TOWARDS MANDATORY HUMAN RIGHTS DUE DILIGENCE

COMPLEMENTING THE UNGPS WITH THE PROPOSED TREATY TO ENHANCE CORPORATE HUMAN RIGHTS RESPONSIBILITY

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NOORA SILVENTOINEN: Towards Mandatory Human Rights Due Diligence - Complementing the UNGPs with the Proposed Treaty to Enhance Corporate Human Rights Responsibility

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Corporations have an ever-increasing influence on international human rights. However, public international law hardly ever regulates corporate conduct directly and the debate is stuck on the theoretical question of corporate subjectivity in international law. International soft law regimes, such as the UN Guiding Principles on Business and Human Rights, constitute a major progress on the field by bringing together the corporate world and international human rights law in an unprecedented way. Nevertheless, it is evident that none of the current international instruments regarding business and human rights are binding in a judicial sense. They rely their efficiency on the voluntary implementations on national level and the power of social expectations, both of which have their own issues.

From this starting point, the study examines the need to set binding international human rights law standards for business and human rights. The focus is further directed to the process of human rights due diligence, which comprises an ongoing management process that a corporation needs to undertake to analyze the impacts of its activities on human rights. The need to shift towards mandatory business and human rights regime is currently being addressed by the intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, which is in the spring 2020 in the middle of the process of drafting a legally binding instrument.

The study finds that both the UNGPS and the new proposed treaty have their own strengths and weaknesses, and that it is necessary to continue with a plurality of initiatives to most effectively enhance corporate human rights responsibility. However, the study concludes that a mandatory human rights due diligence would provide a solution which both clarifies the expectations on corporations to have an adequate human rights due diligence processes in place and provides an effective corporate accountability mechanism.

The study arrives at these conclusions by analyzing extensively material related to the UN Guiding Principles as well as the new treaty process. The most important sources also include a wide range of scholarly material, such as *Human Rights Obligations of Business – Beyond the Corporate Responsibility to Respect* edited by Surya Deva and David Bilchitz and *A Theory of Legal Responsibility* by Steven Ratner.

International law – Human rights – Business and human rights – UN Guiding Principles – Human rights due diligence – Corporate human rights responsibility

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Yritysten vaikutus kansainvälisiin ihmisoikeuksiin kasvaa jatkuvasti. Kansainvälinen julkisoikeus ei kuitenkaan lähes koskaan sääntele yritystoimintaa suoraan, ja keskustelu on juuttunut teoreettiseen kysymykseen yritysten oikeushenkilöllisyydestä kansainvälisessä oikeudessa. Kansainväliset soft law -lähteet, kuten YK:n yrityksiä ja ihmisoikeuksia koskevat ohjaavat periaatteet, edustavat merkittävää edistymistä tällä alalla yhdistämällä yritysmaailman ja kansainvälisen ihmisoikeuden ennennäkemättömällä tavalla. Siitä huolimatta on selvää, ettei mikään nykyisistä yritystoimintaa ja ihmisoikeuksia koskevista kansainvälisistä välineistä ole sitova oikeudellisessa mielessä. Niiden tehokkuus perustuu kansallisen tason vapaaehtoisiin toteutuksiin ja sosiaalisten odotusten voimaan, joihin molempiin liittyy omat haasteensa.

Tästä lähtökohdasta käsin tutkimuksessa selvitetään tarvetta asettaa sitovat kansainväliset ihmisoikeusstandardit yritystoiminnalle ja ihmisoikeuksille. Tutkimuksessa keskitytään edelleen huolellisuusvelvoitteen prosessiin, joka käsittää jatkuvan riskienhallintaprosessin, joka yrityksen on suoritettava analysoidakseen toimintansa vaikutuksia ihmisoikeuksiin. YK:n ihmisoikeusneuvoston hallitusten välinen työryhmä käsitellee tällä hetkellä tarvetta siirtyä pakottavaan sääntelykenttään yritystoiminnan ja ihmisoikeuksien saralla, ja se on keväällä 2020 keskellä prosessia laatia kansainvälinen oikeudellisesti sitova asiakirja ihmisoikeuksista monikansallisten yhtiöiden ja muiden yritysten toiminnassa.

Tutkimuksen mukaan sekä YK:n ohjaavilla periaatteilla, että uudella ehdotetulla sopimuksella on omat vahvuutensa ja heikkoutensa, ja on välttämätöntä jatkaa useilla aloitteilla, jotta voidaan parantaa tehokkaimmin yritysten ihmisoikeusvastuuta. Tutkimuksessa päädytään kuitenkin siihen, että pakottava huolellisuusvelvoite tarjoaisi ratkaisun, joka sekä selventää yrityksille asetettuja odotuksia siitä, että niillä on asianmukaiset prosessit huolellisuusvelvoitteen toteuttamiseksi että tarjoaa tehokkaan yritysvastuumekanismin.

Tutkimuksessa päädytään näihin johtopäätöksiin analysoimalla laajasti YK:n ohjaaviin periaatteisiin ja uuteen sopimusprosessiin liittyvää materiaalia. Tärkeimpiin lähteisiin sisältyy myös laaja valikoima oikeuskirjallisuutta, kuten Surya Devan ja David Bilchitzin toimittama *Human Rights Obligations of Business – Beyond the Corporate Responsibility to Respect* sekä Steven Ratnerin *A Theory of Legal Responsibility*.

Kansainvälinen oikeus – Ihmisoikeudet – Yritystoiminta ja ihmisoikeudet – YK:n ohjaavat periaatteet – Huolellisuusvelvoite – Yritysten ihmisoikeusvastuu

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ABBREVIATIONS

ATS	Alien Tort Statute
CSR	Corporate Social Responsibility
Binding treaty	Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises
ECHR	European Convention on Human Rights
Elements	Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights
EU	European Union
FIDH	International Federation for Human Rights
Framework	Protect, Respect and Remedy Framework
HRDD	Human Rights Due Diligence
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICHRP	International Council on Human Rights Policy
ICJ	International Court of Justice
ILO	International Labour Organization
Interpretive Guide	Interpretive Guide on the Corporate Responsibility to Respect Human Rights
NAP	National Action Plan
NGO	Non-governmental organization
OECD	Organisation for Economic Co-operation and Development
OEIGWG	Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights
OHCHR	Office of the High Commissioner for Human Rights

Proposed treaty	*See* "Binding treaty"
Reporting Framework	UN Guiding Principles Reporting Framework
Revised Draft	Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises
SRSG	Special Representative of the Secretary-General
TNC	Transnational corporation
UN	The United Nations
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNHRC	United Nations Human Rights Council
UN Norms	Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
UNWG	UN Working Group on Business and Human Rights
Zero Draft	Zero Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises

1 INTRODUCTION

1.1 Background

The international human rights law has already for decades been aware of the ever-increasing power of corporations in the world. This well-established notion has resulted in shifting the attention from the exclusive interest on human rights violations committed by states to a close scrutiny of the activities of corporations. While investments and jobs created by corporations have several positive impacts, such as increased standard of living, the corporations' activities may also infringe human rights, for example the right to privacy or the right to enjoy just and favorable conditions of work.[1]

Considering the influence of corporations on the international human rights, it is remarkable that, at almost all cases, public international law regulates corporate conduct only indirectly.[2] The attribution of responsibility for human rights violations to corporations has been stuck in the theoretical question of international legal personality of corporations and the lack of horizontal effects of international human rights law. I argue that it is possible to grant the corporations a level of international personality and that it is important to include corporations among the subjects of international law. However, the focus should be on finding the best tools to regulate corporations, taking into account their special characteristics, and not only continue the debate over the theoretical question of international personality.[3] The time when international law could divide actors solely into states and non-state actors is over, and the corporations' influence on the international human rights requires them to be seen as obligors alongside of the states.

[1] The right to privacy may be infringed by failing to protect the confidentiality of personal data held about employees. By failing to address a pattern of accidents that risk health and safety of employees a corporation may infringe the right to enjoy just and favourable conditions of work. For an extensive list of human rights that corporations may have negative impacts on, please see https://www.ungpreporting.org/resources/how-businesses-impact-human-rights/.

[2] Vázquez 2005, p. 927. As few exceptions, the author mentions international legal norms relating to war crimes, crimes against humanity and forced labour that apply to non-state actors, such as corporations, directly.

[3] *See* Clapham 2006, pp. 80 and 83, where he argues that one should not try to "squeeze international actors into the state-like entities box" and that the focus should be in the rights and duties of non-state entities, not the theoretical question of their personality.

Moreover, I argue that the black-and-white thinking where corporations are seen as the "bad guys" who intentionally violate human rights in every possible turn is faulty. It is rather the fault of the uncertain circumstances that leave corporations not knowing what is expected from them.[4] Corporations that would like to act ethically may struggle to find the right way to operate if they do not have clear standards to follow.[5] Voluntary instruments such as the United Nations Guiding Principles on Business and Human Rights (UNGPs or UN Guiding Principles) have been a major progress in clarifying the relationship of states and corporations and the attribution of human rights responsibility between them. The UNGPs emphasize human rights due diligence (HRDD) as a tool in determining the human rights impacts of corporations and, thus, take an important step towards enhancing the corporate responsibility for human rights. However, the UNGPs still fail to formulate the legal status of corporations as duty-bearers[6] and are dependent on national level positive regulation leaving an atmosphere of uncertainty prevailing.

My main argument is that human rights infringements caused by corporate activities take place when corporations are not paying enough attention to the potential impacts they have on human rights. In order to ensure adequate due diligence, there is a need for an international binding human rights treaty that would set global standards for mandatory human rights due diligence. To illustrate the need for a shift from voluntary to mandatory, the famous *Doe v. Wal-Mart* (2009) case in the United States serves as a good example. There were several plaintiffs in this case who argued that Wal-Mart, an American multinational retail corporation, had failed to enforce its code of conduct, which required its suppliers to comply with labor and industry standards. The code of conduct further required Wal-Mart to undertake measures, such as on-site inspections, to monitor the compliance with the standards, and that failure to implement the standards could lead to termination of the suppliers' contract with Wal-Mart. The court held that Wal-Mart had only reserved a right to inspect which did not amount to a duty to inspect the working conditions in their supply chain. Therefore, the workers could not receive protection by the contracts and the code of conduct clauses between Wal-Mart and its suppliers.[7] Without

[4] Ratner 2001, p. 448. Ratner refers to a corporate policy statement of the Royal Dutch/Shell group of companies, where it says: "It has often been difficult for [NGOs, the media, and others] to agree on... a theoretical framework for a new understanding of business's role in... human rights.... As a result, it has been difficult for business to respond to expectations that appear to be changing significantly ...".
[5] *See* Deva 2003.
[6] Karavias 2014, p. 83.
[7] *See* Angelini 2018.

clear international standards, it is likely that we will continue to witness claims against corporations for their responsibility and, in turn, counterclaims by the corporations against such accountability.[8]

1.2 Research and Important Terms

In this thesis, I examine the aforementioned need for a binding treaty to complement the current regulation of corporations' human rights due diligence in the UNGPs. In order to do that, I search answers for the following questions. I start by looking into the question of why the state monopoly of human rights responsibility is not sufficient alone but corporate responsibility should complement the state responsibility. States are set a requirement of due diligence in international human rights law and, increasingly, the states have also started to regulate corporate human rights due diligence in national laws. However, due to many weaknesses in leaving the responsibility solely on states, the corporations also need to be recognized as having a level of international legal personality and, correspondingly, attribute them responsibility for assessing their impacts on human rights directly through international human rights law. This leads me to analyze the strengths and weaknesses of the human rights due diligence process in the UNGPs, and finally to search the answer to my main research question: how would mandatory human rights due diligence enhance the corporate responsibility for protecting human rights?

Both the legal dogmatic and legal sociology methods are used to be able to answer these questions. The interest in background and effects is characteristic of legal sociology and these play a great role throughout the thesis.[9] On the other hand, the legal dogmatic method is strongly present since the thesis compares the two approaches that international law has to the regulation of business and human rights: the voluntary instruments and the binding treaty. The approach is both *de lege lata* and *de lege ferenda* since I assess critically the adopted UNGPs and I also analyze the future development regarding the proposed binding treaty.

I have conducted the research by studying the relevant sources of international law as provided in the Article 38 of the Statute of the International Court of Justice (ICJ). The

[8] Ratner 2001, p. 448.
[9] Alvesalo and Ervasti 2006, p. 9.

primary sources, such as international treaties and principles, form the core of the research. To understand how the proposed treaty could enhance corporate human rights responsibility, the sessions where the new instrument has been built and the views of different participants thereto are of great interest in this thesis. As secondary sources, relevant judicial decisions are presented as examples. A wide range of scholarly material has also been studied as further secondary sources including, among others, *Human Rights Obligations of Business – Beyond the Corporate Responsibility to Respect* edited by Surya Deva and David Bilchitz and *A Theory of Legal Responsibility* by Steven Ratner. Furthermore, I have studied scholarly material and the UN Guiding Principles themselves to analyze the effectiveness of the UNGPs. At this point, I would also like to give credit to Lia Heasman whose academic dissertation from 2018 inspired me to study the corporate responsibility for human rights and to present the latest turns in the process towards mandatory human rights due diligence in my thesis.

To clarify further my course of research, the definitions of some regularly used terms are presented next. The term corporation is used in a wide meaning to cover all business enterprises similarly as explained in connection with the UNGPs: "regardless of their size, sector, location, ownership and structure".[10] The international law has been criticized for its focus on large, non-state-owned multinational corporations and the lack of attention towards the role of municipal corporations and small and medium-sized business corporations.[11] I find this criticism well-founded since also smaller corporations may gravely affect the human rights. On the other hand, the multinational character of some of the corporations poses its own challenges in the regulation, and these are brought up where relevant.

Similarly, the human rights are discussed in their wide meaning. Corporations may have direct or indirect impact on virtually the entire spectrum of internationally recognized human rights, so they should all be covered in the risk assessment. Alongside with the corporations' impacts on the human rights comes their responsibility for human rights violations. The general term corporate responsibility is used instead of corporate social responsibility (CSR) where it is intended to assess the question of responsibility in a wider sense without the meanings associated to CSR that has existed already before the business

[10] UN Guiding Principles 2011, p. 1.
[11] Johns 2016, p. 638.

and human rights discourse. CSR focuses more on the corporate goodwill based on morality, but the interest of this thesis is to underline the rights and especially obligations that the international human rights standards of business and human rights create. Furthermore, CSR deals with the responsibilities of a company but business and human rights discourse addresses the responsibility of states and corporations in an integrated way.[12] On a separate note, I want to emphasize that even though the focus of this thesis is on human rights, the traditional classification of corporate responsibility to environmental, social and economic responsibility seems rather artificial today. Ideally, all of the aforementioned classes of responsibility should be integrated in the everyday business operations of corporations to guarantee that these once separately conducted processes are implemented seamlessly in the core of the corporate activities.

Lastly, as will be explained more thoroughly below, the focus in the thesis is directed to human rights due diligence. HRDD is a key concept of the UNGPs, but there is no international consensus on the definition.[13] The Office of the High Commissioner for Human Rights (OHCHR) has sought to define the term as follows:

> "Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process 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."[14]

The definition is helpful but leaves some uncertainty on how HRDD is to be applied. I will get back to analyzing the definition of HRDD more thoroughly in the chapter 3.2 regarding the UNGPs and HRDD. On an initial remark, it may be stated that corporations need to have a coherent understanding on the demands that HRDD sets in order to know what they are expected in relation to protecting human rights.

[12] Wettstein 2016, p. 80.
[13] McCorquodale and others 2017, p. 198.
[14] Interpretive Guide 2012, p. 6.

1.3 Structure and Limitations

The structure of the thesis is built to support the answering of the research questions. After this introductory chapter, I move on to analyze the shift from the complete monopoly of states' human rights responsibility to the inclusion of corporate responsibility in the field of international human rights law. I argue that strictly limiting the role of duty-bearer to states is not sufficient, but states need to collaborate with corporations in order to guarantee the best possible protection of human rights. Furthermore, the emergence of due diligence in international law and its importance in connecting corporate world and human rights are presented.

After assessing the need to involve corporations more in the full-scale protection of human rights, I critically review the current international voluntary regulation of human rights due diligence. The focus will be on the United Nations' (UN) work on the field even though also the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organization (ILO) have international instruments in place regarding corporations' human rights due diligence.[15] The limitation of focus to UN is justified since the aim of the thesis is not to give a full review of the current sphere of regulating the human rights and corporations through human rights due diligence, but to analyze the strengths and weaknesses of complementing the voluntary regime with a binding international instrument. Furthermore, despite their flaws, the UNGPs seem to be the most promising basis of the voluntary instruments issued so far for the future work on the worldwide implementation of human rights due diligence. Also, the recent progress within the UN Human Rights Council regarding a binding treaty in the field of human rights and corporations further justifies the focus of the analysis on the UN's work.

Further limitation is also made to focus on one aspect in the fight against human rights violations, the human rights due diligence. This limitation is due to, on the one hand, the central role of risk, or more precisely impact, assessment in preventing human rights violations and, on the other hand, my personal interest on the possibility to utilize the traditionally business-centric due diligence in the sphere of international human rights law.

[15] *See* OECD's Guidelines for Multinational Enterprises as part of the OECD Declaration on International Investments and Multinational Enterprises, which was adopted in 1976 and has been last reviewed in 2011. *See also* ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, which was adopted in 1977 and has been amended in 2000 and 2006.

Access to justice and remedies are naturally essential requirements of the possible future treaty regarding business and human rights, but they are out of the scope of this thesis due to the limited number of pages. In addition, the goal is that, by setting mandatory human rights due diligence on corporations, the HRDD process may prevent beforehand as many human rights harms as possible. Thus, even though remedies will be needed, they hopefully will not be needed that much should the preventing processes succeed.

The critical analysis of the UNGPs and the voluntary nature of the current international HRDD regime leads to the fourth chapter where I present the treaty process of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG), namely the proposed legally binding instrument. A short overview of the status of conducting the treaty is presented. Again, the goal is not to review the full process and progress of the working group but to focus on the strengths and weaknesses of the possible mandatory regulation in the field of business and human rights. Evaluation on the binding nature of the proposed treaty is presented, but to maintain coherence, the research is also here limited to the human rights due diligence, more precisely to the analysis of the elements of mandatory HRDD.

In the conclusion chapter, I conclude the analysis presented in the previous chapters and underline my central argument that a mandatory international human rights due diligence regime for corporations would not only enhance the protection of human rights but could also be a desired instrument from the corporations' point of view. Further thoughts about how to strengthen the proposed treaty in this regard are also presented taking especially into account the challenges posed by globalization and digitalization.

2 FROM THE MONOPOLY OF STATE HUMAN RIGHTS RESPONSIBILITY TO THE INCLUSION OF CORPORATE HUMAN RIGHTS RESPONSIBILITY

2.1 State Human Rights Responsibility

2.1.1 State Monopoly of Human Rights Responsibility

The doctrine of the subjects of international law is part of the fundamentals of this branch of law. Every introductory textbook includes a section regarding the subjects of international law and the question of international subjectivity keeps attracting the attention of scholars who debate over the content and reach of this doctrine.[16] In the history, states were the only subjects of international law and it has taken time to move from the exclusive state-centric model of the international legal system to recognize also other actors amongst the subjects of international law.

Even today, the starting point of public international law is that states are the main actors of international law. This is due to their ability to possess international rights and obligations and, moreover, their capacity to a) maintain their rights by raising international claims and b) be subjected to such claims should they breach their obligations.[17] Thus, states have so-called full legal capacity whereas the capacities of other recognized subjects of international law, such as international organizations, are limited and determined by the powers vested in them.[18] Furthermore, states have inherent sovereign rights and powers as part of their position as principal subjects of international law.[19] As regards the doctrine of sovereignty, it includes the doctrine of state responsibility as a necessary reciprocal element.[20]

In international human rights law, the doctrine of state responsibility has led to finding states having a monopoly of human rights responsibility.[21] The international regulation of human rights is strictly vertical in nature and makes it possible for only states to be

[16] Pentikäinen 2012, p. 145.
[17] Crawford 2012, p. 115.
[18] Pentikäinen 2012, p. 146.
[19] Crawford 2012, p. 447.
[20] Korhonen – Selkälä 2016, p. 845.
[21] Crawford 2012, p. 655.

obliged in their execution. The so-called horizontal effect of human rights has traditionally been seen against the foundation of human rights, and human rights are only indirectly applied to private conduct so that the state remains the guarantor.[22]

The state responsibility for protecting human rights is both positive, i.e. states must take positive measures in the protection of human rights, and negative, i.e. states must not themselves directly violate human rights.[23] On a third point of view, the human rights conventions also require states to ensure that other actors than the state, such as corporations, do not violate the human rights of individuals within their jurisdiction. This is called the state's duty to protect, which is an accepted responsibility in international human rights law.[24]

2.1.2 State Due Diligence Requirement

One of the elements attributed to the duty to protect is an international requirement of due diligence, which in this context refers to the state's obligation to provide appropriate prevention mechanisms and remedies for victims of human rights infringements.[25] Due diligence appeared for the first time in a judgment in relation to the state's human rights obligations in the case *Velásquez-Rodríguez v. Honduras* (1988) of the Inter-American Court of Human Rights. Honduras was held responsible for failing to prevent the attack, which led to an individual being disappeared and assumed to have been killed by the Honduran army, and for failing to punish the attackers. The wording of the judgement referred to Honduras' "lack of due diligence to prevent the violation or to respond to it".[26]

The due diligence requirement of states is also relevant in various human rights treaties. For example, the International Covenant on Civil and Political Rights (ICCPR) may be regarded violated should a state party, according to the General Comment of the Human Rights Council, permit or fail "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".[27] Therefore, under the ICCPR, states have the responsibility to ensure that

[22] Crawford 2012, p. 655. *See also* Heasman 2018, p. 37.
[23] Heasman 2018, pp. 37-38.
[24] Shaw 2008, p. 770; Chirwa 2004, p. 40.
[25] Kulesza 2016, p. 29.
[26] *Velásquez-Rodríguez v. Honduras* (1988), paragraph 174.
[27] UN Human Rights Committee 2004, paragraph 8.

individuals are protected from human rights violations by other private persons. This has also been stated by the Human Rights Committee in *Delgado Páez v. Colombia* (1990), where the state was required to protect an individual's right to personal security in a horizontal relation between private actors.

However, states cannot be held responsible for all violations committed by private actors. According to the judgment of *Velásquez-Rodríguez v. Honduras*, states are required to take appropriate measures with respect to its capabilities, which may depend on the situation at hand.[28] Thus, the due diligence requirement draws a line between the violations of corporations and other private actors for which states can and cannot be held responsible. In the current state of the international human rights regulation, a lot is left to rest on the states' national regulation when it comes to the protection of human rights from corporate abuse. Problems arising from the state monopoly on human rights responsibility are assessed next.

2.1.3 Weaknesses in State Monopoly of Human Rights Responsibility

In a world where states could be counted on to control conduct within their territory effectively, protecting human rights solely through obligations on states seems fairly undisputable. However, corporations have consolidated their position as powerful global actors and some states lack the resources or the will to control them.[29] Therefore, the current system of international human rights law, where the responsibility for human rights infringements by corporations is sought indirectly through states, has multiple weaknesses, which are categorized by Steven Ratner to the three following groups.

Firstly, as already mentioned above, the state may lack the will or resources to monitor corporate behavior. This is especially true in less developed countries that are dependent on foreign investments. At worst, this shortcoming may even lead to the governments granting corporations control over certain territories leading to a total neglect and lack of interference in the possible human rights abuses in such region.[30] Secondly, states and corporations may work together in abusing human rights. This has been seen to happen

[28] *Velásquez-Rodríguez v. Honduras* (1988), paragraphs 174-175.
[29] Ratner 2001, p. 461.
[30] Ratner 2001, p. 462. As examples, Ratner mentions the claims against Freeport-McMoRan regarding human rights abuses in Irian Jaya and the claims against Texaco in relation to the Colombian rainforest.

in South Africa, where the government has used corporate resources to supply them with material for various unacceptable activities.[31] Thirdly, the globalization has led to a growing number of international corporations, which are less and less dependent on government control. Corporations may have nationality in one state and operation in another. Should the host state fail to regulate the activities of the corporation, the corporation may be left in a legislative vacuum if the state of the corporation's nationality also abstains from regulating the corporate activities based on, for example, the fact that such activities are not taking place in their jurisdiction, i.e. due to the extraterritorial nature of the activities. Corporations may also be moved relatively easily to another state with fewer human rights regulations.[32]

In addition to the aforementioned weaknesses, the state's role as the guarantor of human rights is diminishing due to the extensive privatization of state functions and the list could be continued even further.[33] With this said, it is in fact starting to look disputable that states should possess the monopoly of human rights responsibility. The balance of power has shifted since the conduction of human rights conventions and today 69 of the world's top 100 global economic entities are corporations, leaving room for just 31 countries on the list.[34] As a state alone is not a sufficient guarantor of the human rights of its people, it is time to shift the focus on the possibility of attributing responsibility also to corporate actors.

2.2 Corporate Human Rights Responsibility

2.2.1 Status of Corporations in International Human Rights Law

The recognition of subjectivity is at the core of the responsibility doctrine.[35] Therefore, to understand the attribution of some of the responsibility for protecting human rights to corporations, one must first understand where corporations are placed in the field of subjects of international law. According to the prevailing doctrine of subjects of international law, corporations do not have international legal personality.[36] However, the debate of

[31] Ratner 2001, pp. 462-463.
[32] Ratner 2011, p. 463.
[33] Alston 2005, p. 27.
[34] Global Justice Now 2017.
[35] Korhonen – Selkälä 2016, p. 846.
[36] Crawford 2012, p. 122.

the international subjectivity of corporations is far from settled. The views of scholars vary greatly, and it is not anymore that exceptional to support corporate international legal subjectivity even though strong resistance also pertains.[37] Some scholars have simply left the question open.[38]

Fleur Johns describes the theorizations of corporations in public international law, and she recognizes three main ways the corporations have featured in international law: as analogue to individuals, as parastatal entities and as an example of international co-ordination much in comparison to international institutions.[39] All of the aforementioned categories have their own flaws because they fail to take into account the special characteristics of corporations. First, corporations differ from individuals in many ways, not least because of their nature as profit-maximizing entities, which are able to relevantly easily opt in and out of national legal orders.[40] Second, even though revenues of some corporations are beating the gross domestic products of many states, giving corporations state-like role is not actually taming corporate power but granting corporations state-like autonomy leaves them room to, for example, only voluntarily engage in protecting human rights.[41] Third, analogue to an international organization emphasizes the possibility of demanding corporations transparency and social responsibility that is required from international organizations. However, corporations, unlike international organizations, do not answer to states but to their shareholders, and such appeals may not be embraced if they do not benefit the shareholders.[42]

In international human rights law, the theorization of corporations has typically revolved around a statist comparison. Due to the understanding of corporations' growing impact on human rights, the focus has, however, shifted to treating corporations as their own group: not state-like but not merely part of the heterogeneous group of non-state actors. Already in 1949, the International Court of Justice (ICJ) acknowledged in its famous comment that "the subjects of law in any legal system are not necessarily identical in their

[37] Pentikäinen 2012, p. 174.
[38] Clapham 2016, pp. 76-77.
[39] Johns 2016, p. 638.
[40] Johns 2016, pp. 640-641.
[41] Johns 2016, p. 642.
[42] Johns 2016, p. 643.

nature or in the extent of their rights, and their nature depend upon the need of the community".[43] This has been argued to hold open the possibility that categories of international legal personality may be reconsidered in time.[44]

Moreover, when examining the question of international legal personality of corporations, the focus should be on their rights and duties. If international law grants corporations or other non-state actors rights and duties, they may be seen to have international legal personality.[45] Although not brought up often in the discussion of business and human rights, corporations actually possess rights under international human rights law. For example, the European Convention on Human Rights (ECHR) offers a wide range of protection for corporations, such as the right to protection of private property, which applies expressly to "every natural and legal person".[46] Thus, corporations' capability to be right-holders is recognizable.

However, the question of corporations' role as duty-bearers is more troublesome. As discussed previously in connection with the state obligations, international human rights law indirectly poses certain obligations to corporations. If judicial duties exist only through the states, they are argued not to indicate a level of international legal personality for corporations.[47] This notion is further argued by some scholars that, since there does not exist a binding treaty directly regulating corporations, corporations do not possess international legal personality because there is not a valid treaty issuing them judicial duties.[48] Therefore, a legally binding treaty that is specifically drafted for corporations would grant the corporations international legal personality since the treaty would assign them legal rights and duties.

As such treaty has not yet been concluded, the best solution to clarify the current status of corporations is to give them limited rights and duties taking into account their special characteristics.[49] States could include corporations more in the development of public

[43] *Reparation for Injuries Suffered in the Service of the United Nations* (1949), p. 8.
[44] Alston 2005, p. 19.
[45] Reinisch 2005, p. 70.
[46] Emberland 2006, p. 3.
[47] Heasman 2018, p. 68.
[48] Rigaux 1991, p. 129; Cassese 1986, p. 103.
[49] Charney 1983, p. 775.

international law and the corporations would then acquire limited legal personality controlled within international law.[50] Furthermore, Surya Deva notes that corporations have a limited legal personality due to their legal construction derived from states and due to their status under international law which is extended from domestic law.[51]

To conclude, even though the corporations do not have a similar status of legal subjects as states, they have *a level of international legal personality*. The notion is not without concerns. On the one hand, the states may fear losing international power by granting legal personality to corporations. On the other hand, expanding responsibility for human rights protection to corporations is feared to lead to states evading their own responsibility.[52] However, making this concession does not mean that corporations have the full range of rights and duties that are possessed by states. Nor does it mean that the states' rights and duties are diminished. Distributing powers would adjust the levels of power between states and corporations but not abolish the powers of the state.[53] In the human rights context, the fundamental element of international human rights law demands that the actors who are capable of abusing human rights must be obliged to protect those rights. Along with states, corporations are actors that violate human rights. Thus, including corporations in the group of actors that are held responsible for human rights obligations requires them to be capable of obtaining rights and duties and, consequently, being able to violate those duties.[54] Therefore, to guarantee the protection of human rights, it is important to recognize that corporations are actors in the international order but simultaneously not to limit the role of the states.

2.2.2 Theories of Incorporating Corporate Human Rights Responsibility

In the same way as there are many theories on the international legal personality of corporations, there are also several theories on the ways to involve corporations in the protection of human rights. The normative framework of corporate human rights obligations may be roughly divided into three legal sources: national law, international law and soft law, the last mainly referring to voluntary commitments by the corporations themselves.[55]

[50] Friedmann 1964, p. 223.
[51] Deva 2003, p. 50.
[52] Crawford 2012, p. 655.
[53] Heasman 2018, p. 163.
[54] Heasman 2018, p. 58.
[55] Černič 2010, p. 33.

There is not a consensus among the international law scholars from which of these ways should the legal obligations of corporations primarily derive. Therefore, an analysis of these different theories is presented below.

Those who promote maintaining *status quo* support the option that national normative orders should continue to solely regulate companies through domestic laws. As argued already in connection with the state's duty to protect, the national human rights laws play an essential role in ensuring the horizontal protection of human rights within their jurisdictions. Furthermore, many states have derived their human rights rules from the international human rights conventions harmonizing the application of human rights worldwide. However, in much of the same way as the states may not be left to be the only ones to protect human rights due to the many weaknesses presented in previous chapters, also the regulation of human rights solely on national level is not enough to protect human rights. This is especially due to the increasing transnational character of corporations which makes it easy for corporations to abstain human rights regulations by simply moving their business to a state where the human rights protection is not at an adequate level. The national human rights laws need to exist and develop further, but to fill possible governmental gaps, the international human rights law needs to step in to regulate corporations.

Straightforwardly, there are two main alternatives among international human rights scholars regarding the way international law should regulate corporate obligations. The more traditional option is that the state's primary role in human rights protection is emphasized but a simultaneous responsibility for corporations is established with international laws.[56] For example, the UNGPs follow this view by issuing the primary responsibility for human rights protection to states and leaving the companies a baseline expectation to respect rights. The more controversial option would be to demand a direct legal accountability of corporations. The scholars who promote this option do not intend to stop the states' international obligations, but they promote more distinct and direct judicial legal norms.[57] The strengths and weaknesses of these two options are presented in more depth in the following chapters.

[56] Heasman 2018, p. 172.
[57] These scholars include, among others, Steven Ratner and Beth Stephens. *See also* Addo 1999 and Carrillo-Santarelli 2015.

Lastly, corporations themselves have also taken actions through voluntary commitments, such as internal human rights policies and codes of conduct.[58] These are not the central subject of this thesis, but it may shortly be noted that the voluntary instruments are an important add to the national and international law obligations. Some of the policies have been condemned for focusing only on improving the corporation's public reputation,[59] but some have succeeded in truly answering to shareholders' and customers' demand for more responsibility in the corporate activities.[60] However, the corporate codes of conduct have been criticized to include only some human rights and omitting others. Most of them also fail to support the monitoring of their implementation.[61] Nevertheless, even if such voluntary instruments are only a small part in the large exercise to identify corporate human rights obligations, the voluntary commitments of corporations are an important part since they contribute to corporate observance of human rights.[62]

The regulation of corporations derives from internal and external sources, from national and international sources. What is common to all the different ways of incorporation is that they demand some insight into the corporation's operation to ensure they do not violate human rights, i.e. they require due diligence on the company's part. Therefore, after the above-presented initial thoughts on the possible ways to incorporate the corporate human rights responsibility, it is equally important to turn the focus on the actual obligation, namely human rights due diligence (HRDD), that these instruments require corporations to conduct.

2.2.3 Corporate Obligation of Human Rights Due Diligence

Traditionally, due diligence has had a strict business-centered meaning. The concept emerged in corporate governance after the great depression of 1930's in connection with the United States Securities Act of 1939, which provided a defence of due diligence to those who had made reasonable investigation into matters contained in a prospectus for

[58] Černič 2010, p. 43.
[59] *See, for example,* Watson 2016.
[60] *See, for example,* Norgard 2017.
[61] Černič 2010, p. 46.
[62] *See* Waagstein 2005, p. 117, where she concludes that: "The discussion on corporate self-regulation in the Tangguh Project reveals that corporate self-regulation is not merely a corporate commitment. It can inspire, highlight, sharpen, modify, and even supersede existing regulation. In this case, commitment can actually act as a co-regulation and reaffirm existing standard or lay new standard or precedent."

the issue of securities.[63] Risk assessment is in the core of due diligence process and in corporate law due diligence often relates to commercial acquisition of a company or assets. The content of due diligence varies according to the case at hand, but it can include the examination of legal, tax and financial structure and compliance of a corporation involved in the transaction.[64]

In the sphere of international law, due diligence has been recognized as the state's duty to prevent and punish the harm caused by private actors, such as corporations. This has already been discussed in connection with the state's duty to protect in chapter 2.1.2. Therefore, interest can be shifted to the corporation's obligation of human rights due diligence. Due to the increasing concern with the protection of human rights vulnerable to being violated by corporations, it is not enough that states conduct due diligence, but due diligence has become the cornerstone of developing international legal framework to regulate corporations' actions in connection with human rights.[65]

Human rights due diligence differs greatly from the original use of due diligence in corporate activities. The key aspect to understand is that HRDD does not actually focus on human rights risks, but on human rights impacts.[66] Thus, HRDD's aim is not to avoid liability by flagging risks, but to understand the corporation's harmful human rights impacts and to change the corporation's operations where needed according to the findings. Furthermore, HRDD is an on-going and dynamic process, unlike corporate due diligence that is oftentimes linked to a specific transaction.[67] Corporation's operations change over time and the human rights due diligence process needs to follow the changing business activities.

Despite these differences, the human rights due diligence establishes a link between corporate law and human rights law that was thought not to exist.[68] As a result of the common terminology of due diligence, human rights policy makers and corporate representatives

[63] Spedding 2004, p. 3.
[64] *See* Lambooy 2010, pp. 415-416.
[65] Martin-Ortega 2013, p. 50.
[66] McCorquodale and others 2017, p. 199.
[67] Interpretive Guide 2012, p. 6. The Office of the United Nations High Commissioner for Human Rights has defined HRDD as "an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights".
[68] Lambooy 2017, pp. 404-405.

speak better the same language and can define a process which both sides understand. Out of the instruments of international law, the UNGPs have greatly promoted the transition of due diligence that corporations were accustomed to performing in commercial transactions into the sphere of human rights.[69] However, the UNGPs do not yet pose a legal obligation to conduct a due diligence process in any manner, so a question prevails: is it enough to regulate human rights due diligence at international level in voluntary instruments? To answer the question, the focus is further directed to the UNGPs and the assessment of the voluntary HRDD regime they provide.

[69] McCorquodale 2009, p. 392.

3 EVALUATION OF HUMAN RIGHTS DUE DILIGENCE IN THE UN GUIDING PRINCIPLES

3.1 Background of the UN Guiding Principles

To better understand the significance of the UNGPs to the human rights due diligence discourse, a short review of their background is presented. After all, before the appointment of professor John Ruggie as the Special Representative of the Secretary-General (SRSG) in 2005, there had been several attempts to identify the scope of corporate human rights responsibility and, moreover, its nature as a legal obligation. The Global Compact launched by the former UN Secretary-General Kofi Annan in 1999 had not gathered as much support as had been hoped and its principles were relevantly vague and flexible.[70] Later, "the train wreck in Geneva",[71] i.e. the miserable failure of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (UN Norms), resulted in the UN Human Rights Council (UNHRC) not endorsing the UN Norms which would have assigned legal obligation regarding human rights also to non-state actors, including corporations. Thus, the UN took a new approach and mandated the SRSG to clarify and elaborate the relationship of state duties and corporate responsibilities without establishing binding international obligations or changing the current state of international law.[72]

The first achievement of Ruggie was the UNHRC's unanimous approval of the Protect, Respect and Remedy Framework (Framework) in 2008. The Framework outlines three responsibilities that complement each other: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The mandate of the SRSG was further continued to operationalize the Framework and he succeed in the given three years to present the Guiding Principles on Business and Human Rights, which were endorsed by the UNHRC in June 2011. The UNGPs are built on the foundation of the Framework, and the 31 Principles are divided under the three responsibilities presented in the Frame-

[70] *See, for example,* Johnson 2010.
[71] Ruggie 2008, p.1. A representative from a developing country said to Ruggie: "We've had a train-wreck; your job is to get the train back on track."
[72] UN Commission on Human Rights 2005.

work, namely being "the State Duty to Protect Human Rights", "the Corporate Responsibility to Respect Human Rights" and "Access to Remedy". The relation between the Framework and the UNGPs is, as explained by Ruggie, that the Framework addresses the "what" and the UNGPs address the "how".[73]

All in all, the UNGPs have received much praise for being "the first authoritative global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity for the first time".[74] The hard work of the SRSG resulted to the wide approval from both governments and corporate world, and, despite the improvements that are suggested later, the UNGPs undoubtedly represent a huge improvement from previous attempts to identify the standards of corporate responsibility for human rights.

3.2 Corporate Responsibility to Respect and HRDD in the UNGPs

Contrary to the state's duty to protect, the UNGPs address corporations' obligations through the term responsibility. The different wording is intentional, since the UNGPs want to highlight the prevailing doctrine that international law imposes direct obligations onto states, not corporations.[75] The UNGPs also reserve the term violation for states, whilst risks and impacts are used in connection with corporate actions. This further emphasizes that UNGPs do not wish to diminish any of the state's duties, but the corporate responsibilities exist separately from the legal duties of the state.[76]

The corporate responsibility presented in the UN Guiding Principles 11-21 encompasses two areas: negative and positive responsibility. The starting point is that corporations should respect human rights, i.e. they have a negative responsibility to avoid infringing on the human rights of others.[77] However, abstaining from doing harm is not sufficient. The positive responsibility is emphasized in the UNGPs and most of the principles regarding corporate responsibility are devoted to the requirement for corporations to have in place policies and processes, i.e. human rights due diligence, in order to meet their responsibility.[78] In addition, the UNGPs go even further and require that corporations

[73] Ruggie 2011a, p. 129.
[74] OHCHR, Business and Human rights Overview.
[75] Ruggie 2011a, p. 9; Wheeler 2015, p. 761.
[76] UN Guiding Principles 2011, p. 13.
[77] UN Guiding Principles 2011, Principle 11.
[78] UN Guiding Principles 2011, Principle 15.

"seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts".[79] Thus, corporations' positive responsibility regarding due diligence is also extended in certain situation to the actions of third parties, such as subsidiaries and suppliers, with whom the corporations are connected.

Despite HRDD's centrality to the UNGPs, it is not defined in the Principles. Principle 15 only provides that the policies and processes that the corporations should have in place include "a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights".[80] Furthermore, Principle 17, the key principle regarding HRDD, states that human rights due diligence process should include "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed".[81] Later, these two principles were put together in the UN Guiding Principles Reporting Framework's (Reporting Framework), that was introduced to provide guidance for corporations to report on how they respect human rights, definition of HRDD:

> "[Human rights due diligence is] an ongoing risk management process that a reasonable and prudent company needs to follow in order to identify, prevent, mitigate and account for how it addresses its adverse human rights impacts. It includes four key steps: assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed."[82]

Thus, the concept is defined through the actual steps that companies are required to take. More precise definition might not even be feasible, since the scope of HRDD that is expected of a corporations is context specific.[83] Even though the UNGPs apply to corporations regardless of their size, sector, operational context, ownership and structure, the scope of the HRDD depends on these factors, [84] as well as on the risk of severe human

[79] UN Guiding Principles 2011, Principle 13(b).
[80] UN Guiding Principles 2011, Principle 15(b).
[81] UN Guiding Principles 2011, Principle 17.
[82] Reporting Framework 2015, p. 110.
[83] McCorquodale and others 2017, p. 199.
[84] UN Guiding Principles 2011, Principle 14.

rights impacts.[85] Furthermore, it is recognized that the scope of HRDD may change over time since the business operations of a corporation may evolve.[86]

Therefore, to understand what is expected of companies regarding HRDD, focus is shifted on the process of HRDD presented in the UNGPs. Principles 18-21 elaborate HRDD's essential components: analyzing human rights impacts and consulting stakeholders (Principle 18), addressing and mitigating adverse impacts with appropriate actions (Principle 19), tracking the response to the impacts (Principle 20), and communicating to stakeholders how the impacts have been addressed (Principle 21). The commentaries of these principles provide corporations valuable insight on how to comply with them. Furthermore, a separate Interpretive Guide on the Corporate Responsibility to Respect Human Rights (Interpretive Guide) gives "additional background explanations to the Guiding Principles to support the full understanding of their meaning and intent".[87] In practice, as listed by Robert McCorquadale and others, human rights due diligence has been identified to include, for example, the following components:

- "initial identification through human rights impact assessment, desktop research or gap analysis, perhaps followed or complemented by interviews;
- assessment of human rights risks, including risks to rights-holders;
- prioritization of human rights issues;
- development of action plans;
- strategic direction at the board level;
- cross-functionality: steering groups, working groups, interaction between relevant functions;
- integration of human rights into internal compliance mechanisms, scoring and tools;
- translation and application of human rights to apply to each function;
- inclusion of HRDD requirements in contractual provisions;
- having codes of conduct and operational policies;

[85] UN Guiding Principles 2011, Principle 17(b).
[86] UN Guiding Principles 2011, Principle 17(c). *See also* McCorquodale and others 2017, p. 199. These are the factors that were also included in the analysis of the differences of human rights due diligence and corporate due diligence.
[87] Interpretive Guide 2012, p. 3.

- providing training to employees (and in some cases to other stakeholders); and
- ensuring that there are effective grievance mechanisms."[88]

Although the above-mentioned components are applied very differently within each corporation, the approach to HRDD has been found to be surprisingly similar across different sectors and corporate structures.[89] This further emphasizes the meaning of HRDD as a tool that brings together the human rights and corporate world.

Furthermore, HRDD presented in the UNGPs is in line with the prevailing doctrine that separates international obligations between states and non-state actors.[90] When corporations are asked to have in place human rights due diligence policies and processes, the UNGPs on the other hand ask states to "provide effective guidance to business enterprises on how to respect human rights throughout their operations" as part of the state's duty to protect human rights.[91] This is further elaborated in the commentary to mean that states should "advise on appropriate methods, including human rights due diligence".[92] States have, even before the UNGPs but more so after them, started to regulate HRDD in their national laws. In practice, this has taken place by states implementing National Action Plans (NAPs) as encouraged by the UN Working Group on Business and Human Rights (UNWG).[93] NAPs are hoped to, among others, include provisions that state the need for corporations to respect human rights in line with the UNGPs, such as implementing human rights due diligence policies and processes.[94] HRDD actually is the only obligation in the sphere of business and human rights that may be found both in the domestic regulations and in the international mechanisms.[95] Therefore, it seems evident that HRDD will continue to develop both nationally and internationally as the most promising tool to involve corporations in the protection of human rights.

Undoubtedly, the UNGPs have earned their praise regarding enhancement of business and human rights especially by properly bringing the human rights due diligence on the

[88] McCorquodale and others 2017, pp. 223-224.
[89] Ibid.
[90] Dhooge 2008, p. 488.
[91] UN Guiding Principles 2011, Principle 3(c).
[92] UN Guiding Principles 2011, p. 5.
[93] *See* UN Working Group on Business and Human Rights 2016.
[94] UN Working Group on Business and Human Rights 2016, p. ii.
[95] Heasman 2018, p. 186.

international and national tables. Nevertheless, the UNGPs remain merely voluntary principles, and a clear decision was made not to establish binding international obligations to corporations and, consequently, not to change the current state of international law. This leaves room for critique and questions whether the UNGPs are a sufficient international source for the protection of human rights from corporate violations or whether there is a need for a binding international treaty to regulate business and human rights. Therefore, the strengths and weaknesses of regulating HRDD through the UNGPs are assessed next.

3.3 Strengths and Weaknesses of Regulating HRDD through the UNGPs

3.3.1 Strengths of the UNGPs

The UNGPs have received great success among governments and corporations. They managed to create innovative and new approach to business and human rights but at the same time they rely on existing structures and regulation. This made them less dramatic and controversial compared to, for example, the UN Norms. Their wide approval did not turn up from nothing, but several factors explain their strength.

First of all, at a general level, non-legally binding international law instruments have certain advantages. They are often flexible as states do not need to go through a ratification process unlike with treaties. Also, states may more easily find consensus on the voluntary instrument's content as well as agree on more detailed provisions, since the consequences of non-compliance with such instruments are very limited.[96] Thus, voluntary instruments may encourage unanimous approval when the states do not feel that their sovereignty is threatened.

One of the reasons why specifically the UNGPs succeeded as a non-legally binding international law instrument, was that Ruggie emphasized the importance of including all stakeholders in the process and he conducted international consultations around the world to achieve consensus between states and corporations.[97] The consultations included four-

[96] Boyle 2006, pp. 142-143.
[97] Ruggie 2011a, p. 128.

teen multi-stakeholder consultations on five continents as well as two dozen research projects that produced over a thousand pages of documentation.[98] Ruggie's thorough research helped him understand the complex business world, which further resulted in attaining the approval of corporate actors to the UNGPs. The UNGPs highlight that one-size does not fit all and take into account the special characteristics of corporations. This is done, for example, by addressing the corporate responsibility not only with human rights language but also business language, such as due diligence.

It is also highly positive that the UNGPs do not limit their application to a certain type of corporations but apply to all corporations regardless of their size and other indicators.[99] The responsibility to respect human rights applies fully and equally to all corporations.[100] Therefore, the UNGPs have importantly noticed that also small and medium-sized corporations may have severe human rights impacts. Naturally, the scale of the means through which corporations meet their responsibilities, such as the scope of the human rights due diligence, needs to be proportional to individual factors, such as size and scope of human rights impacts, but the starting point is that all corporations need to take into account the possible consequences of their actions to human rights.

By bringing together the corporate law and human rights law, the greatest strength of the UNGPs is, thus, their contribution to the development of the new norm that corporations should respect human rights and be responsible for the impacts of their actions.[101] The public debate on the matter has supported the calls for companies to act in accordance with the principles. Therefore, even without a judicial compulsion, some of the corporations have taken measures to implement human rights due diligence to assess their human rights impacts. The emphasis on the demands of surrounding society is understandable in light of the fact that the UNGPs did not wish to change the current situation where there are not direct international legal obligations for corporations regarding businesses and human rights. In fact, looking already at the Interim Report of the SRSG from 2006, the basis for corporate responsibility has been built on *the social expectations* towards businesses: "companies are constrained not only by legal standards but also by social norms

[98] Ruggie 2008, p. 2.
[99] UN Guiding Principles 2011, Principle 14.
[100] UN Guiding Principles 2011, p. 15.
[101] ICHRP 2002, p. 9.

and moral considerations", and also by "what their internal and external stakeholders expect of them".[102] This notion continued all the way to the final versions of the Framework and the UNGPs, which state that corporations must respect human rights because it is the prerequisite to continue their social license to operate.[103]

3.3.2 Weaknesses of the UNGPs

3.3.2.1 Abstract Standards and Fabricated Consensus

To begin the conversation of the weaknesses of the UNGPs, I will continue where I left with their strengths. There is an evident problem in the fact that the UNGPs solely base the corporate responsibility on social expectations without any actual interference from legislation, since rights based on expectations may not be demanded by the right-holders nor may there exist remedies for rights without legal force.[104] This has also been noted by David Bilchitz, who says that the UNGPs may not simultaneously refer to human rights instruments as a source of social expectations and deny their legally binding nature.[105] Bilchitz continues with an important notion that even if it was acceptable to base the human rights obligations of corporations merely on social exceptions, it is impossible to determine what social expectations require in the globalized world that has competing interests and ideologies.[106] Abstract standards need to be linked with concrete contexts or otherwise the concrete meaning of human rights protection required from corporations is weakened significantly.

The abstract nature of also other standards and terms in the UNGPs poses further problems. Even though the UNGPs were praised for bringing together the business and human rights in a way not seen before, they failed to define terms that were used and left varieties of issues untouched. Therefore, uncertainty remains on both sides of the table since, when not clearly defined, the important terms of human rights may be unfamiliar to corporations and, likewise, the complex corporate world terms may not open up for human rights policy makers.[107] For example, as was already stated before, the UNGPs heavily lean on

[102] UN Human Rights Council 2006, paragraph 70.
[103] Protect, Respect and Remedy Framework 2008, paragraph 54.
[104] Protect, Respect and Remedy Framework 2008, paragraph 13.
[105] Deva – Bilchitz 2013, p. 119.
[106] Deva – Bilchitz 2013, p. 121.
[107] Heasman 2018, p. 96.

human rights due diligence but they do not define the concept. Furthermore, even if a legislative text needs to keep a level of abstraction, it still needs to provide reasonable answers to the core questions it handles. The UNGPs do not succeed in this by leaving the true content of, for example, "appropriate steps" and "appropriate action" regarding the regulation of corporate activity unelaborated.[108]

In addition, the alleged wide consensus of the UNGPs does not appear to be so wide when examined more carefully. Especially some of the non-governmental organizations (NGOs) have presented severe doubts about the UNGPs. The Human Rights Watch has criticized the way the UNGPs merely remain the *status quo*, because it upholds "a world where companies are encouraged, but not obliged, to respect human rights".[109] Also, the greatest worry of the NGOs has been the lack of effective remedies for victims and the difficulties regarding state obligation to prevent violations committed by corporations outside their territory.[110] Surya Deva has raised the concern that, despite Ruggie's extensive consultations, the SRSG did not, in the end, let all stakeholders' opinions have an impact on the outcome of the UNGPs, the core of which was actually determined beforehand for the preponderant part by the SRSG and his mandate.[111] It seems that, in order to satisfy the business sector, some of the more controversial aspects of the debate were left unaddressed and the SRSG took the differences expressed by corporations much more seriously than the ones presented by less powerful actors, such as some of the NGOs.[112] Thus, it was deemed more important to enhance the generally settled consensus on the state duty of protection and corporate responsibility to respect human rights instead of trying to offer recommendations on more controversial issues such as assessing corporations as duty-bearers.

[108] *See* FIDH 2011.
[109] Human Rights Watch 2011.
[110] FIDH 2011.
[111] Deva – Bilchitz 2013, p. 85.
[112] Ruggie 2011b, p. 119. Ruggie noted in the interview that "[i]f you accommodated everybody you would have nothing left". Furthermore, he stated: "At the end of the day, the instruments that we proposed as part of the Guiding Principles – for example human rights due diligence as a method for companies to identify and address what their adverse human rights impacts might be – have to make sense inside of a company. Otherwise, it is not going to get done."

Similarly, the alleged wide consensus on states' side leaves room for doubts. Even though the UNGPs were unanimously endorsed by the Human Rights Council, for example Ecuador presented serious concerns and stressed the need of binding measures.[113] However, these comments were not included in the final text and, likewise in connection with some of the comments of the NGOs, it seems that the idea of consensus, even a fabricated one, was more important than seriously express the presented concerns. In addition, the support of the states for the UNGPs has not been realized in concrete acts very well. Since the UNGPs heavily lean on the state as the obligor, they must be properly implemented in the national legislations of the states in order for them to have a true effect. However, there has been a rather low turnout of the aforementioned National Action Plans that were hoped to strengthen the states' commitment towards the UNGPs,[114] and the NAPs which have been published are mostly declaratory in nature and do not provide concrete new actions.[115] The examples of some of the most successful NAPs include national due diligence laws, some of which regulate due diligence as the background tool for a mandatory reporting requirement and some of which have due diligence as the main focus further including then some additional reporting obligations.[116] Also, some of the national due diligence responsibilities relate to a specific human rights problem, such as child labor.[117] However, many of the requirements are rather vague and general as well as fail to regulate the actual process of human rights due diligence, which may lead to problems in the interpretation of these laws. Furthermore, national due diligence legislations that pose mandatory obligations on corporations are still rare and, as already demonstrated earlier in this thesis, adhering to national laws does not guarantee that international human rights law is respected by corporations, because human rights laws, let alone the UN Guiding Principles, are not adopted into domestic laws everywhere in the world.

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[113] UNHRC 2011. Mauricio Montalvo from Ecuador commented: "It [Ecuador] would not stand in the way of consensus out of consideration of the five sponsoring countries. Ecuador noted that its delegation had stressed concerns about binding measures throughout the whole process, though its comments were not included in the final text of the resolution. Ecuador noted that the resolution swept aside several issues important for setting up a binding legal framework . . . The absence of a complaint mechanism that people affected by transnational corporations could complain to was important. The Guiding Principles were not binding standards nor did they wish to be; they were simply guidance; they were not mandatory, which was why binding measures were necessary."

[114] *See* OHCHR, State National Action Plans on Business and Human Rights Overview.

[115] Metheven O'Brien 2016, p. 118.

[116] The Swiss, the French and the Dutch legislations focus firstly on due diligence and reporting as an aim to enhance transparency on the issue. The UK Modern Slavery on the other hand focuses first on reporting with an expectation of due diligence required in order to be able to compile a statement on the matter.

[117] Some, such as the UK and the Dutch legislations, attempt to tackle due diligence from a single problem like forced or child labour whilst the Swiss and Dutch regulation has more of a general concept.

3.3.2.2 Omission of Extraterritorial State Obligations and Parent Company Liability in the Supply Chain

Although not the central focus of this thesis, the omission of extraterritorial state obligations is connected to many of the weaknesses presented above and, thus, requires some more in-depth analysis since it is one of the most pressing defects of the UNGPs that requires to be responded to in the future. Corporations may with ever-increasing easiness spread their activities worldwide due to globalization and digitalization, and the question of extraterritoriality concerns especially multinational corporations which have found themselves in a selection of jurisdictions. Consequently, this leads to a situation where corporations more and more have impacts on human rights across the borders of their home state.

The starting point of the issue is that, as a default rule, the doctrine of state sovereignty prohibits states from extraterritoriality regulating multinational corporations over state borders. As the SRSG did not wish to change the prevailing state of international law, this notion remained as the basis of the UNGPs. The commentary of Principle two states that "at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction".[118] Therefore, the UNGPs do not compel states to truly adopt extraterritoriality, and affirm the voluntarism of the UNGPs even towards states when they do not require states to regulate corporate behavior abroad.

The lack of enforcing extraterritorial state obligations leaves one of the biggest issues of business and human rights unresolved, namely the key problem of the protection of human rights in countries where the state is unable or unwilling to regulate and enforce human rights. Thus, the lack of extraterritorial state obligations is also related to the worry regarding the lack of sanctions and enforcement mechanisms, since the UNGPs do not have an effective enforcement mechanism leaving them non-enforceable on the international level. The UNGPs vaguely try to address the situation by asking the corporation to "seek ways to honor the principles of internationally recognized human rights when faced

[118] UN Guiding Principles 2011, pp. 3-4.

with conflicting requirements".[119] The commentary further states that "all business enterprises have the same responsibility to respect human rights wherever they operate".[120] However, even putting aside the voluntary nature of the Principles, the obligation severely loses its teeth by merely asking the corporations to *seek ways* to honor and not directly honor human rights in such conflicting situations, for example having in place human rights due diligence process even though their host state would not require one.

Consequently, corporations are not addressed as duty-bearers in the UNGPs. Because of this, the parent companies also have a limited liability in connection with their subsidiaries and supply chains where the human rights violations occur more often and more seriously even though the UNGPs technically ask corporations to prevent also human rights impacts that are linked to them even if they have not contributed to those impacts.[121] In fact, also the commentary of Principle 19 admits that situations, where an adverse human rights impact is linked to corporation's operations, products or services via its business relationship with another entity without the contribution of the corporation, are more complex and there a multiple challenged especially when the business relationship is crucial to the corporation.[122] The alarming notion in this regard is that, similarly as with the "corporate responsibility to respect", a failure to carry out HRDD does not entail any legal responsibility for the corporation. This means that when international law does not hold a parent company liable for human rights abuses of their subsidiaries, the domestic law will most likely determine where the liability rests.[123] However, many subsidiaries, especially the ones in extractive and natural resource industries where there is a chance of high risk for human rights abuses, are located in developing countries with potentially weak rule of law systems, which leads us back to the problem regarding lack of will or resources to hold corporations responsible for human rights violations.[124] All in all, the

[119] UN Guiding Principles 2011, Principle 23(b).
[120] UN Guiding Principles 2011, p. 25.
[121] UN Guiding Principles 2011, Principle 13(b).
[122] UN Guiding Principles 2011, p. 22, which also defines the term "crucial" in the following way: "A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise's business, and for which no reasonable alternative source exists."
[123] Bernaz 2012, p. 215.
[124] A recent decision of the Court of Appeal in the United Kingdom in *Kadie Kalma & Ors v. African Minerals Ltd & Ors* (2020) serves as an example of an attempt to hold an UK-registered corporation liable for a harm suffered overseas. Despite the growing trend of similar cases where parent companies are sued for the actions of their subsidiaries or third parties, the duty of care for the parent company is hard to find even if the harm would have been foreseeable. Since the UNGPs merely promote risk assessments in human rights, the real actions to mitigate the human rights risks, even if they are identified, remain ineffective.

term due diligence suggests a legal standard in the UNGPs but remains fundamentally a series of good practices without clear legal implications.[125]

3.4 Interim Concluding Observations

It appears that human rights due diligence is gathering consensus among states and corporations as a tool to regulate business and human rights. However, both the due diligence principle of the UNGPs and the national due diligence laws leave a level of uncertainty which leads to problems regarding their interpretation. Furthermore, the UNGPs have serious weaknesses which culminate in the notion that they heavily lean on the state duty to protect without actually requiring that states put in place extraterritorial obligations on corporate responsibility to respect human rights – let alone formulating the legal status of corporations as duty-bearers. The competition across national borders driven by globalization and digitalization creates even greater gaps between the operational capacities of multinational corporations and the regulatory capacities of the states. This emphasizes the need for international solutions since there are states who lack the means or will to regulate nationally corporate responsibility.

The current atmosphere of strong nationalism makes the enhancing of extraterritorial state obligations hard. The United Kingdom's "Brexit" and president Trump with his slogan "Make America Great Again" are pointed examples of the phenomena that is seen in many countries as the raise of populist and nationalist parties. However, extending the existing obligations of states to regulate and control corporations beyond their own borders is not the only way to ensure the liability of globally operating multinational entities. Such liability can be ensured by directly imposing legal human rights obligations on corporations.[126] This option was discarded by the SRSG because the UNGPs wanted to part clearly from the UN Norms that had failed to be adopted. However, especially the NGOs presented the need to oblige, not only encourage, the corporations to respect human rights. In practice, this means that the positive obligation for corporations to have in place a human rights due diligence process needs to be strengthened.

[125] Deva – Bilchitz 2013, pp. 60-61.
[126] Deva – Bilchitz 2013, p. 272.

This need is at the moment being addressed by the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) that is in the middle of the process of drafting a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (hereinafter referred to as the "proposed treaty" or the "binding treaty"). The next chapter will focus on the proposed treaty and I will analyze if it could answer to the worries presented about the UNGPs. It is important to emphasize that international soft law and mandatory international law are not in conflict and drafting this treaty would by no means make the work achieved in the UNGPs vain. On the contrary, the international community has a common goal to enhance the corporate responsibility for their human rights impacts, and the different instruments should complement each other to achieve the goal.

4 MANDATORY HUMAN RIGHTS DUE DILIGENCE THROUGH THE PROPOSED TREATY

4.1 Background and Process of the Proposed Treaty

June 2011	The UNGPs were adopted unanimously by the UNHRC
September 2013	Ecuador called for a new binding treaty to be negotiated
June 2014	Ecuador's resolution on a binding treaty was adopted in the UNHRC
October 2015	The first session of the OEIGWG
October 2016	The second session of the OEIGWG
September 2017	The Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights
October 2017	The third session of the OEIGWG
July 2018	Zero Draft of the Legally Binding Instrument
October 2018	The fourth session of the OEIGWG
July 2019	Revised Draft of the Legally Binding Instrument
October 2019	The fifth session of the OEIGWG
February 2020	Written comments of the Revised Draft were invited to be submitted until the end of February 2020

Table 1. To summarize the process of the proposed treaty so far, the timeline above presents the events relating to the binding treaty initiative.[127]

[127] Modified version of the table in European Parliamentary Research Service 2017, p. 3.

Although the UNGPs had formally been adopted unanimously, dissatisfaction with the level of responsibility they required from corporations remained at least among some of the states and NGOs. Ecuador was one of the countries that most vocally presented their concern about the non-binding nature of the UNGPs, but their comments were not included in the final text.[128] Thus, it most likely did not come as a surprise when the representatives of Ecuador made a declaration regarding transnational corporations and human rights at the UNHRC already in 2013, only two years after the UNGPs had been adopted.[129] Ecuador proposed the creation of an open-ended intergovernmental working group (i.e. the OEIGWG) with the mandate to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Ecuador received support from South Africa and together, with the signatures from them as well as Bolivia, Cuba and Venezuela, they tabled their resolution with the UNHRC in June 2014. A few days later in the same month, the resolution 26/9 was adopted by the UNHRC and the OEIGWG was established. The resolution did not receive unanimous support but passed by twenty votes to fourteen, with thirteen states abstaining from the vote.

The rejection of the resolution by many of the industrialized members did not bode the easiest start for the OEIGWG's work. Perhaps the most dramatic setback of the first session held in October 2015 was the interruption caused by the EU delegation's objections. The first session was stalled for several hours due to informal consultations regarding the EU delegation's proposals that "(i) there should be an additional panel entitled, 'Implementation of the UN Guiding Principles on Business and Human Rights: A Renewed Commitment by All States', and (ii) 'TNCs [transnational corporations] and other business enterprises' should be changed to 'TNCs and all other business enterprises' in the text of the program of work".[130] It remains unclear whether the EU delegation wished to interrupt the proceedings or merely wanted to highlight some of the complex issues around the topic.[131] Even though their request for the new panel was approved, the EU delegation did not join the remainder of the first session because the proposed amendment to the wording was not made. However, by the second session in October 2016, the EU

[128] *See* Mauricio Montalvo's comment at supra note 108.
[129] *See* Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights and Council, Transnational Corporations and Human Rights 2013.
[130] Lopez – Shea 2015, p. 112.
[131] Heasman 2018, p. 103.

had a more cooperative stance and participated in the negotiations again. The reasons for the critical viewpoint of the EU as well as other resisting stakeholders are presented in more detail later.

After the OEIGWG had been concentrating for the first two sessions on "conducting constructive deliberations on the content, scope, nature and form of a future international instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises",[132] the third session held in October 2017 took into consideration these discussions and focused further on the Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Elements) that had been published by the chairman of the OEIGWG in September 2017. Based on the Elements and all the discussions in the first three sessions as well as several consultations and more than 100 bilateral meetings with multiple stakeholders,[133] the Zero Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Zero Draft) was published in July 2018. Furthermore, the Zero Draft was the main subject of the fourth session in October 2018. The session was very productive, and along with the previous sessions, enabled the preparation of the Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Revised Draft). The Revised Draft was published in July 2019 and it was the subject of the fifth session of the OEIGWG held in October 2019. States and all other relevant stakeholders were invited to submit their additional textual suggestions on the Revised Draft by the end of February 2020, and the new decade brings along high hopes for the proposed treaty.

4.2 The Role and Scope of HRDD in the Proposed Treaty

As the process of the proposed treaty is still on-going, the following analysis must be based on the documentation available at the time of writing this thesis: the Revised Draft and the documents and discussions leading to it, i.e. the Zero Draft and the Elements as

[132] UNHRC, Fifth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.
[133] Report of the fourth session 2019, p. 4.

well as the sessions of the OEIGW and the expert opinions related thereto. A dominant feature of the treaty process has been the vast multiplicity of the issues from which the drafters of the treaty should select the most relevant to the final treaty.[134] Similarly as with the UNGPs, the obligation for corporations to demonstrate human rights due diligence is one of the main points that has been proposed to be included in the treaty along with remedial mechanisms.[135] Addressing HRDD as one of the main tools of also the proposed treaty highlights its importance in the regulation of business and human rights. Thus, it is justified to further direct the focus to the role that HRDD would have in the proposed treaty.

The obligation of HRDD has been developing throughout the treaty process. Already in the first session of the OEIGWG, various NGOs stressed the importance of having mandatory due diligence requirement for corporations, which would include prevention, mitigation and redress for negative human rights impacts.[136] It was also recognized that better access to remedy is the prerequisite for human rights protection, and collaboration on due diligence investigations and enforcement of judgements is needed.[137]

To further elaborate how the proposed treaty could address human rights due diligence, a briefing paper for consultation on the subject was prepared by Robert McCorquodale and Marcos Orellana before the second meeting of the OEIGWG. The briefing paper suggests some of the processes and procedures that could be included in the proposed treaty. One option for the possible treaty provision regarding the concept of HRDD included a reference to the UNGPs: "In the treaty, it could be stated that all human rights due diligence should be conducted according to, at minimum, the international standards of the Guiding Principles."[138] Other option presented the requirement of due diligence in all business contracts and the responsibility of the contracting party for active monitoring.[139] However, the actual concept of HRDD is suggested to be left open to interpretation through case law and legislation due to the context specific nature of HRDD. Furthermore, the briefing paper provides options for a provision related to the elements of human rights

[134] European Parliamentary Research Service 2017, p. 5.
[135] ESCR-Net 2016.
[136] Report of the first session 2016, paragraphs 76, 85.
[137] Report of the first session 2016, paragraphs 76, 103.
[138] McCorquodale – Orellana 2016, p. 2.
[139] Ibid.

due diligence. States should focus on providing clear obligations that require corporations to put in place HRDD, for example, at key stages, such as in connection with changed activities, or on an annual basis at least.[140] The briefing paper also highlights the requirement for free and informed consultation with stakeholders, especially including local communities, and the need for legal consequences when a corporation fails to comply with HRDD obligations.[141]

In the second session of the OEIGWG, most of the delegations agreed that voluntary standards are insufficient, and a binding instrument should set out direct obligations and responsibilities for corporations as well as clarify the steps that corporations should take in that regard.[142] The importance of establishing a mechanism to evaluate corporate HRDD was highlighted, so that no loopholes would be left for corporations to escape their responsibility.[143]

Taking into account the discussions on the two first sessions as well as the expert opinions, such as the aforementioned briefing paper, the Elements further outlined the obligation of human rights due diligence. The Elements placed HRDD under the headline of "Preventive Measures" and introduced HRDD as "different policies, processes and measures that [corporations] need to undertake, as a minimum prudence, according to its capacities, to meet its responsibility to respect human rights".[144] Furthermore, "[i]n this regard, the real added value of this section would be precisely to give a legally binding nature to the adoption of such measures or minimum standards by [corporation]".[145] To answer to the requests regarding concrete and clear guidance on HRDD, the section also listed examples of what the due diligence procedure should include:

- "a risk assessment of human rights violations or abuses in order to facilitate their identification and analysis;
- a procedure of periodic evaluation of subsidiary enterprises throughout the supply chain in relation to their respect of human rights;
- actions aimed at risk reduction;

[140] McCorquodale – Orellana 2016, p. 4.
[141] McCorquodale – Orellana 2016, p. 4.
[142] Report of the second session 2017, paragraphs 25, 29, 75.
[143] Report of the second session 2017, paragraph 75.
[144] The Elements 2017, p. 7.
[145] Ibid.

- an early warning system;
- a set of specific actions to immediately redress such violations or abuses; and
- a follow up mechanism of its implementation, notwithstanding other legal procedures."[146]

The Elements document was the focus of the third session of the OEIGWG, where many delegations welcomed the provision that required corporations to adopt and implement due diligence policies and processes.[147] Furthermore, it was suggested in the session that the provision shall ensure that states implement uniform, minimum standards. Some concerns were raised that this would allow states to exercise extraterritorial jurisdiction improperly, but the chairman Guillaume Long clarified that the due diligence is intended to oblige the parent corporation domiciled in a state and that it is the parent corporation's obligation then to assess risks throughout its supply chain.[148] This is an important notion that should reassure the states fearing to lose their sovereignty should extraterritorial jurisdiction be expanded. In addition, this explanation takes into account the specific character of corporations and does not let them hide behind the corporate structure; even though every company in a group forms their own entity, the parent company has the obligation to extend the due diligence throughout its subsidiaries and supply chain. Transparent human rights due diligence processes in every part of the supply chain enhances also the consumers access to information that they need to influence business habits.[149]

All the previous work of the OEIGWG and the stakeholders led to including the human rights due diligence in the Zero Draft's Article 9 titled "Prevention". In the fourth session of the OEIGWG, the Article 9 was praised to be one of the key articles of the Zero Draft and its focus on prevention was complimented.[150] However, several improvements to the Article 9 were also suggested. As also discussed previously in this thesis, corporate due diligence and human rights due diligence differ greatly, and thus it was emphasized that the Article 9 should consistently refer to human rights due diligence rather than due diligence alone to avoid any misunderstandings.[151] Furthermore, many delegations suggested

[146] The Elements 2017, p. 7.
[147] Report of the third session 2018, paragraph 78.
[148] Ibid.
[149] Report of the third session 2018, paragraph 37.
[150] Report of the fourth session 2019, paragraphs 9, 11, 17, 55, 57.
[151] Report of the fourth session 2019, paragraphs 11, 55.

that the Article 9 should be aligned more closely with the UNGPs, especially so that it covers both national and multinational corporations.[152] Also, contrary views were presented regarding the precision of the Article 9, and especially the unexhaustive list what due diligence should include. Some argued that each state should be let to determine how to best implement the provision, and that it would be more effective if it outlined general standards. Others, including several delegations and NGOs, insisted that even more precision was needed in the text of the provision.[153] Also the overburdening of corporations with administrative obligations in connection with human rights due diligence was on the table. The conversation regarding this aspect revolved around the Article 9(5) which would grant states the possibility to exempt certain small and medium-sized corporations from selected obligations of the provision. Since there is no accepted universal definition of small and medium-sized undertakings, the provision was argued to leave too much in the discretion of states and severely weaken the provision.[154]

Exactly one year after the Zero Draft was published, the chairman of the OEIGWG released the Revised Draft on 16 July 2019. The provision regarding human rights due diligence was relocated in Article 5, though the title remained "Prevention". At this point, it is rather safe to say that the preventive nature shall be the key component of the provision on HRDD in the proposed treaty because it was further emphasized in the fifth session of OEIGWG that "preventing harm in the first place was preferable to attempting to remedy it after the fact".[155] Furthermore, also the experts underlined the need for companies to take proactive actions when conducting human rights due diligence in order to prevent human rights violations.[156] The wording of the Article 5 was amended accordingly to focus more on the conduct than the outcomes.[157] This notion is also emphasized with adding the requirement of meaningful consultations with affected groups to the HRDD measures to be taken, something which was not directly linked in the HRDD steps of the UNGPs.[158]

[152] Report of the fourth session 2019, paragraphs 55, 58.
[153] Report of the fourth session 2019, paragraphs 10, 55.
[154] Report of the fourth session 2019, paragraphs 11, 63.
[155] Report of the fifth session 2020, paragraph 60.
[156] Report of the fifth session 2020, Annex III paragraph 7.
[157] Report of the fifth session 2020, paragraph 59.
[158] Revised Draft 2019, Article 5.3(b).

However, other concerns regarding the article remained mainly the same. The delegations were still divided into those who thought the open-ended list of the measures, which human rights due diligence should as a minimum standard include, was too prescriptive and those who thought it to be too vague.[159] Also, the article still included some ambiguous concepts, such as the "contractual relationships", that were suggested to be changed, in the case of the example to "business relationships", so that the scope of protection would be increased and that the provision would be more in line with the UNGPs.[160] On the other hand, experts praised the inclusion of paragraph 5, which recognizes the issue of undue corporate influence, as well as the removal of exemptions regarding small and medium-sized enterprises in paragraph 6.[161]

To conclude, the article regarding human rights due diligence is in the center of the discussions on the proposed treaty. It is important to notice that the article is still subject to multiple changes and the whole proposed treaty is expected to go through many more draft rounds before its final form. Opposing views remain regarding the content and especially the precision of the article, and the OEIGWG has a difficult task to settle the differences. Some of the biggest issues that prevail are the scope of the corporations and business activities that the proposed treaty covers as well as the level of defence that corporations could acquire based upon showing human rights due diligence. I will pay special attention to these issues on the next chapter when analyzing the praise and critique that the proposed treaty has received.

4.3 Praise and Critique of the Proposed Treaty

4.3.1 Support for a Binding International Treaty to Complement the UNGPs

Before moving on to more in-depth analysis on the proposed treaty, a few general remarks ought to be presented first. Already at this point of the treaty process, the fear that the proposed treaty would completely sideline the UNGPs has proven to be unjustified.[162] The OEIGWG took into account the comments asking for better compatibility with the

[159] Report of the fifth session 2020, paragraph 60.
[160] Report of the fifth session 2020, paragraph 62.
[161] Report of the fifth session 2020, Annex III paragraph 8.
[162] *See* Paul 2015.

UNGPs, and the Revised Draft includes an explicit reference to the UNGPs in the preamble.[163] Also, the Deputy High Commissioner emphasized in her opening statement in the OEIGWG's fifth session that "the treaty process should not be used to undermine or stop action on the implementation of the UNGPs, at least until such time as a stronger normative framework is in place".[164]

Even though international soft law instruments, such as the UNGPs, have certain strengths,[165] there are clear advantages in complementing them with the "stronger normative framework". In contrast to the current international soft-law regulative field, the most obvious positive impacts of a proposed treaty would include answering to problems related to the enforcement, remedies and overall compliance with human rights norms.[166] The International Council on Human Rights Policy (ICHRP) has highlighted the following advantages of hard law, and especially international hard law, in relation to corporations and human rights. Firstly, hard law instruments have the efficiency that the voluntary norms lack due to their voluntary nature, and create means to ensure that to corporations act accordingly.[167] Secondly, the increasing amount of corporations with transnational activities requires them to be regulated at international level since their growing powers exceed the ability of individual states to regulate them effectively.[168] Furthermore, it may be granted that soft law can be helpful in the beginning of the drafting process of a proposed treaty in creating consensus among different actors. However, especially when creating entirely new obligations or otherwise establishing significant changes in international legal order, such as the human rights duties on companies, soft law is not sufficient regulation on its own, but the new rules require the binding force of a treaty.[169]

Throughout the treaty process, several delegations have emphasized the need for international legal developments in the session of the OEIGWG.[170] The supporting parties have cited several objectives of the proposed treaty, among others the following:

[163] Revised Draft 2019, Preamble: "*Noting* the role that the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework have played in that regard[.]"
[164] Report of the fifth session 2020, paragraph 2.
[165] *See* chapter 3.3.1.
[166] Heasman 2018, p. 14.
[167] ICHRP 2002, p. 8.
[168] ICHRP 2002, p. 11.
[169] Boyle 2006, p. 146.
[170] Report of the fifth session 2020, paragraph 10.

- "increasing legal certainty and predictability to help ensure a level playing field;
- enhancing prevention and mitigation of business-related human rights abuse;
- improving access to remedy for those harmed;
- closing existing gaps in protection and international law; and
- increasing coordination amongst members of the international community."[171]

The prevailing question that follows these objectives is whether the proposed treaty has the means to achieve these goals and, most importantly, close the gaps that remained after implementing the UNGPs. The proposed treaty did not receive unanimous support right from the start, and many predicted in the beginning of the process that the proposed treaty may face the same destiny as the UN Norms. However, the further the process continues, the more positive the participants have become about finding a consensus. The work is not done yet, but the direction is right. Thus, the following analysis is concentrated in addressing the most pressing issues the proposed treaty has to assess, with special emphasis on the matters that are most connected with corporations' obligation to have HRDD in place.

4.3.2 Scope of Corporations Covered by the Proposed Treaty

The most controversial point of the debate since the very first session of the OEIGWG has been the scope of corporations that the proposed treaty should cover. Even though the mandate of the OEIGWG would seem to include also "other business enterprises" in addition to the transnational corporations, the footnote on the preamble of the resolution 26/9 has caused unclarity. The footnote states that "'[o]ther business enterprises' denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law".[172] Thus, presumably to gain enough votes to pass, the footnote in the resolution narrowed the scope of corporations only to those with business activities of transnational character.[173]

[171] Report of the fifth session 2020, paragraph 10.
[172] UN General Assembly resolution 26/9, Preamble.
[173] Lopez – Shea 2015, p. 113.

The exclusion of local corporations was one of the main reasons why the EU and also representatives from many industrial states were first reluctant to support the treaty process. Especially the EU was very determined to ensure that the scope of the proposed treaty should not be limited to transnational corporations, and it proposed to add the word "all" before "other business enterprises" in the beginning of the first session of the OEIGWG but the proposal did not receive sufficient support.[174] Those opposing said that the EU's suggestion would change the mandate of the OEIGWG, and some argued that an international treaty that regulated purely domestic companies would infringe states' sovereignty.[175] Additionally, some states claimed that only multinational corporations should be regulated at international level since they may use complex corporate structures to hide in different jurisdictions but domestic corporations are always subject to local laws.[176]

However, these arguments have several shortcomings and the development of the proposed treaty has shown signs of including both domestic and international corporations into the scope of the treaty. Both the corporations and the NGOs have agreed that the treaty should cover both multinational and domestic corporations, although their reasons differ to some extent. The most obvious reason why the argument that only multinational corporations should be covered by international treaty and domestic law should regulate domestic corporations is weak is the fact, which has been repeated also in this thesis many times, that many states lack the will or capacity to regulate business and human rights domestically. Many human rights abuses are committed by corporations at the domestic level and the strengthening of the protection of human rights throughout global supply chains requires a wide scope of application.[177] If the proposed treaty excluded domestic corporations, it would create an absurd situation where e.g. local clothing factory owners would not be held responsible for infringing workers' rights but the multinational garment purchasing corporations would.[178] Furthermore, corporate structures may be easily structured as acting through locally incorporated subsidiaries which would enable corporations

[174] Report of the first session 2016, paragraph 13.
[175] Report of the first session 2016, paragraph 14.
[176] Lopez – Shea 2015, p. 114.
[177] Report of the fifth session 2020, paragraph 40.
[178] European Parliamentary Research Service 2017, p. 7. A real-life example of such situation is the Rana Plaza disaster where more than 1,100 people were killed due to a garment factory collapse in Bangladesh in 2013. European Parliamentary Research Service states in its report that "[i]f this principle were applied

to avoid falling within the scope of the proposed treaty if its scope remained limited. What is even more important, the victims of human rights infringements do not care and often even do not know whether they are harmed by a multinational or domestic corporation.[179] Thus, the focus should be in ensuring that all corporations have adequate processes in place in order to identify and prevent human rights abuses in their activities, whether with transnational or local character.

The EU, as well as many industrial states and corporations agree to a great extent with the above-mentioned arguments in favor of expanding the scope of the proposed treaty, but they have more business-centric reasons for aiming towards the same goal. The EU, for example, argued that limiting the scope of the proposed treaty to multinational corporations would put numerous European corporations operating in third countries at a competitive disadvantage compared to their local competitors, which would not have to comply with the obligations of the proposed treaty.[180] Furthermore, the international business community commented in their response to the Zero Draft, that should the proposed treaty exclude domestic companies, it also excludes state-owned corporations that operate domestically.[181] This is especially concerning regarding the ongoing trend towards public-private partnerships in delivering public services.[182]

Therefore, several stakeholders warmly welcomed the expanded scope that the Revised Draft brought on the table.[183] Perhaps since it was forcefully argued, among others, by the International Commission of Jurists, that "a footnote in the preamble could not limit the scope of discussion or the outcome of negotiations",[184] the OEIGWG could with confidence widen the scope of corporations covered by the proposed treaty, which had been one of the major concerns regarding the Zero Draft. A compromise was reached that the application of the treaty is not limited on the transnational activities but applies to all business activities with merely special emphasis on the transnational activities. Thus, for example, the human rights due diligence requirement applies, according to the Article

to the Rana Plaza disaster, transnational garment purchasing corporations would be responsible, while local factory owners would not, which is clearly absurd".
[179] Report of the fifth session 2020, paragraph 41.
[180] European Parliamentary Research Service 2017, p. 7.
[181] ICC 2018, p. 11.
[182] The omission is put into perspective when considering that in 2014 state-owned corporations represented 22.8% of Fortune Global 500 companies, with $389.3 billion of profit and $28.4 trillion in assets.
[183] Report of the fifth session 2020, paragraph 41.
[184] Lopez – Shea 2015, p. 114.

5(2) of the Revised Draft, to "all persons conducting business activities, including those of transnational character".[185] This makes the proposed treaty also more in line with the UNGPs. More importantly, taking into account domestic small and medium-sized corporations as well as state owned corporations, the treaty avoids doing the same mistake that the international law has been criticized about: focusing only on the transnational corporations.[186] Nevertheless, even though the explicit exemption of small and medium-sized corporations was removed, the Revised Draft recognizes that one-size does not fit all corporations and allows in the Article 5(6) that "States Parties may provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens".

4.3.3 Level of Defence for Corporations in the Proposed Treaty

In corporate law, due diligence reviews are often conducted in order to gain statutory defence against civil claims or criminal charges towards the company or corporate officials.[187] To defend itself, the corporation must show that it took all reasonable steps or applied the necessary due diligence. However, in connection with human rights due diligence, the starting point has been so far, that HRDD is not meant for corporations to avoid liability.[188]

Thus, under the prevailing interpretation of international HRDD standards there would be no defence available for corporations that have undertaken human rights due diligence. The background for choosing this option might be that it prevents corporations hiding behind the excuse of not being aware of the actions of third parties, for example their subsidiaries or suppliers. However, this may lead some corporations to not undertake HRDD in the fear that HRDD process will uncover human rights impacts and violation which will make the corporations liable for them.[189] On the other hand, Lia Heasman has argued that this might not be the case based on the notion that the adverse human rights

[185] Revised Draft 2019, Article 5(2).
[186] Johns 2016, p. 638.
[187] For example, Canada and the Netherlands both have a due diligence defence in place for strict liability crimes. *See* McCorquodale and others 2017, pp. 203-204.
[188] UN Guiding Principles 2011, p. 19. The commentary of Principle 17 states that " business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses".
[189] Heasman 2018, p. 183.

impacts are hoped to decrease through HRDD since corporations may revise them more quickly when they are more aware of them.[190] In addition, she gives an example of the United States Alien Tort Statute (ATS), where there may be found a connection between the lower litigation costs and due diligence, when the corporation has been able to demonstrate that adequate due diligence has been undertaken and use the HRDD as defence against claims under ATS.[191]

Nevertheless, without going into detail with the specific problems with the ATS, it is only one country's domestic law and the international HRDD standard still disregards the possibility of defence in connection with HRDD. Furthermore, the decrease of adverse human right impacts may not be achieved if the corporation never undertakes HRDD in the first place. The current international HRDD standard leans on too heavily on the underlying expectation that all corporations want to act ethically, even though amongst them are corporations that do not prioritize avoiding adverse human rights impact. Therefore, the voluntary nature of HRDD does not benefit either of the parties since it does not give the corporations any defence if they have conducted HRDD adequately but at the same time it does not oblige corporations to conduct any due diligence which leaves human rights impacts unnoticed and victims without remedies.

Therefore, the proposed treaty should try to balance the mandatory due diligence with a level of defence for corporations regarding the action of third parties. There is a difference in the responsibilities on a corporation between its own actions causing or contributing to adverse human rights impacts and the actions of third parties, where the corporation should prevent or mitigate adverse human rights impacts.[192] Thus, as McCorquodale and Orellana present in their briefing paper, the proposed treaty "might include a provision that allowed a business enterprise that had conducted appropriate human rights due diligence to rely on it as a defence to a claim, though only where a third party has caused adverse human rights impacts".[193] Such provision would take into account that it may be a too stringent requirement to ask corporation to know all aspects of their complex supply

[190] Heasman 2018, p. 183.
[191] Ibid.
[192] UN Guiding Principle 2011, Principle 13.
[193] McCorquodale – Orellana 2016, p. 5. Also, already in the first session of the OEIGWG "a panelist and multiple NGOs suggested that parent companies should be held liable for subsidiaries' harm unless the parent could demonstrate that it took genuine preventative steps or could not have known about the subsidiaries' actions" (cited as in Lopez – Shea 2015, p. 114).

chain. Experts have also suggested that the burden of proof is primarily on to corporation but when the corporation has established that it has conducted HRDD, the burden of proof should be shifted to the victim to demonstrate that the corporations could have implemented actions that could have prevented the harm.[194] Furthermore, the context specific nature of HRDD allows the different cases to be evaluated based on how close the relationship is between the corporation and the third party violating human rights. The closer the relationship is, the more HRDD can be required.[195]

4.3.4 Directness of Corporate Obligation in the Proposed Treaty

It should be once again emphasized that the states hold the primary obligation to protect human rights. A clear statement regarding this matter was also added to the preamble of the Revised Draft, which explicitly stresses that "the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises".[196] Thus, the feared "responsibility shift"[197] is not on the agenda. Throughout the process it has been clear that the responsibility of states is not diminished even though the proposed treaty would pose direct obligations to corporations to promote human rights.

In the beginning of the treaty process, the Elements proposed direct obligations on corporations. However, this was deemed to be too controversial by many stakeholders, especially states, since corporations do not have an established position as subjects of international public law. Consequently, already in the Zero Draft the OEIGWG chose the traditional international law pathway and did no longer stipulate direct obligations for corporations but emphasizes that only states have legal obligations to make corporations legally accountable. Thus, also the Article 5 of the Revised Draft regarding human rights due diligence poses the obligation on states, not directly on corporations, to ensure that corporations undertake human rights due diligence. Therefore, it seems that the outright direct binding of corporations through an international human rights treaty has been put

[194] Report of the fifth session 2020, Annex III paragraph 7.
[195] Heasman 2018, p. 184.
[196] Revised Draft 2019, Preamble.
[197] European Parliamentary Research Service 2017, p. 8.

aside. The more established international law-making, where the treaty will be implemented and enforced by state parties, is chosen to make it easier for states to join in serious treaty negotiations and, in time, in the proposed treaty.[198]

However, even though the states remain the immediate duty-bearers, the proposed treaty's actual addressees and targets are the corporations. The proposed treaty would importantly acknowledge the responsibility of corporations and require much more proactive and preventive approach from corporations regarding human rights due diligence. Most importantly, the proposed draft sets a mandatory human rights due diligence for corporations, and failure to abide by this obligation becomes a source of liability under national law for the violating corporation.

Nevertheless, some experts have argued that it is not yet clear, based on the wording of the Revised Draft, what legal standards apply and to who, and they have advocated the proposed treaty to clearly impose direct obligations on corporations.[199] Throughout the treaty process, several participants have considered that the proposed treaty should include the principle of direct responsibility of transnational corporations.[200] In my opinion, the OEIGWG abandoned the direct obligation of corporations too easily, as it is justified to argue that corporations actually have a level of international personality. In fact, as proposed already earlier in this thesis, the proposed treaty would have had the chance to be the final key needed in the acknowledgement of corporate subjectivity under international law. Therefore, I hope that the level of directness that the Revised Draft sets on corporations is not final.

4.4 Concluding Remarks on the Key Issues Left for Future Negotiations

The OEIGWG invited states and other stakeholders to submit their additional textual suggestions on the Revised Draft by the end of February 2020. Should the working group remain in the same schedule as before, we might expect a second revised draft on the legally binding instrument in the summer 2020, which would then be the subject of the sixth session of the OEIGWG possibly taking place again in the next October.[201]

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[198] *See* Cassel 2018.
[199] Report of the fifth session 2020, Annex II paragraph 10.
[200] *See, for example,* report of the fourth session 2019, paragraph 47.
[201] Due to the outbreak of the coronavirus COVID-19 pandemic, there might be some delays also in the treaty process. The OEIGWG has informed in their website that "the Chair-Rapporteur will hold a series

The Revised Draft has been complimented to be more coherent, well-constructed and mature text than the Zero Draft.[202] For example, consensus has seemed to be found on the scope of the corporations to which the proposed treaty applies, which was a major issue in the beginning of the treaty process. However, there are still many aspects of the proposed treaty and its articles that require refinement. Especially regarding human rights due diligence, the level of defence for corporations as well as the directness of the corporate obligations are major open issues.

The UNGPs were criticized for not defining some of the important concepts, such as human rights due diligence, clearly enough.[203] The proposed treaty needs to be careful not to repeat the same mistake, since the delegations have presented concerns about the choice of words in connection with several of the articles. Especially in the era of digitalization, corporations may relate to each other in a vast array of ways, and the reference to "contractual relationship" needs to be amended to "business relationship" to cover all relevant relationships, e.g. also equity-based relationships. Using the concepts in a same way brings clarity to, among others, parent/subsidiary relationship, which is one of the most critical part of HRDD.

When formulating the first ever article regarding mandatory human rights due diligence, the working group needs to carefully draft the rules so that they do not cause unintended consequences.[204] This is particularly important considering how fast business is changing. The help of all the participants is required to plan the best ways for corporations to integrate human rights consideration into business planning and operations. The opponents of the proposed treaty have even suggested that the international community is not ready to adopt a business and human rights treaty, since it has not yet worked out how standard business activities, such as trade-offs, setting priorities and managing risks, are dealt with in human rights framework.[205] However, this is exactly why the OEIGWG has to include also the corporate participants in the treaty process and listen to carefully their views on

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of open informal consultations with Governments, regional groups, intergovernmental organizations, United Nations mechanisms, civil society and other relevant stakeholders, as one of the basis for the preparation of the second revised draft legally binding instrument". However, the first scheduled consultation had to be cancelled due to the COVID-19 outbreak and it might be that the two other consultations scheduled for the end of April and May have to be rescheduled too.

[202] *See* Lopez 2019.

[203] *See* chapter 3.3.2.1.

[204] *See* Bradlow 2015.

[205] Ibid.

the content of the final HRDD article. As Steven Ratner has stated, "[w]herever lawmaking occurs, the detailed elaboration of norms must directly involve all interested actors, whether governments, businesses, or human rights groups".[206] In the end, all the hard work regarding the proposed treaty would go for nothing if the treaty is not applicable to the business world in practice. Therefore, the most important issue left for future negotiations is to carefully take into account the characteristics of corporate activities so that the human rights due diligence process which is required from them may be realized.

[206] Ratner 2001, p. 451.

5 CONCLUSIONS

5.1 How Mandatory HRDD Could Benefit Both Sides

It is almost a worn-out cliché that corporations may cause adverse human rights impacts on local communities. However, it seems that this "cliché" needs to be repeated multiple times until we actually see results in business and human rights regulation. In the fifth session of the OEIGWG, many delegations and NGOs provided a powerful reminder on the urgency to prevent and address business-related human rights violations by recalling instances where there had not been accountability for corporations nor remedy for those affected: "environmental and human rights defenders being killed or otherwise attacked, destruction of the climate and biodiversity, pharmaceutical companies exploiting those in dire need of medicine, attacks on indigenous peoples, and abuses in situations of armed conflict".[207] Thus, the impacts are out in the open for everyone to acknowledge. Now the focus should be on finding the way to address such impacts and applying the result to corporations.

The way towards effective corporate accountability mechanisms has been lengthy. There has been a flood of soft law at international level but most of such instruments are subjected to complexities which often relate to their voluntary nature. It is indeed evident that none of the current international instruments are binding in a judicial sense. They rely their efficiency on the voluntary implementations on national level and the morality of corporations, both of which have their own issues. For example, since the UNGPs do not pose direct obligations even to states to have in place national legislation regarding corporate accountability, the NAPs that have been produced so far remain vague and general without actually regulating the process that corporations would need to follow in order to assess their human rights impacts. Furthermore, without clear rules, it is hard for corporations to have in place adequate policies that would cover all necessary aspects in their responsibility for human rights protection.

In this regard, a comprehensive binding international instrument would provide a solution that finally combines the corporate world and human rights in a way that both sides could

[207] Report of the fifth session 2020, paragraph 9.

approve. As a matter of fact, corporations may be more willing to support a binding instrument than activists believe. The Economist has found in a recent study that the overwhelming majority of executives (83%) agree that human rights are a matter for business as well as governments.[208] Furthermore, 71% say that their company's responsibility to respect these rights goes beyond simple obedience to local laws.[209] Therefore, it seems that the time is now right to set up effective human rights systems and processes that deal with human rights impacts of corporations. The proposed treaty is on the right path in terms of providing detailed rules on substantive and procedural matters. A framework treaty would leave too much in the discretion of single states if it only provided some key principles and approaches much like the UNGPs. In order to reach a level playing field, all business enterprises have to follow on some level the same rules around the world.

Such rules are likely to be formed in the shape of a human rights due diligence process. This thesis has showed that human rights due diligence has become to stay as the tool that connects business and human rights. The UNGPs represent a great step forward from previous efforts with clarifying the elements of HRDD. However, a judicial obligation for corporations to have in place HRDD will not happen by states randomly regulating themselves without the involvement of clear international standards. The treaty process has continued where the UNGPs left with HRDD and improves applicability of HRDD in practice by setting a mandatory HRDD. An actual responsibility to assess their human rights impacts leads the corporations into shedding their excuse of lack of knowledge. The corporate world has raised concern of heavy administrative burdens that the mandatory HRDD would pose them. However, HRDD is a context specific process and the requirements are set taking into account each corporations' characteristics. Furthermore, with putting in place reasonable standards applicable to all corporations, the corporation are able to fit them into their business operations. In the beginning, setting up such standards might cause additional expenses and corporations may even need to invest to third party experts to help them. However, in the long run, it pays off to set an effective strategy that takes into account the expectations of business conduct in the field of international human rights law since such strategy can also enhance business stability, productivity and long-term profitability.[210]

[208] *See* Economist Intelligence Unit 2015.
[209] Ibid.
[210] *See* DLA Piper, International Business and Human Rights Overview.

The goal is to make corporations aware of their possible human rights impacts so that they realize which way to amend and mitigate such impacts even before actual violations occur. Understanding human rights impacts and demonstrating respect for human rights may minimize litigations risks but also build a culture of trust and integrity, protect corporations' brand profile and make corporations attractive business partners.[211] The corporations need to take the wheel so that the consumers, investors and shareholders will not be the ones who find out about the corporations' human rights impacts before themselves. Here a comprehensive HRDD process could help corporations, especially multinational corporations who are subject to a diversity of regulations that directly or indirectly regulate their human rights impacts, to comply with the various regulations applicable to their business operations and to address their other potential human rights impacts which are not (yet) addressed by any regulation.[212]

On a final note, both the UNGPs and the proposed treaty have, admittedly, their own advantages and disadvantages. Therefore, it is necessary to continue with a plurality of initiatives in order to show corporations how to pursue effective HRDD to prevent human rights harms.[213] Nevertheless, the *Doe v. Wal-Mart* case that was already presented in the introduction illustrates how things may change with the proposed treaty. It would have been significantly harder for the court to reach the conclusion that Wal-Mart had only reserved a right to inspect, which did not amount to a duty to inspect the working conditions in their supply chain, if there had been mandatory human rights due diligence obligation for Wal-Mart, as the proposed treaty requires.[214]

5.2 Ways to Strengthen the Proposed Treaty and Its HRDD Provision

In the process of drafting the proposed treaty, the Revised Draft has clearly been a welcome and crucial step towards to goal to establish a legally binding instrument in the field of business and human rights. The Revised Draft over-came already most of the most serious objections relating to especially the scope of the proposed treaty and its comple-

[211] *See* DLA Piper, International Business and Human Rights Overview.
[212] McCorquodale and others 2017, p. 204.
[213] *See* Černič 2015.
[214] *See* Angelini 2018.

mentary character in relation to other international instruments, mainly the UNGPs. However, there are still many aspects of the treaty that could be strengthened before the proposed treaty reaches its final form.

One of the most obvious aspects that relate to the binding instrument's nature as an international treaty is that the proposed treaty will need a broad support in order to successfully regulate corporate human rights abuse. Since most of the multinational corporations are domiciled in Western states, the support is particularly needed from the industrialized states – the ones that were the most reluctant to participate in the beginning of the treaty process. On the one hand, it seems that the current state of the world with many nationalist movements might make it impossible to find an international consensus on such controversial matter as business and human rights. On the other hand, digitalization has made the information available worldwide in an unprecedented way and made it easier for various groups to get their voices heard. It might be unfeasible for the states to refrain from conducting a binding business and human rights treaty, especially when also the corporations that they are dependent on are more vocal on enhancing human rights protection alongside the NGOs and private persons.

In order to involve states in the treaty process, compromises have already at this stage been made. Regretfully, it seems that the working group has abandoned the extension of judicial obligations directly to corporations. Still in the Elements corporations were suggested to be recognized alongside the states to have direct obligations through the proposed treaty. However, the obligations in the Zero Draft were only directed to states anymore. This thesis has established that in theory and also in practice it could have been plausible to acknowledge corporations as duty-bearers alongside the states due to their level of international personality. In my opinion, this would have made the treaty stronger since there remain weaknesses in domestic legislations such as lack of human rights safeguards and non-recognition of corporate criminal responsibility. Nevertheless, the proposed treaty marks a great improvement from the non-binding instruments, since it recognizes the duties of corporations under international law in an unprecedented way, even though the states would remain the sole subject of direct obligations.

Thus, one of the greatest improvements of the proposed treaty would be its provision regarding mandatory human rights due diligence. However, in the fast-changing world and business environment, the provision needs to be drafted carefully so that it will not

be already out-of-date when the treaty is enforced. Some of the direst consequences that HRDD needs to be able to cover are connected with digitalization. One aspect is the massive amount of hardware that the technology companies, such as Apple and Samsung, need in developing more and more digital devices. The news articles and NGOs reports have covered stories relating to especially Congo's mining of cobalt which is needed for the lithium-ion batteries in most of the smartphones and laptops.[215] The Washington Post revealed in its article in 2016 that few corporations regularly track where their cobalt comes from, and even though some corporations and the government officials of Congo are aware of the human rights abuses, such as infringement of the right to enjoy just and favorable conditions of work, little has been carried on to enhance the protection of workers on the mining sites. The state's problem is that it is too poor to tackle these issues alone, and so far, many corporations have hidden behind the statement of unawareness while some have claimed to plan to increase scrutiny but with no real results.[216] The more the world shifts to using digitalized equipment, the more the corporations need to develop lithium-ion products and the more the cobalt is dug in the mines. As an estimated 80% of the global trade passes through supply chains,[217] the monitoring of supply chains needs to form an essential part of the mandatory human rights due diligence. The human rights impacts are manageable – now we need to see the speech turn into action.

Another aspect that the mandatory HRDD needs to take into account is related to the digital age and the increasing power of information technology companies. So much of our lives is carried out online that corporations such as Facebook and Google hold massive amount of data on us and have a huge impact on people's human rights, such as privacy and freedom of expression, all over the world. With the great amount of data comes perhaps greater power than corporations from any other industry hold. Access Now, an NGO focused on digital rights, has listed several examples of human rights violations taking place online including already everyday occurrences of data breaches and censorship as well as noticeable bigger incidents such as the Myanmar military's use of

[215] *See, for example,* Frankel 2016 and Amnesty International 2016.
[216] For example, Tesla's director of battery technology Kurt Kelty said to Washington Post that they take very seriously ethically sourcing every piece of their vehicles and that they will send somebody from their company to Congo. However, six month later they told the Post that they are still working on to sending someone.
[217] *See* DLA Piper, International Business and Human Rights Overview.

Facebook to incite genocide.[218] Therefore, it is highly important to ensure that the mandatory human rights due diligence shall cover also human rights online. In this regard, HRDD could include a study of the surveillance practices of a country where the information technology company intends to sell networking equipment to the government.[219]

In addition, the mandatory human rights due diligence will achieve its true potential by focusing on increasing transparency with comprehensive reporting obligations. When the proposed treaty increases legal requirements for reporting, also the demand for greater transparency of these reports will increase.[220] Using an international standard of HRDD reporting also enables the corporations to present the information in a way that is increasingly expected by external stakeholders.[221] Reporting obligation is listed as one of the elements of HRDD in the Revised Draft's Article 5.3(c), but the explicit mentioning of transparency is missing. Here digital solutions should be taken into consideration as providing possible answers for increased transparency. Some have suggested that blockchain-based systems are the way forward to ensure, among others, responsible sourcing in supply chains.[222] Layered blockchain systems would allow corporations to be confident in their sourcing and safely report their supply chain due diligence to governments as well as customers by providing keys to encrypted data without disclosing their supply chains to competitors.[223]

Finally, it should also be kept in mind that the development does not stop in the proposed treaty. The content of what kind of HRDD is necessary under different circumstances is further clarified as case law and business practice develop.[224] The work with business and human rights shall continue and no single instrument alone changes the state of human rights responsibility. However, the reform has been started and binding international obligations regarding corporate human rights due diligence also set pressure on states to actively enhance their national legislations regulating the matter. Thus, I agree with the

[218] *See* Oribhabor – Micek 2019.
[219] *See* Oribhabor – Micek 2019.
[220] McCorquodale and others 2017, p. 221.
[221] Ibid.
[222] *See* Jacobsen 2019.
[223] Jacobsen 2019. MineSpider founder and CEO Nathan Williams describes their innovation in the following way: "One layer of data is data you want everyone to see. Another layer is private data that needs to be registered as unchangeable, which is only available to customers. The third layer is key – we encrypt the first two layers, and then asymmetrically encrypt that with the key of your customer."
[224] McCorquodale and others 2017, p. 201.

United Nations Deputy High Commissioner of Human Rights, who stated in her opening at the OEIGWG's fifth session that "[a] business and human rights treaty is not a cure, but it can and must be part of the solution".[225]

[225] Report of the fifth session 2020, paragraph 2.