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Getting down to business:

The implementation of the United Nations Guiding Principles on
Business and Human Rights and ways forward for Corporate
Human Rights Responsibility

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To my grandmother

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Abstract

Multiple cases of negative impacts of business activity on human rights came to light in recent years and with them also the lack of proper regulative frameworks, monitoring and grievance mechanisms for corporate related human rights abuses. In June 2011, the Human Rights Council endorsed the United Nations Guiding Principles on Business and Human Rights, a non-binding document aiming to enhance corporate respect for human rights and the mechanisms accessible to victims of abuses.

This did not represent the end of the debate regarding business responsibilities. The calls for a binding instrument and for stronger mechanisms to ensure compliance are still a reality, just like the claims that a binding instrument is not the proper avenue to follow to have effective progress in the field.

The aim of this thesis is to contribute to the understanding and to the debate of business and human rights by providing a comprehensive overview of the challenges and ways forward. This is done, on the one hand by analysing the current framework (with a focus on the Guiding Principles) and by gathering different implementation avenues that can lead to increased accountability. On the other hand, it looks into prospective developments, grounded on the idea that this is not a settled field and that the debate for possible complementary solutions is essential to achieve progress.

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Table of Abbreviations and Acronyms

ATCA	Alien Tort Claims Act
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Committee on the Rights of the Child
CRC GC16	General Comment No.16 (2013) on State obligations regarding the impact of the business sector on children's rights
CoE	Council of Europe
CSO	Civil Society Organisation
ECHR	Convention for the Protection on Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
EU	European Union
GP	Guiding Principle
HRC	Human Rights Council
HRDD	Human Rights Due Diligence
ICJ	International Commission of Jurists
ILO	International Labour Organisation
NCP	National Contact Point
NGO	Non-governmental Organisation
NHRIs	National Human Rights Institutions
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
SRSR	United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
UN	United Nations
UNGC	United Nations Global Compact

UNGPs	United Nations Guiding Principles on Business and Human Rights
UNSG	United Nations Secretary-General
UNTB	United Nations Treaty Body
WG	Working Group on the issue of human rights and transnational corporations and other business enterprises

I. Introduction

Where were you on 24 April 2013? Where were you on 3 December 1984? It is likely that you do not remember. It is even likely that these dates do not recall any particular event. Those were, respectively, the days of the Rana Plaza collapse in Bangladesh and of the “most deadly industrial disaster in history”¹ – the Bhopal disaster in India. These days represent moments in which the world was shocked with events that disclosed the capacity of the business sector to have a negative impact on human rights. Although, such impacts do not happen only in India or in Bangladesh and do not always capture worldwide attention. Silent but serious violations of human rights by companies happen every day all around the world. They are happening, even if we do not listen to anything about them, even if we do not see an image that captures human suffering.

Nowadays, very few people would argue that corporations cannot have an impact on human rights. This is not a new reality but the increased flows of information, ability to easily move around the world, and other features of globalisation helped to disclose abuses and raised attention to this reality. Just as they facilitate negative impacts of business on human rights. With increasing economic power and mobility beyond borders it is not hard to escape regulation in order to maximize profit.

Nonetheless, the business sector has multiple positive impacts on society and can (in some cases already has) the potential to foster human rights and development. The main issue is what can you do when the opposite happens? It is much harder to refer to a date on which a corporation was held responsible for violating human rights as such. Usually, cases of human rights violations by corporations are addressed reactively: a dramatic event happens or is disclosed, community gets shocked, corporations try to react in order to restrict the damage to their own image (either by repelling their connection to the facts, by hiding behind complex legal structures or by trying to create initiatives that would refresh their image). Preventative culture is still not the rule.

¹ Ruggie, 2013, p.6.

Companies are subjected to the national jurisdictions of the States where they operate and States have the obligation to protect human rights of people by enacting the necessary laws, regulations, policies and remedies to abuses of third parties. Although, reality keeps proving that this is not enough and that new thinking and action is needed, sometimes involving levels higher than the national.

The topic of human rights and business remains a troubling issue in an international system that was designed by and for States and that intended to protect the individual from the actions of States, understood to be more powerful and to have an increased capacity of action (for the good and for the bad). Nowadays, it is clear that such power (political, economical, social...) is not exclusive for them. Non-state actors can and do have an impact on peoples' lives and dignity. Business actors are no exception.

The first question that people should ask when thinking about business and human rights is: if your human rights, the ones based on human dignity, the basic guarantees of all human beings, are violated and you suffer the consequences of such violation, does it really matter if it was the fault of the State or corporation? I would guess that the answer is no. In fact, if you are the victim of a corporate-related human rights abuse, it is likely that both the State and the corporation(s) have responsibilities. The first because it failed to protect you, either by providing appropriate regulation or effective monitoring and remedies; either by inability or by unwillingness. The second because, directly or indirectly, took advantage of the lack of regulation and monitoring or escaped the existent mechanisms.

The whole problem gets even more intricate if you think about corporations that act beyond borders, with multiple subsidiaries, hundreds of suppliers... Multinationals often find operating contexts that are weak in terms of governance, rule of law and human rights standards. Even if you are well intentioned, dilemmas and challenges are likely to become reality. If you are not, then you have an opportunity to maximise profit at the cost of human dignity.

The problem is clear but what about solutions? The solutions for the issues posed by human rights violations by business are fragmented and lack coherence. Until recently, there was no common standard at the international level addressing the issue. Regional or thematic initiatives were in place but business and human rights as a whole was not a topic deserving action at the international level (which is reflected in the rejection of different initiatives at the United Nations). A change in this pathway culminated in 2011 with the end of the mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises (SRSG), Professor John Ruggie and the unanimous endorsement by the Human Rights Council (HRC) of the Guiding Principles on Business and Human Rights (UNGPs).

Based on the previous, this thesis intends to question the current system of regulation of business and human rights based on two main focus points: first, how can the Guiding Principles be effectively implemented and what are the challenges they raise; second, taking into account the state of play, what can be done to make the system more effective and reliable – in sum, what are the prospective developments in the field.

In order to answer these questions, the thesis will first guide you through the current framework regarding business and human rights, with a particular focus on the UNGPs. It intends to provide an understanding on the pathways that can be followed to implement the Guiding Principles. Implementing this new standard, in a system that remains State-centred, where the political will and the pressure from economic power have an important role is not an easy task. Furthermore, implementation is not easy because, despite the reality not being a new one, the responses to the problems are still in their first steps and sometimes it is not clear for the different stakeholders how they should act. This first task will be made with a critical analysis of the content of the UNGPs, followed by a gathering of relevant implementation proposals.

Finally, I will assess the challenges that remain in business and human rights. Based on the idea, expressed multiple times by the former SRSG himself, that the UNGPs (and, more broadly, his mandate) was just “the end of the beginning” it is

important to understand what can and what should be done in the future to increase the clarity of the human rights obligations of business and to achieve meaningful enforcement. In this context, I will analyse different possibilities of action, taking into account not only long-term, but also medium and short-term action.

Apart from the opinion that one can have regarding the content, relevance and potential of the UNGPs, more action is needed, at different levels, with multiple techniques and strategies to move business and human rights forward. And these are not only academic or theoretical discussions. Just a few days ago, during the 26th Session of the HRC, business and human rights was one of the discussed topics. Two resolutions regarding the future of business and human rights with different contents were adopted.

My expectation is that this thesis can contribute to the understanding and to the debate of business and human rights by providing a comprehensive overview of the challenges and possible ways forward in this area.

II. The framework on Business and Human Rights and how the UNGPs came about

The concerns about the impacts of business in human rights are not new. The increasing relevance of business enterprises in the globalised world, allied to the emergence of multiple cases of corporate human rights abuses lead to various normative initiatives. Therefore, there is a context, both normative and factual, in which the UNGPs came about that has to be clarified in order to understand the document and the challenges ahead.

There are currently no binding instruments of international law addressing directly the responsibilities of companies in the human rights field. Although the Universal Declaration of Human Rights (UDHR) calls on all the “actors of society” to foster human rights it can only be seen as a sign of “aspiration”² and not as a direct source of binding obligations towards companies. Regarding other treaties and conventions, every time that business and, more generally, private actors are referred to, the related obligations are directed towards the States parties, in the context of their duty to protect³. Therefore, much of the normative developments so far have occurred in the domain of soft-law, meaning instruments that are not legally binding. Examples of such normative initiatives are the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises⁴ (the only instrument that also comprises a monitoring mechanism, the National Contact Points, hereinafter NCPs) and the International Labour Organisation’s (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises⁵.

There is also a tendency by companies to develop and adhere to voluntary standards. This type of initiatives is often pointed out by the business sector as the proper avenue to increase compliance of corporations with human rights and is

² Deva, 2014, p.5.

³ Ruggie, 2013, pp.39-44.

⁴ The Text of the Guidelines is available at <http://www.oecd.org/daf/inv/mne/48004323.pdf> (last consulted 24 May 2014).

⁵ The text of the Declaration is available at http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (last consulted 24 May 2014).

based on the idea of voluntary commitments and actions. Multiple examples could be used to illustrate the different pathways that have been followed in this field but I will analyse the United Nations Global Compact (UNGC) due to the direct involvement of the United Nations (UN) in the structure. The choice to analyse these soft-law (the Guidelines and the Tripartite Declaration) and voluntary (UNGC) initiatives relates to their international and public nature⁶ and also with their impact in the field of study. It is not the aim of this thesis to scrutinize each of these documents/initiatives but, in order to contextualize the normative framework governing business and human rights, their content, goals and scopes of application will be analysed.

One first element to retain is that none of the two above mentioned normative documents, neither the UNGC, focus exclusively on human rights. They intend to cover a broader field which is often referred to as “business ethics”. This means that they include a wider scope of fields and policies that are often related to the social image of a company and that are linked to its social responsibility. Human rights appear as a part of this broader scenario.

1. The normative framework

a) OECD Guidelines on Multinational Enterprises and National Contact Points

Adopted in 1976 and last updated in 2011, the OECD Guidelines for Multinational Enterprises (hereafter the Guidelines) are supported by states and the only normative framework with its own dispute resolution mechanism, the NCPs. The Guidelines were negotiated in the context of the OECD and represent a set of recommendations issued by the adhering governments to the multinationals based on their territory or developing activities there⁷.

⁶ As an example of a different type of initiative, we can mention ISO 26000. For more information on the norm: <http://www.iso.org/iso/home/standards/iso26000.htm> (last consulted 2 May 2014).

⁷ Theuws, Huijstee, 2013, p.10.

The Guidelines have a restricted geographical scope of application: the thirty-four State parties to the OECD and eight more⁸ that adhered to the OECD Declaration on International Investment and Multinational Enterprises (in which the Guidelines are integrated).

Human rights are only one of the topics covered by the Guidelines as they also address fields like anti-corruption, employment and environment, among others. The chapter focusing exclusively on human rights was added in the 2011 revision of the Guidelines, aligning the framework with the UNGPs that were issued meanwhile⁹. The obligations of enterprises in this context can be summarized as follows: to respect and to avoid to cause or to contribute to human rights violations; to foster the prevention and mitigation of impacts of their activities; to establish a policy commitment and to conduct human rights due diligence (HRDD) and, finally, to have a role in remediation processes in cases where human rights violations occurred¹⁰.

Besides the obligation to promote the principles contained in the Guidelines, the adhering governments are also assumed to establish a NCP in order to further the promotion of the normative standard, to handle enquiries and to contribute to the resolution of implementation issues¹¹. The specific organisation of the NCPs is determined by the States¹², taking into account the so-called “core criteria” - *visibility, accessibility, transparency and accountability*¹³.

These institutions do not have a judicial nature but they can conduct a specific instances procedure (not judicial, based on consent and non-adversarial¹⁴) in order to provide a solution to allegations of non-compliance with the Guidelines. Such a procedure only occurs with the common agreement of the parties involved and has

⁸ Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States (members of the OECD) and Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.

⁹ OECD Watch, 2013, p.18.

¹⁰ Idem, p.19.

¹¹ OECD p.68.

¹² Different examples of organizational options can be found in OECD Watch, 2013, p.33.

¹³ OECD, 2014, p.12.

¹⁴ OECD, 2014, p.13.

a confidential nature (during the good offices phase)¹⁵. In order to a NCP to be able to deal with a case, it is necessary that a complaint is filed and that the parties give their consent. Complaints can be filed by any interested party¹⁶, against any corporation headquartered or operating in one of the States parties. There is no need to associate the complaint with a concrete victim but rather to identify the protected interests in jeopardy¹⁷.

A peer review system of the activities of the NCPs was recently started (as a result of the 2011 review of the Guidelines¹⁸). Up until now, only the Japanese and the Norwegian NCPs were reviewed under this mechanism, (as they volunteered to do so).

b) ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

The first version of the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (hereafter, Declaration), dates from 1977 and the last update from 2006. Besides recommendations on general business policies¹⁹, the Declaration addresses the principle of equality in employment practices, conditions of work and life (namely with provisions on wages, minimum age and safety and health) and industrial relations (where, for instance, the freedom of association and the right to organise are restated). The scope of its regulation is limited by ILO's scope of action and, therefore the norms focus on workers' rights. The Declaration is directed towards the different actors in the labour field: companies, governments and organizations of both employers and employees²⁰.

¹⁵ OECD, 2014, p.13.

¹⁶ Not necessarily a victim. Organizations and community representatives can also fill in complaints. - OECD Watch, 2013, p.33.

¹⁷ OECD Watch, 2013, p.35.

¹⁸ <http://www.oecd.org/daf/inv/mne/ncps.htm> (last consulted 26 June 2014).

¹⁹ For instance in the areas of employment and training.

²⁰ http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (last consulted 3 May 2014).

There are follow-up surveys to monitor the activities of the involved stakeholders regarding the Declaration.²¹ The Declaration also includes a procedure to examine disputes regarding its application which aims to provide the adequate interpretation of its provisions.

Despite the limited scope of application (as it is only applicable to multinationals) and the restraints to the rights included in the Declaration, it represents an important attempt to call human rights (recognised rights in the field of labour) into business responsibilities. It also represents recognition of the issues raised by the action of enterprises operating beyond borders and the need for multinational companies to consider international human rights standards in their activities and operations wherever they take place.

To sum up, it is important to point out that both these normative frameworks show that it is clear that business corporations have a role in the human rights field, especially in the context of a globalized world. Both provide guidance and standards in order to increase the respect of corporations for human rights and emphasize the importance of conducting due diligence in that process.

However, there also have are limitations as they fail to establish a binding, effective and efficient system of regulation, monitoring and accountability of enterprises for violations of human rights in the realm of their activities. It is necessary to highlight some these limitations.

The OECD Guidelines have a limited geographical scope of application²². The ILO's Declaration has a clear focus on workers' rights and not on human rights in general, which is also insufficient to provide for a real scheme of human rights protection in the business field. Moreover, it only applies to multinational corporations. This means that both the initiatives have a limited scope. They do not provide a comprehensive basis for an overall framework of business and

²¹ http://www.ilo.org/empent/Informationresources/WCMS_101251/lang--en/index.htm (last consulted 3 May 2014).

²² Theuws, Huijstee, 2013, p.10.

human rights. Most importantly, none of these documents is binding or provides for a legally binding monitoring and accountability mechanism²³.

All of these have important consequences that jeopardize the respect for human rights. First, there is no comprehensive normative framework that includes the whole realm of recognised human rights. Nowadays, it is clear that companies have the potential to impact all human rights with their operations. It is a fact that patterns can be identified (for instance based on the location of operations or on the activity sector)²⁴ but, in the end, each and every corporation can directly or indirectly be involved in violations of all human rights. Therefore, and taking also into account the indivisibility and interdependence of human rights, an effective and adequate normative framework has to apply a universal approach to human rights.

Second, business and human rights is a field in which geographically fragmented regulations risk to be problematic and not effective. States struggle to attract investment of private actors in order to promote the economic wealth in the country and want, as a consequence, to protect “their” companies. This is particularly visible in developing countries but also in countries facing economic and financial crisis which have been lowering their standards (namely in the field of labour rights) in order to be able to attract investors – it is the race to the bottom phenomenon at the most intense level. In addition, big corporations find it easy to move between different States or to delocalize their activities. This means that the lack of international common standards and effective implementation and monitoring mechanisms may lead to impunity.

Third, the inexistence of a binding standard is also problematic. We cannot ignore the current powers of corporations in the world. It is not rare to find companies that have more power (economical, political...) than a wide number of States. They act around the world and indeed have important social functions but they can also have a huge negative impact. More than that, they are nowadays entitled to rights both at the national and at the international levels. It is true that we

²³ De la Vega, Mehra, Wong, 2011, p.4.

²⁴ Ruggie, 2013.

cannot ignore that the inherent nature of companies is different to that of States but this does not mean that they should not be subjected to respect human rights. As stated in the UDHR, human rights are also a responsibility of the different organs of society and companies should not be an exception. The scope of the obligations might be open to discussion but strong standards are needed, even to make sure that responsible companies are not disadvantaged because of their choice to conduct their activities in a way that respects human rights standards.

Fourth, it should be stressed that not only multinational companies (i.e. companies that conduct operations or activities in states other than their home state) have the potential to impact human rights²⁵. Some dangers are bigger in situations where companies headquartered in developed countries operate (both directly and indirectly) in States with poor human rights records, low income and weak legal standards/ law enforcement mechanisms or that are affected by conflict²⁶. But we should also not fail to take into consideration violations caused by companies acting in their home State. Thus, there is a need for a standard that applies to all companies. In practice, different dimensions, capacities, leverages, activities and scopes can impact the particular obligations of a company but when we talk about business and human rights we should aim for a non-discriminatory standard. Non-discriminatory in the sense that all companies should be subjected to baseline requirements²⁷ and in the sense that such requirements protect individuals wherever the company's activity takes place²⁸.

Finally, the strength of a normative framework will also depend on the mechanisms of implementation that it creates. This is a field in which disclosure of violations or inappropriate conduct has a particular impact (as the campaigns led by civil society against some brands associated to human rights violations show). But civil society cannot be the one and only watchdog of corporate

²⁵ Which is clear if we take into account the states' duty to protect human rights.

²⁶ Ruggie, 2013, pp.29-33.

²⁷ Also reinforced in the General Principles of the UNGPs - Human Rights Council, *Guiding Principles on Business and Human Rights – Implementing the United Nations Protecting, Respect and Remedy Framework*, HR/PUB/11/04, 2011, available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last consulted 26 May 2014), p.1.

²⁸ Idem, GP 11, p.13.

compliance with human rights. A monitoring mechanism is essential to make sure that there are not only standards but that compliance is also under scrutiny.

c) UN Global Compact

In the field of voluntary initiatives, the UNGC deserves particular attention due to its close relationship with the UN. The UNGC was created in 2010, under the auspices of the UN Secretary-General (UNSG) at the time, Kofi Annan. It is defined as “a leadership platform for the development, implementation and disclosure of responsible and sustainable corporate policies and practices.”²⁹ The platform includes different actors, from governments to companies, from labour to civil society organisations. According to its official website³⁰, it now counts “more than 10.000 participants, including 7.000 businesses in 145 countries around the world.” According to the same source, the UN acts “as an authoritative convener and facilitator.”³¹

In order for an enterprise to adhere to the UNGC, its Chief Executive Officer must address a letter to the UNSG. Then, there are some expectations directed towards the members, such as the public endorsement of the principles and the publication of an annual report on the activities developed in order to respect and develop the principles in the organisation³². The members of the UNGC also have to make a financial contribution. The non-compliance with the annual communication on progress has as only consequence the change of state from active to non-communicating member (leading to delisting after two years).³³

The UNGC is based on ten principles in four areas: human rights, labour, environment and anti-corruption. Principles one and two are devoted to human rights and took inspiration from the UDHR³⁴. They read as follows:

²⁹ “United Nations Global Compact, 2014, p.2.

³⁰ <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last consulted 3 May 2014).

³¹ Idem.

³² Deva, 2006(b), p.152.

³³ <http://www.unglobalcompact.org/AboutTheGC/faq.html> (last consulted 24 May 2014).

³⁴ http://www.unglobalcompact.org/Issues/human_rights/ (last consulted 3 May 2014).

“Principle 1 – Businesses should support and respect the protection of internationally proclaimed human rights.”³⁵

“Principle 2 – Business should make sure that they are not complicit in human rights abuses.”³⁶

It is clear from the wording of the principles that they are not precise and do not clarify what companies should do or how they should act to comply with them. Some documents have been released by the UNGC in order to provide some guidance but, according to some authors, the results are not completely satisfactory as they do not go as far as providing tools that help companies to find solutions to problematic situations³⁷.

Several reflections should be raised about this initiative and its results. It is important to understand if the mere fact that this is a UN backed initiative is not furthering the social responsibility capital of its members, whether or not they actually comply with the principles and fulfil the aims of the UNGC. This issue is raised³⁸, by three main factors. Firstly, the UN might be (directly or indirectly) promoting the image of companies that are not complying, in practice, with its aims and goals – as there is no monitoring system. This can also have important reputational risks for the organisation. Secondly, the UNGC will only be a serious and fostering forum if the enrolled actors are effectively committed to the social responsibility it advocates for. In case this does not happen, the UN is supporting a window-dressing mechanism that does not effectively foster corporate responsibility. Finally, the fact that potential non-compliers are involved in a UN backed initiative might damage expectations of society in general (for instance, consumers).

It should be considered if it would not be better for the UN to use the leverage of the UNGC as a mean to foster a real monitoring mechanism instead of remaining blocked in the idea of an “enterprise sharing centre” – a mechanism based

³⁵ Ibidem.

³⁶ Ibidem.

³⁷ Deva, 2006 (b), p.170-171.

³⁸ The following considerations are based on the opinions expressed in Deva, 2006(b), pp.183-188.

exclusively on good will and on good but vague ideas where enterprises share their achievements.

The UNGC has advantages and potential. It promotes the involvement of different actors in a common mechanism and it has the potential to foster the dialogue on corporate responsibility in the UN structure and among the different actors³⁹. Nonetheless, it will be necessary to find a way to maximize its positive elements and to address its major shortcomings. As pointed out by DEVA⁴⁰, “the Compact Office has to devise means and strategies to ensure that those corporations which join the initiative fulfil their social responsibilities both in letter and spirit”.⁴¹

As a conclusion, we can identify the major issues that existed before the creation of the UNGPs and which need to be addressed in order to create an effective normative and monitoring framework for business and human rights⁴²:

- The lack of a normative framework with an international realm entailing the protection of all recognised human rights;
- The non-binding character of all the existent mechanisms;
- The lack of effective monitoring of corporations’ activities regarding their respect for human rights.

2. Grievance mechanisms or *the quest for remedy for corporate related human rights abuses*

The other major issue in the business and human rights field is the difficulty for victims to have access to effective grievance mechanisms, to get remediation or even to achieve the recognition of a violation of his/her human rights.

In order to clarify this aspect, I will now address the treatment that corporate human rights abuses are receiving in monitoring and grievance mechanisms at

³⁹ Idem, p.186-190.

⁴⁰ Idem, p.190.

⁴¹ Idem, p.186-190. The author offers more suggestions to make the UNGC to be more global.

⁴² If the UNGPs did or did not solve these issues is a topic to be analysed later in this thesis.

three levels: the international level (UN Treaty Bodies, hereinafter UNTBs), the regional level (jurisprudence of the European Court of Human Rights, hereinafter ECtHR) and, finally, the national level (access to national jurisdictions in the quest for remedy).

a) International Level: The United Nations Treaty Bodies

The UNTBs “are the committees of independent experts that review the reports by the State parties on their application of the provisions of the core human rights treaties.”⁴³ The UNTBs review the actions of States in the realm of the obligations they assumed with the ratification of a specific human rights’ treaty.

Therefore, the references to corporate related human rights abuses in this context are deeply connected with the State duty to protect human rights or with the extraterritorial realm of States’ obligations. The document “State Responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of the treaty body commentaries”⁴⁴, prepared in order to ground the work of the United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG) offers an overview of the treatment that the different UNTBs have been giving to business and human rights related issues. Some of the elements reported in that document seem to be relevant to the current analysis although they should also be complemented with more recent information.

Firstly, there is an increasing tendency to urge States to provide protection against corporate human rights abuses.⁴⁵ Even in the wording of the treaties, the most

⁴³ Namely: the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women, the Committee Against Torture, the Subcommittee on Prevention of Torture, the Committee on the Rights of the Child, the Committee on Migrant Workers, the Committee on the Rights of Persons with Disabilities and the Committee on Enforced Disappearances. For more on the tasks and the functioning of the UNTBs: ‘The United Nations Human Rights Treaty System – Fact Sheet No.30/Rev.1’, available at: <http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf> (last consulted 6 May 2014).

⁴⁴ UN Doc A/HRC/4/35/Add.1, 2007.

⁴⁵ Idem, p.2.

recent ones show an increasing concern with such violations, containing a more specific language regarding the needs created by corporate abuses⁴⁶.

Secondly, in the approach followed by the General Comments, the UNTBs show a tendency to deal with specific rights and specific business sectors.⁴⁷

It is also interesting to point out that, especially in the activity of the Committee on Economic Social and Cultural Rights (CESCR), it is already recognized that the field of business and human rights is not exclusively related to the State's duty to protect (meaning, avoiding abuses from other actors). In fact, in specific circumstances (such as their actions in international organizations), the duty to respect (not to interfere with protected human rights) itself might be violated.⁴⁸ CESCR also seems to be the UNTB which refers more explicitly to business enterprises and the need of protection that emerges from their activities as it often refers to regulation of business enterprises in its General Comments⁴⁹.

Thirdly, the UNTBs are not providing detailed guidance on how the States parties can fulfil their duty to protect regarding corporate abuses, not even when they are addressing the country reports: "When issues before the treaty bodies involve activities related to business activity, concluding observations often contain general expressions of concern about such activities, rather than specifying whether or how States are expected to regulate or adjudicate the entities behind those activities."⁵⁰ The required measures for States are kept in an ambiguous language, maintaining a wide margin of discretion: "The State's duty to take steps to prevent and punish abuse may necessitate a variety of measures. In particular, the treaty bodies require in most cases that abuse is prohibited by law, that alleged violations are properly investigated, that the State brings perpetrators to justice and that victims are provided with an effective remedy."⁵¹ In addition, it is often

⁴⁶ Ibidem.

⁴⁷ Idem, p.2; 13.

⁴⁸ Idem, p.10.

⁴⁹ Idem, p.13.

⁵⁰ Idem, pp.17-18.

⁵¹ Idem, p.21.

stated that monitoring should be a central piece to the fulfilment of the duty to protect⁵².

In the scope of individual communications, there have been some complaints regarding the failure of states parties to protect against human rights violations conducted by business enterprises⁵³. The Committees have been keen to consider such claims admissible despite the objections raised by some States.

The cited document also provides some highlights on the rights that are more often connected with business abuse in the context of the UNTBs work, some examples are: discrimination, labour rights, minority rights and children rights⁵⁴.

Regarding extraterritoriality, the work of the UNTBs does not allow to talk about the current existence of an obligation of States to exercise it⁵⁵ but in, recent documents, they seem keen to assume the existence of such an obligation⁵⁶.

In April 2013, the Committee on the Rights of the Child (CRC) published its General Comment no.16 (hereinafter CRC GC16)⁵⁷ covering the issue of State's obligations regarding the impacts of businesses on children's rights. This General Comment is the result of a drafting process which involved consultation of different stakeholders and seems to be a first attempt to directly connect business impacts and the rights of a particularly vulnerable group – children⁵⁸.

It seems that, despite the limitations of their mandates and the work they have been doing in this area, the UNTBs could do more in the field of business and human rights. One way to do so would be to provide more clear instructions on how States should behave and what kind of measures can be taken in order to improve human rights' protection and to make sure that State parties are

⁵² Idem, p.21.

⁵³ Idem, pp.19-20.

⁵⁴ Idem, p.31.

⁵⁵ Idem, p.34.

⁵⁶ For details on recent documents issued by the UNTBs: Amnesty International, 2014.

⁵⁷ CRC/C/GC/16, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en.

⁵⁸ For more information on the drafting process and on General Comment No.16 itself: Gerber, Kyriakakis, O'Byrne, 2013, pp.93-128.

complying with their international obligations.⁵⁹ They can also to assume a more prominent role in the disclosure of cases of corporate human rights abuses in the scope of their mandate and activities. In the field of the reporting obligations of States towards the UNTBs, it seems that these bodies could ask more from the States, increasing the visibility of the topic⁶⁰.

b) Regional Level: The European Court of Human Rights

Just as the UNTBs, the ECtHR does not deal with complaints against individuals (or companies). Therefore, when it analyses the issue of business and human rights, it does so from the perspective of States' duties. This can happen if a person files a complaint against a State for non-compliance with the duties established in the European Convention on Human Rights (ECHR), enabling a corporation to violate human rights.⁶¹

Despite the limitations, there are some cases, such as *Young, James and Webster v. The United Kingdom*⁶², *Taskin and Others v. Turkey*⁶³ and *Tatar v. Romania*⁶⁴ that address, in different situations and regarding different rights, the inability of States to provide protection to their citizens' rights against impacts of corporations. In the case *Kalender v. Turkey*⁶⁵, also the State's failure to conduct a criminal proceeding against a company responsible for a violation was condemned.

In *Young, James and Webster v. The United Kingdom*, the applicants, former employees of the British Railway, were dismissed due to the existence of an agreement between the company and three unions, determining that only affiliates

⁵⁹ Supporting this opinion: UN Doc A/HRC/4/35/Add.1, 2007, p.37.

⁶⁰ Ibidem.

⁶¹ Article 35 ECHR.

⁶² European Court of Human Rights, *Young James and Webster v. The United Kingdom*, 13 August 1981, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57608#{"itemid":\["001-57608"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57608#{) (last consulted 6 May 2014).

⁶³ European Court of Human Rights, *Taskin and Others v. Turkey*, 30 March 2005, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67401#{"itemid":\["001-67401"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67401#{) (last consulted 6 May 2014).

⁶⁴ European Court of Human Rights, *Tatar v. Romania*, 6 July 2009, available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-90909> (last consulted 6 May 2014).

⁶⁵ European Court of Human Rights, *Kalender v. Turkey*, 15 March 2010, available at <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=001-96252> (last consulted 6 May 2014).

to those trade unions could be employed by the enterprise (“closed shop agreement”). The applicants claimed that they were victims of a violation of articles 9, 10, 11 and 13 (respectively, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association and right to an effective remedy). The Court considered that the agreement led to a violation of the right contained in art.11 of the ECHR (analysed in conjunction with articles 9 and 10). The Court considered that the State violated its obligations by having a legislation that allowed for such an agreement, which was a limitation to the right contained on art.11 ECHR⁶⁶. Moreover, it considered that “the detriment suffered by Mr. Young, Mr. James and Mr. Webster went further than was required to achieve a proper balance between the conflicting interests of those involved and cannot be regarded as proportionate to the aims being pursued.”⁶⁷

Taskin and Others v. Turkey and *Tatar v. Romania* are related to environmental pollution and violations of article 8 ECHR (right to respect for private and family life). In the first case, the applicants claimed that as a result of the operation licence granted to one company to operate a gold mine nearby their population they suffered the consequences of environmental damages. Even though the Supreme Administrative Court annulled the licence (on the grounds that the risks to environmental integrity and human health posed by the activities and substances used in the activities were high and not sufficiently addressed by the preventive measures implemented by the company), the mine continued to operate for ten months. The Court analysed the alleged violation of article 8 both from a procedural and a substantive point of view, concluding that the actions of the public authorities (not enforcing properly the decision of the Supreme Court) indeed violated article 8 ECHR: “notwithstanding the procedural guarantees afforded by Turkish legislation and the implementation of those guarantees by judicial decisions, the Council of Ministers (...) authorised the continuation of production at the gold mine (...). In so doing, the authorities deprived the

⁶⁶ European Court of Human Rights, *Young James and Webster v. The United Kingdom*, 13 August 1981, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57608#{"itemid":\["001-57608"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57608#{) (last consulted 6 May 2014), §57.

⁶⁷ European Court of Human Rights, *Young James and Webster v. The United Kingdom*, 13 August 1981, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57608#{"itemid":\["001-57608"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57608#{) (last consulted 6 May 2014), §65.

procedural guarantees available to the applicants of any useful effect.”⁶⁸ Moreover, it decided that also article 6 (right to a fair trial) was violated. In this regard, the reasoning of the Court was similar to the one previously stated – by not complying with the decision of the competent judiciary body, the State also disregarded the right to a fair trial by giving it no effect in practice⁶⁹.

Tatar v. Romania also dealt with activities of a gold mine in which a toxic component was used. Following an accident, contaminated water was released. The applicants argued that they were victims of a violation of article 8. Firstly, it was considered that pollution can have an impact on family life and that it is a duty of States to regulate activities that can represent a danger to both the environment and to the health of human beings.⁷⁰ This clarifies that the Court recognises that States have obligations regarding the activities of business enterprises and to take the necessary measures and procedures in order to avoid that their activities impact on the environment and health of human beings. As a consequence, it came to the conclusion that the Romanian State did not fulfil its duties both by failing to assess the risks of the activities of the company and by not taking the necessary measures to protect its citizens⁷¹.

Case Kalender v. Turkey calls upon both the right to family life and the right to a fair trial. The applicants were relatives of the victims of a train accident that, according to the investigation, was the consequence of the lack of adequate safety measures from the Turkish National Railway Company and of the lack of care of the victims. In the proceedings before the ECtHR, the applicants alleged violations of article 2 (right to family life) due to the failure of the authorities to protect their relatives and of article 6 (right to a fair trial) as they considered that

⁶⁸ European Court of Human Rights, Taskin and Others v. Turkey, 30 March 2005, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67401#{"itemid":\["001-67401"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67401#{) (last consulted 6 May 2014), §125.

⁶⁹ European Court of Human Rights, Taskin and Others v. Turkey, 30 March 2005, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67401#{"itemid":\["001-67401"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67401#{) (last consulted 6 May 2014), §135-138.

⁷⁰ Press release issued by the Registrar of the ECtHR, available at [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-2615810-2848789#{"itemid":\["003-2615810-2848789"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-2615810-2848789#{) (last consulted 6 May 2014).

⁷¹ Press release issued by the Registrar of the ECtHR, available at [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-2615810-2848789#{"itemid":\["003-2615810-2848789"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-2615810-2848789#{) (last consulted 6 May 2014).

the national court was not impartial (the final decision concluded for shared responsibility of the company and the victims in the accident) and that the proceedings took too long. The ECtHR concluded that, as regards to article 2, “the authorities had thus failed in their duty to implement regulations for the purpose of protecting the lives of passengers”⁷². In addition, it also held that by not opening official investigations regarding the train company “The Turkish criminal justice system had not therefore been in a position to determine the full extent to which the public servants and authorities were liable for the accident, and had not effectively implemented the provisions of domestic law that guaranteed the right to life.”⁷³ On these grounds, the Court decided that article 2 was violated. Additionally, the ECtHR concluded that article 6 was also violated but only regarding to the excessive length of the proceedings and not to their impartiality.

As these cases show, the ECtHR has been stating that States have responsibilities regarding corporate activities. They are, therefore, responsible at least to monitor the activities and to take the necessary measures in order to prevent violations of rights contained in the ECHR as a consequence of the activities of other entities. Furthermore, there is also an obligation to provide access to fair trial to victims of alleged corporate-related abuses.

Due to the competence limitations of the ECtHR, and to the scope of the Convention, these decisions did not add much regarding the human rights obligations of companies or to the (extra-)territorial scope of the obligations of States regarding corporate activities. It is good that they restate the responsibility of States to protect the citizens against human rights violations of third parties but taking into account the current state of play regarding norms and mandates, there is not much that can be (at least directly) done at this level.

It will be interesting to see how the Court will decide when confronted with a case that regards extraterritorial operations of companies based on the territory of a

⁷² Press release issued by the Registrar of the ECtHR, available at [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2969271-3269606#{"itemid":\["003-2969271-3269606"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2969271-3269606#{) (last consulted 6 May 2014).

⁷³ Press release issued by the Registrar of the ECtHR, available at [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2969271-3269606#{"itemid":\["003-2969271-3269606"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2969271-3269606#{) (last consulted 6 May 2014).

State party to the ECHR and the failure of States to monitor and to provide remedies for victims (as the actions of companies cannot be directly addressed).

c) National Level: National Jurisdictions

As we can conclude from the above, neither at the international, nor at the regional (European) level, alleged victims have direct access to a mechanism that enables them to present their case and get remediation for the violation of their human rights. This is probably one of the reasons why alleged victims have been trying to find compensation in different national jurisdictions⁷⁴.

The obstacles they face in this context are multiple. As in any other mechanism, the financial difficulties and the obstacles to get proper advice are also a problem here. On the one hand, as pointed out by Professor Ruggie, “a negative symbiosis exists between the worst corporate related human rights abuses and host countries that are characterized by combinations of relatively low national income, current or recent conflict exposure, and weak or corrupt governance”.⁷⁵ This is intrinsically connected to difficulties in access to justice in the countries where the violations are committed and where the victims are. On the other hand, even in the cases where victims are able to reach other States in their quest for justice, jurisdictional issues are often raised, namely the problems related to extraterritorial jurisdiction⁷⁶. Besides, it is not always easy to understand exactly who to sue and the different implications of a corporate structure⁷⁷. Non-governmental organisations (NGOs) and Civil Society Organisations (CSOs) in general keep on underlining the difficulties and barriers that victims of corporate

⁷⁴ Skinner, McCorquodale, De Schutter, Lambe, 2013, p.26.

⁷⁵ Ruggie, 2013, p.29.

⁷⁶ Despite the evolution in the UNTBs in this matter (as explained above), in general States still do not have wide recognitions of jurisdiction regarding human rights abuses occurring abroad. Moreover, the problems with imputation of actions (closely related to corporate structures) add new layers to these difficulties.

⁷⁷ In Skinner, McCorquodale, De Schutter, Lambe, 2013, pp.14-20, the authors list the following top ten issues that demand intervention in order to improve access to remedy in the US, Canada and Europe: (1) *ability to bring a claim where the harm occurs outside the home State*; (2) *Forum con conveniens doctrine*; (3) *Corporate liability for human rights abuse (corporate criminal liability and corporate civil liability)*; (4) *time limitations on bringing claims*; (5) *immunities and non-justiciability doctrines*; (6) *applicable law*; (7) *Proving human rights violations*; (8) *the cost of bringing transnational litigation (legal aid, loser pays provisions, legal standing of third parties to bring claims, collective redress and class action mechanisms)*; (9) *the structure of the corporate group*; (10) *remedies: reach and enforcement*.

human rights abuses have to face in order to access remediation⁷⁸. Even though, some cases reached the national jurisdictions of countries such as the United States of America (US), the United Kingdom and the Netherlands. I will not analyse the treatment given to such cases in national jurisdictions but merely highlight some of the most emblematic features of the avenue that has been more discussed in the literature – the US Alien Tort Claims Act (ATCA) that are relevant to understand the difficulties of finding a grievance mechanism for cases of corporate related human rights abuses and to see that such difficulties might be increasing.

In the field of transnational litigation, the ATCA, an American legislation from 1789, has been explored by human rights lawyers as a potential avenue to provide remedy to victims of human rights violations by corporations abroad. It has been the ground for some complaints but, in practice, and as pointed out by MASSOUD, it “has inherent limits and is still subject to uncertainties, such as the absence of any “positive” decision, the limits due to state action, the rule of *forum non conveniens*, and the question of corporate liability under the ATCA in general.”⁷⁹ The truth is that from all the cases that were considered admissible none was decided in favour of the plaintiffs. In addition to the inherent difficulties, the Kiobel decision from 2013 (widely analysed and discussed in the literature) created more difficulties to the application of the ATCA to extraterritorial cases, requiring that the claim “touches and concerns” the US in order to be admissible.⁸⁰ The applicability of ATCA to legal persons has also been questioned. The most emblematic cases that were presented to American Courts in the context of ATCA did not even lead to a decision as they ended up being settled by the parties. This was the case of the complaint regarding the Bhopal tragedy, for instance⁸¹.

Finding redress for human rights violations by companies is also a quest in the national jurisdictions, especially when such violations happen in countries that do

⁷⁸ Relevant texts providing a detailed overview in this regard are: Skinner et al., 2013, and Amnesty International, 2014.

⁷⁹ Massoud, 2012, p.8.

⁸⁰ Skinner, McCorquodale, De Schutter, Lambe, 2013, p.14.

⁸¹ For more about the case: Ruggie, 2013, pp.6-9; Amnesty International, 2014.

not have a reliable judiciary. Extraterritorial jurisdiction for these cases is still rare and even when it theoretically exists it is not easy for victims to accede to courts (in the case of ATCA due, for instance, to the fact that it is only applicable to the most serious violations). In addition, even the most claimed avenue for extraterritorial jurisdiction (ATCA) is getting restricted in a trend that goes against the general opinion regarding the extraterritorial responsibilities of States⁸². Corporate structures and organisational models also represent obstacles in the determination of jurisdiction and sometimes provide a way for corporate entities to escape the scrutiny of judicial bodies.

3. Interim conclusions – issues and weaknesses of the framework

From the above, we can conclude that there are multiple issues that need to be dealt within the context of business and human rights shall be taken into consideration when analysing the UNGPs.

On the normative spectrum, as already stated, there was no document focusing exclusively on human rights and covering all the rights in a coherent fashion. Moreover, all the frameworks were of a voluntary nature (as the UNGPs also ended up being⁸³). Voluntary initiatives (of different natures and scopes) have been multiplying but they are not enough to address the issues of business and human rights. Firstly, in the realm of voluntary initiatives are the companies themselves who have the power to determine the rights to protect, the standards used to their definition and their scope of application⁸⁴. This means that the substantive dimension of human rights protection remains in the hands of corporations themselves, without any scrutiny or control. Secondly, it is also up to the corporations to decide how their performance would be evaluated, how the results will be transmitted and which measures and processes shall be followed in case of

⁸² In this regard the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights provide a valuable source of *opinio juris*. Text available at http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 (last consulted 24 May 2014).

⁸³ This will be further analysed later in this thesis.

⁸⁴ Ruggie, 2013, p.76.

violation. This means that also all the procedures are in the hands of the ones to scrutinise⁸⁵. The proliferation of voluntary initiatives can be an important element in the regulation of business and human rights but cannot be its central piece. It has to have a minimum threshold that complies with the international standards to base on, it has to have a preventative and not a reactive nature and to contribute to a more complete and coherent framework instead of promoting fragmentation⁸⁶.

In addition to the lack of an efficient normative framework, there is a lack of effective grievance mechanisms. It is extremely hard for victims to have access to justice due to multiple barriers. Even in the cases where corporate related human rights abuses are dealt with at the international or at the regional level, they are always seen from the perspective of State duties.

The UN normative initiatives in the field of business and human rights will be described in the next chapter but we should keep the discussed documents and initiatives in mind when assessing the needs and the impacts of the currently leading document in the field, the UNGPs. This was the scenario that the SRSG faced in the beginning of its mandate and those were the challenges posed to him (most of them still prevail). It is important to underline that the UNGPs did not substitute any of the previously existent frameworks; instead, they are a new standard that as to be understood and included in this context.

⁸⁵ Ruggie, 2013, pp.68 *et seq.*

⁸⁶ Ruggie, 2013, p.76.

III. The United Nations Guiding Principles – a new instrument on Business and Human Rights

1. The UNGPs in theory

A first attempt to address business and human rights from a normative point of view at the UN level was the Draft United Nations Code of Conduct on Transnational Corporations from 1990, prepared by a Committee appointed by the Economic and Social Council. This document was never adopted, as there was disagreement between “developed and developing countries”⁸⁷.

The following normative initiative was the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (hereinafter Norms)⁸⁸. The document was approved in 2003 by the UN Sub-Commission on the Protection and Promotion of Human Rights (Sub-Commission), a body composed by experts that was at the dependence of the Commission on Human Rights (Commission), the predecessor of the HRC⁸⁹. The Commission denied the approval to the document, so it never produced real effects⁹⁰. The Norms did not gather the necessary support from States. The business sector was also unhappy with the content of the document⁹¹. Notwithstanding, they were widely discussed by different stakeholders: contested by States and business and applauded by NGOs.

Despite of a general reference to all human rights, the Norms included a catalogue of rights more often associated to business impacts, namely: the right to equal opportunity and non-discriminatory treatment, the right to security of persons, workers’ rights and consumer and environmental protection⁹². Although recognising States as primary duty bearers in the field of human rights, the Norms envisaged wide obligations for businesses, including promotion and fulfilment⁹³.

⁸⁷ Deva, 2012, p.102.

⁸⁸ E/CN.4/Sub.2/2003/12/Ver.2, 26 August 2003.

⁸⁹ Deva, 2012, p.102.

⁹⁰ Ruggie, 2013, pp.47-48.

⁹¹ Deva, 2012, p.102.

⁹² On the arguments presented by the Norms supporters and critics: Jerbi, 2009, pp.299-320.

⁹³ E/CN.4/Sub.2/2003/12/Ver.2, 26 August 2003, p.4.

As pointed by the former SRSG, this statement poses two main issues: first, the unclear scope of the obligations imposed on companies; second, the inclusion of a broad range of obligations that do not seem to distinguish corporations from States⁹⁴.

Without any proper UN normative framework regarding business and human rights, in 2005 the former Commission requested the UNSG to appoint a SRSG in this area. Professor Ruggie was entrusted with this task for an initial mandate of two years that was then renewed (coming to an end in 2011)⁹⁵. The initial mandate of the SRSG was not particularly ambitious. In his own words, he was entrusted with the tasks of “identifying what international human rights standards currently regulate corporate conduct (...); and clarifying the respective roles of states and businesses in safeguarding these rights”⁹⁶. Due to the experience of the Norms and the reactions they raised, major results were doubtfully expected. However, multiple accomplishments happened during the six years he held the function. Both times the mandate of the SRSG was renewed (2007 and 2008), his competences were widened and the results very well received by the HRC. In the first renewal, he was asked to “develop recommendations on how to best advance the agenda”. He responded with his report, containing the Protect, Respect and Remedy Framework⁹⁷. In the second renewal, he was requested “to provide concrete and practical guidance for its [Protect, Respect and Remedy Framework] implementation”⁹⁸. It was with this aim that the SRSG presented the UNGPs⁹⁹.

The UNGPs, endorsed by the HRC in June 2011¹⁰⁰, aim to enhance “standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to

⁹⁴ Ruggie, 2013, p.49.

⁹⁵ Deva, 2012. p.102.

⁹⁶ Ruggie, 2013, p.xi.

⁹⁷ A/HRC/8/5, 7 April 2008.

⁹⁸ Ruggie, 2013, p.xlviii-xlix.

⁹⁹ HR/PUB/11/04, 2011.

¹⁰⁰ Resolution 17/4 of 16 June 2011.

a socially sustainable globalization”¹⁰¹. They are non-binding and do not create “new international law obligations”¹⁰².

The dilemma regarding the nature of the results of the work of the SRSG was an issue since the beginning of his mandate: would he follow a traditional international law approach, pave the way for a binding instrument? Would he ground his work on the Norms?¹⁰³ The Norms intended to start a pathway based on the direct imposition of obligations to companies via International Human Rights Law. This approach was rejected by the SRSG from the beginning. The SRSG disappointed the defenders of hard standards that wanted him to use the Norms as a basis for the work ahead. He publicly criticised the document and rejected to further elaborate on it. The business sector and States were pleased with this option and more receptive to engage in the discussion. The SRSG also rejected to follow the option of paving the way for a legally binding standard, considering that it was not yet possible to reach common grounds on the topic and that such solution would take very long time, jeopardising short and mid-term solutions¹⁰⁴. Simultaneously, the SRSG recognised the limitations of voluntary initiatives¹⁰⁵ and concluded that none of the options, by themselves, would be able to provide a significant change in the field of business and human rights. The SRSG concluded that in order to have the support of the HRC an alternative method was necessary.¹⁰⁶ As a consequence, in the words of their own drafter “the Protect, Respect and Remedy Framework (...) and the Guiding Principles (...) aim to establish a common global normative platform and authoritative policy guidance as a basis for cumulative step-by-step, progress without foreclosing any other promising longer-term developments.”¹⁰⁷

¹⁰¹ HR/PUB/11/04, 2011, p.1

¹⁰² Ibidem.

¹⁰³ On this, and on the tensions that the different actors in the field posed to the SRSG since the beginning of his mandate: Ruggie, 2013, pp.37-38.

¹⁰⁴ Ruggie, 2013, pp.55-68. The objections to the arguments of the former SRSG regarding the creation of a legally binding instrument will be presented infra on Chapter IV.1.

¹⁰⁵ A deep explanation of the work and opinion of the SRSG can be found at: Ruggie, 2013, pp.69-78.

¹⁰⁶ Ruggie, 2013, p.81.

¹⁰⁷ Ibidem.

The fact that the UNGPs do not have a legally binding nature cannot lead to the disregard of their content and potential. The UNGPs achieved the endorsement of the HRC, were in general well received by the business sector and led to changes in previous normative documents¹⁰⁸. They are the result of a wide consultation process involving states, businesses and CSOs that must be applauded. Notwithstanding, it is important to look towards the UNGPs in a critical way in order to assess their role and impacts. In the following pages, an overview is given of the content and main characteristics of the UNGPs. After, there will be an analysis of the different duties/responsibilities the UNGPs establish, and an attempt to point possible avenues for implementation by addressing some specific issues.

While recognising that different challenges may arise to different categories of business structures and in different sectors of activity, the UNGPs are applicable to all types of companies¹⁰⁹. This is very important as an overarching framework should provide standards that apply to the whole business sector. How these standards will be translated in the daily activities of a specific corporation is a work that needs to be done in other instances, involving different contributions and sources of regulation (for instance, this is an important area for sector initiatives)¹¹⁰.

The UNGPs are also applicable to all States¹¹¹ and the responsibilities of corporations do not annul the ones of States regarding human rights¹¹². In other words, the establishment of “responsibilities” for business enterprises shall not be the ground for a disregard of the duties States are bound to. The same goes the other way around. While complementary, the roles of States and business are autonomous and different.

The UNGPs cover all the “internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and

¹⁰⁸ As an example, the 2011 update of the OECD Guidelines can be pointed.

¹⁰⁹ HR/PUB/11/04, 2011, General Principles, p.1.

¹¹⁰ This will be further developed in the next part of this chapter and also in the following chapter.

¹¹¹ Ibidem.

¹¹² HR/PUB/11/04, 2011, Commentary to GP11.

the principles concerning fundamental rights set out in the ILO's Declaration on Fundamental Principles and Rights at Work.”¹¹³ It is proven (both by multiple cases of corporate human rights abuses and by the studies developed by the SRSG¹¹⁴) that it is not reasonable to exclude *a priori* that a company can violate a specific right or group of rights. This is also coherent with the principles of indivisibility and interdependence of human rights. Despite the positive element of admitting possible violations of any recognised rights and allow for consideration of other international standards “depending on circumstances”¹¹⁵, the reference to normative documents is restricted to the International Bill of Human Rights and to the core ILO Conventions. This disregard for other important and well accepted human rights treaties (namely the human rights treaties) is, without any doubt, a negative aspect¹¹⁶.

The duties/responsibilities contained in the UNGPs are organised in a “three pillar structure”: *the State duty to protect human rights, the corporate responsibility to respect human rights and access to remedy*. The SRSG intended to make clear that different actors have different duties/obligations/responsibilities regarding human rights. Not only the content of such duties/responsibilities/obligations is different (protect/respect). They also have a distinct nature: States have a duty while companies have a responsibility¹¹⁷. This is intrinsically related with the non-binding nature of the UNGPs themselves.

Taking all of these into account, it should be recognised that the UNGPs are an important achievement for different reasons. First of all, the SRSG developed an impressive work, not only by involving the different actors in a wide discussion

¹¹³ HR/PUB/11/04, 2011. GP 12. The Conventions classified as “core Conventions” by the ILO's Governing Body are: Forced Labour Convention (no.29, from 1930), Freedom of Association and Protection of the Right to Organise Convention (no.87, from 1948), Right to Organise and Collective Bargaining Convention (no.98, from 1949), Equal Remuneration Convention (no.100, from 1951), Abolition of Forced Labour Convention (no. 105, from 1957), Discrimination (Employment and Occupation) Convention (no.111, from 1958), Minimum Age Convention (no.138, from 1973), and Worst Forms of Child Labour Convention (no.182, from 1999). In <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last consulted 24 April 2014).

¹¹⁴ A brief presentation of such data can be found at Ruggie, 2013, p.24-25 (graphics related to geographical location and sector of activities).

¹¹⁵ HR/PUB/11/04, 2011. Commentary to GP 12, p.14.

¹¹⁶ In this regard, for instance: Blitt, 2012-2013, pp.44 et seq; Deva, 2012, p.105.

¹¹⁷ The character of business' responsibility to respect will be analysed infra.

on the topic, but also by promoting investigation in this field¹¹⁸. Secondly, they do not connect businesses responsibilities with a closed list of human rights. They are grounded on the central idea that through their activities, corporations have the potential to affect different rights in different manners¹¹⁹. Thirdly, they are encompassing in the sense that include a role both for States and for corporations¹²⁰.

Despite of these positive features, there are important gaps that we should be aware of. Being non-binding, the UNGPs do not provide for a legal source of obligations. Their effectiveness depends to a wide extent on the willingness of companies and States to implement measures. It is true that positive impacts of the UNGPs in practice can already be pointed¹²¹. However, it is not as clear that victims are feeling meaningful impacts. There is also no way to oblige unwilling companies to incorporate them¹²². This is connected with the fact that the UNGPs do not provide for any monitoring mechanism, which leaves once again the compliance with their provisions, pretty much dependent on the good will of the actors they address.

2. The UNGPs in action

After an analysis of the general features of the UNGPs, an overview is given of the duties they establish for each actor and possible instruments and measures to implement a system of effective protection will be discussed. For reasons of clarity, this part of the chapter is organized according to the three structural pillars of the UNGPs: the *States' duty to protect*, the *companies' responsibility to respect*, and the *access to remedy*.

¹¹⁸ A list of the documents prepared by and submitted to the SRSG can be consulted at: <http://www.reports-and-materials.org/Ruggie-docs-list.pdf> (last consulted 3 June 2014).

¹¹⁹ Ruggie, 2013, p.20; p.95.

¹²⁰ Ruggie, 2013, p.82.

¹²¹ Such as the amendments on other normative instruments, the endorsements by companies, among others.

¹²² De La Vega, Mehra, Wong, 2011, p.8.

a) States' duty to protect – *How to better protect?*

i) Understanding States' Human Rights duties regarding business

The first chapter of the UNGPs is devoted to the States' duty to protect human rights. It is based on the traditional content of the obligation to protect human rights that binds States. It implies that States have the obligation to provide protection against human rights violations by companies and to make clear that national companies are expected to act in respect of human rights. This is established in the foundational principles of the pillar.

In the first pillar, the operational principles can be summarized as: action in regulation and policy making¹²³, adoption of specific measures in corporations that are owned/controlled/supported by the state¹²⁴, support of respect for human rights in areas affected by conflicts¹²⁵, assurance of policy coherence.¹²⁶

States' regulatory and policy functions are addressed in GP3 which enumerates actions that States shall develop in order to fulfil their duty to protect. These include: enforcement of laws and assessment of their adequacy, coherence in the legal framework, guidance of companies and encouragement of communication regarding human rights impacts¹²⁷.

Regarding the first group of measures, the commentary¹²⁸ mentions the creation of "an environment conducive to business respect for human rights"¹²⁹ through the body of laws and policies they create and develop. It implies that States should assess the impacts of their body of law on human rights, in particular, the effects that the legal frameworks may have in business respect for human rights. It is, therefore, up to States to make sure that the different policies and legislative actions they create, promote corporate respect for human rights¹³⁰.

¹²³ HR/PUB/11/04, 2011; GP3, p.4.

¹²⁴ Idem, GPs4 to 6, pp.6-7.

¹²⁵ Idem, GP7, pp.8-9.

¹²⁶ Idem, GPs8-10, pp.8-12.

¹²⁷ Idem, GP3, p.4.

¹²⁸ Idem, p.5.

¹²⁹ Ibidem.

¹³⁰ Ruggie, 2013, pp.87-88.

It is important that States take this element into account as a general recommendation for the implementation of the UNGPs. This field is intrinsically connected with different bodies of law (as, among others corporate law, labour law and trade law). As a consequence, we cannot isolate the problem of business and human rights from all these branches. Integrated action is a crucial element for success. It also seems relevant that States take more into account the human rights impact (even if indirect) of their legislation and policies as a part of their duty to protect.

Despite referring to an obligation of states to “encourage, and where appropriate require business enterprises to communicate how they address their human rights impacts”¹³¹, the UNGPs do not go far by imposing for example any reporting obligations. It is unclear what kind of measures should be incentivised as it is stated that communication can range from “informal engagement with affected stakeholders to formal public reporting”¹³². This seems to fall short from any effective action. Transparency is fundamental to promote the respect of business for human rights. As a consequence, implementing public reporting is an essential avenue to guarantee public scrutiny of the actions of companies. This is particularly relevant as the UNGPs do not provide for monitoring or compliance mechanisms.

After a general approach of States’ duties, the UNGPs focus on three particular types of situations where a special treatment is necessary. These are the situations in which there is a State-Business nexus (Guiding Principles (GPs) 4 to 6); corporations operating in areas affected by conflicts (GP7) and policy-coherence (GPs 8 to 10).

The State-business nexus related principles cover three areas of concern: (i) companies controlled or owned by the State (GP4) – state acting as a shareholder; (ii) companies with which the State establishes contracts to the provision of services with a potential impact on human rights (GP5) – essential services are to

¹³¹ HR/PUB/11/04, 2011, GP3, p.4.

¹³² *Idem*, p.6.

be provided by corporations due to contracts made with States; (iii) companies with which the State has commercial links (GP6).

The context of operations of a company is an important element in the business and human rights field as there are multiple corporations acting in backgrounds where there are already very intricate human rights situations and an inability/unwillingness of State structures to protect the human rights of their citizens. The UNGPs establish duties for the States to help companies acting in these contexts in GP7. Briefly, these duties are: (i) counselling and assisting corporations acting in such contexts; (ii) exclusion of companies involved in gross human rights violations; and (iii) policy coherence in order to diminish the risks of potential involvement of companies in such violations.

The final three principles of the first pillar of the UNGPs are about policy coherence. This demand is applicable to three main groups of State activities: coherence among State institutions; coherence in the economic agreements in which the State takes part and, finally, coherence in the States' action as members of multilateral organisations.

Finally, there is a duty to provide access to remedy, which is dealt with in the third pillar of the framework and will be further developed in the third part of the current title.

After this general overview of the State's duty to protect, some conclusions can be drawn. While it is positive that the Framework and the UNGPs use the State duty to protect as its central element, there are multiple issues that were not dealt with in a progressive manner. In some areas, the UNGPs risk to establish very wide margins of appreciation for States that, combined with the lack of effective and formal monitoring mechanisms to corporate behaviour, do not help the role that civil society can develop as watchdog. This is the case with the communication requirements, as the UNGPs establish that they can amount merely to informal engagement with stakeholders.

Extraterritorial obligations of home States are briefly mentioned, in order to merely state that, according to international human rights law, States are not

obliged to regulate extraterritorial activities of their national companies¹³³. This is a negative aspect once, as it will be addressed *infra*¹³⁴ there are good reasons to consider extraterritorial obligations as a way to foster corporate human rights responsibility. This is especially relevant in a world where companies can easily move their operations, where there are still many imbalances of power, and where so many host States are still unwilling or incapable to provide appropriate regulation and enforcement. Even when specifically addressing activities in conflict-affected areas¹³⁵, the measures proposed are rather diplomatic and based on leverage and the possibility to exercise any kind of jurisdiction is only mentioned in cases involving gross human rights abuses.

Taking the above into account, I will now focus on some specific areas in which States should act in order to improve protection of human rights violations by the corporate actors.

ii) Specific issues – Fulfilling the duty to protect

The UNGPs preserved the most traditional way of looking towards the relationship between International Human Rights Law and non-State actors – via action of States¹³⁶. This leads to particular demands regarding State action. When we talk about states' obligations, the UNGPs are not the only relevant human rights standard. There are other sources of obligations (human rights treaties, comments, recommendations and analysis of human rights bodies) that have to be taken into account when determining the required action. Doing so is especially relevant if we consider that the UNGPs show a particular lack of ambition in some aspects (as already pointed out, for instance, regarding extraterritorial obligations)¹³⁷. In addition, the effectiveness of the second pillar of the UNGPs also depends in a wide margin on what States do to fulfil their human rights obligations.

¹³³ HR/PUB/11/04, 2011, commentary to GP 2, pp-3-4.

¹³⁴ *Infra* Chapter III.2.a.ii.

¹³⁵ HR/PUB/11/04, 2011, GP7, pp.8-9.

¹³⁶ Seppala, 2009, p.412; Jägers, 2011, p.160.

¹³⁷ Jägers, 2011, p.161.

The fact that States have, in general, three main duties regarding human rights (to respect, to protect and to fulfil) was already touched upon in Chapter II. The analysis undertaken in that chapter also demonstrated how States are much more exposed to the scrutiny of human rights bodies. This is natural if we take into account that, at its genesis, the human rights system was constructed taking into account the relationship State-Individual. Despite not being new actors, the regulation of actions of non-State actors still appears as something relatively recent and problematic, due to the basic construction of the regime¹³⁸.

This does not necessarily imply that States duties regarding the regulation of corporations and the actions needed to fulfil their duty to protect are always clear. Recent documents that provide useful guidance regarding the substantive obligations of States regarding corporate action are the CESCR, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*¹³⁹ and the *General Comment No.16 (2013) on State obligations regarding the impact of the business sector on children's rights* (hereinafter CRC GC16), issued by the CRC¹⁴⁰.

This section will analyse possibilities for States to improve protection for corporate-related human rights abuses and fostering the content of the UNGPs. It is clear that due to their characteristics, the effectiveness of the UNGPs (non-legally binding nature, non-legal character of the corporate *responsibility*, lack of proper enforcement mechanisms) relies widely on State action.

As a preliminary remark, it is important to make clear that in this section, I will deal mainly with the actions of States in their role of regulators (duty to protect) and not in their procurement activities nor in the situations in which corporate activities can be attributed to them. Even though, it shall be underlined that, taking into account the current tendency to privatise services considered as essential to the dignity of human beings, such processes demand careful analysis and

¹³⁸ On the evolution of the international human rights regime in general: Isa, 2009.

¹³⁹ E/C.12/2011/1, 12 July 2011.

¹⁴⁰ CRC/C/GC/16, 17 April 2013.

procedures and, in any event the States shall abdicate of all their prerogatives regarding the privatised functions¹⁴¹.

- Policy coherence

One important first remark that is patent on CRC GC16, on GP8 *et seq.*, and also on the 2012 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (WG)¹⁴² is that dealing with business and human rights shall not be a task of isolated governmental departments. It demands consultations with stakeholders and the involvement of governmental agencies and departments dealing with trade, economic affairs, corporate regulation... This allows for a participative and coherent process and also contributes to one of the priorities established in the UNGPs – policy coherence. In addition, it enhances the legitimacy and scrutiny of policies, regulations and practices.

Also in this regard States cannot forget their human rights obligations when they engage in treaties and contracts and other domains and when act in the context of intergovernmental organisations/multilateral institutions¹⁴³. These are two other reasons why state action regarding business and human rights shall be transversal and involve multiple actors and fields of public action. Only with this type of approach it will be possible to embed business and human rights in state action as a whole.

- National legislation and regulation

National legislation and regulation is essential to make corporate responsibilities meaningful. In this regard States have multiple tasks to perform in order to comply with their human rights obligations.

¹⁴¹ Regarding the duties to protect and privatization of services: de Feyter, 2009; De La Vega, Mehra, Wong, 2011, pp.5-6; HR/PUB/11/04, 2011, GP5, p.8. On the particular impact on the rights of the Child: CRC/C/GC/16, 17 April 2013, p.5.

¹⁴² A/HRC/23/32, 14 March 2013, p.20, par.7(a).

¹⁴³ HR/PUB/11/04, 2011, GPs 9-10, pp.11-12. Regarding the obligations of States in the context of international organizations it also interesting to be aware of the particular reference made by the CRC GC16: CRC/C/GC/16, 17 April 2013, p.7.

First, it is important to assess the impacts of legislation and regulations of branches of law and policy that are strictly connected with business and human rights (corporate¹⁴⁴ and labour law are just two examples). This is stated in the UNGPs but it is also an important piece of the State duty to respect¹⁴⁵. Naturally, if after such impact assessments the conclusion is that there are regulatory barriers implying negative human rights impacts, proper action shall be taken to change the scenario.

In the vast majority of the cases, States will also have to “establish appropriate laws and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations”¹⁴⁶. This is indispensable in the domain of corporate due diligence. As we will see *infra*, due diligence (briefly, the process “to know and show that they do not infringe on others’ rights”¹⁴⁷; the avenue for companies “to identify, prevent, mitigate, and address adverse impacts on human rights”¹⁴⁸) is considered as the central piece of the corporate responsibility to respect. However, if we rely only on the UNGPs, it is not mandatory, is not subjected to content requirements, and its absence or the disregard of its results do not lead to any legal consequence. According to SKINNER AND OTHERS, “legislation imposing minimum due diligence standards on the controlling entities within business enterprises, for example on their headquarters companies, would clarify their legal responsibility and significantly reduce the need for costly litigation.”¹⁴⁹ They proceed stating that “All home States of multinational enterprises should therefore make it clear that a business can be found civilly liable for human rights impacts where it has not complied with a legal duty to carry out due diligence to prevent such impacts from occurring.”¹⁵⁰ In addition and in the line of what is held by Mares¹⁵¹, such regulation should not only be focused on procedural aspects and establish merely

¹⁴⁴ Regarding corporate and securities law being one policy cluster demanding special attention: Ruggie, 2013, pp.87 et seq.

¹⁴⁵ E/C.12/2011/1, 12 July 2011, p.2.

¹⁴⁶ *Ibidem*.

¹⁴⁷ Ruggie, 2013, p.99.

¹⁴⁸ *Ibidem*.

¹⁴⁹ Skinner, McCorquodale, De Schutter, Lambe, 2013, p.91.

¹⁵⁰ *Ibidem*.

¹⁵¹ Mares, 2012, p.27.

formalistic requirements. It should also define substantive standards and monitoring mechanisms in order to avoid “decoupling or ceremonial conformity”.¹⁵² Action in this field is a cornerstone for business accountability.

The problems related to complex corporate structures and relationships also need to be addressed by States regulation. As pointed out by JÄGERS¹⁵³, “corporations regularly escape being held responsible for human rights violations due to their complex business structures, claiming that subsidiaries are separate legal entities that must be brought to trial in the countries in which they operate.” This problem is relevant both in the field of access to remedy¹⁵⁴ and in the due diligence requirements. Companies should not be able to avoid responsibility by using complex legal structures. Often, the corporate institutional organisation allows for a distribution of responsibility that is not compatible with the real control, decision-making, leverage, and other relevant powers, and their exercise in reality. The introduction of changes in this field, accompanied by meaningful regulation of due diligence (embracing the different parts and relationships of the company/group of companies) is essential to enable access to remedy and to increase accountability.¹⁵⁵

In addition, as stated by MCCORQUODALE, “laws should be developed so that parent corporations are clearly legally responsible in their home states for the actions of their subsidiaries in other states that occurred due to the subsidiary operating the policies of the parent company (for example on human resources policies, marketing and finances). This may also be a means to enable appropriate capacity building support to occur in some economically weaker states.”¹⁵⁶

All of these possibilities of action are in accordance with the recommendations issued by the WG to implement the UNGPS that suggest that States shall identify

¹⁵² Ibidem.

¹⁵³ Jägers, 2002, p.253.

¹⁵⁴ Skinner, McCorquodale, De Schutter, Lambe, 2013, p.71 *et seq.*

¹⁵⁵ Skinner, McCorquodale, De Schutter, Lambe, 2013, p.91. Also in the same direction (and with a specific reference to due diligence regarding supply chains): International Commission of Jurists, 2014, p.30.

¹⁵⁶ McCorquodale, 2009, pp.393-394.

barriers in access to remedy and to clarify their schemes of corporate liability for human rights violations¹⁵⁷.

- Transnational activities and extraterritoriality

The UNGPs are intended to be applied to all corporations, whether they act inside the borders of one state or whether their activities go beyond such borders. However, companies that act in more than one State (multinational enterprises) pose different regulatory and monitoring challenges. In these cases we have, at least two relevant jurisdictions to consider: the one of the corporation's home-state (where it is headquartered) and the one of its host-state (where it develops services/products/activities). Despite the reference to conflict affected areas, the UNGPs first pillar often seems designed for a State with strong regulatory capacity and judicial structures. However, it is widely known that while the majority of the multinational companies are headquartered in countries that (at least in abstract) have such capacity, a large part of their activities is developed in States with fragile structures both at the normative, monitoring and accountability levels. This delocalization happens with recourse to different forms – establishment of subsidiaries, subcontracting... In such cases, we have a gap that is leading to multiple corporate-related human rights violations and their impunity.

Jägers was one of the authors who criticised the treatment given to extraterritorial obligations of States in the UNGPs (GP2)¹⁵⁸. Indeed, the wording used by the SRSG falls short from the current general understanding of extraterritorial obligations of States. Even though this is a field where there is still not a wide agreement regarding the particular obligations, we can say that there is a growing tendency to accept the existence of extraterritorial human rights obligations of States¹⁵⁹.

¹⁵⁷ A/HRC/26/25, 5 May 2014.

¹⁵⁸ For instance, Jägers, 2011, p.161.

¹⁵⁹ Supra Chapter II.2.a and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2011, published by the ETO Consortium, available at <http://www.etoconsortium.org/en/library/maastricht-principles/> (last consulted 28 June 2014).

It is not the scope of this thesis to study extraterritorial obligations of States, a topic that can lead by itself to multiple works and research. What is relevant to point out is that the nature of corporate activity often overcomes national borders, and can benefit from regulatory gaps and from the inability and unwillingness of some host States to provide meaningful human rights protection. This creates the need to consider that home States have obligations in preventing human rights abuses by their corporate nationals. Home States shall act in order to prevent that the external activities of such companies harm human dignity and universal values to which they committed and regarding which they have obligations.

In line with what is argued by Bernaz, extraterritoriality is not a black or white concept and embraces different types of action. For instance the adoption by a State of certain regulatory measures will have an extraterritorial impact.¹⁶⁰ The adoption of measures as the ones suggested in the previous point (due diligence embracing the whole corporate activities and relationships) is one of these cases and it seems hardly arguable that States should not do so. As stated by MCCORQUODALE, in order for a State to fulfil its obligations to protect, it has to “enact laws and establish practices to protect against human rights violations, which may include regulation of both corporate nationals and their subsidiaries.”¹⁶¹ The type of measures suggested above is intended to have such impact and is also in line with the Maastricht Principles (namely, principles 9 and 25)¹⁶².

The exercise of extraterritorial jurisdiction is a different issue, related to the access of victims to the courts of home States in order to get redress from human rights violations committed abroad. This is particularly relevant when the judiciary of the host State does not provide guarantees of fair trial. It shall then be possible for victims to access the jurisdiction of the home State. The main issue in this regard is that even when such access is possible, results are often impaired¹⁶³ by practical and legal constraints. First, it usually requires a lot of resources,

¹⁶⁰ Bernaz, 2013.

¹⁶¹ McCorquodale, 2009, p.390.

¹⁶² Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights – cf. *supra* footnote 163.

¹⁶³ *Supra* Chapter II.2.iii.

mainly financial, that may not be accessible to the victims. Moreover, corporate structures and the rules of corporate responsibility also represent obstacles in the way for effective remediation. All these different problems shall be addressed by States and international organisations in order to provide remedy to victims of corporate-human rights abuses and to end impunity.

Despite all these difficulties and obstacles, the issue of extraterritorial obligations is a central topic in the business and human rights discussion and shall be one of the priorities for future debates regarding norm and policy making both at national, regional and international level. It is of the utmost importance that home States stand up for their obligations regarding their corporate nationals and do not disregard their activities overseas. The growing tendency to align with this understanding can be found in different documents from human rights bodies and is reinforced in the CRC GC16¹⁶⁴.

b) Companies' responsibility to respect – *How to fulfil?*

i) General analysis of companies' duties

The responsibility of corporations is dealt with in the second pillar of the UNGPs. While it is up to the States to provide protection, compelling corporations to respect human rights and to provide access to remedies in case of violations, companies have a more restricted scope of responsibility.

First of all, corporations have a *responsibility*, as opposed to states, which hold a *duty*. As the former SRSG points out, this was not a casual distinction: “My use of the term “responsibility” was intended to signal that it differs from legal duties.”¹⁶⁵ This responsibility is not legally grounded and finds its logic in social norms and expectations¹⁶⁶. According to KNOX, this “provided a less controversial basis for the responsibility, but at the potential cost of making it softer and more inchoate. He [the former SRSG] tried to address these weaknesses by drawing on

¹⁶⁴ CRC/C/GC/16, 17 April 2013, p.10.

¹⁶⁵ Ruggie, 2013, p.91.

¹⁶⁶ Idem, pp.91 *et seq.*

human rights law.”¹⁶⁷ Basically, the former SRSG considered that “the corporate responsibility to respect human rights is a widely recognized and relatively well-institutionalized social norm, particularly in relation to multinational corporations. But its implications for what companies need to do to meet this responsibility had never been spelled out authoritatively.” This is where the *responsibility to respect* came from.

But, what does the *corporate responsibility to respect human rights* means then?

According to the wording of GP11, corporations “should avoid infringing on the human rights of others and should address the adverse human rights impacts in which they are/were involved.”¹⁶⁸ The commentary to GP11 states that such obligation exists in any operation of the company, independently of its geographical location; does not have a connection with the States’ obligations and supersedes the obligations to respect local laws and regulatory mechanisms. This is the negative dimension of companies’ responsibility – “to do no harm”.¹⁶⁹

GP12 determines the substantive scope of the obligation to respect. It does so based on the idea that, at least in abstract, any company can violate all human rights¹⁷⁰. As a consequence, the obligation to respect is considered to comprise all the human rights contained in the documents that constitute the International Bill of Human Rights¹⁷¹ and in the ILO’s eight core Conventions¹⁷². It is relevant to underline the criticism held on my general analysis regarding the non inclusion of the other core human rights treaties in a direct manner.

GP13 determines the requirements of the corporations’ responsibility to respect: they can violate human rights not only in their activities, but also in the context of its “business relationships” with other parties¹⁷³. Moreover, such violations can be perpetrated both by action and by omission. In drawing this principle and the

¹⁶⁷ Knox, 2011, p.16.

¹⁶⁸ HR/PUB/11/04, 2011, GP11, p.13.

¹⁶⁹ Lindsay, McCorquodale, Blecher, Bonnitca, Crockett, Sheppard, 2013, p.12.

¹⁷⁰ Ruggie, 2013, p.95.

¹⁷¹ The UDHR (from 1948), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ICCPR both drafted in 1966).

¹⁷² For the list of “core Conventions”: supra footnote 113.

¹⁷³ HR/PUB/11/04, 2011, GP13, p14.

extension of corporate responsibility, the former SRSG abandoned the previously used concept of spheres of influence¹⁷⁴ and choose to “drew the scope of the corporate responsibility to respect human rights from the definition of respect itself: non-infringement on the rights of others. Thus (...) defines the scope in terms of the actual and potential adverse human rights impacts arising from a business enterprise’s own activities and from the relationships with third parties associated with those activities.”¹⁷⁵

It is important to note that regarding their activities companies are required to “avoid causing or contributing to adverse human rights impacts”¹⁷⁶ and to deal with them when they occur. While regarding impacts derived from their business relationships they merely have to “seek to prevent or mitigate adverse human rights impacts.”¹⁷⁷ It seems important not to take this distinction too far and to recognise that a corporation has responsibility for the “human rights record” of its products, services and operations. Furthermore, this responsibility shall go beyond its direct activity and be understood as a responsibility for the product, the service and operations it develops. This is especially relevant regarding powerful companies that work with multiple partners globally, including in countries where the State’s structure is weak and the human rights record is poor. These companies usually have a great power over commercial partners and also over States. They have the potential to change dramatically the situation of such actors and recognising that they also have a responsibility for the products and services they provide can be at least an attempt to balance the situation.

GP14 restates that the responsibility under analysis applies to all corporations, independently of its particular characteristics. Notwithstanding, such individual

¹⁷⁴ Theuws, van Huijstee, 2013, p.7.

¹⁷⁵ Ruggie, 2013, p.97. For more on the distinction on these two approaches: Theuws, van Huijstee, 2013, p.7.

¹⁷⁶ HR/PUB/11/04, 2011, GP13, p14.

¹⁷⁷ Ibidem.

features may have an impact on the capacities and processes used to fulfil the responsibility¹⁷⁸.

Considering this overview of the companies' responsibility (the foundational principles of pillar 2 of the UNGPs) we can already start questioning if this is enough and the UNGPs went as far as they could in the definition of these duties.

It shall be noted that it is extremely positive that such responsibility is expected to be fulfilled by "all business enterprises wherever they operate".¹⁷⁹ Moreover, it is positive that it is independent of the role of States and it is above national laws and regulations¹⁸⁰.

Also the fact that is assumed that a corporation has demands regarding its business relationships is noticeable. Although, it is important not to read the UNGPs in a restrictive manner as it seems essential to recognise that, as a product deliverer or service provider, you are not a mere distributor. Especially taking into account the enormous powers of some companies it makes all sense that they have an obligation regarding all possible human rights linked to their activities.

The commentary to GP11 underlines another aspect that is both clarifying and relevant regarding the responsibilities of corporations: that their "good actions" cannot excuse their negative impacts in human rights¹⁸¹. This is especially relevant to clarify that the traditional activities related to companies "social responsibility" do not annul the need to prevent and address the negative impacts they have on human rights and that their human rights policy and performance shall distinguish the two dimensions.

Finally, it is positive that the UNGPs refer the corporate responsibility to all internationally recognised human rights (GP12). Regarding this point I reiterate the objection made *supra* regarding the non-inclusion of core human rights documents in the commentary to this principle.

¹⁷⁸ HR/PUB/11/04, 2011, GP14, p.15. Regarding treatment of the same aspect in the Protect, Respect and Remedy Framework: McCorquodale, 2009, p.390.

¹⁷⁹ HR/PUB/11/04, 2011, commentary to GP11, p.13.

¹⁸⁰ Ibidem. De La Vega, Mehra, Wong, 2011, p.6.

¹⁸¹ HR/PUB/11/04, 2011, commentary to GP11, p.13.

The content of the GPs regarding the corporate responsibility to respect has also been subjected to criticisms. In fact, some of the options followed in the framework raise doubts regarding their strength and effectiveness. This is the case of the construction of the corporate responsibility to protect based on a mere social norm jeopardises effective protection and remedy. Is that strong enough, especially taking into account the roles and powers developed nowadays by corporations? If we consider the obligations to which some companies are already bound to by national legislations (at least in some States), the rights they are entitled to (even at the international level) and their potential impact is it appropriate ground their human rights responsibility on a mere social norm?¹⁸²

This seems problematic by nature. It is a fact that companies and States have different social roles which is reflected in their social duties, namely in the field of human rights. However, it can be argued that, in order to avoid the political problems that a more solid construction of companies' duties was likely to raise¹⁸³, the UNGPs felt short from what is necessary in the field of business and human rights¹⁸⁴. It is particularly noteworthy that there is so much caution and fear to establish fully fledged duties for companies at the international level when they already enjoy a multiple array of rights, namely in the financial and arbitration field.

ii) Fulfilling the responsibility

In the set of the UNGPs, a company does not only have a negative responsibility not to harm human rights. There is also a positive dimension¹⁸⁵ requiring companies to show that they are acting according to their responsibility. This dimension is the one defined in GPs16 to 22 and includes the concepts of policy commitment, HRDD and remediation.

- Policy Commitments, Human Rights Due Diligence and Remediation.

¹⁸² On this, and on the general issues raised by the “responsibility” concept in the context of an analysis of the Protect, Respect and Remedy Framework see McCorquodale, 2009, p.391-392.

¹⁸³ Taking the case of the Norms as an example.

¹⁸⁴ Jägers, 2011, p.163.

¹⁸⁵ Knox, 2011, p.17-18; McCorquodale, 2009, p.393.

The Policy Commitment (GP16) aims to be the basis of the human rights responsibility of a company and should obey to some demands, such as being approved by the senior levels of the enterprise, being based on proper counselling with experts, publicity, among others.¹⁸⁶ According to the UNGPs, the policy commitment aims to have a role both in the internal and in the external relations of the company.¹⁸⁷ According to DEVA, “the statement of policy envisaged by Principle 16 is a crucial document because this would allow companies to define (in a tailormade way) their human rights responsibilities with reference to the relevant international human rights instruments.”¹⁸⁸ If properly designed and taken seriously, the policy commitment can indeed have an important role in shaping the company’s activities and influence its relations both with subsidiaries and suppliers. Drafting an adequate and meaningful policy commitment may be the first action of a company in order to respect human rights.

HRDD seems to be the central piece¹⁸⁹ of corporate responsibility in the UNGPs. It is developed in GPs 17 to 21, which establish its parameters and essential components¹⁹⁰. HRDD and its role in the fulfilment of corporations’ responsibilities will be further analysed in the next topic.

Remediation (GP22) is necessary when there is an adverse human rights impact caused by a business enterprise. According to the commentary, it can involve the company itself or other actors. It can take place in “operational-level grievance mechanisms”, in judicial mechanisms or merely by taking a role in the remediation process (when the company is not directly involved in the adverse impact)¹⁹¹.

The commentary to GP22 states that “where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself

¹⁸⁶ HR/PUB/11/04, 2011, GP16, p.16.

¹⁸⁷ Idem, Commentary to GP16, p.17.

¹⁸⁸ Deva, 2012, pp.105-106.

¹⁸⁹ Martin-Ortega, 2012, pp.106-107.

¹⁹⁰ HR/PUB/11/04, 2011, Commentary to GP17, p. 18.

¹⁹¹ Idem, Commentary to GP22, pp.24-25.

provides for remediation, though it may take a role in doing so.”¹⁹² This assumption appears to be too simplistic. It is not rare that, in the context of the corporate responsibility to respect, the UNGPs provide for flexibility, allowing to take into account elements such as the size of a company in shaping its duties. Why was not the same approach followed in this regard? A company that sees itself involved in a human rights abuse due to a direct link between the abuse and its operations, products or services might have disregarded some of its duties and, therefore, also have responsibility in the remediation process¹⁹³. Moreover, the fact that such adverse impacts occurred and the company is directly linked to it may be the result of failures in the HRDD process or of a weak policy commitment. Furthermore, as pointed out by DEVA, “while this advice [no direct involvement in the remediation process] is consistent with the current legal position, it might not be the best course to follow for all companies in every situation. Past experiences show that even if the alleged abuses were directly caused by suppliers and contractors of TNCs[transnational corporations], adopting a ‘hands off’ approach might not be a viable option for TNCs, especially if they are seen by stakeholders as benefiting – economically or otherwise – from such abuses of business partners. A more responsible and pragmatic approach might be to engage the concerned business partners and try to remedy the alleged human rights abuses.”¹⁹⁴

The remediation process has to be jointly interpreted with pillar 3 of the UNGPs¹⁹⁵.

- Human Rights Due Diligence in particular

The UNGPs point HRDD as a way to “identify, prevent, mitigate and account for how they [business enterprises] address their human rights impacts.”¹⁹⁶ This

¹⁹² Ibidem.

¹⁹³ This aspect is strictly connected with the distinction present in GP19 (due diligence), regarding the different actions that companies must follow depending on their involvement in a “human rights adverse impact”. This distinction will be briefly addressed in the next heading in the context of human rights due diligence.

¹⁹⁴ Deva, 2012, pp.107-108.

¹⁹⁵ HR/PUB/11/04, 2011, Commentary to GP22, pp.24-25.

¹⁹⁶ Idem, GP17, pp.17-18.

element is dealt with in GPs 17 to 21 and it can be considered as the centre piece of corporate responsibility to respect¹⁹⁷.

In the words of MCCORQUODALE, “this concept of due diligence appears to be an integration of the human rights obligation of due diligence in relation to the actions of the non-state actors (such as corporations) and the general business practice of due diligence.”¹⁹⁸ Indeed, the due diligence concept is used both in the human rights field (related to States’ obligations) and in the corporate field (often associated to risk management)¹⁹⁹.

As pointed by ORTEGA, despite the non-binding character of the UNGPs and the nature of corporate *responsibility*, “human rights due diligence, as defined by the SRSG, switches the focus from the risk to the corporation to that posed by those affected by its activities. It goes beyond the corporate governance standard of risk management to include a whole range of purposes: to identify, prevent, mitigate and account for human rights impact.”²⁰⁰ This is also reflected in the fact that HRDD regards, not only companies’ “direct impact, through their own activity, but also covers the adverse impact that corporations may contribute to through their business relationships”²⁰¹.

HRDD is composed by four elements: assessment of human rights impacts (GP18), integration of findings and implementation of appropriate action (GP19), tracking of the response’s effectiveness (GP20) and, finally, communication (GP21).

Regarding the integration of findings and development of appropriate action, the commentary to GP19 distinguishes three types of situation: (i) the ones where is the company that causes the violation; (ii) the ones where it contributes to the result and, finally (iii) the ones in which there is a direct link between the

¹⁹⁷ Martin-Ortega, 2013, pp.50-51; Deva, 2012, pp.106-107.

¹⁹⁸ McCorquodale, 2009, p.392.

¹⁹⁹ Ibidem. To a more detailed analysis of the use of the concept of due diligence in each of these fields: Martin-Ortega, 2013.

²⁰⁰ Martin-Ortega, 2013, p.56

²⁰¹ Ibidem.

violation and its operations or products.²⁰² Some problematic situations may arise from the lack of precision of these concepts in practice. In the first case, the corporation “must take the necessary steps to cease or prevent the impact”²⁰³. In the second case, “it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.”²⁰⁴ In the last type of situations, recognised as the most complex one, the adequate action by the corporation will have to be determined on a case-by-case basis, taking into account factors like “the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences”²⁰⁵. I agree with BLITT, when stating that “the manner in which the Guiding Principles address the complexity of a corporation being directly linked to harmful human rights impacts appears to weigh heavily in favor of preserving the business enterprise’s economic interests.”²⁰⁶ This is an option that may weaken the obligations of corporations regarding their supply chains which, taking into account, the production structures nowadays may have a very negative impact in the protection of human rights from corporate-related abuses. This position in the field of HRDD, allied with the different demands in the remediation process for this type of situations, and with the general limitation to the responsibility to respect established in GP13, can lead to an unjustified reduction of corporate responsibilities for their activities. In a scenario where decentralisation of production is common and the recourse to suppliers is also a frequent practice of big companies, this can lead to a dramatic protection gap.

²⁰² HR/PUB/11/04, 2011, commentary to GP19, p.21. On this topic and regarding the different demands of each situation: Demuijnck, Björn, 2013, p.808.

²⁰³ HR/PUB/11/04, 2011, Commentary to GP19, p.21.

²⁰⁴ Ibidem. According to the same source, “leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.”

²⁰⁵ Idem, Commentary to GP19, pp.21-22. It is also important to note that, as stated above, in these cases, the corporation can but is not required to take part in the remediation process according to the commentary to GP22. On this: Blitt, 2012-2013, pp.48-49.

²⁰⁶ Blitt, 2012-2013, p.49.

HRDD shall be a constant process but it is somehow flexible as its particular functioning will depend on the company's specific features²⁰⁷. The UNGPs also recognise that "for TNCs that have a large number of suppliers and contractors spread all over the world, the advice is to prioritize those identified areas where the risk of adverse impacts is most significant".²⁰⁸ It seems important that there is recognition that not all the companies have the same needs and demands regarding HRDD, however, it is not clear which is the baseline for all of them and how to assure that a certain process fits the particularities of a specific company.

Regarding the potential effects of HRDD in liability, the commentary to GP17 is clear that the mere conduction of the process does not avoid it²⁰⁹. This is especially relevant once the UNGPs do not provide a set of minimum standards to assure that HRDD is meaningful.

Taking into account all the above, it seems that HRDD can have a very important role in the field of business and human rights. On the one hand, it can enable the company to act in a rights-compatible manner. On the other, the development of HRDD and the increased attention to human rights among the business sector might foster the flow of information regarding its impacts (current and potential) on human rights. It can provide new means for public scrutiny of corporate activity as well²¹⁰.

However, we cannot look at HRDD without underlining some questions regarding its effective impact. First, as ORTEGA points out the UNGPs do not establish any consequences to the lack of due diligence²¹¹. This means that the effective potential of HRDD largely depends on what States decide to do and how they will take it into their national legislations.

Furthermore, it is pertinent to recall JÄGERS' remarks regarding HRDD implementation: "operationalisation of this sweeping notion of corporate

²⁰⁷ Deva, 2012, pp.56, 106-107. Also in the same line of reasoning: Martin-Ortega, 2013, pp.50-51.

²⁰⁸ Deva, 2012, pp.106-107.

²⁰⁹ HR/PUB/11/04, 2011, Commentary to GP17, p.19.

²¹⁰ Demuijnck, Björn, 2013, p.801.

²¹¹ Martin-Ortega, Olga, 2013, p.56

responsibility in practice will prove to be very problematic. The Special Representative does, for example, not address how this responsibility relates to the important legal principle of separation of legal entities.”²¹²

In addition to these implementation and effectiveness concerns, it shall also be stated that implementing HRDD is not an easy task in general. CSOs working on business and human rights are likely to have an important function here, by translating the human rights language into instruments that corporations can easily use on their activities.²¹³ Specific sector initiatives (especially if multi-stakeholder) can also help companies understanding the particular difficulties that arise in their fields and regions of activity. This must be a way to ensure that the flexibility that is allowed by the UNGPs regarding the HRDD requirements is used in a positive way and not as a mean to avoid responsibilities. Moreover, such structures may also promote some kind of internal monitoring of the HRDD practices that companies are implementing.

In order to implement the UNGPs in a meaningful manner, companies shall introduce HRDD in a way that is not merely procedural but that has real substantive impacts and, when necessary, seek for the engagement and support from human rights experts.

- The role of sector initiatives – specific standard setting and guidance tools

The UNGPs are grounded on the idea that every business enterprise can violate all human rights, independently of their sector of activity, dimension, geographical areas of activity, and organisational structure. Nevertheless, it is a fact that different companies face diverse human rights issues. Practice shows that there is a tendency of some sectors to jeopardize some rights more than others²¹⁴. This can be related to the activities they develop but also to the contexts in which they

²¹² Jägers, 2011, p.162.

²¹³ In this regard, the work that has been developed by the Danish Institute for Human Rights deserves a particular note.

²¹⁴ For instance, as it is shown by recent cases, the information and technology sector is closely linked to the right to privacy.

operate. In practice, companies are faced with different dilemmas that cannot be solved by an overarching instrument as it is not, by nature, its function.

Enhancing the respect for human rights and the compliance of companies is a multi-level task, with different spaces of action, actors and normative levels²¹⁵. In addressing specific issues, create standard procedures and develop mechanisms of compliance, sector initiatives (especially if they involve the participation of the different stakeholders) are one of the actors that can have a crucial role.

Some industries have been in the spotlight for a long time regarding human rights issues (such as the extractive industries and the textile sector). Others are more and more addressed recently due to new challenges and demands (as it is the case both for the pharmaceutical industries and to the information and technology sectors). The challenges faced by the companies, and the dilemmas with which they are often confronted can be better understood and better addressed if specific guidance and mechanisms are created at the relevant sector levels. At this level, new forms of discussion and regulation can be addressed, new methodologies can be used and shared learning can enhance human rights respect. It is easier to identify difficulties and problems and to find proper guidance. This idea was already stated by the WG²¹⁶.

It is worth to mention that CRC GC16 already includes references of specific measures regarding some activity sectors, namely pharmaceutical, mass media, advertising and marketing and digital media.²¹⁷

The potential of multi-stakeholder initiatives (involving the corporate sector but also governments and civil society) was already recognised by the former SRSG in its 2007 report to the HRC.²¹⁸ However, their reliability must be assessed. According to the former SRSG, reliability depends on three elements: *participation, transparency and ongoing status reviews.*²¹⁹

²¹⁵ Deva, 2014, p.2.

²¹⁶ A/HRC/23/32, 14 March 2013, p.22.

²¹⁷ CRC/C/GC/16, 17 April 2013, pp.8-9.

²¹⁸ A/HRC/4/035, 9 February 2007, pp.16 *et seq.*

²¹⁹ *Idem*, p.17.

Despite of all this potential to provide sector specific guidance, tools for impact assessment and effective due diligence, and contribution to increased awareness and remediation, it is important to look carefully to these initiatives and to the reasons that lead corporations to take part in them. First, they should involve different stakeholders in order to guarantee that they are not a mere strategy to protect corporate interests. Second, they cannot be used as a way to avoid other types of regulation²²⁰. Third, these initiatives are of a voluntary nature which means that their functioning, results and efficiency are dependent on the willingness of the participants.²²¹

We can then conclude that, if properly structured oriented and assessed, and surrounded by appropriate regulatory frameworks, multi-stakeholder initiatives can be an important tool for the implementation of the UNGPs and other normative instruments. They can be privileged structures for an oriented dialogue, provide sector-specific guidance and develop a role in the grievance structures as well.

iii) *Am I complying?* – The difficult task of measuring Human Rights performance

The whole idea of complying with human rights standards (in the case of corporations by their *responsibility* to respect) brought to the field of business and human rights the issue of designing human rights indicators and measuring performance.

In order to understand what is at stake it is important to clarify what a human rights indicator is. According to GREEN: “a Human Rights Indicator is a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation.”²²²

Measuring human rights performance is a difficult task. Notwithstanding, in the realm of evaluation of States it is already a much debated issue, with some

²²⁰ International Accountability Roundtable, 2013, p.11.

²²¹ Albin-Lackey, Christopher, ‘Without Rules – A failed Approach to Corporate Accountability’, available at <http://www.hrw.org/world-report/2013/essays/112459> (last consulted 21 June 2014).

²²² Green, 2001, p.1065.

development²²³. In the field of business and human rights, measurement and development of indicators is a relatively new concern but the number of initiatives and standards developed is growing²²⁴.

The topic is too broad to be analysed in detail here but, due to its growing relevance and to its potential relevance in the future, it is important to understand what can be the advantages, and what are the difficulties regarding the measurement of business compliance with human rights²²⁵.

Monitoring corporate behaviour regarding human rights is not simple. There are too many different realities, contexts, and rights. Furthermore, if tracking the performance of every State's is already challenging, control the huge amount of corporations that exist nowadays is even harder.²²⁶ Therefore, indicators that allow for reliable evaluations and comparisons can be a useful tool. And not only for the ones monitoring but also for the ones monitored and other stakeholders.²²⁷

In the opinion of DE FELICE, the UNGPs provide some guidance on indicators requirements: (i) "indicators should not limit their focus on those human rights that have significant financial consequences for the company (...)"²²⁸; (ii) indicators cannot mix human rights impacts and human rights positive actions of companies;²²⁹ (iii) once companies have different responsibilities from states, the indicators to measure their performance have to capture that reality²³⁰. Taking this last point into account the author suggests three types of indicators to this field: policy (focusing on the corporation's compromise with human rights); process

²²³ Idem; HR/PUB/12/5, 2012.

²²⁴ A list of such initiatives can be found at: http://www.business-humanrights.org/media/documents/mb&hr_list_of_initiatives_featuring_indicators_15_may_2014.pdf (last consulted 29 June 2014).

²²⁵ For more detailed information on this topic: <http://blogs.lse.ac.uk/businesshumanrights/about/> and De Felice, 2015 (to be published).

²²⁶ Idem, p.8.

²²⁷ A list with the different entities benefiting from business and human rights indicators can be found at: <http://blogs.lse.ac.uk/businesshumanrights/about/>.

²²⁸ De Felice, 2015 (to be published), p.20.

²²⁹ Idem, p.21.

²³⁰ Idem, p.22.

(regarding the due diligence and remediation mechanisms) and impact indicators (focusing on the corporate activities' consequences).²³¹

However, none of the mentioned advantages comes without challenges. In a set with a particularly unclear definition of the corporate obligations²³²; where there are still multiple methodological challenges (namely scales of measurement and the differences in activities and contexts of operations)²³³, and difficulties in gathering valid and reliable information are particularly prominent²³⁴, developing reliable indicators and methodologies is a difficult task and will require a lot of work and devotion in the future.

It seems that once again, this is an aspect that will demand the involvement of different stakeholders in order to achieve results²³⁵. Moreover, priorities will have to be defined²³⁶. And if numbers and quantitative data can be appealing to managers and corporate actors, it is important bear in mind that, when assessing corporate compliance with human rights, “the strategy of accompanying scores with narrative explanations of the company’s contexts of operation can help avoid the political risks linked to an overreliance of self-contained, seemingly objective, quantitative expressions.”²³⁷

The development of indicators is extremely relevant to the development of business and human rights. However, the task shall be carefully conducted. The process shall be inclusive and procedural and substantive dimensions of human rights compliance shall be taken into account.

c) Providing access to remedy – How to enhance accountability?

Chapter III of the UNGPs deals with access to remedies. GP25 characterises the existence of a State duty to ensure access to effective remedy as an element of its duty to protect human rights. This function can, according to the same principle,

²³¹ Idem, pp.22-27.

²³² Idem, p.27

²³³ Idem, pp.31 et seq.

²³⁴ Idem, pp.37-41.

²³⁵ Idem, p.45.

²³⁶ Idem, p.45.

²³⁷ Idem, p.45.

be fulfilled “through judicial, administrative, legislative or other appropriate means”²³⁸ and respects to violations that take place “within their territory and/or jurisdictions.”²³⁹

A duty to protect that does not include a reliable and accessible system of remediation is useless. A State can adopt a wide range of measures to promote protect human rights but if violations are not addressed, it is unlikely that they will be effective.

Remediation has a substantive (regarding which different possibilities are pointed) and a procedural dimension²⁴⁰ and the mechanisms used can be State-based and non-State based; judicial and non-judicial. Regarding the non-judicial procedures (both State and non-State based), there is a range of effectiveness criteria: *legitimacy, accessibility, predictability, equitability, transparency, compatibility with rights* and *continuous learning*²⁴¹. Additionally, the so-called operational-level mechanisms also have to be “based on engagement and dialogue.”²⁴²

This pillar of the UNGPs promises more than what it provides. There is a reinforcement of the need to redress victims of human rights abuses by business; it is recognised that the remedies might have different natures and scopes, and some criteria are defined in order to make them credible. But does this add a lot to what the previous pillars of the UNGPs already imply? Does this pillar indeed allow better access to remedy and grievance by victims? By now, it is widely recognised that the State duty to protect includes an obligation to provide remedies to victims of human rights violations by third parties. Moreover, access to remedy is itself a human right, included in multiple human rights instruments (art.8 UDHR, art.2 (3) International Covenant on Civil and Political Rights; art.13 ECHR; art.47 Charter of Fundamental Rights of the European Union).

What is necessary is to offer solutions to the multiple obstacles that still affect access to remedy: the overall lack of accountability due to multiple jurisdictional

²³⁸ HR/PUB/11/04, 2011, GP25, p.27.

²³⁹ Ibidem.

²⁴⁰ HR/PUB/11/04, 2011, Commentary to GP25, p.27.

²⁴¹ HR/PUB/11/04, 2011, GP31, pp.33-34.

²⁴² Ibidem.

obstacles, to the complex corporate organisational structures, the problems related with victim's access to grievance mechanisms, etc.²⁴³. No progress has been felt in this regard and the truth is that, as rightly pointed out by the International Commission of Jurists (ICJ), even some of the avenues that were previously used in an attempt to achieve remedies are now being narrowed (e.g. the ATCA and the Kiobel case)²⁴⁴. These problems are increased by the lack of international monitoring and accountability structures²⁴⁵, another issue that the UNGPs did not solve. In fact, they “were primarily conceived as a tool for positive engagement (...)”²⁴⁶ and do not provide solid grounds for accountability²⁴⁷. As a consequence, the advancements produced by the UNGPs in the field of access to remedy are likely to be extremely limited, which impairs their effectiveness as a whole.

3. Interim conclusions

Despite the criticisms, the UNGPs were able to gather some consensus around business and human rights, something that none of the previous UN initiatives and frameworks was able to achieve. The UNGPs are, therefore able to be part of the response to one of the needs in business and human rights– a common normative standard. The problem is that they have important flaws that affect other need in this field – enforcement.

The non-binding nature of the UNGPs, allied to the inexistence of a monitoring body and to the non ambitious mandate of the WG²⁴⁸ weakens the potential of true empowerment of victims of corporate-related abuses.

Companies can also deal with difficulties in implementing them due to the lack of proper guidance²⁴⁹. Regarding the implementation of the UNGPs, both States and companies will have to act in a comprehensive manner, not focusing on merely

²⁴³ International Commission of Jurists, 2014, p.16.

²⁴⁴ *Idem*, p.17

²⁴⁵ *Idem*, pp.16-17.

²⁴⁶ *Idem*, p.17

²⁴⁷ *Ibidem*.

²⁴⁸ *Infra* Chapter IV.2.a.

²⁴⁹ Deva, 2012, p.108.

procedural adjustments but seeking substantive results. This will demand the development of consistent knowledge on the different ways in which corporate activities can impact human rights. Even practices that might not look like having adverse impact at first sight can lead to abuses. An example of this is the companies' practices as buyers²⁵⁰.

Another concern to keep in mind is that business and human rights is not only about integrating concerns that are related to human rights in business practices and reporting. In order to achieve meaningful progress, such issues also have to be seen as human rights concerns and therefore achieve better practices²⁵¹.

As an attempt to provide an answer to the question of whether the UNGPs were able to provide solutions to the gaps that existed in business and human rights, I would say that they did it partially. They did so mainly to the ability of creating an inclusive dialogue, to develop a basic standard, to advance some solutions and to uncover some of the problematic issues that still exist. However challenges are not over. At the normative level there is still need for stronger standards and for proper guidance. Regarding the monitoring and remediation processes there is work to do at the different levels in order to provide meaningful access to remedy and accountability²⁵².

New challenges are showing up – being measurement of compliance one of them. The development of indicators that allow reliable understanding of compliance of corporations with human rights is a challenge that will mark the following years. This process can help the monitoring task but can also lead to advancements in the clarification of business obligations regarding human rights.

Cooperation, open-mind, transparency, rigor and creativity will be necessary to address all the challenges ahead.

²⁵⁰ A clear example of this situation can be found in: Ruggie, 2013, pp.1 *et seq* (regarding the Apple case).

²⁵¹ Institute for Human Rights and Business, *The "State of Play" of Human Rights Due Diligence – Anticipating the next five years – Volume One: General Overview*, ISBN: 978-1-908405-03-6, 2011, p.33.

²⁵² FIDH, 'Briefing Paper – Business and Human Rights: Enhancing Standards and Ensuring Redress', 2014.

IV. Prospective developments

The adoption of the Protect, Respect and Remedy Framework and of the UNGPs did not end the regulatory difficulties regarding business and human rights. Multiple avenues and different measures are available and, contrary to what is argued by some authors, they are not necessarily exclusive.

From everything that was presented above, the vast literature on the topic and taking into account the reality itself, it is clear that, the UNGPs and their implementation “are no panacea”²⁵³ for the issues faced on business and human rights. This chapter aims to analyse the main options that have been discussed to move the field forward and to provide some contributions to such discussions. It is grounded on the idea that the implementation of the UNGPs is not incompatible with other processes and options for the future, and that the debate must be open and inclusive. No option is, by itself, the solution to the challenges we face regarding regulation, monitoring, protection and remediation. Every move shall be considered as a part of an overall system of regulation with multiple layers, both normatively and institutionally²⁵⁴. The problems in this field of action cover too many actors, too many rights, too many places, too many challenges to International Human Rights Law that demand creative and innovative solutions²⁵⁵.

The possibilities addressed in this chapter do not exclude but complement the possibilities discussed to implement the UNGPs. I will first address the question of the legally binding instrument on business and human rights and after, once strategies for implementation of the UNGPs on the State and company level were addressed in the previous chapter, I will focus on what can be done in the current institutional framework (both international and regional) to promote the respect of human rights by business enterprises.

²⁵³ Albin-Lackey, Christopher, ‘Without Rules – A failed Approach to Corporate Accountability’, available at <http://www.hrw.org/world-report/2013/essays/112459> (last consulted 21 June 2014).

²⁵⁴ Meyersfeld, 2014, p.2; Deva, 2014, p.2; Jägers, 2002, p.257.

²⁵⁵ Deva, 2014, p.2

1. A legally binding instrument on Business and Human Rights?

The more recent impulse regarding an international binding instrument started in September 2013, when Ecuador, supported by a group of other countries and CSOs²⁵⁶, led the call for a binding instrument addressing transnational corporations²⁵⁷. This brought the treaty issue again into the spotlight, raising multiple reactions: the support of some countries (mainly non-Western) and civil society organizations and the objections of business and other States.

According to Professor Ruggie²⁵⁸, the opinions regarding an international legally binding instrument are divided into two major groups. One, that includes the former SRSG, considers that the implementation of the UNGPs shall be the priority and bases its perspective on the “principled pragmatism”. This group aims to tackle specific governance gaps with international instruments focused on issues considered to be more relevant and regarding which there is, in their opinion, broader consensus (e.g. gross human rights abuses). The second group advocates for an overarching treaty with the aim to address the issues related to corporate-related abuses. According to PITTS, “the world’s diverse and inconsistent laws and enforcement, combined with the utter lack of corporate accountability in *most* cases of business human rights abuse (...), sufficiently justify a treaty. Indeed, a treaty is arguably *required* by the state duty to protect read with the requirement of effective remedy, given the prevailing corporate impunity.”²⁵⁹

Considering the factual circumstances and the described state of play of business and human rights, further international action is necessary. There are still multiple and grave issues related to human rights abuses by corporate actors. The UNGPs and all the other standards and initiatives (including multi-stakeholder initiatives

²⁵⁶ Ibidem.

²⁵⁷ Republic of Ecuador, ‘Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council’, September 2013, available at: <http://business-humanrights.org/media/documents/statement-unhrc-legally-binding.pdf> (last consulted 23 June 2014).

²⁵⁸ Ruggie, ‘International Legalization in Business and Human Rights’, June 2014, available at: http://www.business-humanrights.org/media/documents/ruggie_-_wfls.pdf (last consulted 23 June 2014).

²⁵⁹ Pitts, 2014, p.1. In the same line of reasoning: Deva, 2014, p.5.

and industry initiatives) are relevant: they provide important ground for discussion and baseline norms that can help States and corporations behaving more responsibly. They are an essential piece of the regulation of business and human rights²⁶⁰ and shall be used as a ground to future initiatives. However, firstly they are all of a voluntary nature; they do not have a legally binding status that obliges the different actors to behave accordingly²⁶¹. Secondly, they lack independent and strong monitoring and implementation mechanisms. Thirdly, they leave a great number of topics without proper treatment (e.g. extraterritorial obligations; the accountability issues related to the complex corporate structures). Finally, neither of them provides effective remedy structures that assure that victims can be redressed²⁶². It is clear that these issues continue to be obstacles in the field of business and human rights and that only a multilateral solution will be able to provide coherent policies to this “collective action problem.”²⁶³

This does not mean, however, that a treaty by itself would be the definite solution. As rightly pointed out by DEVA: “rather than being a stand-alone magical tool, an international instrument should be seen as plugging in some of the deficiencies of existing regulatory tools.”²⁶⁴ This means that its content and scope shall be carefully considered and that we should not simply argue for any treaty²⁶⁵.

One of the arguments presented against the possibility of negotiation of a treaty is that it will take too long to achieve results. This seems undeniable. In general, multilateral treaties take their time to be concluded. There is no reason to believe that it would be different with a treaty on this topic, on the contrary. This does not imply, however, that the avenue shall not be explored. As long as the different actors keep working with the current grounds and frameworks and acting up to

²⁶⁰ Deva, 2014, p.2

²⁶¹ Albin-Lackey, Christopher, ‘Without Rules – A failed Approach to Corporate Accountability’, available at <http://www.hrw.org/world-report/2013/essays/112459> (last consulted 21 June 2014).

²⁶² International Commission of Jurists, 2014, pp.15 et seq.

²⁶³ Pitts, 2014, p.2.

²⁶⁴ Deva, 2014, p.2.

²⁶⁵ Esdaile, 2014, p.2.

their obligations, the problem of duration shall not exclude the negotiation process²⁶⁶.

In the conception defended in this thesis, the treaty would be a complementary piece to the regulatory system, providing coherence and common solutions to common problems. This does not mean that the UNGPs and other frameworks shall be disregarded. They must be a central element in the negotiation process²⁶⁷. Additionally, the existence of mandatory standards is not incompatible with the existence of voluntary frameworks and they shall be seen as complementary²⁶⁸. It is important to remind that the UNGPs and the other relevant frameworks on business and human rights will not be thrown away just because other options are considered. They remain as authoritative standards and shall be taken into account both in the national, regional and international level.

There are more issues to solve. The international community cannot initiate a negotiation process that will certainly be, by its own nature, hard and long, without framing the aims and priorities of the expected outcomes²⁶⁹. As referred to above, some authors consider that moves shall be focused on a treaty addressing the so-called gross human rights abuses, a concept that, according to the former SRSG²⁷⁰ includes “those that may rise to the level of international crimes, such as genocide, extrajudicial killings, and slavery as well as forced labour.”²⁷¹ On the opposite side, DEVA argues that “such an instrument should cover all human rights, because calls for negotiating a narrow treaty that deals

²⁶⁶ Jägers, 2002, p.258. Although not considering at least in the referred work, the treaty as a need, the author reinforces that: “Pending such an agreement, it is crucial that the existing supervisory mechanisms are used to their full potential by including a systematic scrutiny of corporate behaviour.”

²⁶⁷ Pitts, 2014, p.2.

²⁶⁸ Deva, 2014, p.10.

²⁶⁹ We agree with Professor John Ruggie in this regard when he affirms that “before launching a treaty process its aims should be clear, there ought to be reasonable expectations that it can and will be enforced by the relevant parties, and that it will turn out to be effective in addressing the particular problem(s) at hand.” In Ruggie, ‘International Legalization in Business and Human Rights’, June 2014, available at: http://www.business-humanrights.org/media/documents/ruggie_wfls.pdf (last consulted 23 June 2014), p.3.

²⁷⁰ Ibidem.

²⁷¹ On the difficulties regarding the determination of the concept of gross human rights abuses and the applications of standards in this regard to companies: International Commission of Jurists, 2014, pp.22 et seq.

with only egregious abuses is reflective of the prioritisation of civil and political rights over social, economic and cultural rights.”²⁷²

I consider the last position as the most appropriate. The arguments for such are the ones that were used to applaud the fact that the UNGPs cover virtually all internationally recognised human rights. Companies have the potential to impact with all the array of protected human rights in different forms, with different intensities and within different contexts. Gross abuses are undoubtedly a matter of concern but such concern should not overshadow the fact that all violations shall be addressed and even the ones that would not fit in the category of gross abuses can have a dramatic impact in human dignity, the primary concern of human rights²⁷³. We cannot ignore that some of the most violent human rights by companies would arguably be considered as gross human rights abuses as the term is often used. Moreover, due to the criminalisation of conducts that are classified as gross human rights abuses (both at the national and international level) it might be easier to address such cases.

I also agree with Deva regarding the scope of application – an international binding instrument shall be applicable to all corporations²⁷⁴. Specificities regarding sizes, activities and other elements shall be addressed in different contexts.

It is also important to focus on the content of such instrument. We do not need a new instrument that establishes obligations that already exist in International Human Rights Law. Nowadays, is consensual that States have a duty to protect that involves avoiding human rights violations by non-state actors. What we need is a document that addresses, on the one hand the difficulties raised by the nature of corporations and their activities, their human rights duties²⁷⁵, and that enhances the possibilities for victims to access to remedies.²⁷⁶ States should also be envisaged by such an instrument. Besides clarifying their obligations in this

²⁷² Deva, Surya, 2014, p.7.

²⁷³ On the same logic: International Commission of Jurists, 2014, p.35.

²⁷⁴ Deva, 2014, p.7.

²⁷⁵ International Commission of Jurists, 2014, pp.32.

²⁷⁶ Deva, 2014, p.2.

realm, a new document can, for instance, as rightly pointed out by the ICJ, “create a system of international cooperation in judicial and legal matters”²⁷⁷. A new instrument will only be useful if it addresses problems and gaps that are currently unsolved. There is no point in initiate a process of negotiation of a treaty if it will merely reaffirm commitments to which States are already bound.

A final issue that I would like to mention is the question of extraterritorial obligations and the need to consider them in this context. As pointed out by DEVA, “while extraterritoriality may not be an ideal form of regulation, it is a necessary evil that already exists in many areas and can be justified both on legal and policy grounds.”²⁷⁸

It also seems extremely relevant that, besides reinforcing the access to remedies in national jurisdictions (to which extraterritorial obligations is a central piece) a monitoring mechanism is established. Such mechanism should be able to receive individual complaints regarding specific cases (where both the corporations and the involved States can be targeted), to provide guidance to the relevant actors and to initiate investigations by its own motion²⁷⁹. Regarding the activities of such a mechanism, different action options can be considered. We can think in a similar model to the General Comments issues by the UNTBs, but also in the creation of cooperation networks with NHRIs allowing for more local action and directed guidance. The task of oversight the compliance of States with their obligations has necessarily to be articulated with the other UNTBs. Not only because it is part of their functions but also because, in some cases, they are in a better position to analyse and address State action regarding specific rights and contexts.²⁸⁰

It is now possible to summarize the main issues involved in the binding instrument topic and to reinforce some essential ideas. First, an international legally binding instrument seems to be a missing piece in the business and human

²⁷⁷ International Commission of Jurists, 2014, p.37. Also stating that “International cooperation would be necessary in several areas to realize the objectives of such a treaty. One crucial area is the area of mutual legal assistance in the investigation, collection of evidence, prosecution and recognition and enforcement of sentences in both criminal and civil cases.”

²⁷⁸ Deva, 2014, p.11.

²⁷⁹ De La Vega, Mehra, Wong, 2011, p.11.

²⁸⁰ This function of oversight States should also be a competence of such body, according to De La Vega, Mehra, Wong, 2011, p.11.

rights regulation. The global nature of the problems involved requires concerted action and cooperation²⁸¹. Second, the binding instrument shall be seen as a necessary complement to the existing regulation tackling the issues that the non-binding and voluntary initiatives are not able to solve in an effective manner and that can be better addressed at the international level. Third, it is true that there are many obstacles. A long process, with hard negotiations is predictable but should not, as such, avoid the debate. Fourth, as stated by the former SRSG that there is no “silver bullet” in this field.²⁸² The international legally binding instrument shall not aim to be the source for the solution of all business and human rights related problems. It has to develop a different role from other standards and initiatives at a different level of regulation, to represent a guarantee of certainty both for States, victims and corporations, and to be an element of cohesion and coherence of the system. Finally, due to the complexities of the business and human rights field and to the multiplicity of actors involved, an inclusive process of drafting and negotiation should be followed. It is important that the moves forward are not lead from an anti-business perspective, though bearing in mind that “human rights are not negotiable: they should not be subject to the consent, willingness or capacity of business to assume human rights obligations.”²⁸³

In the 26th session of the HRC (June 2014), two resolutions regarding business and human rights were approved²⁸⁴. The first, led by Ecuador and South Africa focused on the creation of an “open-ended intergovernmental group” to work on the creation of a legally binding instrument addressing the activities of transnational corporations. The second, led by Norway and the Core Group focused more on the WG and in the domestic implementation of the UNGPs, although it also requests a consultation process regarding a future binding instrument²⁸⁵.

²⁸¹ De La Vega, Mehra, Wong, 2011, p.1; Pitts, 2014, p.2.

²⁸² Ruggie, 2013 – the author even uses the expression as the title of chapter two of the book.

²⁸³ Deva, 2014, p.2.

²⁸⁴ Both resolutions can be found at <http://business-humanrights.org/en/binding-treaty-pros-and-cons> (last consulted 7 July 2014).

²⁸⁵ Pietropaoli, 2014. The document is the analysis of the Business and Human Rights Resource Centre to the business and human rights events in the 26th Session of the HRC and provides a general overview of the resolutions.

The analysis held in this chapter can already be used to assess these resolutions. Regarding the first one, though it represents an important first step in the progress of business and human rights we cannot ignore that the lack of support of States such as the US and the EU Member States²⁸⁶ jeopardizes the success of a negotiation process and the effectiveness of future results. Moreover, as was already highlighted by some CSOs, the resolution focus on companies that develop transnational activities²⁸⁷, not being encompassing in this sense. As was argued throughout this thesis, such an option is not appropriate and may lead to inappropriate results in practice.

Regarding the second resolution, focused on the implementation of the UNGPs, it is also a positive development as the process of drafting a legally binding instrument will undoubtedly took a long time. Meanwhile, as stated in this thesis, reinforcing the activities of the WG and work on better and increased implementation of the UNGPs is both a way to ensure protection and to establish some common ground to the content of the prospective legally binding instrument.

As pointed by Rees, the panorama today is not the same as it was in the past, as it is much clearer today that business cannot ignore human rights²⁸⁸. As a consequence, the treaty process shall not start from zero. We have now common standards that can ground the discussions and a clearer view of the gaps and regulatory needs in this field. It is of the utmost importance that the intergovernmental working group to the legally binding instrument takes this into account. It is undeniable that the process will largely benefit from the involvement of the States that voted against Ecuador's resolution. This is of particular relevance as the main argument of the US and the EU grounding the vote against

²⁸⁶ <http://www.ipsnews.net/2014/06/after-losing-vote-u-s-eu-threaten-to-undermine-treaty/> (last consulted 12 July 2014)

²⁸⁷ International Network for Economic, Social and Cultural Rights, http://business-humanrights.org/sites/default/files/media/documents/cawg_statement_re_un_hrc_resolution_text.pdf (last consulted 12 July 2014).

²⁸⁸ <http://www.csrwire.com/blog/posts/1417-treaties-the-un-guiding-principles-on-business-human-rights-the-way-forward> (last consulted 12 July 2014).

the resolution (that it would impair the efforts of implementation of the UNGPs²⁸⁹) is weak and, as argued above, does not correspond to the reality.

The approved resolutions do not seem to be incompatible, on the contrary. It will now be a matter of time to see how they will be followed-up and which developments they will promote.

2. Interim measures: International and Regional Institutions – rethinking priorities and mandates

a) International level: The United Nations structure

The aim of this part is to, based on the needs, possibilities and proposals identified and advanced by the UNSG²⁹⁰ and by different authors, gather some thoughts and propose an integrated approach within the UN structure that allows the issue of human rights and corporations to move forward. It will not, however, go into a detailed analysis of the complexities of the UN structure and bodies.

The UNSG recognises that the business and human rights topic demands an overarching approach from the UN system²⁹¹. Moreover, it is necessary to coordinate efforts and to embed business and human rights across the organisation, its priorities and actions.²⁹² Indeed, despite of the fuzz around the UNGPs and the fact that business and human rights seems to be nowadays a topic of growing concern, it is hard to discern a coherent UN action in the field. On the contrary, it seems that compartmented initiatives are developed without a clear common strategy. Due to the wideness of the topic, only decentralised but coordinated action will be able to provide evolution.

²⁸⁹ Ruggie, http://www.ihrb.org/commentary/board/past-as-prologue.html#_edn5; Statement by the Delegation of the US, available at <https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/> (both last consulted 12 July 2014).

²⁹⁰ A/HRC/21/21, 2 July 2012.

²⁹¹ *Idem*, p.4.

²⁹² *Idem*, pp.17-18.

According to the UNSG, the “the institutional focal point within the United Nations system for providing uniform guidance and clarification on issues relating to the interpretation of the Guiding Principles rests with OHCHR.”²⁹³

It is with this in mind and taking into account the suggestions that both the UNSG and other authors advanced, that I will synthesise a model of intra and inter institutional cooperation within the UN that can promote the advance of business and human rights. Such a structure requires the involvement of different actors that shall be responsible for different tasks and has the OHCHR, in close cooperation with the WG, at its centre. It also includes: the different UN Agencies, the UN TBs, the Special Procedures, the UNGC, the UN action in the field in general (in particular, as pointed out by the UNSG in the same source, OHCHR personnel) but also, NHRIs and the different regional actors²⁹⁴.

The aims of such systematic organisation should be clear and are closely related to some of the needs that have been pointed out by the doctrine and also presented in this thesis:

- To promote of the engagement an of the different stakeholders in the processes;
- To increase the accessibility and transparency of the system to victims;
- To enhance guidance and implementation support to the relevant stakeholders;
- To promote of a system based on different but coordinated levels of action;
- To foster the gathering of relevant information, allowing for focused action and real life improvements.

This shall lead (if successful) to an overall increase of the capacity to respond to the challenges and to a general mainstream of the issue of business and human

²⁹³ Idem, p.8.

²⁹⁴ It is important to underline that this is the result of a systematization of the proposals presented by the UNSG in the above mentioned report, complemented by the identified gaps and opinions of different authors who will be referred to in all relevant occasions.

rights, capable of promoting a spill-over effect and of being the basis for the future steps.

The WG was established by the HRC in Resolution 17/4²⁹⁵, which also defined its mandate. It is an expert body (composed by five members) which has mainly focused its activities in “the dissemination and implementation of the GPs in addition to supporting capacity building and providing advice upon request.”²⁹⁶ Moreover, the WG can hold country visits and organises an Annual Forum on Business and Human Rights.²⁹⁷

One of the main criticisms pointed to this body is the fact that, despite receiving communications from different sources, the WG does not have the power to handle individual complaints²⁹⁸. The possibility to do so should be seriously considered as an avenue to improve corporate responsibility for human rights. The fact that an international body would be able to do such a task would provide a mean of disclosure of corporate abuses; facilitate the access to remedy for victims and the identification of normative gaps, and promote the action of the different actors involved in the business and human rights governance. All of these would lead to a decrease of impunity but also to an array of lessons learned that can be an important tool for further developments in the field²⁹⁹.

It is important that WG uses its power to issue recommendations in a meaningful way. The recommendations provided in its reports shall not be mere restatements of the content of the UNGPs, which seems to have happened in the 2013 Report³⁰⁰. It shall be recognised that the more recent report³⁰¹ shows improvements on this point, being more focused in action than in policy.

²⁹⁵ A/HRC/RES/17/4, 6 July 2011.

²⁹⁶ Addo, 2014, p.136.

²⁹⁷ Idem, p.137. For a complete description of the mandate of the WG: A/HRC/RES/17/4, 6 July 2011.

²⁹⁸ As an example of this criticism: Dejusticia, Conectas, Justicia Global, ‘Working Group on the Issue of human rights and transnational corporations and other business enterprises: A review of the first two-and-a-half years of work’, pp.3-4, November 2013, available at http://conectas.org/arquivos/editor/files/6_Dej_Con_JG_WG2years_Nov2013.pdf (last consulted 25 June 2014).

²⁹⁹ In the same direction: De La Vega, Mehra, Wong, 2011, pp.10-11.

³⁰⁰ A/HRC/23/32, 14 March 2013.

³⁰¹ A/HRC/26/25, 5 May 2014.

As a consequence of the above, both the OHCHR and the WG shall have a central role in the coordination and cohesion of UN action regarding business and human rights.

The different UN agencies can provide specific contributions taking into account their areas of work. An encompassing business and human rights action involves different affected groups and needs. The agencies, due to their specialized work, position on the field and networks can provide meaningful contribution in the process of incorporation of such specific concerns³⁰².

The same can be said about the UN Special Procedures, being them either thematically or geographically oriented. They are especially suited to make a connection with particular groups of right-holders, regions, rights and topics³⁰³. It is important that they are not only sensitive to questions related to business human rights impact during their activities, but also that their work and experience can be used in a coordinated fashion by the overall structure³⁰⁴. I also believe that, more than addressing exclusively the implementation of the UNGPs, these mandate holders can have an important role in identifying gaps and situations of corporate-related human rights abuses, and in providing contributions to the evolution of the business and human rights framework in a more general way.

I already dealt with the UNTBs³⁰⁵, providing an overview of their action regarding business and human rights. Despite the limitations that are inherent to their mandates and of the non-legally binding nature of the outcomes of their work, these bodies are in a particular good position to address State duties regarding corporate activities and related human rights abuses. With their reviews, general comments and by handling of individual complaints, their statements can have important political impact and lead to consequences in policy making³⁰⁶. The Human Rights Committee already requested, in the list of issues regarding Ireland's reporting for 2014, the country to "provide information on how the

³⁰² A/HRC/23/32, 14 March 2013, pp.6, 10-12.

³⁰³ *Idem*, p.6.

³⁰⁴ *Idem*, p.9.

³⁰⁵ *Supra* Chapter II.2.1.

³⁰⁶ A/HRC/23/32, 14 March 2013, p.6.

Government addresses concerns regarding the activities of private businesses based in the State party that may lead to violations of the Covenant outside the territory of the State party.”³⁰⁷

In addition, the specialised agencies, the Special Procedures and the UNTBs can also have an important role in identifying and addressing the needs of particularly vulnerable groups to corporate related human rights abuses (e.g. women, children, human rights defenders, migrant workers...). This is of particular relevance as it is a task that the UNGPs do not fulfil in a meaningful manner³⁰⁸.

The Universal Periodic Review is also relevant. As stated by the UNSG: “In their submissions for the present report, some states proposed incorporating reporting on the duty to protect against corporate-related human rights abuse – the first pillar of the Guiding Principles – in the universal periodic review. Doing so, would facilitate a more systematic collection of information on State efforts to implement the Guiding Principles. Civil society may also contribute to the universal periodic review and treaty body processes by using the Principles as benchmarks in their submissions.”³⁰⁹

In fact, the majority of these last proposals had already been advanced by Jerbi as possible prospective developments even before the endorsement of the UNGPs (but after the endorsement of the Protect, Respect and Remedy Framework): “It is reasonable to conclude that there will be follow-up, both in terms of recommendations for further action in Ruggie’s future reports and increased scrutiny of government performance during reviews by treaty body committees, following country visits by special procedures mandate holders and as part of the UN Human Rights Council’s newly established Universal Periodic Review mechanism.”³¹⁰

³⁰⁷ CCPR/C/IRL/Q/4, 22 November 2013. Additional information on the topic can also be found at: <http://businesshumanrightsireland.wordpress.com/2013/11/15/un-human-rights-committee-requests-information-on-business-and-human-rights/> (last consulted 29 June 2014). In general; Jägers, 2002, p.257.

³⁰⁸ De La Vega, Mehra, Wong, 2011, p.8.

³⁰⁹ A/HRC/23/32, 14 March 2013, p.9.

³¹⁰ Jerbi, 2009, p.314.

Regarding the field personnel, developing activities at regional and country levels, they are in a privileged position to develop capacity-building, promote dialogue and to gather relevant information.³¹¹

The UNGC shall be seen as a direct point of gathering of the different stakeholders inside the UN structure³¹². The advantages and roles of the initiative are also addressed by the UNSG³¹³.

Finally, the proposed systematisation of UN action involves “outside” actors: X Regional Actors and NHRIs. The regional organisations can provide a mediation role and help in the adjustments to regional realities. Some of the European Union (EU) and Council of Europe (CoE) initiatives regarding business and human rights will be developed *infra*³¹⁴. The main idea to bear in mind in this regard is that the different levels of regulation shall interact among themselves and that, regional actors, taking into account their specificities and different implementation mechanisms can be used as motors to the implementation of the UNGPs and to the advance of business and human rights in general.

It is important to address NHRIs as well. These institutions are referred in the UNGPs regarding different contexts (namely, as sources of guidance for both States and companies and as a possible non-judicial grievance mechanism). NHRIs³¹⁵ can be extremely valuable not only in guaranteeing the coherence of state policies and actions but also in acting as focal points for guidance, in making the connection with the regional and international levels and promoting national dialogue between the different stakeholders. In addition, it seems that, if properly framed with international and regional actors, they can be a valuable resource at the capacity-building level³¹⁶.

³¹¹ A/HRC/23/32, 14 March 2013, pp.9-10; Jerbi, 2009, pp.314-315.

³¹² About the potential role of the UNGC *vide supra* Chapter II.1.c.

³¹³ A/HRC/23/32, 14 March 2013, namely: pp.6-7.

³¹⁴ *Infra* Chapter IV.3.b.

³¹⁵ For more on the role of NHRIs regarding business and human rights *vide infra* chapter IV.3.c.

³¹⁶ A/HRC/23/32, 14 March 2013, p.21.

b) Regional level: the Council of Europe and the European Union

As actors with different available tools and a closer understanding of the region's reality regional organisations are particularly well positioned to promote regional dialogue, to define collective strategies and, depending on the organisation, to provide for normative and jurisdictional advancements.

I will focus on the European level in order to briefly analyse the relevance of the two regional actors dealing with human rights and their potential role in the future of business and human rights. This is so because, as it is well known, both the EU and the CoE are involved with human rights but they have different roles, tools and possibilities of action.

i. The Council of Europe

As an international organisation comprising 47 countries in the European region and having as central focus the promotion of human rights, rule of law and democracy, it is reasonable to consider that the CoE should also have a role on the issue of business and human rights.

I already analysed the role of the ECtHR (one of the CoE's institutions) and its relevance as a grievance mechanism in the field of business and human rights³¹⁷. The possibilities for the future regarding this body are not easy to predict and there are restrictions inherent to the character of its jurisdiction (only can receive cases against states).

The question here is what can be done in the CoE's structure as a whole to contribute to the evolution of business and human rights. In 2010, the Parliamentary Assembly of the CoE adopted one resolution and one recommendation on the topic, and, in 2011, the Committee of Ministers requested the realisation of a study on the feasibility and the added value of new standard-setting work to the Steering Committee on Human Rights³¹⁸. The result was two documents: the 'Draft Preliminary study on Corporate Social Responsibility:

³¹⁷ *Supra* chapter II.2.b.

³¹⁸ Information available at:

http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/hr_and_business/default_EN.asp.

Existing Standards and Outstanding issues'³¹⁹ and a 'Feasibility study on corporate social responsibility in the field of human rights'³²⁰.

Taking into account the aim of determining whether there was a need to adopt an additional non-binding standard at the CoE level, in the first study, the Steering Committee provided an extensive overview of the different documents and initiatives at the international, regional and national level and also of the jurisdictional treatment given to business and human rights related issues. The "problem of extraterritoriality" was also dealt with³²¹. The main conclusion was as follows: "The present preliminary analysis of existing standards allows already to identify some issues on which a feasibility study may focus as a matter of priority, such as the concept of corporate social responsibility, the scope and addressees of a possible new Council of Europe instrument (States and/or businesses), some thematic areas (such as children's rights, the Internet, bioethics, data protection), and some "horizontal" issues (for instance access to remedies for victims of violations, jurisdiction issues), bearing in mind the relation with existing Council of Europe and international standards."³²²

This was the ground for the following Feasibility Study where, after analysing specific issues, the Steering Committee proposed an array of measures that may be taken by the CoE in order to make a contribution to business and human rights. The proposed measures go from raising awareness of the Member States to the UNGPs, addressing the question of gaps at the regional level (namely in the accountability realm), addressing the responsibility of corporation in the context of targeted policies of the CoE and dissemination of good practices³²³. A final important remark is made regarding the need to cooperate with other institutions such as the EU, international organisations and NHRIs³²⁴.

The most prominent result of all this work and subsequent meeting of the Steering Committee for Human Rights Drafting Group on Business and Human Rights,

³¹⁹ Council of Europe – Steering Committee for Human Rights, 2012 (a).

³²⁰ Council of Europe – Steering Committee for Human Rights, 2012 (b).

³²¹ Council of Europe – Steering Committee for Human Rights, 2012 (a).

³²² *Idem*, p.18.

³²³ Council of Europe – Steering Committee for Human Rights, 2012 (b), pp.20-21.

³²⁴ *Ibidem*.

was the adoption of the Declaration of the Committee of Ministers on the UNGPs, on 16 July 2014³²⁵.

Despite of the fact that it is a good indicator that the Committee of Ministers decided to take some action in this field, the Declaration does not add much (if something) to the current panorama of business and human rights. Essentially, it shows support for the Guiding Principles and calls the Member States to act in accordance to with their content and to develop national action plans (NAPs)³²⁶.

It seems that a major challenge for the whole CoE structure in the short-term will be to determine the areas where its action can provide added value to this field. Taking into account the referred documents and the scope of the institution, it seems that a priority area of intervention shall be the clarification of State duties and the difficulties regarding access to justice by victims. Furthermore, as stated in the Feasibility Study, it also seems a relevant to determine the main fields of action taking into account the scope and activities of other organisations in order to maximize results.

ii. The European Union

The EU quickly became a strong supporter of the UNGPs. After their endorsement by the HRC, the Commission issued a Communication regarding its strategy for Corporate Social Responsibility for 2011-2014³²⁷.

In that strategy, the Commission defined four main lines of action regarding the implementation of the UNGPs – the first two concerning its direct action and the last two regarding Member States action: i. “Work with enterprises and stakeholders in 2012 to develop human rights guidance for a limited number of relevant industrial sectors, as well as guidance for small and medium-sized enterprises, based on the UN Guiding Principles.”; ii. “Publish by the end of 2012

³²⁵ Council of Europe Committee of Ministers, *Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights*.

³²⁶ Ibidem.

³²⁷ Addo, 2014, p.141; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A renewed EU strategy 2011-14 for Corporate Social Responsibility*, 2011.

a report on EU priorities in the implementation of the UN Guiding Principles, and thereafter to issue periodic progress reports.”; “The Commission also: [iii] Expects all European enterprises to meet the corporate responsibility to respect human rights, as defined in the UN Guiding Principles” and iv. “invites EU Member States to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles.”³²⁸

The Commission issued guiding materials for smaller business and for specific sectors (employment and recruitment agencies, information and communication technology, and oil and gas)³²⁹. The National Action Plans (NAPs) were also an innovative tool that is now starting to be used widely, with the WG endorsing the creation of such documents, creating an online database for them and making them one of its key areas of action.

The most recent and probably most prominent initiative regarding business and human rights at the EU level was the adoption, by the European Parliament of the proposal for a directive regarding non-financial reporting of companies that took place on 15 April 2014³³⁰. This much awaited piece of legislation determines that listed institutions (the so-called “public interest entities”) in the EU, employing more than 500 persons, have to issue, on an annual basis, a statement containing information that allows to assess the non-financial (including human rights) of their activities³³¹.

The inclusion of human rights matters and of the concept of due diligence in the field of non-financial reporting has to be considered as a progress in corporate accountability regarding human rights. Moreover, the directive echoes the UNGPs

³²⁸ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A renewed EU strategy 2011-14 for Corporate Social Responsibility*, 2011, p.14.

³²⁹ All documents are available for download at: http://ec.europa.eu/enterprise/policies/sustainable-business/documents/corporate-social-responsibility/index_en.htm.

³³⁰ European Parliament, ‘European Parliament legislative resolution of 15 April 2014 on the proposal for a directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups (COM(2013)0207 – C7-0103/2013 – 2013/0110(COD))’, document P7_TA-PROV(2014)04-15, 15 April 2014. The proposal is now waiting for Council approval.

³³¹ *Idem*, pp.328-329.

and follows a line of much needed coherence between different regulatory instruments. Despite some of the shortcomings already identified by the European Coalition for Corporate Justice³³², namely the reduced number of enterprises that fall into the reporting scope and the lack of more concrete guidance regarding the reporting process (though here we must consider that it will be up to the Commission to draft orientation guidelines and that a legislative act will not be able, by itself to go into very detailed and technical issues³³³), this directive is an achievement at the regulatory level. The disclosure of the required information (such as: the description of the business structure, leading policies regarding non-financial issues and due diligence mechanisms, results and risk assessments³³⁴) can provide useful tools for the different actors involved in business and human rights and improve compliance³³⁵.

It is also important to underline that an important part of the final success of the non-financial reporting procedures will lie on the willingness of states once it is up to them to incorporate the provisions of the directive into their national legislation. Doing so will require them to make choices that may determine the relevance of the process³³⁶. For instance, both monitoring and enforcement will depend on the decisions of States³³⁷. It will be interesting to see how far they are willing to go in these particularly relevant aspects because without meaningful monitoring and enforcement, the reporting obligations (just like the obligations imposed on companies by the UNGPs) will hardly have any real impact.

It will probably still take a long time until the European Court of Justice has the opportunity to address cases related to this directive, the transposition and reporting requirements but it will be interesting to see what kind of position this judicial body will follow. If a progressive approach will be taken by the Court, it

³³²European Coalition for Corporate Justice, 2014, pp.2-3.

³³³ Caroline Rees, 'Pointing the Way Forwards on Non-Financial Reporting', available at: <http://shiftproject.org/article/pointing-way-forwards-non-financial-reporting> (last consulted 26 June 2014).

³³⁴ Cf. supra footnote 338, p.3.

³³⁵ Ibidem.

³³⁶ European Coalition for Corporate Justice, 2014, p.4; Caroline Rees, 'Pointing the Way Forwards on Non-Financial Reporting', available at: <http://shiftproject.org/article/pointing-way-forwards-non-financial-reporting> (last consulted 26 June 2014).

³³⁷ European Coalition for Corporate Justice, 2014, p.2.

is likely that progress can be achieved by its jurisprudence. It would not be a novelty to have the Court moving forward the topic of fundamental rights in the EU.

It is clear that the EU can have a very important role on taking business and human rights further. It has a particular privileged role to act among its Member States in order to push for the implementation of the UNGPs; it can act as a coherence element between Member States policies, and facilitate multi-stakeholder dialogue³³⁸. If the EU makes use of its regulatory powers it can reach specific sectors and enhance requirements that will have a regional impact and reflex consequences at the global level (as they will be shaping the activities of European corporations).

Furthermore, it can also use its position at the international level to promote business and human rights. As stated in the last Forum on Business and Human Rights, “the EU is dedicated to a two-pronged approach: first, to ensure that the Guiding Principles are fully understood and adhered to at European Union level; and second, to promote their implementation through its external action.”³³⁹ The role of the EU in external promotion of human rights is not a novelty. However, it is important to bear in mind that its legitimacy to deal with the issues connected to business and human rights at the external level will depend on the action taken at the internal level too. We cannot forget that a wide number of multinational corporations are headquartered in Member States of the Union. So far, for instance, the EU and its Member States have not showed support to the development of an international binding instrument. The EU must not look to the UNGPs as the definite and perfect regulation for business and human rights. It is never enough to restate that working for the implementation of the UNGPs does not have to avoid the consideration of future measures, especially initiatives with a binding nature, capable of addressing the gaps that persist in the field of business and human rights.

³³⁸ All of these aspects were referred to in Statement of the European Union at the second UN Business and Human Rights Forum, December 2013, available at http://eeas.europa.eu/delegations/un_geneva/documents/eu_statments/human_right/2013-1203_forum_buz_hr-panel-i.pdf (last consulted 25 June 2014), pp.2-3.

³³⁹ *Idem*, p.2.

c) National level: National Human Rights Institutions

NHRIs “are independent, public bodies with broad mandates in national law to promote and protect human rights”³⁴⁰, they are “state-founded, independent, and pluralistic national bodies established by law and mandated to promote and protect human rights at the national level.”³⁴¹ The ones aligned with the Paris Principles (defined by the UN General Assembly in 1993)³⁴² were attributed important functions under the UNGPs which justifies the need to address them in this context.

NHRIs can assume very different structures and develop distinct mandates³⁴³ which make it difficult to address specific recommendations that apply to the whole range of bodies that the concept encompasses.

These institutions are already engaged in the field of business and human rights. Their work regarding this topic started in 2008 with the organization of a roundtable on the issue³⁴⁴, followed by the creation of a specialized Working Group on the topic (2009)³⁴⁵. The International Coordination Committee promoted the adoption, in 2010, of the Edinburgh Declaration, recognising their relevance in this field at the different geographical levels and their interest to further engage on the area³⁴⁶.

The NHRIs were involved in the drafting process of the Protect, Respect and Remedy Framework and the UNGPs³⁴⁷ and, were successful in making the point that the institutions could have relevant impacts in the context of the three different pillars³⁴⁸. The role of NHRIs in the UNGPs is referred to in the context

³⁴⁰ International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights Working Group on Business and Human Rights, *Business and Human Rights 101: A National Human Rights Institution Primer*, available at <http://nhri.ohchr.org/EN/ICC/BureauMeeting/052013/Item%207%20Sub%20Committee%20on%20Accreditation%20Report/BHR%20101%20Fact%20Sheet%20-%20English%20PDF.pdf> (last consulted 24 June 2014), p.1

³⁴¹ Haász, 2013, p.166.

³⁴² A/RES/48/134, 20 December 1993.

³⁴³ Haász, 2013, p.167 and Faracik, 2012, p.9-11.

³⁴⁴ Haász, 2013, p.173.

³⁴⁵ Ibidem.

³⁴⁶ Faracik, 2012, p.17.

³⁴⁷ Haász, 2013, pp.174-175.

³⁴⁸ Idem, p.175.

of the three pillars, namely on GP3 (State duty to protect – more specifically in the context of the general state regulatory and policy functions), GP23 (corporate responsibility to respect – issues of context) and GPs 25 and 27 (access to remedy – foundational principle and state-based non-judicial grievance mechanisms)³⁴⁹.

The measures undertaken by different NHRIs in this field are multiple and varied, and there are various examples of procedures and actions being developed in the structures³⁵⁰. Based on that, but also on the suggestions provided by the commentaries to the UNGPs, the literature on the topic, and on the general structure and mandates of the NHRIs aligned with the Paris Principles, some directions can be pointed on the role that NHRIs can have on business and human rights mainstreaming. This can happen both in a bottom-up and in the inverse direction, due to the role these institutions have at the international level.

These institutions might have an important role *per se*, acting individually in their own countries but also as a whole, in the context of the established group regarding business and human rights and of the regional networks (which can be highly relevant both in their contact with the WG and with the regional institutions, for instance)³⁵¹. Regarding, individual action, they can be determinant in reaching the national level of implementation, which is particularly important in the field of business and human rights. As pointed out by Haász, they can develop important preventive functions³⁵². The referred author mentions this feature when comparing NHRIs action with courts but it seems that this can be applied to all the fields of intervention of NHRIs. By providing assistance to the different stakeholders and acting as dynamic structures, NHRIs can easily contribute to avoid future human rights violations by corporate actors and violations of the State duty to protect regarding corporate actors.

NHRIs seem especially well placed to promote the mainstreaming of business and human rights in the national structures. This involves all the governmental and non-governmental institutions that directly or not are involved with trade,

³⁴⁹ Haász, 2013, pp.176-177.

³⁵⁰ Multiple examples and an overview of best practices can be found in Faracik, 2012.

³⁵¹ Haász, 2013, pp.177-179; Faracik, 2012, p.21.

³⁵² Haász, 2013, p.172.

investment and corporations in general. In the State context, their action might be important to avoid that human rights matters remain encapsulated in departments that cannot reach other relevant governmental agencies that deal directly with business, for instance.

Working with the legislative bodies in order to access the human rights compliance of future and current legislation on human rights is a particularly important task, especially taking into account the amount of branches of law that can have an impact in the field of business and human rights³⁵³. Also suggestions for necessary legislation may be advanced³⁵⁴. This advisory and supervisory role might also be important in helping governments understanding the potential impacts on human rights of the positions they take in intergovernmental organisations related to trade and finance, for instance³⁵⁵.

It is worth to mention that, taking into account the forthcoming EU Directive on non-financial disclosure and the need for transposition of its content to the national laws, the NHRIs can also have an important role, assuring that it is processed in a manner that enhances rights protection.

A proposal advanced by Faracik that also deserves attention is the potential role on these institutions in the development of overall national strategies, for instance by a close involvement in the drafting of NAPs.³⁵⁶

With regard to action in the context of the corporate responsibility to respect, NHRIs may be well positioned to provide advice, capacity-building and translating more general recommendations to practical instruments³⁵⁷, taking into account the specific needs and characteristics of the companies and the country concerned³⁵⁸.

³⁵³ HR/PUB/11/04, 2011, Commentary to GP3, p.6; Haász, 2013, p.180; Faracik, Beata, 2012, pp.20-21.

³⁵⁴ Cf. supra footnote 351, p.4

³⁵⁵ Faracik, 2012, pp.20-21; Cf. supra footnote, p.4

³⁵⁶ Faracik, 2012, p.21; Haász, 2013, pp.172, 182.

³⁵⁷ Cf. supra footnote 351, p.4

³⁵⁸ Faracik, 2012, p.21.

It is not the aim of this heading to go into an exhaustive list of possible action of NHRIs (also because as previously mentioned that also depends largely on the specific institution and its mandate and structure) but it shall be clear that these institutions may well be a central piece in the field of business and human rights. At least two more possible roles should be highlighted. First, they can work as “platforms for dialogue” among the different stakeholders³⁵⁹. Secondly, it seems that they may be very well positioned to, in cooperation with other stakeholders (academia, for instance) develop studies on specific sectors and their human rights performance, being then able to provide specific recommendations and to engage in dialogues with the business sector³⁶⁰.

As pointed out by Faracik and Haász, the intervention of NHRIs in the context of the third pillar is not as direct and clear as the previous ones³⁶¹ as not all of them can handle individual complaints³⁶². In addition, it should be stated that even when NHRIs have such competences, it is essential to make sure that they respect the requirements established in GP31 and to guarantee that they are coherently integrated in the remedy structure in order to make them meaningful and effective. In the cases where the mandate of NHRIs does not allow them to act as a grievance mechanism (and maybe even in such cases), they can develop an important work raising awareness and disseminating the available remedies at the national and international level³⁶³. Moreover, as pointed by FARACIK, “NHRIs can also identify obstacles to the access to justice for the victims of human rights abuses by businesses operating in, or registered in, the national jurisdiction”³⁶⁴

Despite all of the potential of these institutions to foster the dialogue around future developments on business and human rights, the process is not easy. They face important challenges. First, the general broad mandate in accordance with the Paris Principles, that is one important feature in order for them to be able to act in the business and human rights field, obliges them to act in different areas and they

³⁵⁹ *Idem*, p.22; cf. supra footnote 351, p.4.

³⁶⁰ A suggestion advanced by Haász, using the United Kingdom as an example - Haász, 2013, p.180; cf. supra footnote 351, p.4

³⁶¹ Faracik, 2012m p.20 and Haász, 2013, p.176.

³⁶² Haász, 2013, p.176.

³⁶³ Cf. supra footnote 351, p.4.

³⁶⁴ Faracik, 2012, p.22; in the same line of reasoning: cf. supra footnote 351, p.4.

cannot devote all their efforts and resources to business and human rights. Second, there is the problem of funding of the institutions (as a broader mandate requires larger resources)³⁶⁵. Finally, they often have to deal with lack of expertise in this area³⁶⁶. This reinforces the idea that business and human rights are still an area requiring a lot of awareness raising, proper dissemination and capacity-building. This is true not only for States, companies and international organisations, but also for the national institutions primary responsible for the promotion of human rights.

We can then conclude that, despite the challenges inherent to the tasks related to the work in the business and human rights field, NHRIs may have (at least in some cases) to overcome practical difficulties in order to be active and meaningful actors in this area. This does not mean, however, that they should be not taken into account and empowered. On the contrary, it seems clear that these institutions can have an essential role in a multi-layered system of regulation and implementation and are well positioned (at least in abstract) to be meaningful actors in the business and human rights field.

³⁶⁵ Haász, 2013, pp.183, 185.

³⁶⁶ Idem, p.183.

V. Conclusion

Throughout this thesis, an overview was given of the current framework on business and human rights. This was combined with a critical analysis of the different documents, initiatives and elements and with an array of suggestions to achieve better protection and effective remedies to corporate-related human rights abuses.

In chapter II, the framework previous to the endorsement of the UNGPs was analysed. The main findings of this chapter were that the system lacks strength in the sense that it is based on non-legally binding standards and voluntary initiatives. Moreover, it lacked comprehensive norms, embracing the business sector as a whole and all the internationally recognised human rights. Finally, the absence of effective grievance mechanisms and the difficulties in acceding to remedies were pointed as one of the key factors for the lack of meaningful protection in this field. The challenge ahead was to understand whether or not the UNGPs, as the latest and outstanding normative framework on business and human rights were capable to solve these issues and represent significant improvements.

The UNGPs were analysed in chapter III and different proposals for implementation were gathered regarding both State and corporate action. It was concluded that the UNGPs have multiple merits and represent, in many senses, a move forward in this field. In fact, the SRSG was able to involve the different stakeholders, to create a baseline agreement, and, by the studies and the research that was done in the context of its mandate, to improve the knowledge on this field as well. Moreover, they encouraged multiple organisations to line up their standards with their content, increasing coherence and leading to improvements in some companies. Even though they provided for a common standard at the international level, they have various flaws that impair meaningful advances. They lack legally binding status and the responsibilities of companies were constructed over a social norm, without a legal ground. It can also be said that in some aspects they were not progressive enough, probably staying behind some of the latest advances in human rights. Most importantly, despite of having a chapter

exclusively focused on access to remedies, the UNGPs do not have any monitoring or remediation mechanism or attempt to solve the main barriers faced by victims in accessing to grievance mechanisms. My conclusion was, therefore, that the UNGPs only answered to a part of the issues that need to be solved in business and human rights and that further action is essential to provide a consistent system of protection in this field.

Regarding the implementation of the UNGPs, it was ascertained that success will depend, to a large extent on the action of States. They remain as the focal point of obligations and it is up to them to give strength and to enforce the responsibilities imposed on corporations. The facilitation of access to remedies by victims of corporate human rights abuses shall be a priority and legislation and policies shall be accessed, changed and drafted accordingly.

This is not necessarily a criticism to the former SRSG work. If it is indeed true that in some areas the flaws of the UNGPs are related to policy options, in other cases they are merely the result of the complexity of the reality of business and human rights.

Another matter that requires attention is the development of indicators and measurement of human rights performance of companies. This is part of the process to facilitate monitoring but is also important to clarify demands and to improve accountability of corporate actors. This seems to be an area to focus on in the future due to its great potential but that also requires a careful development, especially due to the lack of clarity that still exists regarding the human rights obligations of corporate actors and to the need to overcome practical difficulties, inherent to the process of translating human rights compliance into the measurement language.

Taking into account the need for further action and the current debates, the last chapter focused on the ways forward for business and human rights. Challenges and prospective developments were highlighted both to long-term (the creation of an international legally binding instrument) and to mid and short-term action (advancements in the different levels of action – international, regional and

national – aiming to maximize the potential of existing structures and initiatives). It was verified that the debate regarding a legally binding instrument shall be conducted but that such an instrument cannot be an aim in itself. It has to represent added value to the current frameworks and its content and scope have to be clearly defined. It will definitely be a long and hard process, a realization that can already be perceived from the last session of the HRC, the voting of the resolutions regarding business and human rights and the posterior reactions. However, once the treaty is not an aim in itself and the process is likely to be lengthy, the existing structures and avenues cannot stop their work regarding business and human rights. And there are multiple ways to do so. In addition to the internal actions of states and the changes that are available for corporations, it is important to bring the up the topic both at the international and regional level as well. Pathways to those processes in the UN structure, in the EU and in the CoE were highlighted. Finally, there is another group of actors that can be an important element on business and human rights – the NHRIs. Despite of the variety of their mandates and practical difficulties that were analysed, if geared with proper expertise and resources, the NHRIs can develop a very important role, helping the different actors in this area, for instance, by assessing state policies and laws and proposing changes, by providing guidance to companies on the proper actions to take in order to respect and foster human rights and by helping victims in acceding to remedies for violations. In some cases, making them able to act will require broadening their mandates and increase their funding.

It is clear that the discussion regarding business and human rights is not even close to an end. There are multiple issues to tackle: from the gaps of the UNGPs, to the future developments, passing through the difficulties in the UNGPs' implementation. One of the main reflections that I take from my research is that any advance on this field requires action of different stakeholders, at different levels and in different scopes of action. This is an area where the traditional human rights system needs to be readjusted and methodologies and strategies have to be appropriate to the context of work. This starts with engagement of the different stakeholders and with the mainstream of the basic idea that the discussions regarding business and human rights cannot be grounded on the idea

of the Good vs. the Evil. Considering the characteristics of today's world and the specific needs regarding business and human rights, addressing the problems effectively requires action that involves not only the States but also the regional and international organizations, the business sector, the civil society and victims themselves. Fragmentation and lack of cohesion are two of the main obstacles to meaningful protection against corporate related human rights abuses.

It will not be an easy task to overcome the political issues that involve this field of human rights in particular but it seems clear that there is a need for International Human Rights Law to adjust itself, its processes and mechanisms. One thing is clear: this is a global problem. In order to be appropriately addressed, it requires inclusiveness and actions at different levels, including at the international.

I was not able to provide one answer to the problems of business and human rights but I do not see that as a failure. On the contrary, I believe that is the result of the wide array of issues that are still pending and demanding urgent attention. In addition, it is also the reflection of the need to act in multiple levels, involve different actors and to explore different options as no measure, by itself, will be able to deal with the complexity and with the challenges that this area poses to international human rights law.

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