked a great trend amongst clients who increasingly demand that investors follow ESG criteria and although sustainable investment is different from impact investment it also reflects ever increasing population's concerns in finance world which go beyond mere financial profit.

The relevance of this emerging concept is denoted by its acceptability in the mainstream banking and investment world. Currently, some of the biggest finance

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<sup>152</sup> WEF supra footnote 149 p.8, 9

<sup>153</sup> WEF supra footnote 149 p.7

<sup>154</sup> Social Impact Investment supra footnote 169 p.18

<sup>155</sup> WEF supra footnote 149 p.9

<sup>156</sup> WEF supra footnote 149 p.9

<sup>157</sup> WEF supra footnote 149 p.9

institutions have been aggressively making impact investment from which I would like to denote the Credit Suisse, the Deutsche Bank and JP Morgan.<sup>158</sup>

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<sup>158</sup> WEF supra footnote 149 p.9,10

## **5. ARE THERE ANY HUMAN RIGHTS BASED BUSINESSES? AN ANALYSIS THROUGH CASE-STUDY AND A MORE DETAILED ACCOUNT OF THE CONCEPT**

The advocacy of the existence of Human Rights Based Businesses entails a full understanding of the concept of HRBB as an entity drawing upon best practices found within the field of business and human rights. Furthermore, rendering the concept interesting for analysis will also entail a distinction between HRBB and other existing business configurations. So what does the concept of HRBB entail? Additionally, within the scope of Social Enterprises, Ziqitza Health Care (ZHL), stands out for its success in the betterment of the social context, thus its study is interesting in the analysis of the existence of HRBB.

In 5.1 I will discuss a more complex understanding of HRBB than the one led on the introduction, while also discussing its linguistics and comparing it to SES.

In subchapter 5.2 I will make a case-study of the enterprise Ziqitza HealthCare Limited (ZHL) operating in India, which will encompass an analysis of its social impact, its business strategy and ethical conduct.

In subchapter 5.3 I will elaborate on whether one can assume the existence of HRBB or not.



## 5.1. The concept of HRBB

At an initial level, as introduced earlier, the concept of HRBB was formulated as referring to enterprises that were built to respond to certain social needs that amount to human rights and that pursue the effective enjoyment of human rights over simple financial maximization.

Etymologically, the term Human Rights Based Business, denotes a business meaning: “the activity of making, buying, or selling goods or providing services” meaning a commercial activity “...in exchange for money”<sup>159</sup> which is based on meaning *reliant* or *built upon* human rights which are defined by the United Nations as “rights inherent to all human beings” having the characteristics of being simultaneously universal, inalienable, interdependent, equal and non-discriminatory.<sup>160</sup> Taking Ruggie’s example, it is wiser for the time being to consider human rights as those recognized by International Bill of Human Rights and at the most basic level of common international agreement and understanding. While business is usually understood as conducting their operations in exchange of money, the understanding of SE contradicts that all enterprises actually pursue financial profit for motives of greed, instead the profit obtained is applied into the pursuit of a social cause. This understanding can denote 2 scenarios relative to the term:

- a) HRBB are enterprises that incorporate human rights considerations in its services and operations
- b) HRBB are commercial activities formulated towards the advancement of human rights

Scenario a) is referent to the understanding that business must incorporate human rights ideals in its operations and services. At the most basic level, it denotes, as formulated by all international initiatives in the field of Business and Human Rights, that business

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<sup>159</sup> Webster Merriam- Webster dictionary (online) Available from URL: <http://www.merriam-webster.com/dictionary/business>

<sup>160</sup> OHCHR (2015) What are human Rights? [online] Available from URL: <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

must not infringe human rights. Under the perspective of the UNGP, as conveyed in corporate respect of human rights also entails preventing others within their sphere of influence from doing harm, which is very similar to the duty to protect only upheld by states under IHRL, and that furthermore compliance is assured by the formulation and usage of due diligence processes. Interpreted in this way, scenario a) relates to the current expectations set by international initiatives in regards to corporate respect of human rights.

Scenario b) is very similar to the existing concept of SEs as enterprises which, pursues social impact rather than simple financial profit, thus self imposing a dimension of the duty to fulfill human rights.

Utilizing both aforementioned concepts one can understand HRBB as: Commercial activities that incorporate the promotion, respect and protection of human rights all throughout its operations and services and that whose objective is connected to the advancement of human rights. In this formulation, a HRBB becomes an enterprise which self-imposes an uphold of all three human rights duties (respect, protect and fulfill) in non absolute dimensions.

An example suited to both scenarios would be of an institute offering tutoring services for special needs children, at an affordable price in an area where no such service exists neither in private or public form. Such an institute would effectively be an enterprise providing educational services that engage a marginalized part of the population, while respecting human rights and pursuing the full realization of right to education. However merely interpreting HRBB in this fashion would annul the necessity of the formulation of the concept at all, because it is very similar to the concept of SE. Thus, I suggest that while the concepts of social enterprises and HRBB are similar, the difference between both is that HRBB encompasses all the best practices set in the field of Business and Human Rights objectively framing enterprises as a possible ally and human rights defender rather than a threat to HR.

One could expect that a HRBB would uphold the following operational commitments understood in previous chapters to be conducive to a better way of linking business and human rights:

- a) Possessing a Policy Statement which, as formulated in GP 16, should be a public statement, widely available in internal and external communications of the enterprise reaffirming the enterprises' commitment to the respect of human rights;
- b) Implementing an ongoing and ever-present due diligence process that as formulated in Guiding Principle 17, 18 and 19 would act towards the avoidance, identification and mitigation of human rights impact;
- c) Formulating the correct commercial strategy to facilitate the achievement of the proposed human rights impact as do Social Enterprises;
- d) Actively measuring the attainment of the human rights advancement goal through the realization of studies, reports and surveys to the likeness of the way in which impact investors measure the attainment of their investment goals.

While questioning the morality of SE, Professor Dacin submitted a valuable question in regards to if was ever possible to combine good and greed. I suggest the interpretation of HRBB as the effective culmination of good and greed. However it must be understood that under HRBB greed is always subordinate to good thus, in situations in which the attainment of both goals of good and greed is mutually exclusive the goal of human rights advancement always takes primacy over the pursuit of financial profit.

If imagining the relation between business and human rights as a continuum from traditional business to HRBB all concepts connected to responsible business practices, expectations of the international community and SEs would fall somewhere in between.

## **5.2 Ziqitza HealthCare Limited supported by Acumen Fund: a case study**

Ziqitza Health Care Limited (ZHL) and related support by impact investor Acumen (previously named the Acumen Fund) also provides to be a remarkable case-study for the advocacy or denial of the possibility of existence of Human Rights Based Business due to 3 factors:

### **a) Social need and social impact**

ZHL is a social enterprise with a high poverty outreach that owns and dispatches a string of private ambulances in certain Indian states.

India's domestic healthcare context explains the necessity of the existence of ZHL as a socially impacting private ambulance service. In 2000, 4 years before the creation of ZHL, the World Health Organisation ranked India's healthcare system as being the 79<sup>th</sup> worst out of a universe of 191 countries in spite of India being one of the world's largest economies.<sup>161</sup>

India's estimated 1.2 billion inhabitants have to pay for medical treatment, which is preoccupying when considering that 79,5% of the population lives below a 2.5\$ per day poverty line and in 36% of Indians lived under the 1.25\$ extreme poverty line in 2009 statistics. Additionally, the majority of the underprivileged Indians live in rural areas of remote access which complicates emergency access to hospitals.<sup>162</sup>

Worryingly, in spite of averaging 21.3% higher than the world average in traffic accidents, India does not dispose of a federal emergency number and adequate governmental alternatives to access to hospitals. Thus, most Indians rely on private vehicles, electric rickshaws and van "ambulances" that lack medically trained personnel and equipment causing 30 % of road accident victims to die due to delays in hospital

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<sup>161</sup> World Health Organisation- WHO (2000) The World Health Report 2000. Health Systems: Improving Performance ISBN 92 4 156198 X (NLM Classification: WA 540.1) ISSN 1020-3311 [online] Available from URL: [http://www.who.int/whr/2000/en/whr00\\_en.pdf](http://www.who.int/whr/2000/en/whr00_en.pdf)

<sup>162</sup> Acumen and Grameen Foundation (2014) Poverty Profile of Ziqitza's clients [online] Available from URL: <http://zhl.org.in/images/ZHLPPstudyfinal.pdf> p.p.1-7

transport. In urban areas wealthier Indians rely more often on adequate, but costly private ambulance services .<sup>163</sup>

ZHL was created with the purpose to facilitate a dependable ambulance solution to Indians, irrespectively of their financial status; additionally the aim extended to “create a world class ambulance service in India that would be on par with 911 in the U.S. and 999 in the U.K”.<sup>164</sup> All ZHL ambulances are medically equipped and have staff with first aid or advanced medical training.

The aspect that really sets ZHL apart from traditional companies is the scope of its poverty outreach: 77% of its clients are living below the 2.5\$ poverty line.<sup>165</sup>

Additionally the service follows notions of fair finance and responsiveness which have been hailed by WHO as indispensable so that the ill or injured do not have to choose “between financial ruin and loss of health”<sup>166</sup>. ZHL’s service in view of facilitating population’s access to hospitals denotes the sole characteristic of an SE that achieves global consensus: the creation of social impact.

In 2014, ZHL’s poverty outreach was the subject of an Acumen commissioned a study, as a part of the active measuring of social impact that is caused by the use of impact investment. This report also paid significant attention to client complaints and feedback that reasoned on the transparency and efficacy of ZHL services.

The study was circumscribed to ZHL performance in the states of Punjab and Odisha. The conclusions denoted three major conclusions:

Firstly, the poor are effectively using the 108 emergency benefiting from free transportation. The 108 number was created by public-private partnerships in certain Indian states after the initial success of the company’s 1298 emergency number.<sup>167</sup>

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<sup>163</sup> Acumen and Grameen Foundation Supra footnote 162 pp.1-7

<sup>164</sup> Acumen and Grameen Foundation Supra footnote 162 pp.1-7

<sup>165</sup> Acumen and Grameen Foundation Supra footnote 162 pp.1-7

<sup>166</sup> WHO Supra footnote 161 p.2

<sup>167</sup> Acumen and Grameen Foundation Supra footnote 162 pp.1-7

ZHL has a significant poverty outreach being that 77% of clients in Punjab and 78% of clients in Odisha fall below the 2.50 poverty line. Also, ZHL poverty outreach has a percentage of poor clients greater than average poverty rates in Punjab but Odisha falls short being that the average poverty rates exceed the poverty outreach average of ZHL.<sup>168</sup>

Secondly, in Punjab a great majority of clients were female (71%) which is positive since women have significantly higher poverty levels in comparison to their male counterparts. However, an analysis of the medical complaints denoted that 41 percent of complaints were related to maternal, child and pregnancy health; the reasoning that may be drawn from this fact is twofold: a) ZHL may need better child and maternal care, b) women are increasingly using the services which is a positive step in the decrease of child mortality rates which are particularly high in India.<sup>169</sup>

In spite of actively seeking and facilitating the betterment of society as a purpose, in Europe ZHL would not qualify for any SE funding schemes because it is also a for-profit enterprise.

## **b) Success and business model**

In operation since 2005, ZHL has had a remarkable success story, originally ZHL relied on 20 ambulances and operated exclusively in the city of Mumbai, currently ZHL extends across 5 Indian states and operates over 1000 ambulances.<sup>170</sup>

The success of ZHL is due to the overcoming of two difficulties typically associated with SE's: a) access to funding which it has overcome by attracting an 1.5 billion dollars impact investment by the global venture fund Acumen and subsequent public-private partnerships (PPP) with Indian states; b) management of administrative burden which is difficult by high levels of corruption within Indian society.

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<sup>168</sup> Acumen and Grameen Foundation Supra footnote 162 pp.1-7

<sup>169</sup> Acumen and Grameen Foundation Supra footnote 162 pp.1-7

<sup>170</sup> Acumen and Grameen Foundation Supra footnote 162 pp.1-7

Acumen, as a non-profit dedicated to impact investment was crucial for the success and development of ZHL. Acumen, similarly to ZHL also uses a commercial strategy to achieve social impact: Instead of simply offering donations to SEs, Acumen raises charitable donations which then invests under a patient capital in SEs of developing countries, the returns of the investments are then reinvested in other SEs. The utilization of this innovative method of creating social impact is connected to the reasoning that the best way to improve the situation of the disenfranchised is to provide them with opportunity and choice. Acumen treats the enterprises it supports as business partners instead of merely aid recipients which eliminates the possibility of dependence which Jacqueline Novogratz, Acumens founder, considers to be the opposite of dignity.<sup>171</sup>

ZHL's business strategy innovation that allows the usage of this private service by poor people is the creation of a sliding price scale which regards the user financial situation. Theoretically, this model should ensure that affluence determines the amount or existence of transportation fee. In practical terms, there is a system which allows to determine fees: Originally, and still valid in certain cities (Mumbai, Kerala, Punjab and Bihar) under the dial '1298' model the fees are decided in function of the hospital the user elects to be transported into however, all unaccompanied victims or those who need emergency assistance due to accident, disaster are transported gratuitously.<sup>172</sup>

However, more recently and due to the enterprise, signing a Private- Public Partnership (PPP) with certain states, ZHL is also outsourced to operate an additional three National Emergency Lines in which the cost of call is state subsidized and small fees may or may not be requested: a) dial '108' which transports people in critical care, trauma or accident free of charge; b) dial '102' for mothers and children also free of charge and c) 1033 for highway accidents also free of charge

### **c) ethical conduct beyond mere social objective**

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<sup>171</sup> Acumen and Grameen Foundation Supra footnote 162 pp.1-7

<sup>172</sup> Acumen and Grameen Foundation Supra footnote 162 pp.1-7

Studies have also denoted ZHL's exceptional uncompromising position on the issue of bribery and corruption practices in India which, goes beyond this SE's dual purpose goal of social impact through access to health and financial profit.<sup>173</sup>

The practice of bribery and corruption is ingrained in Indian society to the detriment of fundamental values. India ranks number 95, in Transparency International's corruption index, behind countries like Italy, Saudi Arabia and Liberia which, are well known for having corruption practices.<sup>174</sup> Furthermore, over 25% of Indian politicians were under investigation for corruption practices.<sup>175</sup>

High officials and low level bureaucrats are usually the benefactors of this exploitative system that victimizes the general public and organizations. 54% of Indians resort to bribery to access basic services such as driving licenses, telephone and water access. Enterprises usually resort to bribery to stop officials from purposely delaying operations by imposing an insurmountable amount of red tape on to them.<sup>176</sup>

While ZHL has been exceedingly pressured into giving into bribery and corruption practices, the company has decided to not succumb to the allure of partaking in illegal activity. The founders of ZHL believe that corruption has a "symbiotic relationship with poverty"<sup>177</sup> thus non engagement with such practices and transparency should be the only course of action to take in its operations and employee demeanor.

However, this strong moral code and lack of adherence to a corrupt system has repeatedly endangered ZHL's social and business goals.

The first time ZHL was pressure to bribe officials was in the beginning of its operations at the time the enterprise desired to purchase an easy-to-remember four digit dial emergency number "1299". The purchase of this four digit number was numerous times difficult by officials requiring bribes; due to this pressure and ZHL business ethos it

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<sup>173</sup> INSEAD (2012) Ziqitza Health Care Limited: Responding to Corruption [ONLINE] Available from URL: [http://zhl.org.in/images/casestudy/INSEAD\\_Case\\_Study\\_on\\_ZHL\\_2012.pdf](http://zhl.org.in/images/casestudy/INSEAD_Case_Study_on_ZHL_2012.pdf) pp.1-13

<sup>174</sup> INSEAD supra footnote 173 pp.1-13

<sup>175</sup> INSEAD supra footnote 173 pp.1-13

<sup>176</sup> INSEAD supra footnote 173 pp.1-13

<sup>177</sup> INSEAD supra footnote 173 pp.1-13



decided to give up on attempts to purchase 1299 and purchase 1298 which, despite not as easy to remember became memorable through the imprint on every ambulance and equated with the enterprise's service.<sup>178</sup>

The second time, ZHL suffered enormous pressure to succumb to bribery practices happened in 2008 after Mumbai terrorist attacks. After this very delicate time officials resorted to the reinterpretation of national laws regarding work hours and threatened ZHL with lawsuit. The resolve of this situation outside the Court would require a bribe to officials; once again, not caving into the pressure, ZHL decided to engage in a lengthy and costly court battle.<sup>179</sup>

At the time of the study an additionally situation was happening concerning a PPP with a certain state that owed ZHL a large sum. This was a grave situation because the state's payment was necessary for the processing of employees salary and the continuance of the ambulance service in the region. Not processing with the bribery would endanger people's livelihoods and actual lives making the company increasingly prone to negligence complaints. This time some state officials required ZHL to pay a bribe of 5% of the indebted sum to be able to process payment. Alternatively, ZHL would have to requested a bank loan at 15% interest rate, under mere financial objectives it would be easier, more profitable and safer for business to merely pay the bribe. However and due to the fact that ZHL is an SE, with a strict moral code, CEO Ms Sangal chose to proceed differently. Ms Sawet Mangal, ZHL's CEO, reflected and describe the pressures to adhere to bribery as the following:

“Always looking for a payout, they found all sorts of new ways to harass us. They demanded ‘a, b, and c’ right away, even though they were slow to process our demands on their end, and when we delivered, they said now they needed ‘d, e, and f’. It's always different and always the same. But we would never choose to go down the road of bribes or opacity.”<sup>180</sup>

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<sup>178</sup> INSEAD supra footnote 173 pp.1-13

<sup>179</sup> INSEAD supra footnote 173 pp.1-13

<sup>180</sup> INSEAD supra footnote 173 pp.5

### **5.3 Are there any HRBB?**

The analysis of one case study does not allow for the identification of the existence of a higher standard of SE which through the use of best practices as defined in international initiatives also constitutes HRBB. However likelihood is that there might be SEs that adhere to such best practices.

The absolute identification of the existence HRBB would entail a comprehensive study of several enterprises of different configurations but most likely HRBB would be found in the comprehensive scope of SE.

ZHL's conduct when faced with pressure to commit bribery in order to receive state's missing payments reflects that even for-profit enterprises are able to forgo financial gains in order to fulfil a self imposed standard of conduct that contributes towards the advancement of Human Rights, which reinforces the idea that even for profit enterprises might be HRBB. It is proven that for-profit social enterprises are also possible of subjugating greed to good if confronted with the choice, thus, I would be wary of adopting a strict European understanding of the concept of SE in the pursuit of HRBB.

Although ZHL's conduct denotes strong evidence of possibly being a HRBB, it is a shame that in spite of statements by CEO Sangal that the company is known for its anti-corruption stance that statement of policy are difficult to find in their official communications or website, furthermore it is unclear of how they apply a rigorous due diligence process, in spite of the fact Acumen confirms and measures ZHL performance in creating *good*.

The importance of the concept of HRBB is attached to reformulation of the action of the enterprise in the field of Human Rights therefore; more important than identifying their existence, is the augmentation of efforts to ensure their existence through the publicizing of best practices.

## CONCLUSION

Globalization has increased the realization of the inefficiency of solo state action for the effective protection of human rights.

Accordingly, states have been keen on developing new initiatives at the international level that will allow for a better protection of common goals, one of which is the prevention of corporate human rights abuses. Amongst these initiatives one might find the Guidelines, the Global Compact, the Draft Norms and the UNGP.

The development of the Guiding Principles by Jonh Ruggie has gathered an immense applause and some criticism in the setting of a Business and Human Rights framework. The Guiding Principles contain three obligations: the state duty to protect human rights from corporate abuses; the corporate duty to respect human rights and access to remedy.

While the Guiding Principles only attribute the duty to respect to enterprises, the notion of respect is formulated differently from the classical “*do no harm*” IHRL interpretation. Respect, under the Guiding Principles, becomes understood, as *do no harm by action or by direct association*. This signifies that upon closer inspection, it is right to conclude that business is attributed the duty to respect *in preventing human rights impact by partners within its sphere of influence* which resembles the duty to protect, which can only be held by States under IHRL. In fact such a formulation of the duty to respect redirects the attention of the field of Business and Human Rights on enterprises in order to acknowledge them as possible human rights defenders and not just human rights’ threats. UNGP’s advocacy for the corporate adoption of self regulation mechanisms such as Policy Statements and Due Diligence Processes are best practices which surely any HRBB should strive to adopt.

Surprisingly, and in spite of desiring a better control of the corporate sector impact on human rights, states have decided to make these initiatives rely on voluntary commitments with the exception of the Draft Norms,. The non-legally binding initiatives were adopted, at least on a superficial level, reasonably well by the corporate sector, which seems increasingly interested in human rights compliance. However, it would be naïve to assume corporate interest in human rights is solely based on altruistic

considerations and it is important to consider the message conveyed by the voluntary nature of these initiatives.

While the SRSG has defended the use of voluntary commitments, Civil Society yearns for a binding commitment and shows interest in the creation of a Treaty on Business and Human Rights as proposed by Ecuador and adopted in Resolution 26/9. Alternative solutions for the betterment of human rights protection in regards to corporate impact is judicial remediation recurring to self regulatory enterprise measures such as codes of conduct and due diligence processes which have proven to be interesting legal avenues.

Beyond a revamping of the perception of enterprise action on human rights, an innovation of the UNGP was the fact that it concerns all enterprises instead of doubling attention on MNEs abuses as did all other initiatives.

It must be understood that beyond MNEs other business configurations might have a big impact on human rights.

While SMEs do not actively seek the achievement of social impact nor the advancement of human rights it is remarkable to understand the weight they have on local economic development which might have repercussions on full realisation of certain human rights. Furthermore, their market position might entail that they are more prone to be concerned with government transparency. SMEs seem to benefit from favourable public perception in the betterment of society as they are regarded as capable of creating local employment and diversifying the economies of single commodity exporting countries which important for the economic protection of its people. However, SME's do not aim to create social impact and using taxpayers money to support SMEs might be unethical. Nevertheless, there is a the possibility of justification of such support through a new conceptualisation of SME's which entails the formulation of a qualitative definition including not general assumptions but confirmed recognitions with regards to SME's role in the betterment of society.

SEs, as enterprises working within the field of social economy that strive for the creation of social impact, are the most valuable business configurations alluding to the possibility of HRBB. SE's focus on a commercial strategy rejects the traditional

exploitation of market opportunities for mere financial profit. Instead SEs capitalizes market opportunities for the improvement of social conditions and local communities.

Anew and while reinstating that only states holds the duty to fulfil under IHRL, one might denote a big similarity between the states' duty to fulfil and SE's focus on facilitating the full realisation of human rights. Although contributing the most for a paradigm shift which sees enterprises as possible human rights defenders, SEs face the same difficulties as SMEs with regards to access to finance and improving the legal environment. Another difficulty faced by SEs and the concept of SEs has a whole is the fact that there is no global consensus on which enterprises, may qualify as SEs. There are various differences between the American and European concept of SEs from which the most prominent is the fact that in Europe SEs must always be non- profits. The European understanding of SEs as non profits would however not be necessary for the formulation of HRBB since the case-study of ZHL has shown that for profits are able to actively seek the advancement of human rights and to even place human rights and societal concerns before the pursuit of financial profit.

Additionally, Acumens' support to ZHL while actively measuring its social impact through poverty outreach underlines the importance of the inclusion of this best practice, the active measuring of social impact, in the formulation of HRBB.

I finally formulate HRBB as a for profit or non profit SE that upholds best practices of possessing a Policy Statement, implementing a proper Due Diligence Process, formulating an appropriate commercial strategy for the attainment of a social goal while actively measuring the attainment of the human rights advancement goal.

While ZHL does not incorporate some of the best practices conducive to ensure the advancement of human rights it cannot be considered a HRBB.

However there is strong possibility of the existence of HRBB and hopefully further studies in this field will be able to demonstrate it without a shadow of a doubt.

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