REGIONAL APPROACHES IN THE BUSINESS & HUMAN RIGHTS FIELD

Par

Humberto Cantú Rivera[*]

Résumé

L'actuel agenda pour les entreprises et les droits de l'homme a initialement été conçu aux Nations Unies et a depuis été adopté à l'échelle régionale, tout particulièrement dans le contexte des institutions de l'Union Européenne et de l'Organisation des États Américains (OEA). Tandis que l'approche européenne s'est principalement focalisée sur le développement et l'alignement de politiques publiques concernant la responsabilité des entreprises en matière de droits de l'homme au niveau régional, l'OEA a approuvé les Principes directeurs relatifs aux entreprises et aux droits de l'homme. Ainsi, le système interaméricain des droits de l'homme pourrait éventuellement développer cette thématique à travers sa jurisprudence, notamment grâce au concept de diligence raisonnable en matière de droits de l'homme.

Abstract

The current business and human rights agenda was conceived at the United Nations, but has since been adopted at the regional level, particularly in the context of the European institutions and the Organization of American States. While the European approach has primarily focused on the development and alignment of public policies at the regional level concerning corporate responsibility to respect human rights, the OAS has endorsed the Guiding Principles on Business and Human Rights, where the Inter-American System of Human Rights may be prepared to take this issue further through its case-law, particularly through the concept of human rights due diligence.

[*] Associate Researcher and Ph.D. Candidate at Université Panthéon-Assas Paris II; former Visiting Professional at the Special Procedures Branch of the UN Office of the High Commissioner for Human Rights, and 2013 Excellence Scholar of The Hague Academy of International Law. CONACYT Scholar.

Summary

I - INTRODUCTION 54
II - A FEW WORDS ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 56
III - THE EUROPEAN PROCESS: ORGANIZATIONAL COHERENCE AND NATIONAL IMPLEMENTATION 60
1. EU institutions and coherence at the regional level 60
2. Domestic implementation of the UN Guiding Principles by EU Member States: developing national action plans 65
IV - THE INTER-AMERICAN ALTERNATIVE TO BUSINESS & HUMAN RIGHTS: THE ORGANIZATION OF AMERICAN STATES, NATIONAL HUMAN RIGHTS INSTITUTIONS AND THE ROLE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 74
1. Political commitments within the Organization of American States and by NHRIs in the Americas in relation to business and human rights........................ 74
2. The case law of the Inter-American Court of Human Rights on due diligence: an interesting option for the UN Business and Human Rights Framework 77
IV - CONCLUDING THOUGHTS 83

I - INTRODUCTION

The business and human rights field of study has thoroughly changed since 1999, where a voluntarist approach was instituted through the Global Compact[1] proposed by Kofi Annan at the World Economic Forum. Since then, a return to the obligatory character of human rights norms for companies[2] was widely supported by the former UN Sub-Commission on the Promotion and Protection of Human Rights, proposed through the "UN Draft Norms" at the 55th session of the Commission on Human Rights[3]. The Draft Norms were later discarded by the now-extinct

---

1 *United Nations Global Compact*, available at http://www.unglobalcompact.org (accessed 29 April 2014).

2 The discussion in this field has focused on the obligatory versus voluntary character of norms that have as an objective the regulation of corporate conduct at the international level. In this regard, the Draft Code of Conduct on Transnational Corporations, a UN proposal in the 1980s and 1990s aimed at establishing direct international law obligations for companies, was discussed and later discarded. A turn to the voluntary commitment model established under the Global Compact in 1999 followed — and still operates—, being later succeeded by another effort of binding norms: the Norms of the UN Sub-Commission for the Promotion and Protection of Human Rights, which also were discarded in 2004. See N. JÄGERS, *Corporate Human Rights Obligations: In Search of Accountability*, Antwerp, Intersentia, 2002, pp. 119-130; H.F. CANTÚ RIVERA, 'Empresas y derechos humanos: ¿Hacia una regulación jurídica efectiva, o el mantenimiento del status quo?', *Anuario Mexicano de Derecho Internacional*, Vol. XIII, 2013.

3 Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

Commission on Human Rights[4], which instead instituted a mandate to examine the issue of human rights and transnational corporations[5].

This task, entrusted to Professor John Ruggie, would eventually evolve into the 'Protect, Respect and Remedy Framework'[6], in the first place (2008), and later become the 'UN Guiding Principles on Business and Human Rights'[7] in 2011, the first set of guidelines on the business & human rights field that have ever been endorsed by the United Nations. The Guiding Principles on Business and Human Rights establish an interrelated three-pillar framework, based on the State duty to protect human rights, including from non-State actors such as business enterprises; the corporate responsibility to respect internationally recognized human rights, including undertaking due diligence and impact assessments in order to ensure compliance with international human rights law; and the need to have more effective access to remedy for victims of human rights abuses, both of a State and non-State based, judicial and non-judicial nature[8].

After the unanimous adoption and endorsement of the UN Guiding Principles on Business & Human Rights[9], the task of diffusing and implementing them has become the main focus for countries, companies and other involved stakeholders[10]. In this sense, two regional actors have started to take important steps in this regard: the European Union, on the one hand, and the Inter-American System of Human Rights and the Organization of American States, on the other hand. The European Union has taken up as an initiative the task of developing a regional approach in favour of implementing the Guiding Principles, with certain institutions having a specific task and role to play in this regard, and with its countries having to develop national plans of action to implement domestically the Ruggie guidelines. On the other side of the Atlantic, the Organization of American States has taken much slower steps before this issue, possibly as a result of their position as host countries to many transnational companies and the relative fragility of the political and economical situation of most of its member States. However, some initiatives and discussions on this topic have

---

[4] Commission on Human Rights, *Responsibilities of transnational corporations and related business enterprises with regard to human rights*, UN Doc. E/CN.4/DEC/2004/116 (20 April 2004).

[5] Commission on Human Rights, *Human rights and transnational corporations and other business enterprises*, UN Res. 2005/69 (20 April 2005).

[6] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5 (7 April 2008).

[7] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31 (21 March 2011).

[8] For a detailed account and different perspectives on how the Guiding Principles contribute to strengthening human rights in relation to corporate activities, see generally R. MARES (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, Leiden, Nijhoff, 2012; for a detailed critique on the shortcomings of the Guiding Principles on Business and Human Rights, *cf.* S. DEVA & D. BILCHITZ (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge, Cambridge University Press, 2013.

[9] Human Rights Council, *Human rights and transnational corporations and other business enterprises*, A/HRC/RES/17/4 (6 July 2011).

[10] J. RUGGIE, *Just Business: Multinational Corporations and Human Rights*, New York, W.W. Norton & Co., 2013, pp. 173-182.

also taken place within the Inter-American context, which may be in a particularly favorable position to advance the issue of business and human rights within its legal and territorial boundaries.

With this in mind, this article aims to analyze the extent and manner in which the regional approaches to the business & human rights question are developing, the main complexities and difficulties they face while trying to tackle this question, and finally, if a regional approach has the opportunity of being successful, given that the Guiding Principles originally addressed this matter as a universal-to-national approach. A second chapter of this article will broadly present the UN Guiding Principles on Business & Human Rights, while a third one will broadly review the institutional and national approaches taken by the European Union's institutions and some of its Member States, respectively, to foster the implementation of the Ruggie Framework, in order to analyze the advantages and challenges resulting from this regional process. A fourth chapter will focus on what an Inter-American alternative may be, since the lack of a broader and more committed political collaboration among American States (contrary to the EU) appears to be an obstacle to adopt a regional approach to this issue. It is therefore argued that the Inter-American System of Human Rights may be well-suited to contribute via its jurisprudence to the implementation efforts of the UN Guiding Principles on Business and Human Rights throughout the region, after which some concluding thoughts on this subject will be shared.

II - A FEW WORDS ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

As mentioned before, the UN Guiding Principles on Business and Human Rights are the resulting report of the mandate of the former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, which was presented to the Human Rights Council in 2011. It is a soft law policy document that tries to clear up the confusion that had been present in this field for several decades, and that became more acute after the UN Sub-Commission on the Promotion and Protection of Human Rights adopted its Norms, referred above, in the early 2000s.

From the outset, John Ruggie tried to adopt a pragmatic approach that would let him depart from the intellectual ambiguities that many criticized the Norms for[11], such as the notions of "sphere of influence" and "corporate complicity"[12]. In this sense,

---

[11] Including himself in his first interim report, where he notoriously stated that "…the Norms exercise became engulfed by its own doctrinal excesses. Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers." Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, E/CN.4/2006/97 (22 February2006). par. 59.

[12] The Special Representative devoted a full report to the clarification of both concepts. See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Clarifying the Concepts of "Sphere of influence" and "Complicity"*, A/HRC/8/16 (15 May 2008).

he determined to adopt a "principled pragmatism" approach[13] that would let him move the debate forward, and established a common ground from which further developments could be built up from. In 2008 he laid the foundations for such developments, by creating the "Protect, Respect and Remedy Framework"[14], revolving around three interrelated pillars detailing how the State is the main duty-bearer in the protection of human rights; how corporations have a responsibility to respect human rights throughout their operations[15]; and how it is necessary to ensure that victims of human rights abuses by corporations have access to effective judicial and non-judicial remedies, of a State and non-State nature.

The positive reaction his work received at the UN Human Rights Council ensured the extension of his mandate for a supplementary period of three years, in which he was asked to operationalize his framework[16]. Thus, he developed his three-pillar framework into 31 guiding principles that could be implemented at the State and company levels in order to combat human rights abuses by corporations, mainly by reinforcing the State machinery and legislation to ensure the State complies with its international human rights obligations, and by advising corporations to undertake human rights due diligence and impact assessments to prevent harm to human rights. The endorsement of his Guiding Principles on Business & Human Rights by the Human Rights Council marked a positive step to move beyond the *impasse* that had been present since the Draft Norms were discarded, creating a more-or-less operative framework that could be implemented internationally.

While States and businesses welcomed the Guiding Principles, they did not escape the criticism of major NGOs and academics, which were mostly concentrated on the lack of reference to issues such as extraterritorial adjudication, the lack of a central mechanism to ensure their implementation or the binding character of the Ruggie guidelines[17]. Moreover, it is worth mentioning that they were conceived as policy guidelines for situations where States are willing and capable of assuming and ensuring the proper implementation and protection of international human rights

---

[13] John Ruggie describes his approach in the following terms: "I envisioned a model of widely distributive efforts and cumulative change. But for such efforts to cohere and become mutually reinforcing, they require an authoritative focal point that the relevant actors can rally around. Providing that focal point became my strategic aim. […] In short, I aimed for a formula that was politically authoritative, not a legally binding instrument." He thus based his 'principled pragmatism' on a model of polycentric governance. For a full account of these choices, see J. RUGGIE, *Just Business: Multinational Corporations and Human Rights*, New York, W.W. Norton & Co., 2013, pp. xlii-xlvi.

[14] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5 (7 April 2008).

[15] On the responsibility to respect under the UN Guiding Principles on Business and Human Rights, see J. NOLAN, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights', *Utrecht Journal of International and European Law*, Vol. 30:78, 2014.

[16] Human Rights Council, *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/RES/8/7 (18 June 2008).

[17] For a more precise reference to the criticism aimed at the UN Guiding Principles, see H.F. CANTÚ RIVERA, 'Empresas y derechos humanos: ¿Hacia una regulación jurídica efectiva, o el mantenimiento del status quo?', *Anuario Mexicano de Derecho Internacional*, Vol. XIII, 2013.

standards, and where corporations will be willing to spend their resources on ensuring that they do not harm human rights throughout their operations. This is not always the case, as it can be observed in the consideration of State reports by the different UN Treaty Bodies, or in the mission reports and communications received by different Special Procedures of the Human Rights Council; the same can be said for corporations, who will normally seek to find a 'business case' to perform 'extracurricular' activities that —if not prescribed by domestic law— may not necessarily be in their best interest, nor for the benefit of their profits[18].

Following the positive reaction that the UN Guiding Principles on Business & Human Rights received in general terms at the international level, the Human Rights Council determined to establish a Working Group of five independent experts to oversee the implementation and dissemination of the Ruggie guidelines. By the end of their first three-year mandate[19], they have so far made several official visits to different countries[20], received complaints in relation to corporate involvement in human rights abuses[21], and presented five reports to the Human Rights Council and the General Assembly, although with only one of them being thematic —and addressing the very important question of the impact of corporate activities in the human rights of indigenous peoples[22]. The task entrusted to them is of a high

---

[18] For a critique of the 'business case', see S. DEVA, *Regulating Corporate Human Rights Violations: Humanizing Business*, London, Routledge, 2012, pp. 141: "The business case introduces 'cost and benefit' analysis to human rights discourse by connecting corporate compliance with human rights obligations to corporate profits. However, any approach that requires assigning human rights and life itself a calculable value and encourages a trade off between human rights and other goals is questionable for obvious reasons. Corporations should be subject to human rights obligations irrespective of the impact on their profits and competitiveness."; *cfr.* M. ADDO, 'El Mandato del Grupo de Trabajo de las Naciones Unidas sobre Empresas y Derechos Humanos: Ideas Preliminares', in H.F. CANTÚ RIVERA & M. MARTÍNEZ GARZA (Eds.), *El futuro es hoy: Construyendo una agenda de derechos humanos*, Monterrey, CEDH-NL/UANL, 2013, pp. 82-83, who presents a much more optimistic view of the 'business case.'

[19] An evaluation of the progress achieved in the first two years after the adoption of the UN Guiding Principles on Business & Human Rights and some remaining challenges has been published elsewhere. See H. CANTÚ RIVERA, "Evaluando los Principios Rectores de las Naciones Unidas sobre Empresas y Derechos Humanos a dos años de su adopción", *Revista Internacional de Derechos Humanos*, Nº 3, 2013.

[20] To Mongolia, the United States of America and Ghana. See Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *Addendum - Visit to Mongolia*, A/HRC/23/32/Add.1 (2 April 2013); Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *Addendum - Visit to Ghana*, A/HRC/26/25/Add.5 (6 May 2014); and Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *Addendum - Visit to the United States of America*, A/HRC/26/25/Add.4 (6 May 2014).

[21] See *The UN Working Group on Business and Human Right's work on individual cases of alleged human rights violations and abuses*, March 2014, available at http://www.ohchr.org/Documents/Issues/Business/WGBrief_Communications_with_States_and_non-State_actors_12.03.2014.pdf (last accessed on 15 June 2014).

[22] See Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/68/279 (7 August 2013). This question has been thoroughly examined by the Inter-American Court of Human Rights with a special emphasis on the duty of the State to protect human rights; on this issue, see Report of the Special Rapporteur on the rights of indigenous peoples, *Extractive industries and indigenous peoples*, A/HRC/24/41 (1 July 2013); see also H. CANTÚ RIVERA, 'Corporations & the rights of indigenous peoples: Towards a cohesive doctrine on human

complexity, given the very limited resources they have and the potential danger to the whole human rights spectrum; nevertheless, it would be particularly useful if they focused at least some of their reports on analyzing and providing guidance on issues that continue to be vexing to human rights advocates and academics, such as extraterritorial regulation and adjudication, or the application of home country, host country or international standards throughout corporate operations.

As if the paint was sufficiently dry to start a new painting (after all, the UN Guiding Principles on Business and Human Rights have only been in existence for three years, which is not nearly enough time to properly assess if they have been successful or not), an old ghost has appeared in the international human rights arena. In September 2013, a large group of States —mostly developing countries— and NGOs, led by Ecuador, presented a request to the Human Rights Council to start anew a process to develop a business and human rights treaty, aimed at imposing binding norms of international law on corporations, in the same sense as the UN Draft Code of Conduct of the 1980s and the UN Draft Norms of the early 2000s did. While the UN Guiding Principles were developed as part of a larger process to address the issue of corporate impact on human rights —as its creator recognized[23]—, further diverting the attention and momentum from the issue of implementation of the Ruggie Framework to discussing a new set of international law standards seems to risk the overall progress achieved in the last decade, and could further antagonize the different stakeholders involved in this process to the detriment of victims[24]. An interesting alternative to this situation are the regional processes taking place in some areas around the world; although there are initiatives in the ASEAN region and Africa, this article will specifically focus on what is being done in Europe and the Americas to foster implementation of the UN Guiding Principles on Business & Human Rights.

---

rights due diligence', *International Journal of Human Rights*, 2014 (Forthcoming). The Working Group has also announced that their next report to the General Assembly, due in October 2014, will address the issue of National Action Plans for implementation of the Guiding Principles.

23 Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, E/CN.4/2006/97 (22 February2006), par. 54: "…insofar as the overall global context itself is in transition, standards in many instances do not simply "exist" out there waiting to be recorded and implemented but are in the process of being socially constructed. Indeed, the mandate itself inevitably is a modest intervention in that larger process.".

24 The Working Group has recently acknowledged this risk: see Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/26/25 (5 May 2014), pars. 47-51. For a commentary in favour of developing a new international instrument that imposes binding human rights obligations on corporations, see S. DEVA, *The Human Rights Obligations of Business: Reimagining the Treaty Business* (12 March 2014), available at http://business-humanrights.org/media/documents/reimagine_int_law_for_bhr.pdf; *cfr.* J. RUGGIE, *Just Business: Multinational Corporations and Human Rights*, New York, W.W. Norton & Co., 2013, pp. 58-60, where he identifies four impediments for a business & human rights treaty; also J. RUGGIE, "Business and human rights: Treaty road not travelled", *Ethical Corporation*, May 2008, pp. 42-43.

III - THE EUROPEAN PROCESS: ORGANIZATIONAL COHERENCE AND NATIONAL IMPLEMENTATION

The business & human rights discussion at the institutional level appeared only recently in Europe, although some of its early forms have been present since at least 2001[25]. This discussion aims to develop a regional strategy that collectively addresses the human rights issues resulting from business operations and activities, at two different levels: in the work of its regional institutions, and within the policies and legislation of its Member States. In this sense, different developments have taken place in the Council of Europe, at the European Commission and within the European Group of national human rights institutions (NHRIs). The main logic behind developing a regional strategy to implement the UN Guiding Principles on Business & Human Rights is to have organizational coherence at the regional level, while ensuring that Member States contribute at the domestic level to their implementation, in order to set up a bidirectional process between the two dimensions. The next paragraphs will address to a certain extent how effective such developments have been so far and how they can improve their impact on human rights protection.

1. EU institutions and coherence at the regional level

The first European institution to address the question of business & human rights after the UN Guiding Principles were issued in mid-2011 was the European Commission. Through its Communication 681, titled *A renewed EU strategy 2011-14 for Corporate Social Responsibility*[26], the Commission intended to update its understanding on CSR to 'current standards' at the international level, in line with the developments taking place at the Human Rights Council and the OECD with its 2011 update of the Guidelines for Multinational Enterprises. In doing so, the European Commission determined to adopt a "modern" definition of what corporate social responsibility is: "the responsibility of enterprises for their impacts on society"[27]. In addition, it mentioned that "To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders…"[28].

While it certainly is a broader approach than that suggested by the UN Guiding Principles on Business & Human Rights —which concentrates exclusively on human rights and the responsibility of corporations to respect them—, the focus of the European Commission appears to be aiming at a different angle that may

[25] In its 2001 Green Paper, the European Commission had defined CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis." European Commission, *Green Paper: Promoting a European Framework for Corporate Social Responsibility*, COM(2001) 366 final (18 July 2001).

[26] European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final (25 October 2011).

[27] *Ibid.*, §3.1.

[28] *Idem.*

completely depart from the purpose set forth by the Guiding Principles, despite the obvious references to the Ruggie Framework and its contents —and which may be closer to the OECD Guidelines for Multinational Enterprises, which contains references to human rights but also consumer protection, employment relations, combating corruption or environmental protection, among others. One of the resulting problems of taking such a position, and specifically of supporting a corporate social responsibility stance, is that CSR is more of a management technique than a moral or legal obligation[29], and therefore will almost inevitably follow the path of profit (the 'business case' discussed above) regardless of how business activities affect surrounding stakeholders[30]. While it may appear from the text of Communication 681 that the European Commission transformed its standpoint to adhere to the new international regulatory frameworks on business and human rights, it certainly seems as if it is 'old wine in new bottles' and that there was no actual update in its treatment of the issue of corporations and their human rights responsibilities. It actually reflects a confusion of what changed with the mandate of the UN Special Representative of the Secretary-General on human rights and transnational corporations, and thus only extends its long-standing position on corporate social responsibility[31].

In its agenda for action 2011-14, the European Commission nevertheless devoted a section to implementing the UN Guiding Principles on Business & Human Rights[32], following the multistakeholder approach used by John Ruggie during his mandate. To implement the framework, Communication 681 proposed two sets of actions (intentions and expectations), to be undertaken by the European Commission, by EU Member States and by European corporations. Firstly, the Commission made clear its intent of developing human rights guidance for certain relevant sectors and for small and medium-sized enterprises, and in publishing a report on EU priorities in the implementation of the UN business and human rights guidelines; and in the second place, it emphasized its expectation that all European enterprises comply with the Guiding Principles —specifically with the corporate responsibility to respect human

---

[29] See for example C. LÓPEZ, "The 'Ruggie process': from legal obligations to corporate social responsibility?", in S. DEVA & D. BILCHITZ (Eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge, Cambridge University Press, 2013, p. 77: "CSR with an added element of human rights seems to be the accepted formula at present, but the evolving understanding and expectations of international law in relation to corporations seem to be moving in directions that can take us beyond CSR and into the realm of legal liability."

[30] On CSR, see T. GÖSSLING, *Corporate Social Responsibility and Business Performance*, Cheltenham, Edward Elgar Publishing, 2011, pp. 1 and 124: "CSR is responsibility in management of organizations, taking social issues, environmental issues and the economic development of region and society into account. […] CSR is not about voluntary actions or benevolence, but rather about rational business decisions." See also CNCDH, *La responsabilité des entreprises en matière de droits de l'homme*, Paris, La Documentation Française, 2009, pp. 39-40, p. 137.

[31] However, Deva makes an interesting critique to some of the choices made by John Ruggie in his mandate. See S. DEVA, "Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles", in S. DEVA & D. BILCHITZ (Eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge, Cambridge University Press, 2013.

[32] European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final (25 October 2011), §4.8.2.

rights— and invited EU Member States to develop national plans for implementation of the Ruggie Framework[33].

The actual development of such actions is important for the construction of a cohesive regional policy on business and human rights. While most of Communication 681 didn't particularly address this issue, it served to analyze how these questions could be dealt with in Europe. To do so, the Council of the European Union included in its EU Strategic Framework and Action Plan on Human Rights and Democracy[34] specific references to corporate human rights responsibility, adopted eight months after the European Commission issued its strategy, and based on its proposed actions. However, it departed since the beginning from the ideological, business-oriented perspective of the European Commission, for example by making clear in its Strategic Framework that it would "encourage and contribute to implementation" of the Ruggie Framework[35], without making any references to corporate social responsibility.

The Council of the European Union determined that three actions were to be taken for the implementation of the UN Guiding Principles on Business & Human Rights, contained within its Outcome 25. Possibly for coherence, it echoed the actions identified by the European Commission, therefore entrusting to it the development of sector and company guidance in 2013[36] and the publication of a report on EU priorities for the effective implementation of the Ruggie Framework by the end of 2012[37]. On the other hand, it tasked EU Member States with the development of national plans on implementation of the UN Guiding Principles, initially scheduled for 2013[38].

In relation to the tasks entrusted to EU institutions, the planned actions were only partially concluded. While the European Commission has not published the report on EU priorities for implementation of the Guiding Principles on Business & Human Rights, it did publish its guidance on implementation and use of the Guiding Principles by small and medium-sized enterprises in 2012[39] and the sector guidance by mid-2013. Both of them are useful tools to help corporations understand how their operations can impact the different range of human rights, and explain in detail how to fulfil their responsibility to respect human rights through positive actions within the company. What is more important, however, is that unlike Communication 681, the sector and company guidance did have a legal focus founded on the UN Guiding Principles on Business & Human Rights, and excluded the scope devoted to corporate

---

33 The implementation of the actions outlined in the European Commission's communication will be analyzed *infra*.

34 Council of the European Union, *EU Strategic Framework on Human Rights and Democracy*, Doc. 11855/12 (25 June 2012).

35 *Idem.*

36 *Ibid.*, Outcome 25.a).

37 Nevertheless, such report was never produced.

38 Council of the European Union, *EU Strategic Framework on Human Rights and Democracy*, Doc. 11855/12 (25 June 2012), Outcome 25.c); however, at the time of writing (mid-2014), very few States have published a national plan to implement the Ruggie Guidelines.

39 European Commission, *My business and human rights: A guide to human rights for small and medium-sized enterprises*, 2012.

social responsibility that was present in the 2011 document of the European Commission.

It is also particularly relevant that the European Commission focused its sector guidance to three industrial areas: the information and communications technology industry, the employment and recruitment agencies industry, and the oil and gas sector. Given that these sectors have the potential to affect all human rights (although they are by no means the only industries in that position), providing guidance on how to prevent and remediate human rights impacts linked to their business seems like a logical step. It also implicitly recognizes a new reality: that an exclusive State-centric approach may not necessarily be the best option to engage with non-State actors like corporations, and thus corporations should be treated directly — without the necessary intervention of the State— if a more effective corporate human rights due diligence process is to take place.

The three sector guides identify the different challenges each industry faces and what rights they are more likely to potentially affect. In this sense, the information and communications technology guide, for example, addresses the possible impacts to freedom of expression and the right to privacy that companies in this area may face —particularly if they operate in countries with repressive governments—, and how they must carefully ensure that their actions and decisions are in line with international human rights law despite the domestic legal environments where they operate[40]. On the other hand, the guide on employment and recruitment agencies focuses particularly on the right to work and how its violation can also have an impact on other internationally recognized human rights, such as an adequate standard of living, or on other people that may not be directly related to the company, such as the livelihoods of the employees' families[41]. The main emphasis of the guide is on the need for States to act in conformity with international human rights law and international labour provisions[42] —including international norms regulating migrant workers—, as well as to ensure not to allow the occurrence of human rights violations by omission[43], and identifying which challenges companies may be facing depending on the legislative and practical context in which they operate.

---

[40] European Commission, *ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, 2013, p. 10.

[41] European Commission, *Employment & Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, 2013, p. 10.

[42] An important element in this regard is the traditional multistakeholder approach used in international labour law, particularly under the umbrella of the ILO. Given that employers, employees and the State convene to discuss and agree on international provisions, their method on collective agreements and problem-solving could be beneficial to the business and human rights agenda.

[43] For example, the guide has a specific focus on the absence of effective regulation of the services provided by employment and recruitment agencies, on the lack of protection of workers' human rights in law and practice, or on the regulation and protection of migrant workers' rights. European Commission, *Employment & Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, 2013, pp. 11-12.

The oil and gas sector guide focuses on one of the areas that have received an important amount of attention in recent years[44], particularly following the involvement of companies such as British Petroleum or Royal Dutch Shell in environmental accidents or human rights violations[45]. Even if oil and gas companies are particularly well-suited to contribute to the realization of human rights[46], their activities are also heavily influenced by the context where they operate. Considering that a large part of natural resources are also located in developing countries or areas where the rule of law may be weak or absent and where the judicial system may not be fully independent, they are at a high risk of having negative impacts in the human rights of the local population[47].

The three sector guides offer detailed insight to corporations on how they should put into practice their human rights due diligence and assess human rights impacts, as well as on how to integrate the findings into its processes and develop grievance mechanisms at the company level. While the focus of the State duty to protect is a well-established notion under international human rights law, the European Commission concentrated on developing clear instructions to companies on how to ensure that their responsibility to respect internationally recognized human rights is met, in accordance with the provisions set forth in the UN Guiding Principles on Business & Human Rights.

A final group that determined to contribute to the regional implementation of the UN business and human rights framework was the European Group of National Human Rights Institutions, which through the adoption of the *Berlin Action Plan on Business & Human Rights*[48]*,* engaged itself to make collective and individual contributions to the dissemination and implementation of the Ruggie Framework. Among the most interesting and potentially important collective decisions taken by the European Group is the proposal to engage with regional and national institutions regarding the development of national action plans of implementation, the regional regulation of finance (particularly of export credit agencies, financial disclosure and other reporting mechanisms), and the public procurement and commissioning of public services. Although it is not immediately clear the extent to which NHRIs have actually contributed to the development of such actions, so far a few national plans for the implementation of the UN Guiding Principles on Business & Human Rights

---

44 See e.g. R. LINDSAY et al., "Human rights responsibilities in the oil and gas sector: applying the UN Guiding Principles", *Journal of World Energy Law & Business*, Vol. 6:1, 2013.

45 See e.g. O. OLUDURO, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities*, Antwerp, Intersentia, 2014.

46 "The O&G sector plays an important role in supporting development through the provision of energy and the generation of significant revenues. These revenues can in turn contribute to poverty reduction (if well managed) and the realisation of many human rights, including rights to work, to health, to an adequate standard of living and to education." *Oil & Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, 2013, p. 8.

47 "However, in states where governance is weak, such exploitation may instead contribute to poverty, corruption, crime and conflict with all the associated negative impacts on individuals' human rights.", *Ibid*.

48 European Group of National Human Rights Institutions, *Berlin Action Plan on Business and Human Rights* (7 September 2012).

have been issued, which in some cases have been prepared with the participation and involvement of the corresponding NHRI[49]. As well, interesting efforts to develop non-financial reporting requirements are taking place in Europe, such as the recent adoption of the *EU Directive on disclosure of non-financial and diversity information*[50], which establishes a mandatory reporting requirement on human rights impacts for large corporations and the obligation of EU Member States to adapt their domestic legal frameworks to implement this directive.

As important actors in the promotion and protection of human rights, national human rights institutions have a specific role to play in the business and human rights field[51], where they can be a liaison between the State, businesses and victims to try to find common ground upon which problems may be solved. As well, as intermediaries in the dissemination and development of domestic human rights standards that are in conformity with international human rights law, their role as promoters of the UN Guiding Principles of Business & Human Rights can be particularly relevant[52].

The European institutions, whether consciously or not, have taken steps to act in a coherent manner, trying to develop a regional approach to the issue of business and their human rights impacts through the adoption of frameworks, action plans and directives. While their collective work is particularly useful for the advancement of this issue in the region, an important element that will determine whether there is a real implementation —or not— of the Ruggie guidelines in Europe is the commitment and procedures taken at the State level, to which we now turn.

2. Domestic implementation of the UN Guiding Principles by EU Member States: developing national action plans

The adoption of the UN Guiding Principles on Business and Human Rights did not entail the creation or development of new international obligations; rather, as a restatement of existing international obligations for States, it merely focused the

---

49 This question will be addressed in the next section of this article.

50 *Directive 2014/.../EU regarding disclosure of non-financial and diversity information by certain large undertakings and groups*, COM/2013/0207 final (15 April 2014).

51 Ruggie recognizes this: "In the area of business and human rights the potential of state-based non-judicial mechanisms, alongside judicial, is often overlooked. They can play a complaint-handling role as well as other key functions, including promoting human rights, offering guidance and providing support to companies as well as stakeholders. National human rights institutions are one promising vehicle. These are administrative entities, established constitutionally or by statute, to monitor and make recommendations regarding the human rights situations in their respective countries. […] But many lack the mandate to address business-related human rights grievances, or are permitted to do so only when business performs public functions or impacts certain rights. I recommended that those mandates be expanded." J. RUGGIE, *Just Business: Multinational Corporations and Human Rights*, New York, W.W. Norton & Co., 2013, p. 103.

52 "NHRIs' most significant immediate contribution to the advancement of the Guiding Principles will be supporting the operationalization of the state duty to protect and corporate responsibility to respect human rights." M. BRODIE, 'Pushing the Boundaries: The Role of NHRIs in Operationalising the 'Protect, Respect and Remedy' Framework', in R. MARES (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, Leiden, Nijhoff, 2012, p. 247.

discussion on what States need to do to ensure that they effectively protect against human rights abuses, including those involving corporate activity. In light of this, States need to adapt their legislative and regulatory frameworks to ensure they do not create or facilitate the existence of regulatory gaps where wrongful corporate conduct that impacts human rights can remain unsanctioned. Such situation was clear to both the European Commission and the Council of Europe, who in their corresponding policies determined that States should pursue the development of national plans of implementation of the Ruggie Framework[53]. As well, with the adoption of the *Berlin Action Plan on Business & Human Rights* by the European Group of NHRIs, they undertook to develop approaches to integrate this topic into their line of work, as well as to contribute to the development of national plans by their governments. The next paragraphs will discuss and analyze how such implementation efforts are developing within EU Member States.

In relation to the involvement of national human rights institutions in the dissemination of the UN Guiding Principles on Business & Human Rights as agreed in the Berlin Action Plan, a sample of eight such institutions[54] reveals that few have taken specific actions to comply with the commitment expressed at the European Group of NHRIs. While the NHRIs of Spain, Norway, The Netherlands and Luxembourg did not appear to have taken any specific steps to include the Ruggie guidelines into their line of work, the French and Danish institutions did address this specific issue and have tangible results in sight. On the other hand, the British[55] and Scottish[56] institutions did take into consideration some questions related to the field of business and human rights, although not necessarily focused on the UN Guiding Principles.

The case of the French NHRI —the CNCDH, *Commission Nationale Consultative des Droits de l'Homme*— is particularly relevant, given the proposals

---

[53] M.K. ADDO, "The Reality of the United Nations Guiding Principles on Business and Human Rights", *Human Rights Law Review*, Vol. 14:1, 2014, p. 141: "In January 2013, 19 States reported that they had initiated or progressed on the development of a National Action Plan.".

[54] The official websites of the national human rights institutions of France, Denmark, the United Kingdom, Scotland, Spain, Norway, The Netherlands and Luxembourg were sampled for this purpose.

[55] For example, the Equality and Human Rights Commission of the United Kingdom developed a guide to business and human rights in 2013, especially focused on small businesses and taking a 'business-case' approach, primarily based on labor issues and domestic law. It nevertheless reproduces globally what companies must do to respect human rights (due diligence procedures) in accordance with the Ruggie framework. See Equality and Human Rights Commission, *A guide to business and human rights*, 2013, available at http://www.equalityhumanrights.com/sites/default/files/publication_pdf/A%20guide%20to%20business%20and%20human%20rights.pdf (last accessed on 15 June 2014).

[56] The Scottish Human Rights Commission, for example, has considered that the main area where they should have work and guidance developed is in relation to procurement and human rights. Thus, they developed in September 2010 a Guidance on Social Care Procurement, where human rights are inserted into different schemes such as contractual clauses; however, they do not rely on the work of the former UN Special Representative on business and human rights. See Scottish Human Rights Commission, *Guidance on Social Care Procurement in Scotland*, 2010, available at http://www.jitscotland.org.uk/action-areas/commissioning/procurement/ (last accessed on 15 June 2014).

made in relation to business and human rights. Through an official opinion[57] on how to implement the UN Guiding Principles in the French National Action Plan, the French NHRI divided its report in two sections, referring firstly to the State duty to protect human rights, and secondly, to the issue of access to remedies for victims of corporate human rights violations. In relation to the State duty to protect, an important part of its report focused on actions the French government must take to properly regulate corporate conduct in relation to human rights, such as measuring impacts on human rights by State agencies, particularly in the contexts of foreign investment and State-owned companies[58]; on developing a legal obligation for corporations under domestic law to undertake human rights due diligence for the activities of parent companies and subsidiaries, both in France and abroad[59]; and to ensure human rights are an integral part of non-financial reporting, both at the domestic and regional level[60].

The CNCDH report's section on the Third Pillar of the UN Guiding Principles on Business & Human Rights, referring to access to remedies, discusses both judicial and non-judicial remedies. Firstly, in relation to judicial mechanisms, the report recognizes the legally-created burden that corporate autonomy supposes — that is, that in a corporate group every enterprise is a separate entity with its own legal personality— for holding parent corporations accountable for their involvement, or that of its subsidiaries, in human rights violations, and thus the difficulty to "pierce the corporate veil." To ensure that access to justice is more effective, the CNCDH recommends in its report that corporate responsibility of the parent company should exist whenever the subsidiary cannot be held accountable[61], as well as extending its jurisdiction on civil and criminal matters extraterritorially whenever a denial of justice may happen within the competent State, thus turning the French judiciary into a *forum necessitatis* for certain cases[62]. In relation to non-judicial access to remedy, the report recognized the need to reinforce the French National Contact Point under the OECD Guidelines for Multinational Enterprises[63], particularly in relation to its visibility and

---

57 CNCDH, *Entreprises et droits de l'homme: avis sur les enjeux de l'application par la France des Principes directeurs des Nations unies* (24 October 2013).

58 *Ibid*., §§26-32.

59 *Ibid*., §33; in this regard, it is important to note that the French National Assembly is presently considering the enactment of a law intended to amend the commercial, civil and criminal codes to establish a duty of corporate due diligence on environmental, health or human rights risks to French parent companies, in relation to the activities carried out by itself, its subsidiaries or supply chain. See *Proposition de loi Nº 1519 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (6 November 2013); *Proposition de loi Nº 1524 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (6 November 2013); *Proposition de loi Nº 1777 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (11 February 2014), and *Proposition de loi Nº 1897 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (29 April 2014). All of the above-mentioned initiatives are equal as to their content.

60 CNCDH, *Entreprises et droits de l'homme: avis sur les enjeux de l'application par la France des Principes directeurs des Nations unies* (24 October 2013), §§38-39. In relation to the regional level, see comment above on the EU directive on disclosure of non-financial information.

61 *Ibid.*, §§47-50.

62 *Ibid.*, §§63-70.

63 *Ibid.*, §§72-84

efficacy, as well as on ensuring the effective application of ILO conventions to better protect labour rights in France, comprising measures such as the determination of sanctions for non-compliance[64].

While the French NHRI focused on a more academic and positivist approach to address the issue of corporate responsibility and human rights that reviewed and proposed interesting alternatives to some of the main discussion points in the field, the Danish NHRI took a more pragmatic route to business and human rights. While it may not have reflected on the legal issues surrounding this field, it has developed notable instruments[65] to evaluate how and where a corporation may be more prone to have an impact on human rights, as well as to provide guidance to businesses, States and NHRIs on the main issues and difficulties arising in this field. In this sense, the main mission and focus of the Danish Institute for Human Rights has been capacity-building and providing guidance and tools for companies to effectively self-assess their compliance with international human rights standards, in order for them to identify the risks their operations may originate and determine how to act upon the findings.

Regarding the development of national plans of implementation in accordance with Communication 681 of the European Commission and with the Action Plan of the Council of Europe, progress has not been much faster. At the time of writing, only four EU Member States (the United Kingdom, The Netherlands, Italy and Denmark) have developed the National Action Plans (NAP) that were scheduled to be ready by the end of 2013. Furthermore, by the initial deadline provided by the Council of Europe, only two countries had published their NAPs, which may be an indicator of the disparity between political commitment at the regional level and domestic implementation.

The first National Action Plan issued was that of the United Kingdom, titled *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*[66]. While divided in sections reflecting the structure of the Ruggie Framework, where they make reference to the actions taken to implement the Guiding Principles and other actions to be taken before 2015, they have an approach reminiscent of the corporate social responsibility discourse and the existence of a 'business case' to compliance and respect of human rights[67]. As well, it is clearly recognized that companies require State guidance on how to respect human rights, as well as policy

[64] *Ibid.*, §§85-88.

[65] The toolkit they have developed is the following: *Guide on Impact Assessment for the Oil & Gas Industry*; the *Human Rights and Business Country Guide*; *Guide on Human Rights and State-investor Contracts*; *Children's Rights in Impact Assessments*; *Guidebook and E-Learning for NHRIs*; *Human Rights Compliance Assessment*, and the *Global Compact Self Assessment Tool*. The Danish Institute for Human Rights, Business Tools, available at http://www.humanrights.dk/business/fremhaevet (last accessed June 18, 2014).

[66] Secretary of State for Foreign and Commonwealth Affairs, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (September 2013).

[67] *Ibid.*, p. 6, where the British NAP details some of the benefits of respecting human rights.

coherence, certainty about expectations on human rights and support to meet those expectations of the State[68].

Two particular issues that are addressed in the U.K. National Action Plan are remarkable: the positions on extraterritorial regulation and on the inclusion of human rights clauses in foreign investment agreements. In relation to the first, the British plan mentions that the Government may decide to adopt measures to regulate the conduct of U.K. businesses overseas, given the silence in international law on this matter[69]. This position has a direct effect in the second issue, and thus, through the addition of a clear expectation that businesses respect human rights under foreign investment agreements, and the inclusion of contractual clauses that ensure that the host State maintains its ability to regulate foreign companies doing business in its territory, the British National Action Plan may have adopted measures to ensure that human rights are better protected[70]. While most of the actions envisaged in the U.K. National Action Plan are focused on providing guidance to British companies and fostering dialogue, these two previous references may actually contribute to solidify human rights protection in foreign countries.

The second National Action Plan that was publicly issued in December 2013 was prepared by The Netherlands[71]. Divided in four sections where they review current policy and the result of consultations taken to develop the plan, a final section is devoted to determine several action points to be adopted by the Dutch Government. The current policy section reveals that the main focus of the Dutch Government so far has been on corporate social responsibility[72], and that while there is broad consensus on the need for the government to have an active role, for policy coherence and on the need to clarify due diligence, some contentious point remain regarding transparency and reporting on the one hand, and the scope for remedies in the other.

In relation to transparency and reporting, the Dutch Government explains its position of support of the new EU Directive on non-financial reporting. However, it also recognizes that potential domestic legislation on transparency —the Production and Supply Chain Information (Public Access) Act (WOK)—, which would force companies to inform about the origins of their products and services, would impose

---

68 *Idem.*

69 *Ibid.*, p. 8: "Accordingly, there is no general requirement for States to regulate the extraterritorial activities of business enterprises domiciled in their jurisdiction, although there are limited exceptions to this, for instance under treaty regimes. The UK may also choose as a matter of policy in certain instances to regulate the overseas conduct of British businesses."

70 On this, see O. DE SCHUTTER, "The host state: Improving the monitoring of international investment agreements at the national level", in O. DE SCHUTTER, J. SWINNEN & J. WOUTERS (Eds.), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements*, London, Routledge, 2013, p. 157; and A. GATTO, *Multinational Enterprises and Human Rights. Obligations under EU Law and International Law*, Cheltenham, Edward Elgar Pbulishing, 2011, p. 135.

71 Ministry of Foreign Affairs, *National Action Plan on Business and Human Rights: 'Knowing and Showing'* (December 2013).

72 *Ibid.*, p. 2.

an important financial burden on companies and has thus discouraged its adoption[73]. Regarding the Third Pillar of the UN Guiding Principles on Business & Human Rights, the Dutch Plan concentrates mostly on non-judicial access to remedy, particularly the National Contact Point under the OECD Guidelines for Multinational Enterprises and its adequateness in its current form[74]. Another important comment was on the enactment of legislation with extraterritorial effect (extraterritorial regulation)[75], to which the Dutch Government appears to be highly conservative and cautious; while the emphasis it places on enforcement in foreign countries may be valid, it appears to disregard how in current practice the foreign subsidiaries of Dutch corporations may be summoned to appear before the Dutch judiciary, as proven by the *Akpan* case, in a clear case of extraterritorial adjudication of the foreign subsidiary of a Dutch parent company[76].

The third National Action Plan to be issued was the Italian one in 2014[77]. So far, this document presents a deeper insight into the existing domestic legal framework and policies in relation to the way in which corporate activities may impact on human rights in the different areas of public policy. It is divided in two main sections, related to the First and Third Pillars of the Guiding Principles, to which are added some final considerations. However, its approach barely relates to the tripartite content of the UN Guiding Principles on Business and Human Rights, and does not appear to be based on the discourse of the Ruggie Framework. A reason for this may be that nine different Ministries contributed a chapter to the National Action Plan, which were then regrouped by the Ministry of Foreign Affairs in the final document.

In relation to the State duty to protect human rights, the Italian plan recounts the actions taken by the State in its domestic policies and legislation. Of them, the most explicit reference to the business and human rights approach is made in the chapter related to MNEs, foreign direct investment and export credits, where the Italian state explains the content and scope of the OECD Guidelines for Multinational Enterprises and other relevant OECD instruments that relate to them[78]. Nevertheless, the remainder of the section on the First Pillar is largely descriptive of existing legislation and policies that affect human rights. On the other hand, the section related to the Third Pillar of the Guiding Principles, contributed by the Italian Ministry of Justice, makes a brief analysis of the policies for accessing state judicial[79] and non-judicial remedies[80]. However, one point which may reflect the overall content of the Italian Action Plan appears in the reference made to extraterritorial jurisdiction, where

---

73 *Ibid.*, p. 10: "In this light, the government does not feel that this is the right time to enact such legislation, and points to the increasing availability of information on supply chains through [other] instruments…".

74 *Ibid.*, pp. 11-13.

75 *Ibid.*, p. 13.

76 Judgment, *Friday Alfred Akpan et al. v. Royal Dutch Shell Plc et al.*, Case C/09/337050/HA ZA 09-1580 (District Court of The Hague, 30 January 2013).

77 Ministry of Foreign Affairs, *The Foundations on the Italian Action Plan on the United Nations "Guiding Principles on Business and Human Rights"* (March 2014).

78 *Ibid.*, p. 46.

79 *Ibid.*, p. 66

80 *Ibid.*, p. 73.

the Ministry of Justice states that a foreign company's access to judicial remedies is governed by article 3 of the Italian Private International Law, thus referring not to the potential *victims* of corporate human rights abuses, but to the right of the usually alleged '*perpetrators*' to access the judicial system. This remark only demonstrates that, even though the Italian State may be supportive of the Guiding Principles[81], its contents may not have been thoroughly disseminated throughout its governmental structures.

The Italian Action Plan identifies three proposals in relation to the Guiding Principles[82]: The first is the definition of programs and actions to be shared with decision-makers to ensure their implementation; the second, to develop and integrate governmental directions in relation to the corporate responsibility to respect human rights, including how the Government will support companies in adopting the Guiding Principles; and finally, ensuring policy coherence throughout the different governmental structures. While being the longest National Action Plan to have been produced to date, the Italian plan does not precisely address the measures it will take to implement the Guiding Principles; instead, it only addresses the actions that are currently in place to protect human rights in Italy. Even if more domestic developments will appear in the country to implement the Ruggie Framework, a reliance on the work of the European institutions is apparent: "without deducting any importance to national policies, only an authentically European dimension can bring about that political and contractual added value, allowing the field of human rights at global level to be really effective"[83].

The last National Action Plan to have been enacted in Europe at this point is the Danish case, which was issued in April 2014[84]. Following the structure of the UN Guiding Principles on Business and Human Rights, it contains a section for each pillar, where the relevant Guiding Principles are summarized, to then annotate the recommendations of the Danish Council on CSR and the actions taken by the Government to implement them, and where relevant, the actions planned for implementation. In relation to the State duty to protect[85], the main recommendations were in relation to non-financial reporting, and specifically, to establish a mandatory reporting obligation for corporations in relation to human rights; requiring due diligence in public procurement contracts; and requiring state-owned companies to undertake due diligence in their business activities. Several of the recommendations received appear to have been implemented from the statement of the Danish Government[86], particularly in relation to reporting requirements, where CSR reporting

[81] *Ibid*., p. 76: "From the Foundations of the Italian Action Plan on the implementation of the UNGPs (in this first year focused on the foundations for future action) a comforting fact becomes apparent: in Italy a role is emerging in the Public Administration which intends to promote a virtuous connection between company profit and human rights protection."

[82] *Ibid*., p. 79.

[83] *Ibid*., p. i (*The Bases for Future Action*).

[84] Danish Government, *Danish National Action Plan - implementation of the UN Guiding Principles on Business and Human Rights* (April 2014).

[85] *Ibid.*, p. 11.

[86] *Ibid.*, pp. 11-15, for a detailed list of the actions taken in relation to the implementation of the UN Guiding Principles on Business and Human Rights.

is required since 2009[87] and human rights reporting is in place since 2013[88]. As well, among the planned actions, an inter-ministerial discussion on extraterritorial legislation to study the feasibility of the approach will be put in place, in addition to an increase of labor and social clauses in public contracts and promoting the use of CSR in the public sector[89].

Regarding the corporate responsibility to respect, the Danish government states in its business and human rights plan that four measures have been taken to foster the development of a corporate human rights culture[90]. Thus, the government recognizes the need to create a legal environment where corporations can comply with their responsibility *vis-à-vis* human rights, particularly through the support by the government for international CSR guidelines; by clearly setting an expectation that companies and other stakeholders must respect human rights; through the evaluation of CSR reporting as a result of the legal requirements in force, and finally, as a very interesting approach, by awarding the best non-financial report, which is however not granted by the Government but by a private auditing firm[91].

Additionally, an important contribution is made regarding the Third Pillar on access to remedies, particularly in relation to non-judicial remedies. The establishment of a new mediation and complaints-handling institution[92], based on Danish law, with a mandate that includes overseeing and receiving complaints over corporate impacts on human rights, may be a step in the right direction that follows the preventive and multistakeholder approaches used during the Ruggie process. Per its mandate, the "institution focuses on mediation to solve complaints -both on company level and if that is not possible, assisted by the Mediation and Complaints-Handling Institution. If mediation is not possible, the institution can initiate an investigation of the matter and based on the result, make a public statement"[93]. As well, considerations on the inclusion of civil law remedies for human rights impacts

---

87 *Ibid*., p. 14: "Since 2009, large companies including all state-owned companies and institutional investors in Denmark have been required to report on their work on corporate social responsibility. This means…there is a statutory requirement that they must take a position on CSR in their annual reports."

88 *Ibid*., p. 18, 14: "Following the latest amendments of Section 99a of the Danish Financial Statements Act, companies thus have to report on the topics of human rights and climate with effect from the 2013 financial year. […] In June 2012, this reporting requirement was expanded so that the largest Danish companies from 2013 expressly must state in their reports what measures they are taking to respect human rights and to reduce their impact on the climate… The purpose is to further strengthen Danish companies' activities in relation to human rights and climate change which will be beneficial to society overall, but also to the individual company."

89 *Ibid.*, p. 16.

90 *Ibid.*, p. 18.

91 *Ibid.* See also S. DEVA, *Regulating Corporate Human Rights Violations: Humanizing Business*, London, Routledge, 2012, p. 222: "Incentives and/or disincentives do not yet constitute a major strategy for promoting responsible corporate behaviour. [However,] Corporations often find a model of incentives, which is concerned only with 'ultimate results', more attractive than an intrusive regulatory design".

92 *The Mediation and Complaints-Handling Institution for Responsible Business Conduct*; see www.businessconduct.dk for more information on its composition and guidance.

93 Danish Government, *Danish National Action Plan - implementation of the UN Guiding Principles on Business and Human Rights*, 2014, p. 21.

by companies will possibly take place as part of the broader dialogue on extraterritorial legislation[94]. The experience of dealing with the issue of business and human rights at the national level is clearly an advantage for the implementation of the UN Guiding Principles on Business and Human Rights in Denmark, which is reflected in the structure, development and goals of its national action plan.

The development of National Action Plans is an important step to develop policy coherence within the governmental structures of each one of the EU Member States, and has the potential of allowing them to individually identify what is needed to do at the domestic level to ensure that the Ruggie Framework is adequately enforced. Even if the Action Plan of the Council of Europe in this regard does not specifically direct States to adopt a certain position, it would be beneficial for them to take into consideration some measures appearing at the international level in relation to extraterritorial regulation of corporations domiciled or operating in their State, given the current legislative disparity in this area in the European continent. A clear example of this are the Concluding Observations of the UN Human Rights Committee regarding Germany[95], where the Committee noted the State party should clearly communicate that all companies domiciled or doing business in Germany shall respect human rights standards in accordance with the Covenant, and provide "appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating *abroad*"[96].

Being a situation that is less controversial than extraterritorial adjudication, it would be important for EU Member States to consider how the enactment of legislation with extraterritorial effect (particularly in relation to reporting requirements or access to remedies) can be beneficial for the overall business and human rights field, moreover if it's taken into account that the US (through its *Dodd-Frank Wall Street Reform and Consumer Protection Act*) and the EU (through its proposed *Regulation on conflict minerals due diligence*, although to a lesser extent given its opt-in character) are taking steps in this direction[97]. The adoption of regional and domestic legislation and regulation by home States of European multinationals that aims to ensure the respect of human rights in their operations and activities abroad is a quintessential necessity that, if properly enacted and enforced, can become an effective way of addressing corporate violations of human rights, particularly when such activities take place in States where the rule of law is weak or where economic

---

[94] *Ibid.*, p. 20.

[95] Human Rights Committee, *Concluding observations on the sixth periodic report of Germany*, CCPR/C/DEU/CO/6 (12 November 2012).

[96] *Ibid.*, §16 (Emphasis added). On the extraterritoriality under international human rights law, see M. MILANOVIC, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford, Oxford University Press, 2011. On the issue of extraterritorial regulation in relation to the field of business and human rights, see S. DEVA, 'Corporate human Rights Violations: A Case for Extraterritorial Regulation', in C. LUETGE (Ed.), *Handbook of the Philosophical Foundations of Business Ethics*, Dordrecht, Springer, 2012; and J. RUGGIE, *Just Business: Multinational Corporations and Human Rights*, New York, W.W. Norton & Co., 2013, pp. 140-141.

[97] For a detailed analysis and comparison of the American and European regulations, see A. BULZOMI, *The EU draft law on conflict minerals due diligence: a critical assessment from a business & human rights standpoint*, IPIS Insights, 2014.

development may be more valuable to some than the protection and preservation of human dignity.

IV - THE INTER-AMERICAN ALTERNATIVE TO BUSINESS & HUMAN RIGHTS: THE ORGANIZATION OF AMERICAN STATES, NATIONAL HUMAN RIGHTS INSTITUTIONS AND THE ROLE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

While the European Union is taking coordinated steps to implement the UN Guiding Principles on Business & Human Rights within its borders, the situation in the Americas is particularly different, despite the continent having a large amount of natural resources and the unfortunate occurrence of several industrial accidents or human rights violations involving corporations. As well, some countries in the region have been particularly supportive of the development of a binding business and human rights treaty, without taking any steps to implement the Ruggie Framework at the domestic level, and despite having supported the mandate of the former Special Representative on human rights and transnational corporations. The next paragraphs will address what has been done within the Americas to address the implementation of the UN Guiding Principles on Business & Human Rights, to then turn the attention to an area that may offer a glimpse of potential for the business and human rights agenda: the work of the Inter-American Court of Human Rights.

1. Political commitments within the Organization of American States and by NHRIs in the Americas in relation to business and human rights

Any analysis of the work carried out in the Americas to develop a regional approach or strategy to the question of business and human rights has to take into consideration the fact that although political commitment may be expressed at international forums, there is a looming disconnection between the official position and the implementation process that should take place domestically[98]. Although clearly this situation is not exclusive of the American continent, it currently does not have the same level of political commitment and actions that, for example, appear to be more common in Europe. With this in mind, a few recent developments have taken place in the region to try to address a topic that is of a particular interest to many of its countries.

Beginning in 2011, the Network of National Human Rights Institutions of the Americas held a regional seminar in Guatemala on business and human rights, where a declaration and action plan was adopted[99]. This plan, merely eight months removed from the formal presentation of the UN Guiding Principles on Business & Human Rights to the Human Rights Council by John Ruggie and five months after its

---

[98] See e.g. *Open letter from human rights organizations on the contradictions in Ecuadorian human rights policy*, 10 February 2014, available at http://www.business-humanrights.org/media/letter-to-ambassador-luis-gallegos-chiriboga_english.pdf (Last accessed on 15 June 2014).

[99] Network of National Human Rights Institutions of the Americas, *Antigua Declaration and Action Plan* (November 11, 2011).

endorsement by this human rights body, determined to elaborate a list of actions to be implemented in relation to this topic. In its declaration, the Network of NHRIs of the Americas clearly identified as one of its main problems the mass privatization of public services, which have reduced the State's capacity to meet its international human rights obligations, while at the same time eroding the human rights of their population[100]. However, despite its intention, the Declaration also recognizes potential shortcomings, such as the lack of an explicit mandate to oversee corporate activities and their impacts on human rights, or the lack of transparency and accountability of governments and businesses alike, a situation that is unfortunately common in the continent.

The Antigua Declaration and Action Plan on business and human rights enumerates several objectives that NHRIs would commit to work on in the region, particularly focused on the promotion of the issue of business and human rights, capacity-building within their domestic jurisdictions and the strengthening of legal frameworks on business and human rights (including the performance frameworks of NHRIs). However, despite the adoption of the declaration and action plan, few developments are apparent in this regard[101]. This was also clear in another context: The UN Working Group on the issue of human rights and transnational corporations and other business enterprises determined to have its First Regional Forum on Business & Human Rights in Medellin, Colombia, in August 2013[102]. However, in its report of the event it recognizes that according to the information it received, there is an important level of disparity in relation to corporate acquaintance with the Guiding Principles in the region[103], as well as a lack of practical and theoretical knowledge by human rights defenders and regional organizations on this issue.

The Organization of American States, on the other hand, has had for some time a few connections to the topic of business and human rights[104]. Two of its most recent cases (both after the adoption of the Guiding Principles), for example, have taken place at the General Assembly of this regional organization. In this sense, the Organization of American States adopted a resolution on corporate social

---

[100] *Ibid.*, p. 2. A landmark example of this situation: Decision on Respondent's Objections to Jurisdiction, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 (ICSID, 21 October 2005); see also A. DE GRAMONT, "After the Water War: The Battle for Jurisdiction in Aguas del Tunari, S.A. v. Republic of Bolivia", *Transnational Dispute Management*, Vol. 3:5, 2006.

[101] For example, the public information website of the UN Working Group on Business & Human Rights shows that several Latin-American States (Colombia, Costa Rica, Guatemala and Uruguay) have filed submissions; nevertheless, only the Canadian Human Rights Commission has submitted a report to the Working Group. Available at http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx (Last accessed on 15 June 2014).

[102] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *Report on the First Latin America and Caribbean Regional Forum on Business and Human Rights*, A/HRC/26/25/Add.2 (24 April 2014).

[103] *Ibid.*, § 20.

[104] It must however be noted that it has normally seen this situation from the perspective of 'corporate social responsibility', and thus, the business and human rights angle has just started to appear. This much was also recognized by the Working Group on Business & Human Rights in its report of the Latin American Forum, where it stated that it noticed how some people believe that the Guiding Principles are another example of corporate philanthropy. *Ibid.*, §52.c).

responsibility in 2012 that encouraged its Member States to "promote corporate social responsibility, programs and initiatives among the private sector, the community and other stakeholders"[105]; to "promote among businesses operating in or from their countries the use of applicable corporate social responsibility initiatives, tools, and best practices"[106], including the UN Guiding Principles on Business and Human Rights, and to "encourage dialogue between legislative bodies and the private sector on the subject of corporate social responsibility"[107].

Its latest resolution on this topic, still in draft form, was adopted in June 2014. However, its focus is essentially different from the last resolution of 2012, concentrating on protecting human rights in business and mentioning the Ecuadorian effort to develop a binding international instrument. Thus, the General Assembly of the Organization of American States recognized that businesses "have a responsibility to respect human rights wherever they carry out their activities, irrespective of the capacity of states to meet their obligations in that regard"[108], although pointing out that the State duty to protect human rights under international human rights law does not change nor diminish.

The OAS General Assembly adopted two important resolutions in its latest meeting: the encouragement of member states and their NHRIs to become central pieces to foster dialogue among different stakeholders, including corporations and civil society, to disseminate and apply the Guiding Principles within their jurisdictions[109], in the first place; and secondly, to submit a request to the Inter-American Commission on Human Rights to "continue supporting states in the promotion and application of state and business commitments in the area of human rights and business"[110].

In relation to this last point, it must be recalled that the Inter-American Commission on Human Rights held a hearing at its 149th Period of Sessions on the human rights situation of people affected by mining in the Americas and responsibilities of the host and home States of mining companies in November 2013. In the hearing, a particularly interesting notion came to the floor, in relation to an obligation established in article 36 of the OAS Charter, which in the interest of clarification is reproduced:

> *"Article 36. Transnational enterprises and foreign private investment shall be subject to the legislation of the host countries and to the jurisdiction of their competent courts and to the international treaties and agreements to*

---

105 Organization of American States, *Promotion of Corporate Social Responsibility in the Hemisphere*, AG/RES. 2753 (XLII-O/12) (4 June 2012), §7.

106 *Ibid.*, §8.

107 *Ibid.*, §6.

108 Organization of American States, *Promotion and Protection of Human Rights in Business*, AG/doc.5452/14 (4 June 2014), p. 2 (Preamble).

109 *Ibid.*, §3.

110 *Ibid.*, §4.

> *which said countries are parties, and should conform to the development policies of the recipient countries"*[111].

It is a unique provision under international law that may be a catalyst for important jurisprudential developments in relation to human rights and the responsibilities not only of home and host States of transnational corporations for their infringement of human rights dispositions and of their duty to protect human rights, but of the very enterprises themselves.

Despite these recent developments in the field of business and human rights in the Americas, a lack of political will at both the regional and domestic levels has limited any potential development involving the implementation of the UN Guiding Principles. While a consolidation of these principles in the region may appear distant, an element of the Ruggie Framework could potentially have an interesting opportunity to contribute to the development of case law involving the responsibility of corporations to respect human rights and of States to ensure such respect under the Guiding Principles. In this regard, the next paragraphs will address the role the concept of "due diligence" could play in the case law of the Inter-American Court of Human Rights.

2. The case law of the Inter-American Court of Human Rights on due diligence: an interesting option for the UN Business and Human Rights Framework

The human rights field appears to be at a crossroads regarding what the best measures are to hold corporations accountable for their involvement in human rights violations. Despite the adoption of the UN Guiding Principles on Business and Human Rights in 2011, the development of national policies, legislation and regulations for their implementation has been slow, to the dismay of academics[112], NGOs[113] and victims of human rights abuses. This panoramic view of the business and human rights field seems to reflect that the momentum accompanying the adoption of the Guiding Principles is starting to fade, as a consequence of the actual challenges of implementing those international standards in national realities where the rigour of international standard-setting and law-making may not be as pressing[114]. It also fuels some of the doubts that continue to exist behind initiatives calling for the development

---

[111] *Charter of the Organization of American States* (30 April 1948), §36.

[112] See generally S. DEVA & D. BILCHITZ (Eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge, Cambridge University Press, 2013.

[113] Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy,* London, 2014.

[114] Nolan argues, for example: "The reliance on private regulation to fill this lacuna is in part an *acknowledgement of the sluggish pace at which international (and often national) law develops and the political reality that there is little appetite* at present among states for the development of a new treaty focused specifically on business and human rights concerns." J. NOLAN, "Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights", *Utrecht Journal of International and European Law*, Vol. 30:78, 2014, p. 8 (Emphasis added).

of other international processes to adopt binding measures that are directly applicable to corporations under international law[115].

While most responsibilities lie with the State and corporations to adapt their own structure and processes to implement as best as possible the legal designs constructed at the international level, a different avenue may also constitute an interesting and important option to pursue the development of measures dealing with the business and human rights sphere. In this sense, the use of international instruments by regional human rights bodies and courts could be an important path to gradually give those instruments a more binding character, through its use in its case law and decisions and the requirement that States implement domestic frameworks that take into consideration such standards. While the competence of courts to use said instruments may be limited by their statutes and the treaties they derive from, it may prove a valuable asset for the human rights field to continue building up the strength of the UN Guiding Principles on Business and Human Rights through this avenue. It is then of particular importance that the concept of human rights due diligence, as understood under the general guidelines and assertions of the Ruggie mandate, is explored further in the case law of regional human rights courts, and particularly in the jurisprudence of the Inter-American Court of Human Rights.

Several safeguards and considerations must be taken, however, while considering this type of possibility. First of all, it is clear that due diligence has a very different meaning in the corporate world than it does in human rights law, and there may even be a degree of difference between the concept of due diligence if looked at through the lens of human rights or through the lens of general international law[116]. As it has been noted by the International Law Association, "Normative and institutional fragmentation has revealed significant divergences in the application of due diligence, both in terms of the scope of its application, and also seemingly its content"[117]. Furthermore, the debate is still open regarding the possible existence or emergence of a common standard of due diligence under international law that permeates the different areas of this discipline, or if the nature, content and scope of due diligence depends on the particular context that is treated and cannot be interpreted as a general principle. The main issues in assessing whether a development is possible for the enlargement —or consolidation— of the concept of human rights due diligence within the Americas are the identification of similarities and differences between the proposals made by John Ruggie and the case law of the Court.

In relation to the similarities, two characteristics are evident: in relation to its content, a common ground between due diligence exercised by the State and due

---

[115] One of the important challenges in this regard is execution: given that the international human rights law regime is enforced by national authorities -which in many cases are already lagging behind in reporting and implementation of international standards-, the lack of a regulatory body at the international level makes this approach at least dubious. How is a binding instrument on business and human rights going to be enforced, if there is no international court or an equivalent of the "executive" power to refer to? And moreover, which developed economies will join such a treaty, if it is not drafted with the appropriate level of acceptance within the international community?

[116] For a broader discussion on this issue, see generally International Law Association, *ILA Study Group on Due Diligence in International Law: First Report*, 2014.

[117] *Ibid.*, p. 4.

diligence exercised as part of a corporate risk assessment exists, since due diligence generally entails taking positive steps to prevent harm from happening. The State, for example, must exercise due diligence to prevent human rights violations taking place within its jurisdiction, regardless of its origin (a State agent or a non-State actor committing the violation)[118]. This duty entails not just actions to prevent the violation from taking place —including the adaptation of its legal framework to ensure the State performs its duty of care—, but also any other measure available that may help to redress the damage if the State was unable to prevent it. Thus, its focus is on identifying probable risks that exist in relation to human rights, and acting accordingly to prevent such damages from happening, if possible.

This same characteristic is shared by corporate due diligence, and particularly corporate human rights due diligence as described by the UN Guiding Principles on Business and Human Rights: "In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process [thus, exercising a *duty of care*] that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights"[119]. Corporations have a responsibility to ensure their operations don't affect negatively the rights of others, and if they do, to undertake the necessary measures to stop such negative effect and mitigate its impact as possible, as well as redress any damage that may have taken place. In this sense, the content of what due diligence entails for the State and for business enterprises is highly similar, expecting of both to perform their duties with care to avoid breaching an obligation or responsibility.

The question of practice is also shared by both entities: although different in their own context, States and corporations regularly conduct due diligence throughout their activities and operations to identify risks and act to prevent them, particularly in the form of impact assessments. To some extent, corporations are normally required under domestic law to undertake environmental and/or social impact assessments and report on their findings, in order to have access to permits and development projects. Inter-American case law has determined, on the other hand, that States must undertake environmental and social impact assessments prior to granting a concession for a development project to a company, in consultation with affected communities and acting in good faith. The fact that both subjects have practical experience in conducting such diligence exercises —or in commissioning them— reflects that at the very least, this issue is not new to them, and therefore can adapt their standards to meet the requirements set forth by the Ruggie mandate, as long as they have a clear understanding or guidance on what human rights due diligence, and particularly human rights impact assessments, require.

However, despite the existence of some similarities in relation to the basic content and practice of due diligence by the State and corporations, important differences are still present that may be significant obstacles for the development of a case-law based doctrine on human rights due diligence by the Inter-American Court

---

[118] *Case of Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988. Series C No. 4, par. 172.

[119] Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, Geneva, 2012, p. 4.

of Human Rights. Notably, such obstacles derive from the *foundations* of the legal obligation (or responsibility) to perform due diligence, on the one hand, and on the other, from the *temporality* of such activity, which in practice may not be used in the same proportion by the State and multinational corporations.

Under general international law and international human rights law, States have a legal obligation to perform due diligence in relation to the activities they undertake, in order to ensure that their actions do not infringe international norms, whether in respect of other States and other international law subjects in the first case, or of their own population in the second case. This obligation is firmly embedded in international jurisprudence[120], including in early human rights case law within the Inter-American Court's jurisdiction, such as *Velásquez Rodríguez*[121]. As such, the State has an obligation of means or conduct (a *positive* obligation) not to undertake any action that may constitute a violation of international law, under the risk of compromising its international responsibility.

In this regard, the State obligation to perform due diligence is not limited to temporary cycles or projects, but rather a permanent obligation that should be present in every action or policy it decides to undertake. Regional human rights courts have repeatedly set forth in their jurisprudence that any lack to this fundamental obligation of the State will inevitably compromise their international responsibility. For example, the Inter-American Court of Human Rights stated in *Sarayaku* that the State will only escape its international responsibility for failing to respond with due diligence to guarantee the right to life in exceptional cases[122], implying that the State has a permanent obligation to undertake all its actions in a diligent manner, in order to avoid breaching its international human rights obligations.

Corporations, however, follow a different route. Since there are few domestic legal requirements demanding that they undertake human rights due diligence processes, there is no standard basis against which this variable can be consistently measured up to[123]. Moreover, they may undertake due diligence continuously throughout their operations, as a corporate governance[124] practice, or only for specific

---

120 *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania)*, Judgment, I.C.J. Reports 1949, p. 4; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43.

121 *Case of Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988. Series C No. 4.

122 *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of June 27, 2012. Series C No. 245, par. 235.

123 "Human rights now must be given the same degree of attention. Indeed, beyond laws which protect the interests of consumers, workers and the environment, the Authors found little in the way of explicit reference to human rights in the variety of due diligence regimes which exist in the legal systems of most States. States can do much more to utilize their existing regulations as part of the goal to ensure companies conduct human rights due diligence." See O. DE SCHUTTER ET AL., *Human Rights Due Diligence: The Role of States,* ICAR, 2012, p. 4

124 Tenev, Zhang and Brefot define corporate governance as "the set of instruments and mechanisms (contractual, legal, and market) available to shareholders for influencing managers to maximize shareholder value and to fixed claimants, such as banks and employees, for controlling the agency costs of equity." S. TENEY, C. ZHANG & L. BREFORT, *Corporate Governance and Enterprise Reform in China*, Washington, D.C., World Bank/International Finance Corporation, 2002, p. 5.

projects where significant legal or reputational risk may exist. As well, the decision of undertaking due diligence in general also depends on the sector, size and location of the company, with multinational companies being more used to this type of practices and assessments and small and medium enterprises less so. As it can be inferred, practice is far from being uniform in this field, which could potentially be an obstacle for the development of an Inter-American doctrine on due diligence, unless a common standard develops throughout the region, where States determine this obligation as a legal requirement. If this were to happen and a due diligence standard was enacted, requiring corporations operating in any given territory to exercise human rights due diligence as a matter of corporate governance and practice, any compliance default by the corporation that had a direct effect on human rights could potentially compromise the State's international responsibility, based on its lack of compliance with article 1.1 of the American Convention on Human Rights.

Another potential difficulty in this regard is the normative foundation requiring that corporations undertake due diligence as part of their business practice. While the State's due diligence duty is firmly established in general international law and international human rights law's instruments, case law and practice, the same cannot be said of corporate human rights due diligence at the international level, where mentions of this type of processes don't appear before their adoption and use by John Ruggie's mandate as UN Special Representative on business and human rights[125]. Thus, the normative foundation on which corporate human rights due diligence rests is relatively weak —despite its broad international acceptance by different stakeholders—, deriving directly from a soft instrument of international human rights law and not from a binding norm agreed upon by States. It remains to be seen if the content of the UN Guiding Principles on business and human rights does permeate the membranes of domestic law to find a place where they can be duly enforced by States within their domestic sphere. Despite the slow implementation phase currently taking place in some regional contexts —including the Latin-American region—, the broad support they enjoy may eventually allow them to develop an increasingly binding force, under both domestic and international law.

If the Inter-American Court of Human Rights were to develop a cohesive doctrine on human rights due diligence, the main question is what would it measure and how, given that human rights due diligence divides in two levels: in *State* human rights due diligence, and *corporate* human rights due diligence. In relation to the State, it would basically have to confirm what it already requires of States where development or extractive projects are being undertaken by transnational corporations: that the State ensures that due diligence in relation to the project is effectively carried out, where risk assessments are employed and there is a bidirectional consultation process with the potentially-affected communities. However, adopting the basis and terminology of the Ruggie mandate (*human rights due diligence* and *human rights impact assessments*) could possibly be more concise

---

[125] For example, the Draft UN Code of Conduct on Transnational Corporations did not include within its non-financial reporting requirements any mention of diligence or even risk assessment. *Draft UN Code of Conduct on Transnational Corporations*, UN Doc. E/1983/17/Rev.1, Annex II (1983), pars. 44-46. The same can be said of the Draft UN Norms on the responsibilities of transnational corporations with regard to human rights. *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

and less misleading than dividing impact assessments on environmental and social measurements.

Environmental assessments don't only measure how the environment is affected, but also what effects a particular project could have on surrounding communities, including their access to natural resources, which in many occasions are their sources of livelihood. As well, social impact assessments also measure which effects a project has on the socio-cultural, economic and biophysical surrounding of a community[126]. Given that environmental or social impact assessments explicitly or implicitly relate to different human rights, adopting a common standard (*human rights impact assessments*) measuring how any given development project impacts on the whole spectrum of human rights, as proposed by John Ruggie regarding the corporate responsibility to respect, would seem a more viable solution that would strongly emphasize the need to focus on human rights as a starting point, while also being more coherent with the purpose of such risk management instruments: identifying how any project impacts on the well-being of human beings that may be at risk[127]. This change would potentially be more beneficial for the development of a more consistent standard by the Inter-American Court of Human Rights, which would be directly applicable to States.

In relation to the second level of human rights due diligence, tasked to corporations, the situation is less clear without sufficient State and corporate practice. However, a prognosis on how it could function can be imagined: provided that a State has enacted legislation requiring human rights due diligence and reporting by corporations involved in extractive industry projects, and any such project eventually leads to an important negative impact on human rights, the State would be internationally responsible under international human rights law for failing to adequately protect human rights within its jurisdiction and for not ensuring that corporate actors conducted their operations and activities with due regard to human rights standards. Thus, while the State would remain the sole responsible for breaching its human rights obligations internationally, the steps required under the Ruggie Framework (*inter alia* corporate human rights due diligence and human rights impact assessments) would also compromise the responsibility of the corporation under domestic law, therefore developing a more consistent approach that would push the State to act more diligently to prevent inappropriate corporate impacts on human rights[128]. If the representatives of the victims and the Inter-American Commission on

---

[126] According to the International Association for Impact Assessment, social impact assessments identify and measure changes on the following areas: people's way of life; culture; community; political systems; environment; health and wellbeing; personal and property rights, and fears and aspirations. As it can be noted, most of these aspects are human rights in themselves, or are closely associated to different human rights. See International Association for Impact Assessment, *Social Impact Assessment*, available at http://www.iaia.org/iaiawiki/sia.ashx#Definition_13 (accessed 15 June 2014).

[127] This seems to be, to some extent, the proposition of the UN Working Group on business and human rights; Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/68/279 (7 August 2013), §31.

[128] See also V. CHETAIL, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward", in D. ALLAND ET AL. (Eds.), *Unité et diversité du droit international: Ecrits en l'honneur du Professeur Pierre-Marie Dupuy*, Leiden, Martinus Nijhoff, 2014, p. 127: "…the very notion of due diligence can have a consequential effect on the addressees of the international rules for which the violation has to be prevented or redressed. As soon as there is state

Human Rights provide the Court with sufficient arguments to foster a judgment that points out the direct relation between a corporate negative impact on human rights (for a lack of human rights due diligence under the UN Guiding Principles) and the State incurring international responsibility for lack of human rights due diligence (under international human rights law), an important and concrete development could appear that could potentially project the character of the UN business and human rights framework.

While several questions may remain on the convenience of this approach, and its feasibility depends on States adopting legislation related to the issues surrounding business and human rights, pronouncements of the Court in this regard could provoke an important jurisprudential development and further the cause —and perhaps the protection— of human rights *vis-à-vis* extractive industry projects and the activities of transnational corporations. If one thing is clear from the issue of business and human rights in the Americas is that, unlike the European Union's need to address the question of enacting legislation to regulate its corporate nationals abroad, countries in this region —and particularly in Latin-America— need to focus on strengthening their domestic legal frameworks to ensure that the State has effective mechanisms to ensure the adequate protection of human rights, including through the development of appropriate redress mechanisms that enable access to judicial and non-judicial remedies for victims of human rights abuses

IV - CONCLUDING THOUGHTS

While at the international level further dissemination of the Guiding Principles may still be taking place, no other paramount developments appear in the horizon, with the exception of the probable discussion on the development of a binding treaty on business and human rights. However, regional systems have an important opportunity to continue advancing the issue, both through its regional organizations and by fostering national implementation by its corresponding Member States.

As it can be observed in several of the examples discussed in previous paragraphs, the main danger in the adoption of regional approaches to the issue of human rights and transnational corporations is the risk of diverging interpretation of the UN framework, which could contribute to further dilute a soft normative initiative that has been criticized for an apparently confusing terminology[129]. Considering that States may have different —legitimate— business concerns, it is only ordinary that

---

responsibility in accordance with the notion of due diligence, one may assume that the violation in question has been —or at least will be— committed by private actors which are thus the holder of the relevant international obligation. Otherwise no breach can be attributed to them and there is no ground for justifying the duty of the state to act in due diligence to prevent, investigate or redress violations. In other words, as violations are not directly imputable to the state itself, private actor must be considered the direct bearer of the violated rule. Hence the state duty of due diligence presupposes the horizontal application of human rights."

[129] *Ibid.*, p. 129: "The result of such conceptual cacophony may be a dilution of responsibility for both states and corporations. A possible rationale would be to define due diligence by reference to international law when it concerns states and to understand it as a term of risks management once applied to corporations."

such diverging criteria appears; the question of prior involvement and practice in the business and human rights field will also affect how the business and human rights framework is interpreted at the domestic level and further transposed into policies and regulations. Because of these dangers, international and regional organizations need to continue providing guidance and assessments to States and other stakeholders on what is to be considered a standard in the field, in order for their domestic implementation to remain within the gravitational centre that the original work of John Ruggie constitutes.

It is in this sense that the Working Group on Business and Human Rights needs to redirect its efforts to provide tailored guidance to the different actors that may require an official interpretation of the Guiding Principles. Such guidance cannot hesitate to focus on issues such as extraterritoriality, on clarifying the difference between business and human rights and corporate social responsibility, or on the need of States to have a coherent policy in place that ensures that the content and implications of the UN Guiding Principles on Business & Human Rights are adequately understood at the different levels of government; only then will there be hope to achieve domestic developments that can reinforce the status of the framework as the authoritative standard for the prevention and redress of corporate impacts on human rights.