

# Connecting Corporate Human Rights Responsibilities and State Obligations under the UN Guiding Principles

## Communication and Human Rights Due Diligence

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*Document Version*

Accepted author manuscript

*Published in:*

Perspectives on Philosophy of Management and Business Ethics

*DOI:*

[10.1007/978-3-319-46973-7\\_17](https://doi.org/10.1007/978-3-319-46973-7_17)

*Publication date:*

2017

*License*

Unspecified

*Citation for published version (APA):*

Buhmann, K. (2017). Connecting Corporate Human Rights Responsibilities and State Obligations under the UN Guiding Principles: Communication and Human Rights Due Diligence. In J. D. Rendtorff (Ed.), *Perspectives on Philosophy of Management and Business Ethics: Including a Special Section on Business and Human Rights* (Vol. 2, pp. 281-295). Springer. [https://doi.org/10.1007/978-3-319-46973-7\\_17](https://doi.org/10.1007/978-3-319-46973-7_17)

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Journal article (Accepted version\*)

## Please cite this article as:

Buhmann, K. (2017). Connecting Corporate Human Rights Responsibilities and State Obligations under the UN Guiding Principles: Communication and Human Rights Due Diligence. In J. D. Rendtorff (Ed.), *Perspectives on Philosophy of Management and Business Ethics: Including a Special Section on Business and Human Rights* (Vol. 2, pp. 281-295). Cham: Springer. Studies in Economic Ethics and Philosophy, No. 2, Vol.. 51, DOI: 10.1007/978-3-319-46973-7\_17

This is a post-peer-review, pre-copyedit version of an article published in *Perspectives on Philosophy of Management and Business Ethics: Including a Special Section on Business and Human Rights*. The final authenticated version is available online at:

DOI: [https://doi.org/10.1007/978-3-319-46973-7\\_17](https://doi.org/10.1007/978-3-319-46973-7_17)

\* This version of the article has been accepted for publication and undergone full peer review but has not been through the copyediting, typesetting, pagination and proofreading process, which may lead to differences between this version and the publisher's final version AKA Version of Record.

Uploaded to [CBS Research Portal](#): February 2019

Published as:

Buhmann K. 2017. Connecting Corporate Human Rights Responsibilities and State Obligations under the UN Guiding Principles: Communication and Human Rights Due Diligence. Rendtorff JD, red. I Perspectives on Philosophy of Management and Business Ethics: Including a Special Section on Business and Human Rights . Cham: Springer. s. 281-295. (Studies in Economic Ethics and Philosophy; Nr. 2, Bind 51).

Karin Buhmann<sup>1</sup>

## **Connecting Corporate Human Rights Responsibilities and State Obligations under the UN Guiding Principles: Communication and Human Rights Due Diligence**

**Abstract:** Taking its point of departure in the UN Guiding Principles on Business and Human Rights (UNGP), this paper discusses the complementarity between Pillars One on the State Duty to Respect and Pillar Two the Corporate Responsibility to Respect Human Rights. It does this through HRDD and communication such as non-financial reporting. HRDD and reporting are discussed as modalities for promoting businesses' self-regulation. They therefore offer a way for States to push businesses towards greater respect for human rights. States may induce learning and self-regulation on human rights among businesses through 'smart mix' hard, soft and incentives measures related to HRDD and reporting. The paper argues that that clever deployment of these measures may bring forth normative guidance and directives for business action respectful of human rights, strengthening Pillar Two through Pillar One activity.

**Keywords:** *Corporate Responsibility to Respect; Guiding Principles on Business & Human Rights; Human Rights Due Diligence; Non-financial Reporting; State Duty to Protect*

### **1. Introduction**

The result of six years work by the United Nations (UN) Special Representative of the Secretary-General ('SRSG') on the issue of human rights and transnational corporations and other business enterprises, the UN Guiding Principles on Business and Human Rights (the UNGP)<sup>2</sup> were endorsed by the Human Rights Council in June 2011. Elaborating the general elements that were set out in the 2008 '*Protect, Respect and Remedy*' Framework for Business & Human Rights ('UN Framework')<sup>3</sup> the UNGP provide operational guidance to States as well as businesses under three Pillars: (1) The State Duty to Protect; (2) The Corporate Responsibility to Respect; and (3) Access to Remedy (comprising state-based judicial and non-judicial remedies as well as operational-level remedies, that is, company level grievance mechanisms). In June 2014, the UN Human Rights Council (HRC) adopted a resolution to set in motion a process towards a binding (hard law)

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<sup>2</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', John Ruggie, A/HRC/17/31, 21 March 2011, endorsed in Res. 17/4 adopted by the Human Rights Council, A/HRC/RES/17/4, (2011) [hereinafter 'UNGP'].

<sup>3</sup> *Protect, respect and remedy: A framework for business and human rights*. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. UN Doc. A/HRC/8/5 (2008), 7 April 2008 [hereinafter 'UN Framework']

instrument to regulate business and human rights.<sup>4</sup> In the line of international law-making, the development of such an instrument may be lengthy. The UNGP may feed into as well as complement a binding instrument for interpretation and for issues not covered by that instrument. Until the possible adoption of a binding instrument, the UNGP constitute the most detailed legal guidance on what responsibilities business organizations have for human rights, and what States must or can do to promote business respect for human rights. The UNGP therefore remain highly relevant to the emergent Business & Human Rights regime.

Under Pillar One the UNGP set out the State's Duty to Protect against human rights abuses by third parties, including business organizations. Pillar One affirms States' existing obligations under international human rights law, and for practical purposes reminds States of the scope of those obligations as well as the range of State bodies they extend to. States may be in breach of their international human rights law obligations when they fail to take proper steps to prevent or punish abuses by the private sector through regulation, policy-making, investigation and enforcement. Pillar Two sets out what the Business Responsibility to Respect human rights entails in terms of obligations, social expectations and the process of identifying negative human rights impacts. The UNGP emphasize three operational types of steps for firms to discharge the responsibility: a policy commitment to human rights, undertaking human rights due diligence, and ensuring remedy.

Because of their focus on two essentially different types of organizations – public and private, Pillars One and Two are often treated as distinct. However, for purposes of implementation of the UNGP, the two pillars have several closely connected elements. These relate particularly to the ways in which governments may promote the Corporate Responsibility to Respect by requiring or recommending specific business activities.

The Corporate Responsibility to Respect comprises both the obligation to comply with applicable law and a responsibility to respect social expectations. There is an implicit connection between the two in that the boundary between what is a compliance obligation and what is social expectation may be narrow. Governments may decide to develop statutory law that changes a social expectation to law. Likewise, issues subject to social expectation in some jurisdictions may be subject to statutes and therefore compliance obligations in others. Implicitly, also, the possibility to change a normative issue from a social expectation into a statutory obligation may shift the focus within the general area of Pillar Two. From the perspective of the UNGP, Human Rights Due Diligence (HRDD) and communication based transparency (including human rights reporting) may be subject to statutory obligations on companies, or to social expectations. Even when subject to statutory obligations, HRDD and/or reporting may in practice have to deal with social expectations. In other words, the boundaries are both in a grey zone and complementary.

From a legal perspective, the responsibility to observe social expectations may be perceived as weaker than the obligation to comply with applicable law. Yet, social expectations may be met with social or market based sanctions, which may potentially be considerable in financial terms.<sup>5</sup> These sanctions may be highly significant to a company, although in practice they are often hidden as general operational costs and therefore not explicit.<sup>6</sup> What is perhaps the most significant weakness

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<sup>4</sup> *Elaboration of an internationally legally binding instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights*, Res. A/HRC/26/L.22/Rev.1, 26 June 2014.

<sup>5</sup> Ethan B. Kapstein (2001) *The Corporate Ethics Crusade*, *Foreign Affairs* Vol. 80 No. 5 (September/October) 105-119.

<sup>6</sup> Ruggie, John G. (2013) *Just Business: Multinational Corporations and Human Rights*. New York: W.W. Norton & Company: 136-138.

of the responsibility to respect social expectations is its weakness in terms of what that responsibility really is. Increasing the persuasive power of the Corporate Responsibility to Respect may require strengthening the call or drive for companies to obtain knowledge of the relevant social expectations in a given context, and to make them raise the bar high rather than set it low. Where the Responsibility to Respect connects to statutory compliance, there is often a close connection to the State Duty to Protect (UNGP Pillar One). Such a connection may also be present, however, in relation to social expectations. This may particularly be the case where a home state seeks to govern businesses beyond its own jurisdiction through encouraging or requiring measures that will make companies consider human rights extraterritorially, for example in terms of social expectations.<sup>7</sup>

HRDD and non-financial reporting have emerged as particularly strong measures on the regulatory agenda of nation states and companies alike in this respect. While these activities are ultimately undertaken by firms, both were emphasized by the SRSG in his recommendations to States to promote business respect for human rights. In general, reporting is reactive in that it recounts and communicates how a company performed in a given period of the past; whereas HRDD is proactive in that this is a process which takes stock of current and future human rights impact and seeks to avoid problems. Both practices may function in reverse as well, as elaborated below.

The first element of the Corporate Responsibility to Respect, that is, the compliance part, connects closely with established legal discourse and knowledge on company law and business obligations within various jurisdictions. The second element, that is, the social expectation element, has been treated in less detail in the legal literature. Yet precisely because social expectations are an important driver for firms for economic reasons related to risk management, investment and market positions, the ‘beyond compliance’ element inherent in Pillar Two complements the objective of Pillar One in important ways that go beyond defining obligations of responsible conduct. This article set out to identify and discuss how governments as regulators in countries where companies have their home states or operate can promote the Corporate Responsibility to Respect by encouraging HRDD and reporting.

The paper proceeds as follows: Section 2 frames the issue by introducing literature and debates on HRDD, firms’ communication and reporting on human rights impact, and the UNGP’s emphasis of policy coherence. HRDD and reporting are introduced as regulatory modalities that may promote businesses’ self-regulation and, therefore, offer a modality for States to push businesses towards greater respect for human rights. Section 3 discusses complementarity between HRDD and communication. Section 4 develops the argument towards complementarity between Pillars One and Two, discussing how States may induce learning and self-regulation on human rights among businesses through ‘smart mix’ hard, soft and incentives measures related to HRDD and reporting. Section 6 concludes.

## **2. Framing the issue**

### **2.1. Human Rights Due Diligence**

The Due Diligence concept applied by the UNGP differs from much other corporate related due diligence. It is focused first and foremost on risks caused by the firm to society (as opposed to risks to the firm). It entails a process that continues as long as the activity/activities to which it is related and even beyond those in respect to remedy. The UNGP apply the term ‘impact’ to distinguish

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<sup>7</sup> Buhmann, K. (2015) Defying territorial limitations: Regulating business conduct extraterritorially through establishing obligations in EU law and national law, in J.L. Cernic and T. Van Ho (eds) *Human Rights and Business: Direct Corporate Accountability for Human Rights*, The Hague: Wolf Legal Publishers: 179-228.

between business related human rights abuse, and States' violations. According to the UNGP, HRDD includes assessing actual and potential human rights impacts, integrate and acting upon the findings, tracking responses, as well as communicating how impacts are addressed. It should cover not only adverse human rights impacts that the firm may cause or contribute to through its own activities but also those which may be directly linked to its operations, products or services by its business relationships. While it may vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations, the process should be open-ended in recognition of the fact that human rights risks may change over time as the firms operations and operating context evolve.<sup>8</sup>

The UNGP's HRDD concept has been adopted by OECD's Guidelines for Multinational Enterprises not only for its new human rights chapter but to most of the issue areas covered by the Guidelines, including labour/industrial relations, environment and anti-corruption.<sup>9</sup> With the possibility of emerging unified jurisprudence among the (currently) 34 OECD and 12 non-OECD State NCPs,<sup>10</sup> the potential complementarity between firms' HRDD and State's obligations have been noted to be of considerable interest to the promotion and protection of human rights.<sup>11</sup> Under Pillar One, States are encouraged to consider whether provisions for HRDD by businesses should be introduced as part of measures to honour their duty to protect.<sup>12</sup> This may form part of States' providing guidance to firms on how to respect human rights throughout their operations, which is also encouraged by the UNGP.<sup>13</sup> The UNGP explicitly note that States' steps to protect against human rights abuses by firms owned or controlled by the State or otherwise closely connected to State agencies through support and services should include requiring HRDD where appropriate.<sup>14</sup>

Despite its potential, HRDD has received somewhat limited attention in the human rights, business ethics and 'Business & Human Rights' literature. On the positive side, linking the new form to well-known business practices deployed as financial risk management has been seen as ingenious ways to generate support among business organizations.<sup>15</sup> The due diligence approach more commonly deployed as a business practice and among corporate lawyers is typically exercised in the context of mergers, acquisitions and related corporate activities. It is geared towards identifying possible financial risks or legal liabilities that may flow from such a corporate activity. Accordingly, while the exercise of due diligence is naturally a process, the conventional due diligence is limited in time to the point of being static: its stops at the time when the decision to undertake the pertinent action is made. When it extends beyond this point of time, at the most it sets out certain specific action to be taken in order to identify such financial risks or legal liability from the perspective of the time when the due diligence exercise was closed. HRDD shares key elements

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<sup>8</sup> UNGP, Principle 17 [hereinafter specific principles will be referred to by their number following UNGP].

<sup>9</sup> *OECD Guidelines for Multinational Enterprises*, Organisation of Economic Cooperation and Development, May 2011, Paris, 25 May 2011, General Policies, II.A.10 and Commentary Para. 14.

<sup>10</sup> Buhmann, Karin (2014) Business and Human Rights: Understanding the UN Guiding Principles from the perspective of Transnational Business Governance Interactions. *Transnational Legal Theory* 6(1) 399-434.

<sup>11</sup> Humberto Cantu-Rivera (2014) *Human Rights Due Diligence: a developing concept for human rights and environmental justice?* 3<sup>rd</sup> UNITAR-Yale Conference on Environmental Governance and Democracy, 5-7 September 2014, New Haven.

<sup>12</sup> UNGP 4, Commentary.

<sup>13</sup> UNGP 3(c).

<sup>14</sup> UNGP 4.

<sup>15</sup> Taylor, Mark (2011) The Ruggie Framework: Polycentric regulation and the implications for Corporate Social Responsibility, *Nordic Journal of Applied Ethics*, 5(1) 9-30; Buhmann, K. (2013) Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the 'Protect, Respect, Remedy UN Framework'. *International Law Research*, Vol. 1(1) 88-101.

with conventional due diligence, but crucially is an open-ended process aiming at reducing adverse impact by the firm on society. Because the latter may also affect the firm adversely through reputation damage and other economic effects, HRDD may also serve as a risk management tool for the firm.

Some authors have received the HRDD concept with interest but noting weak points. It has been argued that the concept proposed by the UN Framework and elaborated with the Guiding Principles reveals a flawed inner logic by confusing two meanings of the due diligence terms: a standard of conduct (to discharge an obligation), and a process (to manage risks to businesses).<sup>16</sup> As indicated, however, that connection may also be precisely why the concept has appealed to business interests. From the philosophically informed business ethics perspective, it has been argued that there is a tension between the philosophical approach to human rights as a ‘perfect moral duty’ and the UNGP’s relative flexibility inherent in human rights due diligence.<sup>17</sup> However, while dilemmas are recognised for practical business application,<sup>18</sup> scholars generally welcome the HRDD approach as a modality for firms to identify and limit adverse impact on human rights. Governmental requirements on due diligence have been noted effective in making firms assess and take account of potential adverse impacts in time to prevent or mitigate those.<sup>19</sup> Confirming the assumption of the potentially important interconnection between Pillars One and Two, business ethics scholars have found that government regulation plays an important role for firms’ application of HRDD.<sup>20</sup> From the legal perspective, analysis of existing and emerging public, public-private and business due diligence initiatives indicate the emergence of a culture of HRDD in the responsible sourcing of ‘conflict-free’ minerals, which may act as a precursor to the hardening of the soft or ‘social expectations’ element of UNGP Pillar Two.<sup>21</sup>

## 2.2. Communication and reporting

To honour their own Duty to Protect, the UNGP note that States should encourage and where appropriate require firms to communicate how they address their human rights impacts.<sup>22</sup> Such communication ranges from informal engagement with affected stakeholders to formal public reporting. The UNGP note that a requirement to communicate as particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights.<sup>23</sup> While some States, have introduced mandatory reporting to provide transparency on sourcing from

<sup>16</sup> Bonnitcha, Jonathan & Robert McCorquedale (2013) Is the concept of ‘due diligence’ in the Guiding Principles coherent? Available at SSRN [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2208588](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208588).

<sup>17</sup> Fasterling, B. and Demuinck G. (2013) Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights, *Journal of Business Ethics* 1-16, DOI 10.1007/s10551-013-1822-z

<sup>18</sup> Lambooy, Tineke (2010) Corporate Due Diligence as a Tool to Respect Human Rights, *Neth. Q. Hum. Rts.*, 28(3): 404-448; Buhmann, Karin (2012) Damned if you do, damned if you don’t? The Lundbeck case of Pentobarbital, the Guiding Principles on business and human rights, and competing human rights responsibilities. *Journal of Law, Medicine & Ethics*, Summer 2012: 206-219.

<sup>19</sup> De Schutter, Olivier, Anita Ramasastry, Mark B. Taylor and Robert C. Thompson (2012) *Human Rights Due Diligence: The Role of States*, published by The International Corporate Accountability Roundtable (ICAR), the European Coalition for Corporate Justice (ECCJ), and the Canadian Network on Corporate Accountability (CNCA).

<sup>20</sup> Hamann, Ralph, Paresha N. Sinha, Farai, Kapfudzaruwa, Christoph, Schild (2009) Business and human rights in South Africa: An analysis of antecedents of human rights due diligence, *Journal of Business Ethics* 87(2), 453-473

<sup>21</sup> Footer, Mary (2015) Human Rights Due Diligence and the responsible supply of minerals from conflict-affected areas: Towards a normative framework?, in Cernic, Jernej Letnar & Tara Van Ho (eds) *Direct Human Rights Obligations of Corporations*, The Hague: Wolf Legal Publishers.\*\*

<sup>22</sup> UNGP 3(d).

<sup>23</sup> UNGP 3, Commentary.



conflict areas,<sup>24</sup> European practices demonstrate that mandatory CSR reporting may also be deployed to induce business self-regulation based on reflection on their impact on society in a more general sense that need not be linked to conflict areas.<sup>25</sup> CSR reporting is an integrated part of some voluntary CSR schemes, and is required of participants in the UN Global Compact in order for them not to be ‘delisted’ (excluded). However, the Global Compact’s practice of counting non-communicating firms among participants counters the argument that de-listing is an effective sanction.<sup>26</sup>

Like general CSR reporting,<sup>27</sup> firms’ human rights reporting may be argued to function along the lines of reflexive law,<sup>28</sup> generating insight into stakeholder views and social expectations as well as the firm’s social impact, which companies may apply for self-regulatory purposes. Indeed, this appears to have been the assumption and part of the purpose of the Danish CSR reporting requirement, which was introduced with effect from 2009<sup>29</sup> and with effect from financial year 2013 strengthened to explicitly require reporting human rights by companies with policies on that particular issue.<sup>30</sup> So far, the Danish approach is among the most comprehensive in terms of what must be reported but also very flexible in terms of how firms choose to report, including the usage of any specific standards. Adopting a similar structure, the EU’s new Non-Financial Directive, requires certain large EU firms to communicate their CSR policies, including policies on human rights and due diligence practices in relation to their supply chain.<sup>31</sup> Since reports are not due until beyond 2016 it is not yet possible to determine the effectiveness of the approach.

The influence of CSR reporting on firms remains unclear. Studies suggest that mandatory CSR reporting in some states has a positive impact on firms’ internal training of staff and their development of business ethics practices.<sup>32</sup> Organizational studies of voluntary reporting in Swiss firms suggests that reporting leads to higher strategic integration of social responsibility in small and medium sized firms compared to large firms (such as Multinational Enterprises (MNEs)), which tend to approach communication as a practice addressing external stakeholders rather than the organization itself.<sup>33</sup> Assessments of CSR reporting under the Danish statutory requirement so

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<sup>24</sup> US (2010) *The United States Wall Street Reform and Consumer Protection Act of 2010*, sections 1502 (conflict minerals).

<sup>25</sup> Several European States require certain firms to submit annual reports on CSR-related policies or impact.

<sup>26</sup> See Global Compact website, <https://www.unglobalcompact.org/what-is-gc/participants>, accessed 27 June 2016.

<sup>27</sup> Orts, Eric W. (1995) A reflexive model of environmental regulation, *Business Ethics Quarterly* 5(4) 779-794; Hess, D. (1999) Social Reporting: A reflexive law approach to Corporate Social Responsiveness, *Journal of Corporation Law* 25(1) 41-84.

<sup>28</sup> See in particular, Teubner, Gunther (1983) Substantive and reflective elements in modern law. *Law and Society Review* Vol. 17(2)239-285

<sup>29</sup> Buhmann, K. (2013) Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the ‘Protect, Respect, Remedy UN Framework’. *International Law Research* 1(1) 88-101.

<sup>30</sup> Buhmann, Karin (2013) The Danish CSR reporting requirement as reflexive law: Employing CSR as a modality to promote public policy, *European Business Law Review* 24(2)187-216.

<sup>31</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2015 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

<sup>32</sup> Ioannou, Ioannis & George Serafeim (2012) *The Consequences of Mandatory Corporate Sustainability Reporting*, Harvard Business School Working Paper 11-100, October 26, 2012.

<sup>33</sup> Baumann-Pauly, Dorothee, Christopher Wickert, Laura J Spence og A.G. Scherer (2013) Organizing Corporate Social Responsibility in small and large firms: Size Matters, *Journal of Business Ethics* 115:693-705.



far do not appear to confirm the actual influence of reporting on company self-regulation.<sup>34</sup> Theoretical research has suggested that reporting risks diverting firms' attention from their actual impact on society and in-depth appreciation of specifically relevant social expectations leading to internal reflection, towards communication to respond to more general requirements and expectations without deep reflection on actual impact and without influence on organization.<sup>35</sup> The learning potential inherent in reporting is only fulfilled if the organization engages in order to learn rather than simply adapt.<sup>36</sup> Thus, a tension seems to exist as regards the potential for reporting to generate self-regulation, and in particular with regard to the policy objective for companies to self-regulate on their impact on human rights.

### 3. Complementarity between Human Rights Due Diligence and communication

The social risk-based due diligence approach set out in the UNGP aims to enable a firm to meet its responsibility to respect human rights by avoiding causing or contributing to adverse human rights impacts through its own activities; addressing such impacts when they occur; and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.<sup>37</sup>

When developing the UN Guiding Principles in his capacity as SRSG, John Ruggie named HRDD a potential game changer for companies: from "naming and shaming" to "knowing and showing".<sup>38</sup> This statement announces a shift in approaches to corporate social responsibility and accountability in which companies go from being culprits associated with breaking social expectations and escaping the law in areas of weak public governance, towards becoming knowledgeable about their impact on human rights, taking responsibility, and showing that they do so. As such, the statement incorporates both HRDD and communication (including reporting). Indeed, for practical purposes reporting and HRDD go hand in hand.

The complementarity between HRDD and communication comes out clearly in the UNGP's recommendations on how businesses should communicate how they address human rights impact. They should therefore communicate how they deploy HRDD. The UNGP Commentary explains that discharging the responsibility to respect means not only developing policies and deploying processes (like HRDD) for the company to know about and handle human rights impact to respect human rights, but also to show that this is the case. This 'showing' entails some sort of communication, which can range from meetings, online dialogue, consultation with affected stakeholders, and formal public reports. Reporting itself may take several forms, such as CSR or sustainability reports, on-line updates or integrated financial and non-financial reports. The higher

<sup>34</sup> Global Compact Office (2010) *Global Compact Annual Report*, New York; Erhvervs- og Vækstministeriet (2013) *Samfundsansvar og rapportering i Danmark – effekten af 3. år med rapporteringskrav i Årsregnskabsloven*: 32-33; Rahbek Pedersen et al. (2013) Conformance and Deviance: Company Responses to Institutional Pressures for Corporate Social Responsibility Reporting, *Business Strategy and the Environment*, doi: 10.1002/bse.1743.

<sup>35</sup> Danwatch, *The Impact of the Danish Law on CSR Reporting*, report prepared for the European Coalition for Corporate Justice (Copenhagen 2011).

<sup>36</sup> Holmstrøm, Susanne (2013) Legitimerende praksisformer: Et sociologisk perspektiv på praksisformers funktion, strategi og begrundelse, in Holmstrøm, Susanne and Susanne Kjørbeck (eds) *Legitimitet under forandring: Virksomheden i samfundet*, Copenhagen: Samfundslitteratur: 273-312.

<sup>37</sup> Gond, J-P and O. Herrbach (2006) Social Reporting as an organisational learning tool? A theoretical framework, *Journal of Business Ethics* 65: 359-371.

<sup>38</sup> UNGP 13.

<sup>39</sup> John Ruggie (2010), speech at ILO conf june 2010, [http://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@emp\\_ent/@multi/documents/genericdocument/wcms\\_142560.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/@multi/documents/genericdocument/wcms_142560.pdf).

the risk to society, the more formal should communication be. High risk is assessed not only as flowing from the nature of the business operation itself, but also from the operating context,<sup>39</sup> like conflict zones.

The UNGP's elaboration of Pillar Two takes its point of departure in the UN Framework, which describes the Corporate Responsibility to Respect as basically an obligation to do no harm. Constituting "a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it"<sup>40</sup> the novel HRDD concept was offered by the UN Framework as a key element for a firm to avoid doing harm. The Framework underscored that "in addition to compliance with national laws, the baseline responsibility of companies is to respect human rights".<sup>41</sup> By including compliance in the core substance of Pillar Two, the UN Framework bought into arguments that had been propounded by opponents to the idea that businesses should have non-binding responsibilities for human rights, or that authorities (including the UN) should engage in developing such guidance. The Draft UN Norms<sup>42</sup> as well as the process leading to the UN Framework had seen such arguments being made by business organizations as well as some States in an effort to ward off official guidance on Business & Human Rights.<sup>43</sup> The arguments had typically noted business compliance with national law as a core obligation of business to society, emphasizing that authorities turn public policy needs into law if they identify needs that exceed current binding business obligations. By also buying into a well-known definition by organizational scholar Archie Carroll of CSR as comprising economic, ethical, 'discretionary' as well as legal obligations,<sup>44</sup> the suggested implication was that businesses would observe new binding rules. At the same time, however, the argument for practical purposes played on the disagreement between States as well as the often lengthy international law-making process to retard or stop further rule-making.<sup>45</sup>

For the social expectations element, the International Bill of Human Rights and the ILO core conventions (on freedom of association and collective negotiation, non-discrimination, and elimination of child labour, forced labour and slavery) were offered by the UN Framework as the principles against which other social actors judge the human rights impacts of companies.<sup>46</sup>

Covering five of the nine operational principles under Pillar Two, the elaboration of HRDD is the most detailed. For practical purposes an essential element in a firm's discharge of its responsibility, it underscores the centrality of HRDD for the Corporate Responsibility to Respect. That responsibility is defined by the UNGP to entail that business enterprises avoid infringing on the

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<sup>39</sup> UNGP 21 and Commentary.

<sup>40</sup> UN Framework paras. 24-25.

<sup>41</sup> UN Framework para. 54.

<sup>42</sup> Sub-Commission on the Promotion and Protection of Human Rights (2003) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights 2003, UN doc. E/CN.4/Sub.2/2003/12/Rev.2.

<sup>43</sup> Buhmann, Karin (2013) Navigating from "trainwreck" to being "welcomed": Negotiation strategies and argumentative patterns in the development of the UN Framework. In Deva, Surya and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge: Cambridge University Press: 29-57, at 52-53.

<sup>44</sup> Carroll, Archie B. (1979) A three-dimensional conceptual model of corporate performance, *The Academy of Management Review* Vol. 4, No. 4: 497-505.

<sup>45</sup> Buhmann, Karin (2014) *Normative discourses and public-private regulatory strategies for construction of CSR normativity: Towards a method for above-national public-private regulation of business social responsibilities*, Copenhagen: Multivers publishing, esp. Chapters 4 and 6.

<sup>46</sup> UN Framework para. 58.

human rights of others, and that they address adverse human rights impacts with which they are involved.<sup>47</sup> “[O]ver and above compliance with national laws”<sup>48</sup> the responsibility to respect is independent of States’ abilities and/or willingness to fulfill their own human rights obligations, but at the same time complementary to compliance.

Beyond compliance with the law of home or host states, the scope of the Responsibility to Respect is “defined by social expectations - as part of what is sometimes called a company’s social license to operate”.<sup>49</sup> The obligation may be passive as well as entailing positive steps, such as for a firm to undertake specific recruitment and training programmes to give substance to its anti-discrimination policy.<sup>50</sup>

The UN Framework explained the concept of HRDD as the steps a company must take to become aware of, prevent and address adverse human rights impacts.<sup>51</sup> It noted that companies typically already have processes comparable to the steps of HRDD in place as a result of requirements in many countries to apply information and control systems to assess and manage financial and related risks.<sup>52</sup> While that phrase partly functioned to put concerns about the requirements of HRDD at ease and to underscore the risk management potential of the process as a reflection of managing the risks the firm might cause to society,<sup>53</sup> it also indicated that HRDD may be – or become – a process required by law in countries where companies are hosted or have their home base. Indeed, France is currently (2016) considering the introduction of a due diligence statute (Loi Vigilance).

The connection between the generally pro-active HRDD process and the generally re-active communication process supports learning processes within firms, as well as for other organizations who wish to learn from the processes, successes (and failures) of others.<sup>54</sup> This important connection between pro-active and re-active measures under Pillar Two offers an opportunity for States in their discharge of their own Duty to Protect, with the combined goal of decreasing business risks to human rights.

#### **4. Complementarity between Pillar One and Two: opportunities for States**

While the Guiding Principles only in Pillar Three directly address the State Duty to Protect and the Corporate Responsibility to Respect under the same overall topic (Access to Remedy), Pillar One does set out some recommendations for States on how to promote the Corporate Responsibility to Respect. Those recommendations in particular involve HRDD and reporting.

The UNGP specifically recommends that States clarify what is expected of firms.<sup>55</sup> For practical purposes, this may entail providing HRDD guidance,<sup>56</sup> or providing guidance on public policy

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<sup>47</sup> UNGP 11.

<sup>48</sup> UNGP 11 Commentary.

<sup>49</sup> UN Framework para. 54.

<sup>50</sup> UN Framework para. 55.

<sup>51</sup> UN Framework para 56.

<sup>52</sup> UN Framework para. 56.

<sup>53</sup> Buhmann, Karin (2014) *supra*, esp. Chapter 6.

<sup>54</sup> Compare on approaches to organizational learning DiMaggio, Paul J. and Walter M. Powell (1983) The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields, *American Sociological Review* 48(2) 147-160.

<sup>55</sup> UNGP 3.

expectations of firms, which firms may integrate into their HRDD. Likewise, States are explicitly recommended to encourage firms to communicate how they deal with the Responsibility to Respect.<sup>57</sup> In other words, States are asked to recommend or require reporting or other communication, both on their HRDD processes and on their actual human rights impact and risks causes. It clearly forms part of the State Duty to Protect for a State to not only enforce laws requiring business to respect human rights, but also to provide effective guidance to business enterprises on how to respect human rights throughout their operations; and encourage and “where appropriate” require business enterprises to communicate how they address human rights impact.<sup>58</sup>

The Commentary applies the terms ‘smart mix’ in its explanation of how States may consider combining a variety of measures to foster business respect for human rights: such measures may be national and international, mandatory and voluntary. Testifying to the pertinence, the term ‘smart mix’ was adopted by the EU in its 2011 Communication on CSR, which encourages EU Member States to implement the Guiding Principles.<sup>59</sup>

The Commentary explains that States’ encouragement or requirements of communication are important in fostering respect for human rights by business enterprises.<sup>60</sup> Directives on what information should be provided and how it should be communicated may further contribute to clarity for business on what is expected, and help stakeholder gain access to the information.

It follows from this that hard, soft or incentives regulatory measures on HRDD and reporting may function as modalities for States to push businesses towards greater respect for human rights. This opens a number of opportunities for States to promote business respect for human rights by carefully considering how they may transform public policy needs and social expectations of firms into detailed guidance, whether in form of explicit HRDD guidance or in the form of explanations of why and how business respect for human rights matters to the State and to the general society in which the firm operate. Similarly, States can include HRDD explicitly in reporting recommendation or requirements. The public transparency offered by external reports will offer firms incentives to develop detailed HRDD processes, assess and reflect on their effects and effectiveness and consider revisions reflecting the firm’s learning. The transparency offered by the firm’s sharing of such information in the report offers a form of accountability, whose significance need not be in the courts of law but in what the UN Framework termed ‘the courts of public opinion’.<sup>61</sup> This caters for positive or negative sanctions being in the form of economic decisions by investors, consumers and buyers. Translating into effects on the economic rationale and survival of the firm, such sanctions may be as important for the firm’s decisions and practices as those of a court of law.

The importance of pro-active regulatory modalities by States to encourage firms to apply HRDD has been heightened by the potential learning effects of the practice or ‘case law’ of National Contact Points established under OECD’s MNE Guidelines. These may provide additional guidance to inform HRDD by clarifying the specific expectations of business organisations beyond what is required by applicable national law.

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<sup>56</sup> UNGP 4.

<sup>57</sup> UNGP 3, Commentary.

<sup>58</sup> UNGP 3.

<sup>59</sup> European Commission (2011) *A renewed EU Strategy 2011-2014 for Corporate Social Responsibility*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 25.10.2011, EU Doc. COM(2011) 681 final.

<sup>60</sup> UNGP 3, Commentary.

<sup>61</sup> UN Framework para. 54.

The OECD Guidelines' integration of the Guiding Principles' due diligence concept to most issue areas covered by the Guidelines<sup>62</sup> means that all cases ('specific instances', that is, complaints lodged with the NCPs for mediation or assessment of violation) may contribute to the ongoing elaboration of what is expected of companies with regard to due diligence as a process to detect, mitigate and remedy adverse impact on society. Established in not only in OECD States but also in several non-OECD States which have acceded to the Guidelines, NCPs may develop a shared body of case law by considering the practice of each others. NCPs are state-based remedial institutions but established under an international organization adopt a practice of considering the jurisprudence of similar institutions, especially other NCPs. Cases handled across the NCPs globally may collectively contribute to the ongoing evolution of guidance on what is required by the due diligence process envisaged by the UNGP. OECD due diligence guidance for specific sectors also may feed into an emergent and coherent process-oriented due diligence concept.

A shared understanding and application of due diligence across NCPs and the States in which they are established constitutes an important element in transnational policy coherence. Indeed, such coherence is paramount in order to limit 'forum shopping' to countries with weaker application.

On an individual as well as collective basis, States may work towards such coherence by directing the insight developed through NCP practice into guidance which they issue in accordance with the UNGP's recommendations on the State Duty to Protect in order to assist companies in their Responsibility to Respect. Such insight may be incorporated into due diligence guidance. It can also play an important role in guiding businesses on what information is expected or required of reporting or communication. While this obviously is relevant to States that are members of the OECD or those non-OECD States which adhere to the Guidelines, in principle all States and all business organizations may benefit from that information and insight.

Effective transnational policy coherence in this area offers a highly significant element in connecting Pillars One and Two as well as pro-active and re-active public regulatory measures under the State Duty to Protect towards the promotion of the Corporate Responsibility to Respect. The potential implications are further underscored by the fact that policy coherence may spread between international organizations through their Member States.

## 6. Conclusion

Given their combination of pro-active and re-active capacities, HRDD and reporting may mutually support and reinforce each other in relation to insight into what is required or expected of business organizations with regard to human rights.

The UNGP make clear that HRDD is not only an issue for companies: states may encourage the practice and provide effective guidance to business enterprises on how to respect human rights throughout their operations. And as regards communication, the UNGP recommend that States encourage or require firms' communication on how they address their human rights impact, again connecting to HRDD.

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<sup>62</sup> OECD's Guidelines' due diligence recommendations do not apply to the chapters on Science and Technology, Competition and Taxation (OECD 2011, Commentary to General Principles, para. 14).

The Corporate Responsibility to Respect entails for firms to know about and observe social expectations to respect human rights, and to comply with national law to respect human rights in their countries of operation (home and host states). To promote the Corporate Responsibility to Respect States may promote, encourage or even require activities by business to ensure their respect for human rights. The UNGP specifically recommend that States do this with regard to HRDD and to non-financial reporting. Mainly referring to or relating to activities that organizations have already undertaken, reporting is primarily a re-active measure. HRDD, by contrast, is primarily pro-active in seeking to identify human rights risks and avoid or remedy those. Both also work in reverse, and offer learning opportunities for the specific firm as well as for others. HRDD and reporting may mutually support and reinforce each other in relation to insight into what is required or expected of business organizations with regard to human rights.

A firm's human rights related communications, such as a non-financial report, may share information on the process and effects of HRDD in a past period. The process to develop the report may provide learning feeding into future HRDD. Both may contribute to a strengthening of the firms' understanding of the social expectations element in the Corporate Responsibility Respect in accordance with the implications of the UDHR, core ILO conventions and other international human rights law which the 'man on the street' expects companies to observe in terms of social expectations. States may enhance those effects by carefully considering how they can combine and deploy 'smart' mixtures of recommendations or requirements on HRDD and communication on human rights impact by firms acting within and beyond their territories.

The territorial scope of the OECD Guidelines, which are recommendations addressed by governments to MNEs operating *in* or *from* adhering countries, means that companies may be subjected to grievances in front of home state NCPs for actions committed even in non-OECD states. The jurisprudence or practice of NCPs may promote insight on due diligence processes to reinforce the clarification to business organisations of what is expected of them. This may feed on both international law and other social expectations, and may in turn feed into reporting, enabling stakeholders to hold businesses to account through the market or the social licence to operate for their human rights impact from the perspective of social expectations. States may support these processes by critically reviewing and revising the status and powers of their NCPs. At the same time, they may strengthen the role of NCPs to develop practice that serves as guidance on what is expected of firms as regards HRDD and ensure coherence with due diligence guidance or requirements issued by other international organizations, including those in the field of economic and trade law.

In sum, States' promotion of HRDD, communication and institutions which apply or assess these (including in particular NCPs) may over time bring forth normative guidance and directives for business action respectful of human rights. The clever deployment by States of the 'smart mix' regulatory strategy to promote these pro-active as well as re-active measures may push the corporate responsibility to respect toward higher levels of overall human rights protection.