

# CORPORATE DUE DILIGENCE AS A TOOL TO RESPECT HUMAN RIGHTS

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## *Abstract*

*This article aspires to assist companies and human rights analysts to determine why, when and how human rights impact assessments can be integrated into existing corporate due diligence processes. It elaborates on the approach proposed by Professor Ruggie, the UN Special Representative on human rights and business. His policy framework relies, amongst others, on ‘the corporate responsibility to respect human rights’, that is to act with ‘due diligence’ to avoid infringing on the rights of others. In this article, the corporate and human rights law origins and application of ‘due diligence’ are explored. Subsequently, the concept of due diligence as catered for in the Ruggie policy framework is discussed, and suggestions are offered as to how this can be practically applied in business transactions. Dilemmas are identified.*

From Individual Rights to Common Responsibilities<sup>1</sup>  
(Ruud Lubbers in *Inspiration for Global Governance*)

## 1. INTRODUCTION

Human rights doctrine has long focussed upon what States should do to further promote the enforcement of human rights standards. In this article, the attention will shift to the role of business. The work of Professor John Ruggie<sup>2</sup> – who first served with the UN Global Compact and was appointed in 2005 as the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises – is pertinent in this regard. The establishment of this position shows the wide recognition of the relevance of business in the advancement of human rights.<sup>3</sup>

In April 2008, Ruggie proposed a policy framework ‘Protect, Respect, Remedy’ to the UN Human Rights Council (Ruggie Report or Report).<sup>4</sup> The framework rests on three pillars: (i) the State duty to protect against human rights abuses by third parties, including business; (ii) the corporate responsibility to respect human rights,

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<sup>1</sup> Lubbers, R., Van Genugten, W. and Lambooy, T.E., *Inspiration for Global Governance – The Universal Declaration of Human Rights and the Earth Charter*, Kluwer, Deventer, 2008, p. 89.

<sup>2</sup> John Ruggie is a Professor at Harvard John F. Kennedy School of Government, US.

<sup>3</sup> See, for an introduction on this subject, Van Genugten, W. and Lambooy, T.E., ‘The Universal Declaration of Human Rights: Catalyst for Development of Human Rights Standards’, in: Lubbers, Van Genugten, Lambooy, *op.cit.* (note 1), pp. 55-66, especially §. 14.

<sup>4</sup> UNHRC GA, Report of 7 April 2008; UN Doc. A/HRC/8/5.

which means – according to Ruggie – to act with ‘*due diligence*’ to avoid infringing on the rights of others; and (iii) greater access by victims to an effective remedy, judicial and non-judicial. It was unanimously welcomed by the Council members. The suggested policy framework has furthermore been widely appreciated: governments have referred to this framework in new policy documents, leading business organisations have endorsed the framework, and civil society organisations have expressed support. Ruggie’s mandate has been extended for three years to operationalise his framework.<sup>5</sup> This marks the first time in 60 years that the Council<sup>6</sup> and the international community have taken a substantive policy position on business and human rights.

The Report addresses the complex question of the scope of corporate social responsibility. This article will explore the second pillar of the Ruggie framework: in which way can corporate due diligence contribute to achieving human rights compliance? It will be contended that Ruggie – by using the term ‘due diligence’, a concept commonly used in corporate law practice – established a link between two areas of law, that is human rights law and corporate law, which were long considered unrelated. The main focus of this article is to further affirm this link. Both areas of law have long been familiar with ‘due diligence’, each in a different way. It will be interesting to investigate the setting in which the framework proposed by Ruggie landed.

Section 2 of this article will address the history and practice of ‘due diligence’ as this concept has been used in securities law practice (that is the law applicable to the trading of shares and debt paper). This will be followed in section 3 by an account of the process and the timing of corporate due diligence investigations performed as part of preparing a private transaction or a capital market transaction. Attention will thereby be paid to the legal reasons for performing this type of corporate assessment as well as other reasons for doing so. It will also be evaluated whether the subject of human rights can fit into the present practice. Although the central perspective of sections 2 and 3 is grounded in international transactions, the legal base of the argumentation can be found in Dutch law.<sup>7</sup> Section 4 will then attend to ‘due diligence’ as utilised in international law, thereby especially focussing on how to determine the content of the State duty to protect its citizens from human rights violations infringed upon by private actors. Since the Ruggie Report does not contain clear references to existing corporate and human rights law, it is important to examine what is meant when Ruggie uses the term ‘due diligence’. Section 5 will therefore elaborate on this. Subsequently, to establish a concrete bridge between theory and practice, section 6 will mention existing ‘human rights impact assessment’ (HRIA) tools and evaluate how they can provide guidance to comply with the corporate responsibility to respect human rights. Legal and practical dilemmas will be highlighted in section 7. The last section will conclude with a summary of the previous sections and integrates them, thereby suggesting how HRIAs can become part of existing corporate due diligence processes.

<sup>5</sup> UNHRC GA, Report 18 June 2008; UN Doc A/HRC/Res/8/7 [§§ 1,4]; UNHRC GA, Report of 22 April 2009; UN Doc. A/HRC/11/13. See also Shell ([www.shell.com/](http://www.shell.com/)); Akzo Nobel ([www.akzonobel.com/](http://www.akzonobel.com/)); and Amnesty International ([www.amnesty.org/](http://www.amnesty.org/)).

<sup>6</sup> And its predecessor, the UN Commission on Human Rights (UNCHR).

<sup>7</sup> For a US law perspective, reference is made to the interesting paper of John Sherman III and Amy Lehr on the same topic. Sherman III, J. and Lehr, A., ‘Human rights due diligence: is it too risky?’, Corporate Social Responsibility, Initiative Working Paper No. 55, February 2010, John F. Kennedy School of Government, Harvard University, Cambridge ([www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_55\\_shermanlehr.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_55_shermanlehr.pdf)).

## 2. CORPORATE PRACTICE – HISTORY ‘DUE DILIGENCE’

Due diligence is not a new concept. For corporate lawyers, the term ‘due diligence’ stems from American securities law. When a company wishes to attract capital from the public at large – that is by issuing shares or notes, in general: securities – it has to involve a bank. The bank can offer the new securities to the public and arrange for the listing thereof at a stock exchange (the so-called ‘lead manager’). After the initial public sale of the securities, the Initial Public Offering (IPO), the securities can be resold through the stock exchange trading systems. For the listing, the lead manager – usually jointly with the company that issues the securities (the issuer) – has to prepare a ‘prospectus’, that is a brochure which introduces the issuing company and the securities to be offered to the public. The lead manager acts as an intermediary between the issuer and the investors who are buying the shares. The prospectus itself is ‘an offer to sell’; hence it is a legal document stating the purpose of the security issue. It contains a description of the business of the company, the product groups, the geographical regions where it operates, the principal officers, the securities offered and how they can be purchased, the financial results and prospects, such as the return on the investment: the expected annual dividend. The prospectus also contains a chapter on business risks. Investors will base their decision to buy the new securities on the prospectus; hence the lead manager has to carefully draft the content of the prospectus.

Countries employ different systems to supervise the quality of a prospectus. In the United States (US), federal and State securities laws as well as stock exchange rules give detailed instructions on how to prepare a prospectus.<sup>8</sup> In the European Union (EU), the Prospectus Directive, implemented in the national legislation in EU member States, prescribes which subjects need be covered in a prospectus.<sup>9</sup> Typically, a draft of the prospectus has to be approved by a national supervisory authority before it can be made public.<sup>10</sup> The rationale of this system is to protect investors against misleading or fraudulent information on securities sales.

<sup>8</sup> See The Securities Act of 1933, Sections 5 (registration securities) and 10 (content prospectus). Sections 11 and 12 impose liability on the issuer and underwriters (that is the bank/lead manager) if a prospectus contains incorrect information (of a material nature) or is incomplete. The prospectus, or ‘offering circular,’ and the Registration Statement have to be submitted to the Securities and Exchange Commission (SEC). The SEC can object to the offering, ask for more information, or allow the prospectus to go public. Most jurisdictions regulate listing requirements in a similar way. For example *re* UK, see the Public Offers of Securities Regulations 1995, Section 4 and Schedule I (content prospectus), Section 8 (liability issuer and offeror); Financial Services Act 2000 (FSA), Listing Rules PR 2.3.1 and 3.1.1 (requirement and minimum content prospectus); Article 90 FSA (compensation for false or misleading particulars); preceding common law jurisprudence-based prospectus liability on deceit or negligent misrepresentation and the assumed duty of care by the issuer towards the investor). See further Low, L.A. *et al.* (ed.), *The International Practitioners, Deskbook Series*, 2nd ed., ABA Publishing, Chicago, 2003, p. 167. In the Netherlands, The EU Prospectus Directive has been incorporated in the *Wet op het Financieel Toezicht* (Wft, Financial Supervision Act). See Articles 5.13-5.19 (content prospectus); Euronext Rule Book I, Section 6.5 (preparation prospectus).

<sup>9</sup> Directive 2003/71/EC, OJ L345/64, and Commission Regulation (EC) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC. See also Franx, J.P., ‘Inhoudelijke prospectusvereisten’ [Requirements regarding the content of prospectuses], in: Busch, D. *et al.* (ed.), *Onderneming en Financieel Toezicht* [Company and financial supervision], Kluwer, Deventer, 2007.

<sup>10</sup> For example approval by the Netherlands Authority for the Financial Markets (AFM) pursuant to Article 5.21 Wft. Subsequently, the prospectus can be used to offer securities throughout

However, even when the procedures have been followed, it sometimes occurs that new shareholders are disappointed about the results of the company or the value of the securities, and want to cancel their purchase or receive compensation. They institute legal proceedings against the issuer and/or, when the issuing company performs poorly, and does not offer much recourse, they also turn to the lead-manager.<sup>11</sup> They will state that they were misled, that is that the bank had drawn a too positive picture of the company, and claim compensation for their losses. As a defence, the bank will explain that it has carried out an extensive investigation into the affairs and business of a company on which to base its prospectus. The bank will state that the company's subsequent negative results could not have been foreseen. In short, the bank will explain that it has adequately assessed the company's affairs, and that any business or other risks found were clearly described in the prospectus, implying that the investor consciously took the risk to buy the shares. In other words, the bank claims that it performed the IPO 'diligently', 'with due care', 'with sufficient diligence' (*met de nodige waakzaamheid*).

The standard to be measured against is what other banks would have done, how they would have investigated this company if they had done that with due diligence, and whether any information disseminated about the new shares and the company, in the prospectus or in any other manner in view of an IPO, would have misled a normal, prudent investor in his decision to buy the shares.<sup>12</sup>

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the EU. In the UK, the Financial Services Authority has to approve a prospectus (FSA Listing Rules PR 3.1.7 referring to Article 87(1) FSA).

<sup>11</sup> See for example, *WOL*, DSC, 27 November 2009, JOR 2010/43 (LJN: BH 2162, Dutch only) 4.14.3-5, 4.26.3, 4.32.3, 4.33, 4.36.4, 4.39.1; Amsterdam Court of Appeal (CoA), the Netherlands, 3 May 2007 (LJN: BA4343, Dutch only) 2.12.3-5, 2.24.3. World Online (WOL) was a European Internet Service Provider, which came to prominence in the late 1990s dotcom boom. After the IPO of WOL in March 2000 in the Netherlands, the value of the newly listed shares dropped dramatically. Moreover, the financial results of WOL lagged behind the projections communicated in the prospectus, and the internet bubble collapsed. Legal claims were instituted against WOL, and against the Dutch bank ABN-AMRO and the US investment bank Goldman Sachs, the joint lead managers of the IPO. Basically, the claims alleged that WOL and the lead managers had failed to adequately disclose certain information necessary to correctly inform the investors. In 2009, the Dutch Supreme Court (DSC) judged that WOL and the lead managers had misled the investors. The DSC resolved that the difference between the price for which Nina Brink, the incorporator and CEO of WOL, had sold a substantial number of her shares before the IPO, in December 1999 (that is USD 6.04) and the share issue price at the IPO in March 2000 (that is EUR 43) was considered material and should have been disclosed in the prospectus. By the end of 2000 the WOL shares were worth less than EUR 10. Furthermore, the DSC confirmed the Amsterdam CoA's findings that the value and the future results of WOL were presented too optimistically by WOL and the lead managers, and that they had misled the investors. Compare also *Baan*, Arnhem CoA, the Netherlands, 16 October 2007 (LJN: BB5511), in which case the Appellate Court decided that the fact that statements by the company which – with hindsight – could be considered too optimistic, in itself, alone, could not be qualified as disseminating incorrect or misleading information.

<sup>12</sup> Besides *WOL* (*supra* note 11), other Dutch case-law on this subject includes: *ABN-AMRO CoopAG*, DSC 2 December 1994, NJ1996/246 regarding the responsibility of a lead manager for misleading annual accounts prepared and approved by accountants and contained in a prospectus; *MeesPierson BoterenBrood*, DSC 8 May 1998, JOR98/110 (regarding incomplete information in a private placement memorandum); *DAF*, The Hague CoA 29 June 2004 (LJN: AP4593) regarding a misleading prospectus on notes issue; *TMF Financial Services*, DSC 30 May 2008, JOR2008/209 (LJN: BD2820) regarding the standard which is used to identify the capacity of the investor to understand whether the facts presented in a brochure should be considered as misleading or not (*vermoedelijke verwachting van een gemiddeld geïnformeerde, omzichtige en oplettende gewone consument tot wie de brochure zich richt of die zij bereikt*). The Unfair Trade Practices Directive of 11 June 2005, 2005/29/EG, PbEU

### 3. DUE DILIGENCE IN CORPORATE PRACTICE

The concept of ‘due diligence’ emerged from securities law. It also found its way to other areas of corporate law. Today, corporate lawyers spend much time on organising and performing due diligence investigations when they advise on establishing a merger between two or more companies; an acquisition of a business; a management buy-out (an MBO is the acquisition of a business by its existing management, usually in cooperation with outside financiers); an investment in another company (for example a private equity investment); or in setting up a joint venture with other parties. Some of these transactions take place through a capital market transaction, for example the issuing or sale of publicly traded securities or a public offer; others concern the preparation of a private transaction, that is a transaction that is not concluded via the stock exchange.

Divestments, selling off part of a business or a subsidiary company, or a privatisation, for example through organising a ‘controlled auction’, also involve due diligence investigations. A controlled auction is a process whereby the company is marketed to a specific target group, creating a process where multiple potential buyers can bid for it. The seller controls the process. Before the auction begins, commonly, the seller performs a due diligence assessment on the basis of which a so-called ‘Information Memorandum’ is prepared concerning the business and particulars of the business or company for sale (that is the ‘seller’s due diligence’). Potentially interested parties receive the Information Memorandum and they can then make a preliminary price offer for the business concerned. In a second phase, the seller narrows down the list of potential bidders to a few preferred bidders. They are given access to the documents collected in the seller’s due diligence process in order to conduct their own due diligence investigation (that is the ‘buyer’s due diligence’). Based on this information, these bidders will confirm their preliminary bid or withdraw from the process. Ultimately, the seller will decide with which party it enters into the final negotiations.

Furthermore, finance transactions usually involve a due diligence investigation as well as situations in which companies enter into a large operational agreement, such as an exploration or exploitation agreement (for example concerning natural resources); a management agreement (for example the exploitation of a chain of cinemas or hotels); turn-key projects (for example building a power plant); transport contracts; and infrastructural contracts (for example building a bridge, a road or constructing a gas or oil pipeline).

There are multiple reasons for a company to perform a due diligence investigation. Some are embedded in legislation or stock exchange rules, others are more of a practical nature. The results of a due diligence process can assist the negotiators in shaping the deal, and will make any material risks transparent. The following subsections will provide an answer as to why, how and when companies perform a commercial due diligence investigation in order to create a base for reflecting on the question whether a human rights assessment could be integrated in such a process. The next subsection will firstly explain which actors can be involved in a due diligence process.

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L149 [§§ 22–39], also underlines the responsibility of a seller of financial products. Implemented in the Netherlands in the *Wet oneerlijke handelspraktijken* [Act on unfair trade practices], which introduced articles 6:193a – 193j Dutch Civil Code including a definition of the ‘normal consumer’ who – according to the Directive and the legislative history will be assumed to be a person who, on average, is prudent and well informed (Stb. 2008, 397).

### 3.1. WHO PERFORMS THE DUE DILIGENCE PROCESS?

Due diligence is a container concept. Every professional will first think of due diligence in his own field of expertise. It depends on the scope and purpose of the project or transaction which experts will be engaged for the due diligence process. For a full due diligence investigation, many different experts can be involved. Multidisciplinary teams will work on: business issues (this work will typically be performed by commercial lawyers and the company's commercial staff); financial position and forecast (the company's financial staff, investment bankers, accountants); technical aspects (in-house and external technical experts); tax risks (tax lawyers); corporate structure and legal liabilities (lawyers and notaries); real estate (notaries; real estate agents' valuation experts); pension issues (lawyers, tax lawyers, accountants and actuaries); IT issues (IT consultants); environmental issues (environmental law and administrative law specialists, technical environmental consultants); insurance issues (insurance or actuarial experts); and fraud and corruption (forensic accountants). Presently, few due diligence investigations include an assessment on human rights issues.<sup>13</sup> To add them in, human rights lawyers and experts are to be engaged.<sup>14</sup>

A due diligence investigation renders the best results when the experts work together as a team, in which information is shared and issues discussed. Together with the company that commissioned the due diligence process, the team members should decide which issues to pursue more deeply and which issues to leave aside. Communication by the team members can best take place by organising a take-off meeting in which the company sets out the intended project or transaction, and explains what its goals are in respect to the due diligence process. Company representatives or the lead counsel who co-ordinates the process will explain the procedural and the substantial parameters for the research project. Subsequent meetings can take place physically or via video conferencing, which is usually more practical when team members are spread out all over the world.

### 3.2. WHY DUE DILIGENCE?

Why do companies take the effort to arrange for a costly and cumbersome due diligence investigation? There are various legal reasons to do so.

#### 3.2.1. *Capital Markets Transactions – Legal Reasons and Scope*

As section 2 explained, a due diligence research in the context of issuing new securities is usually, directly or indirectly, obligatory under the law, or recognised by case-law. Where a jurisdiction requires the issuer and lead manager to issue a prospectus, it indirectly implies that they should execute a due diligence process to collect the information needed to prepare the prospectus. Moreover, as argued,

<sup>13</sup> Based on the author's experience as a practitioner. See, for example, Pickard, S., *Due Diligence List*: [www.duediligencelist.com](http://www.duediligencelist.com), Writers Club Press, New York, Lincoln, Shanghai, 2002; and see examples of due diligence questionnaires at: [www.meritusventures.com/template\\_assets/pdf/diligence.pdf](http://www.meritusventures.com/template_assets/pdf/diligence.pdf).

<sup>14</sup> For example, the Danish Institute for Human Rights at [www.humanrights.dk/](http://www.humanrights.dk/), the consultancy firms Aim for Human Rights, at [www.humanrightsimpact.org/](http://www.humanrightsimpact.org/) and AidEnvironment, at [www.aidenvironment.org/landingpage.aspx](http://www.aidenvironment.org/landingpage.aspx). See section 6 *infra* on Human Rights Impact Assessments (HRIAs).

conducting a due diligence process in view of an IPO can constitute a defence against claims from investors who allege that they were misled by false or incomplete information contained in the prospectus.

Regarding the scope of a capital market due diligence, it was recorded in section 2 that the EU Prospectus Directive details the information which has to be included in a prospectus.<sup>15</sup> This indirectly determines the main subjects which are to be addressed in the diligence process. Since capital market transactions usually concern the sale of securities in the capital of a holding company, the due diligence has to cover *all operations* of the company and its subsidiaries. Any miscalculation or business problem in any part of the world can affect the value of the securities. Still, in practice, the lead manager, the issuing company and their lawyers have to decide on the scope and level of the due diligence investigation. For instance, may the lead manager rely on a company secretary's communication stating that no substantial litigation is pending anywhere in the world? Or do the lead manager's lawyers have to assess this for themselves? In that case, do they have to examine all court documents, or can they rely on communicating with the counsels who actually litigate such cases? These type of issues need to be agreed on to make the due diligence process transparent and workable. Best practices in the market will lead the way in this respect. No lead manager or lawyer wants to take the risk of insufficient due diligence. Commonly, the standard applied to determine on professional liability is whether the professional has acted in the same professional way as another skilled professional would have done in his place. Consequently, it is important to keep up-to-date with best practices.<sup>16</sup>

### 3.2.2. Capital Markets Due Diligence – Integrating Human Rights?

The EU Prospectus Directive does not specifically mention potential human rights impacts as a subject to report on in a prospectus. The European Parliament and Friends of the Earth had advocated this in the pre-stages of the Directive.<sup>17</sup> It is interesting however, to note that the Prospectus Directive stipulates under (48) of the Recitals: 'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union'.<sup>18</sup>

The fundamental rights set out in the Charter encompass all internationally recognised human rights like dignity, freedoms, equality, solidarity, citizens' rights and justice. From the referral to the Charter in the Prospectus Directive, it could be deduced that the EU considers human rights also important in the context of capital market transactions. Consequently, it would not be illogical if a prospectus contains information about the human rights aspects of the business activities of the issuer. This view also aligns with Ruggie's approach, that is to encourage business to exercise due diligence with regard to respecting human rights. In addition, one could

<sup>15</sup> Articles 5 (content prospectus) and 13 (approval prospectus).

<sup>16</sup> *ABN-AMRO CoopAG*, *supra* note 12. For further reading Brink, M., *Due diligence. Een beschouwing over het due diligence onderzoek volgens het Nederlandse recht* [A reflection of due diligence under Dutch law], Boom Juridische Uitgevers, The Hague, 2009, pp. 320-334. *Ibidem*, on professional liability, pp. 443-482, especially p. 445.

<sup>17</sup> Friends of the Earth, *Consultation Paper: CESR's Advice on Possible Level II Implementing Measures for the Proposed Prospectus Directive* (2003); EU Parliament (Committee on Employment and Social Affairs) 'Report on Corporate Social Responsibility: a new partnership' (2006/2133(INI)).

<sup>18</sup> *I.e.* the Charter of Fundamental Rights of the European Union, 2000/C 364/01-22.

say that, in practice, any risks related to (potential) human rights violations will be regarded as general risks that need to be disclosed because they can negatively influence the company's position, reputation and income-generating capacity.

Furthermore, another factor that might incite the inclusion of human rights aspects in capital market due diligence investigations is the fact that the market for sustainable investments is growing. Sustainability-rating agencies and institutional investors welcome more information on human rights aspects relating to companies' activities.<sup>19</sup> This information can be provided in the prospectus, but it can also be communicated in other ways, for example through annual reports, sustainability reports, and websites.

### 3.2.3. Private Transactions – Legal Reasons and Scope

Under Dutch law as well as in other jurisdictions, buyers and sellers owe each other a certain degree of respect. By entering into negotiations they create a new ambiance – a pre-contractual stage – that requires care towards each other.<sup>20</sup> Part of this doctrine prescribes that a party should provide the other party with correct and complete information as to the object of the transaction. This applies to the prospective seller and buyer in different ways. For example, under Dutch law: the *seller* must *disclose* the positive but also the negative features (*mededelingsplicht* [disclosure duty]);<sup>21</sup> however, the *buyer* must clearly communicate which facets are important for him, so that the seller understands which information he needs to provide to the buyer;<sup>22</sup> moreover, on the *buyer* rests a duty to *enquire and investigate* whether the target-object or business fulfils his expectations (*onderzoeksplicht* [investigation duty]).<sup>23</sup> An exchange of information by the parties as part of the preparations for the transaction, and to discharge their duty of care, is usually called a 'due diligence' investigation.<sup>24</sup> If a party has not adequately performed such due diligence, this may

<sup>19</sup> Information received from sustainability-rating agencies and institutional investors during interviews in the course of the Nyenrode International Research on Biodiversity and Capital Markets, 2009 – an ongoing project in which the author participates. Please visit [www.UNPRI.org](http://www.UNPRI.org) to find out which institutional investors are signatories to the Principles for Responsible Investment (PRI). See also Umlas, E., *Human Rights and SRI in North America: An Overview*, PhD; January 2009, [www.reports-and-materials.org/Umlas-Human-Rights-and-SRI-Jan-2009.pdf](http://www.reports-and-materials.org/Umlas-Human-Rights-and-SRI-Jan-2009.pdf).

<sup>20</sup> Article 6:248 Dutch Civil Code *re* pre-contractual good faith. See further Wessels, B., 'Precontractuele aspecten van een bedrijfsovername' [Pre-contractual aspects of a business acquisition], in: *Bedrijfsovername* [Acquisition of a business], 2nd ed., Kluwer, Deventer, 2005, pp. 3-9.

<sup>21</sup> *Offringa/Vinck & Van Rosberg*, DSC 10 April 1998 (NJ1998/666) regarding a seller which had to inform the buyer of any construction faults in the building before the actual transaction; *L.E. Beheer/Stijnman*, DSC 16 June 2000 (NJ2001/559) concerning the situation in which the buyer had not conducted a due diligence investigation; even so, the seller should have informed the buyer about hidden liabilities related to the company.

<sup>22</sup> *VDL Shipyards*, DSC 21 February 2003 (JOL 2003/111; LJN AF1891) concerning the size of a fuel tank of a new ship and the intention to use the ship as a seagoing vessel; the buyer should have indicated clearly which expectations he had concerning the new ship and the size of the fuel tank.

<sup>23</sup> According to *VBI/Interchem*, DSC 10 October 2003 (LJN AI0306), it can be expected from professional parties that they perform an adequate due diligence investigation and demand sufficient guarantees when buying a business. If the buyer does not do so, he cannot demand a rescission of the contract.

<sup>24</sup> See, for scholarly analyses, Kersten, H., 'Het due diligence onderzoek' [The due diligence investigation], *Dossier Ondernemingszaken* [journal on corporate law subjects], 2001-47, Elsevier-The Netherlands, pp. 27-33, p. 28; Van Rossem, M.M., *Garanties in de praktijk*



have repercussions for its rights after concluding the transaction. If the buyer has not performed a sufficient due diligence investigation, it will be more difficult for him to rescind the transaction, or claim damages, in the event that some factual matters appear not to be to his liking. He could have found that out before, and is expected to have done so.<sup>25</sup> On the other hand, if a seller keeps silent about some crucial fact, for example an invisible construction fault in a building, or a liability that is not revealed by the annual accounts, he will be considered to have violated his duty to inform the buyer. As a consequence, the buyer is entitled to rescind the agreement or claim compensation.<sup>26</sup>

The scope of a commercial due diligence process is not prescribed. The parties to the transaction can agree on any type of information that will be exchanged between them. Sometimes, a buyer of a company is only interested in learning about really material issues. Since these mostly come up with regard to pensions, environmental or tax matters, parties can decide to limit the due diligence to these subject matters. Only specialists in these areas will then be hired to perform the investigation. In other situations, a buyer is mainly interested in acquiring a company because of the human capital. In that case, he will primarily focus on the employment agreements to ascertain that the key-employees will stay after the take-over. Parties also need to agree on the scope of the investigation: will the buyer be given access to information concerning all companies in a corporate pyramid or just one or more of the top-holding companies?

### 3.2.4. Private Transactions Due Diligence – Integrating Human Rights?

Generally, just like in capital markets transactions, a due diligence process in private transactions will cover the whole spectrum of subjects which are pertinent to the business that is the object of the transaction. Human rights issues are typically not issues that are listed on a due diligence questionnaire exchanged between the parties before the investigation commences.<sup>27</sup> However, since many companies operate globally, human rights violations become a business risk relevant to be considered. Being accused of human rights abuse, or complicity thereto, is bad news for a company. It could severely damage its reputation.<sup>28</sup> It therefore seems rational to

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[Representations and warranties in practice], Kluwer, Deventer, 2002, p. 210; De Kluiver, H.J., 'Overnamecontracten, letters of intent en garanties' [Acquisition agreements, letters of intent and representations and warranties], *Dossier Ondernemingszaken*, 2001-47, pp. 34-43; De Nijs Bik, W., 'Mededelings- en onderzoeksplichten bij (bedrijfs)overname' [Disclosure and enquiry duties in relation to a business acquisition], *Ondernemingsrecht* [Corporate Law Journal], Kluwer-The Netherlands, 2003-16, pp. 627-631; and De Nijs Bik, W., 'Het due diligence-onderzoek' [The due diligence investigation], in: *Bedrijfsovername* [Acquisition of a business], 2nd ed., Kluwer, Deventer, 2005, pp. 51-73. For an analysis of European tort law and the duty of care, see Van Dam, C., *European Tort Law*, Oxford University Press, Oxford, 2006, p. 502.

<sup>25</sup> Articles 6:228 Dutch Civil Code *re dwaling* [mistake] and 6:265 *re* rescission. See, for example, *ABP/Hoog Catherijne*, DSC 22 December 1995 (NJ1996/300) concerning damages under a representations and warranties claim that were not awarded because the buyer could have performed a more adequate due diligence investigation; *VBI/Interchem* (*supra* note 23).

<sup>26</sup> *Mol/Meyer (Provamo)*, DSC 4 February 2000 (NJ2000/562) concerning sellers which had not informed the buyer of a potato processing factory about the illegal ways in which the factory obtained water and discharged its polluted water, hence the discovery of the hidden liabilities (tax claims) led to the rescission of the purchase agreement.

<sup>27</sup> Pickard, *op.cit.* (note 13).

<sup>28</sup> Van Tulder, R. and Van der Zwart, A., *International Business-Society Management. Linking corporate responsibility and globalization*, Routledge, London and New York, 2006. See also

include this subject in a private transaction due diligence process. If the due diligence investigation of the target business or future project reveals any human rights related problems, the entrepreneur or financier can deal with such issue in good time, or alternatively, back out of the intended transaction.

### 3.3. OTHER REASONS

Besides legal reasons, companies also mention other reasons, of a more practical nature, why they perform a due diligence investigation. For example, the motivation of a bank to carry out a due diligence inspection before granting a loan is to ascertain, firstly, whether the company can repay the loan and generate sufficient cash flow to pay for the periodical interest and, secondly, to identify collateral and to determine its value. A risk analysis of the company, its business, the industry and the geographical region usually forms part of a finance due diligence.

The reason for initiating a due diligence analysis before concluding an operational agreement is that the company needs to know about the operational and business opportunities, the value of the proposed contract, and which obstacles and risks can be expected.

There are many more commercial and practical drivers for a due diligence investigation. Some are transaction-related, such as to prepare the best tax structure for the acquisition or joint venture, or to analyse which steps need to be taken before the transaction can take place. Other reasons include the identification of ‘conditions precedent’,<sup>29</sup> which are applicable to concluding the transaction (for example supervisory board or shareholders’ approval may be required); examining whether permission from third parties is required for the transaction, for example pursuant to legislation or contractual ‘change of control’ clauses;<sup>30</sup> the preparation of the ‘representations and warranties’ that will become part of the transaction documentation;<sup>31</sup> to avoid mismanagement and directors’ liability (due to unfunded

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Lambooy, T.E. and Rancourt, M-È, ‘Shell in Nigeria: From Human Rights Abuse to Corporate Social Responsibility’, *Human Rights & International Legal Discourse*, Vol. 2, No. 2, 2008, pp. 255-259.

<sup>29</sup> ‘Conditions precedent’ are conditions, which if not fulfilled, would lead the contract to be void or would allow the party who has benefited (usually the purchaser) to render the contract void. The completion of a due diligence investigation can be one of such condition precedent to complete the purchase.

<sup>30</sup> ‘Change of Control’ clauses allow one or both parties to terminate the agreement on a change in ownership of a controlling interest in the other party. They are quite common in debt and lease agreements as well as in substantial supplier contracts. See further Rankine, D., Bomer, M. and Stedman, G., *Due diligence: definitive steps to successful business combination*, Pearson Education Limited, Harlow, 2003, at p. 94.

<sup>31</sup> *ABP/Hoog Catherijne*, *supra* note 25.

investment decisions);<sup>32</sup> and to prepare a to-do list concerning improvements which need to be made after the transaction has been concluded.<sup>33</sup>

In sum, there are various reasons for companies to commence a commercial due diligence investigation. So far, companies did not consider human rights concerns as a typical subject to be included in a due diligence assessment.

### 3.4. How?

How does one carry out a due diligence process? A due diligence assessment typically consists of a factual investigation and desk research. The factual part takes place by for example interviewing company representatives, inspecting operations and machinery, taking soil samples to examine pollution levels, valuating real estate and exploring the IT systems. The steps to be taken depend on the type of business that needs to be investigated and on the type of transaction. A finance transaction requires other information than a management buy-out transaction. The desk study part of a due diligence process will focus on examining documents, for example annual accounts and other financial documents such as management reporting systems, accountants' letters. Other relevant documents include: operational licences, intellectual property rights registrations, court documents, consultant reports, commercial contracts, distribution contracts, supply contracts, rental contracts, service level agreements, key employee agreements, collective labour agreements and social plans.

A legal due diligence consists of an examination of the legal, tax and financial structure of a company or a project. Besides investigating facts and risks pertinent to the company, the examination also focuses on more general business risks. Questions to be answered are, for example: are there any country risks such as currency risks or corruption risks that need to be avoided? The NGO Transparency International provides useful indices on corruption risks on its website. Human rights issues could well be included in this part of the investigation. In order to deal with this subject – as with any subject which forms part of a due diligence investigation – the researcher should truly understand the way in which the company works, produces its products, where the resources and other ingredients needed for the production process come from, where the company buys its products, and in which way the products are manufactured. Based on this overall knowledge, sensitive issues from a human rights perspective can be distilled and more fully investigated. Furthermore, the due diligence research could include an Internet search to see if the company concerned has been identified in connection with any human rights issues. Local news sources could also be included in the search to analyse whether there are any issues in which

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<sup>32</sup> Compare *OGEM*, Amsterdam Enterprise Chamber, 3 December 1987 and DSC, 10 January 1990 (NJ1990/466), concerning mismanagement due to an inadequate preparation of acquisitions; *Verto*, Amsterdam Enterprise Chamber, 7 March 1996 (NJ1997/674) – the fact that the directors had not performed a due diligence investigation in view of a business acquisition was judged not to be diligent; however, special circumstances in this case (that is prior knowledge concerning the target company) led to the judgment that there had been no mismanagement; *Verto*, The Hague CoA, 6 April 1999 (NJ1999/142), concerning the personal liability of the directors (rejected); *De Vries Robbé*, DSC, 13 September 2002 (LJN AE7940), concerning mismanagement by directors and supervisory directors; one of the questions concerned the quality of the due diligence process.

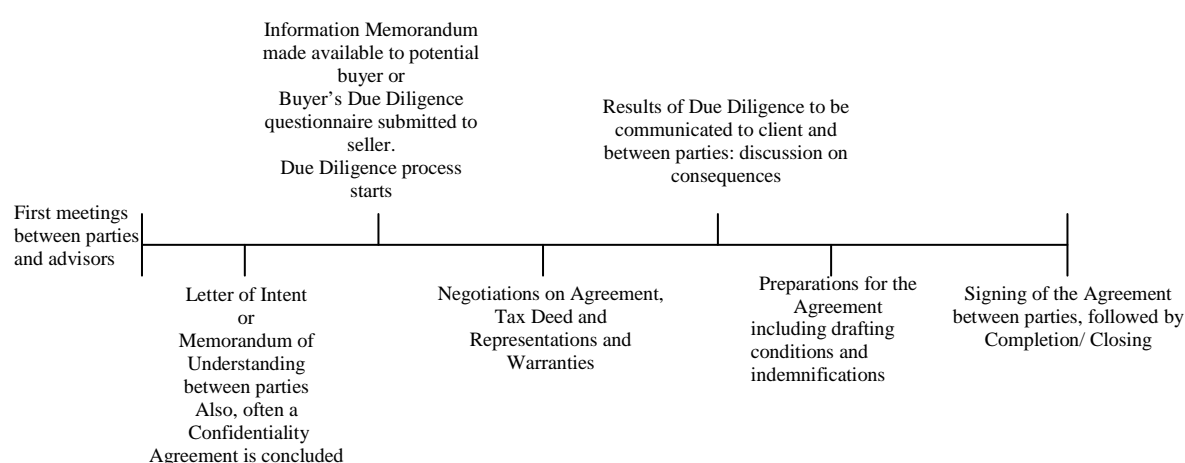
<sup>33</sup> Based on the practitioner's experience of the author and on the *Loyens & Loeff Handbook: Due Diligence Law and Practice* (1997, 2<sup>nd</sup> edition 2003), that is an in-house handbook of which she was the author. See also Brink *op.cit.* (note 16), pp. 67-73.

the company is mentioned. If the parties agree, stakeholder interviews can also be made part of the due diligence assessment.

### 3.5. WHEN?

Figure I depicts a typical transaction timeline. A due diligence inspection typically starts quite early on in the process and mostly ends just before completing the transaction. It is important that the experts who perform the due diligence process communicate their findings promptly to their client so that he can use the information in the negotiation process. Quite often, even at the very last moment of a transaction, parties are still exchanging information.

Figure I: Timing of a due diligence process in corporate practice



### 3.6. CONCLUSION ON CORPORATE DUE DILIGENCE PROCESSES

The elaboration on corporate due diligence processes in this section has demonstrated in which way human rights impact research can fit into the current corporate practice. The logic of including the subject of human rights in standard corporate due diligence processes is that any future problems could have a material adverse effect on the business and reputation of the company. Since a corporate lawyer generally has no training in human rights law, it is recommendable to cooperate with human rights law experts. They can make use of existing HRIA tools (see section 6). Consequently, from these perspectives, and in view of Ruggie's recommendations – which now represent the 'state of the art', and are therefore relevant in determining best practices in due diligence – it can be concluded that such cooperation can be of great assistance to any issuer and lead manager performing a due diligence investigation in order to prepare a prospectus, as well as in any private transaction due diligence process.

The following section will first explain how the concept of due diligence has emerged in international human rights law, since this also provided a background for Ruggie when he developed his policy framework.

## 4. DUE DILIGENCE IN HUMAN RIGHTS LAW

International human rights treaties require of the parties to such treaties, that is the States parties, to ensure that their citizens can enjoy human rights. The obligations on States parties are often categorised in three levels: the obligations to respect, to protect and to fulfil human rights. These obligations entail that States should withhold from violating these rights themselves, but also positive obligations, *i.e.* that States take measures to assure that the rights will not be violated and will be fulfilled.

The duty to protect is also referred to as a ‘responsibility from omission’ or ‘duty of due diligence’.<sup>34</sup> Referring to this positive State obligation, an individual whose rights have been violated by another private actor, can call upon his rights towards the State.<sup>35</sup> If the police or a court as State agents do not protect the human rights of such individual when called upon, the State can be considered to have violated its international responsibilities under the relevant human rights treaty.<sup>36</sup> As States in fact cannot control the behaviour of private actors, the fulfilment of their positive obligation cannot be measured by the achieved result: it therefore qualifies as a ‘due diligence’ obligation, that is the State is expected to employ all possible means and measures to prevent violations.

The term ‘due diligence’ is often utilised in international law as an indicator of the level of effort that a State party to a treaty should employ to discharge its obligations under such a treaty: has the State applied due diligence?<sup>37</sup> According to Professor Malcolm Shaw, the test of due diligence is in fact the standard that is accepted generally as the most appropriate one, at least in the context of preventing harm to another State by environmental pollution.<sup>38</sup> He points out that the due diligence test undoubtedly imports an element of flexibility into the equation and must be applied in the light of the circumstances of the case in question. Case-law has catered for new norms and instruments applicable to the State duty to employ due diligence. For instance, the elements of remoteness and foreseeability have become part of the framework of the liability of States: a State must base its actions on an assessment of possible risks and harm. Furthermore, due diligence refers to those measures which are generally considered to be appropriate and proportional to the degree of risk of the harm in the particular instance. The measures can comprise legislative, administrative and other actions, including the establishment of suitable monitoring mechanisms to implement the measures.<sup>39</sup>

The duty of States to take any necessary measures to protect individual rights is developed in case-law pertaining to human rights. In order to understand this concept, one should look closely at the context in which positive obligations are

<sup>34</sup> Nollkaemper, A., *Kern van het international publiekrecht* [Basics of International Law], 2nd ed., Boom Juridische Uitgevers, Den Haag, 2005, p. 255; and Clapham, A., *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 318 and 334, and see pp. 317-436 for a systematic analysis of positive obligations under selected human rights treaties.

<sup>35</sup> Nollkaemper, *op.cit.* (note 34), p. 256; and Clapham, *op.cit.* (note 34), pp. 521-523.

<sup>36</sup> For example, ECtHR, *X and Y vs the Netherlands*, (Appl. No. 8978/80), judgment of 26 March 1985, Series A., No. 91, p. 23, § 22, regarding Article 8 ECHR ‘Right to Family Life’.

<sup>37</sup> Nollkaemper, *op.cit.* (note 34), p. 180. A classic international law case on due diligence is ICJ, *Corfu Channel (United Kingdom vs Albania)*, ICJ Reports 1949, p. 22. The Court states that States have the duty ‘not to allow knowingly its territory to be used for acts contrary to the rights of other states’. A State should ensure that acts of private parties committed on its territory or are subject to its jurisdiction, do not harm other States nor their citizens.

<sup>38</sup> Shaw, M.N., *International Law*, 5<sup>th</sup> ed., Cambridge University Press, Cambridge, 2003, pp. 764 and 770.

<sup>39</sup> *Ibidem*, p. 760.

recorded, and specifically the rights at issue, and what extent of effort – the due diligence - is required.

#### 4.1. DUE DILIGENCE IN TREATIES AND COMMENTARIES

Most human rights conventions oblige States parties to take certain measures, whether by domestic legislation or otherwise, in order to protect the rights of individuals in their jurisdiction. Various examples will be provided below. Some treaty provisions indicate clearly that the measures need to include remedies for victims and penalties for perpetrators to make the rights effective. Additionally, the States parties' obligations are sometimes formulated in such a manner that they explicitly extend to the acts by third parties, that is other than State agents. This highlights that international law might demand that States regulate private behaviour in order to protect human rights. For example, Article 3 of the Slavery Convention (1926) clearly includes third parties:

The High Contracting Parties undertake to adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon *all vessels* flying their respective flags. (emphasis added)

Article V of the Genocide Convention (1948) refers to penalties:

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide *effective penalties* for persons guilty of genocide or any of the other acts enumerated in article III. (emphasis added)

Article 1 of the European Convention on Human Rights (ECHR, 1948) requires more generally: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

There is little doubt that the State has the duty to ensure that non-State actors in the private sector do not engage in direct or indirect discrimination. In that respect, the International Convention on the Elimination of All Forms of Racial Discrimination (1965) reads in Article 2(d): 'Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination *by any persons, group or organization.*' (emphasis added)<sup>40</sup>

Article 2 of the International Covenant on Civil and Political Rights (ICCPR, 1966), the Articles 1 and 2 of the American Convention on Human Rights (Pact of San Jose, Costa Rica, ACHR, 1969) and Article 1 of the African [Banjul] Charter on Human and Peoples' Rights (ACHPR, 1981) put down similar duties on States parties. By Article IV.2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), the States parties to this Convention also pledged to act in respect of third parties and prosecute and punish them.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) has been on the forefront of efforts to make it clear that

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See, regarding racial discrimination by a bank, *ZIAD Ben Ahmed Habassi vs Denmark*, Communication No. 10/1997, UN Doc. CERD/C/54/D/10/1997, 6 April 1999, pp. 10-11.

States have positive duties to protect individuals from violent acts of other individuals and groups. In the Articles 2(e), (f) and 5(a), the States parties commit to eliminate discrimination against women by any person, organisation or enterprise, by taking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee)<sup>41</sup> builds on the concept of due diligence under general international law by recommending the application of due diligence as a standard to protect individuals from infringements of their rights committed by non-State actors.<sup>42</sup> This was followed by similar wording, ‘States should exercise *due diligence* to prevent...’, in Article 4(c) of the UN Declaration on the Elimination of Violence Against Women (1993).<sup>43</sup> The references to due diligence in these two texts have been used to develop a set of positive obligations for States with regard to violence by non-State actors.<sup>44</sup> An example can be found in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará, 1994), that is the first human rights convention which explicitly mentions the term due diligence (Article 7(b)):

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to (...) apply *due diligence* to prevent, investigate and impose penalties for violence against women. (emphasis added)

A similar view was employed in 2004 by the Human Rights Committee in its General Comment regarding the ‘Nature of the general legal obligation imposed on States Parties to the Covenant’ (that is the treaty body to the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)).<sup>45</sup> The Inter-American Commission on Human Rights (2008),<sup>46</sup> and the political bodies of the Council of Europe (2002),<sup>47</sup> and the UN General Assembly (2004)<sup>48</sup> have also recognised due diligence standards as requiring swift and effective action against perpetrators of human rights violations. Furthermore, the due diligence standard as a tool for the elimination of violence against women was the main subject of the 2006 Report of Yakin Ertürk, the UN Special Rapporteur on Violence against Women.<sup>49</sup>

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<sup>41</sup> The Committee monitors the implementation of national measures to fulfil this obligation and makes recommendations.

<sup>42</sup> General Recommendation No. 19, [§ 9], UN Doc. A/47/38, 1992, p., 5.

<sup>43</sup> UN Doc. A/RES/48/104, Res. of 20 December 1993.

<sup>44</sup> Amnesty International, ‘Respect, protect, fulfil – Women’s human rights. State responsibility for abuses by “non-state actors”’, AI Index IOR 50/01/00 [§ 4].

<sup>45</sup> General Comment No. 31, [§ 8], 2004, UN Doc. HRI/GEN/1/Rev.8, 2006, ‘Compilation’.

<sup>46</sup> Concerning due diligence. See also General Comment No. 16, [§ 27], 2005.

<sup>46</sup> ‘Observations of the Inter-American Commission on Human Rights upon the conclusion of its April 2007 visit to Haiti’, OEA/Ser.L/V/II.131 Doc 36, 2 March 2008, [§§ 39, 65]; and ‘The situation of the Rights of women in Ciudad Juárez, Mexico. The right to be free from violence and discrimination’, OEA/Ser.L/V/II.117, Doc. 44, 7 March 2003 [§§ I 7,9,10 and IV 103,104,131-137,154-158,165].

<sup>47</sup> ‘Committee of Ministers Recommendation to Member States on the Protection of Women against Violence’, 2002, p. 5, see II; and Appendix [§§ 34-41,45] and Explanatory Memorandum [§§ 90-92].

<sup>48</sup> UNGA Res. 58/147 of 19 February 2004.

<sup>49</sup> Report of 20 January 2006; UN Doc. E/CN.4/2006/61, [§§ 61-64,101-103].

The above quotations provided some examples of the use of the term ‘due diligence’ in human rights conventions and commentaries. Yet, when ‘due diligence’ is used in a treaty text or in commentaries by treaty bodies, the concept remains broad. It is therefore valuable to study how international human rights courts have explained its meaning in concrete cases.

#### 4.2. DUE DILIGENCE IN JURISPRUDENCE

‘Due diligence’ was first used in *Velásquez Rodríguez vs Honduras* (1988). The Inter-American Court of Human Rights introduced this term as the standard against which the State’s behaviour could be tested. The test resulted in a judgment that Honduras had violated international human rights obligations. The case concerned the question whether Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the American Convention on Human Rights had been violated, because of the forceful disappearance of Mr Velásquez. The Court argued that Honduras could be held liable, ‘not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it as required by the Convention’ (emphasis added).<sup>50</sup> The Court rationalised:

What is decisive is whether a violation of the rights recognized by the Convention has occurred *with the support or the acquiescence of the government*, or whether the *State has allowed* the act to take place without taking measures to prevent it or to punish those responsible. (emphasis added)<sup>51</sup>

The Court explained that the State has a legal duty to take reasonable steps to prevent human rights violations. It was stressed that every situation involving a human rights violation committed within its jurisdiction must be seriously investigated by the State. The Court considered it a failure if ‘the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible.’<sup>52</sup> Even when the violations have been caused by private persons or groups, the State is expected to take action to avoid impunity: it should identify those responsible and impose the appropriate punishment. Also, it is the State’s duty to ensure that the victim receives adequate compensation.<sup>53</sup> The Court reasoned that the State’s ‘duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result.’ The concept of due diligence was further elaborated by the Court in its statement that the investigation ‘must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty.’ Compliance therewith does not suffice ‘without an effective search for the truth’.<sup>54</sup> Elements that were important in this case were: (i) the failure of the judicial system to act upon the writs brought before various tribunals; (ii) no judge had access to the places where Velásquez might have been

<sup>50</sup> IACtHR, *Velásquez Rodríguez vs Honduras*, 29 July 1988, Series C, No. 4, [§§ 172-175]. The Inter-American Commission on Human Rights had submitted this case to the Inter-American Court of Human Rights.

<sup>51</sup> *Ibidem*, [§§ 173-174].

<sup>52</sup> *Ibidem*, [§ 176].

<sup>53</sup> *Ibidem*, [§ 177].

<sup>54</sup> *Idem*.



detained; (iii) the executive branch failed to carry out a serious investigation to establish the fate of Velásquez; and (iv) public allegations of a practice of disappearances had not been investigated.

At the other side of the Atlantic, the European Court of Human Rights (European Court) deducted from a number of substantive provisions of the ECHR that circumstances may arise in which a State would have a positive obligation to protect individuals' rights. According to this Court, the right to life of Article 2 entails the obligation to take appropriate steps for the safeguarding of life within its jurisdiction.<sup>55</sup> A similar due diligence standard as applied in *Velásquez* was used by the European Court in *Osman vs the United Kingdom* (1998).<sup>56</sup> Mrs Osman's husband had been killed by her son's former teacher. Her son was seriously injured in the same incident. The case concerned the alleged failure of the authorities to protect the right to life of Mr Osman and his son from the threat posed by the teacher. The Court noted that it was not disputed that the right to life may in well-defined circumstances imply 'a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.' As to the scope of that obligation the Court considered that

bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, any such obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.

This consideration clearly brings in the proportionality factor which, according to Shaw, forms part of the concept of due diligence as applied under environmental law.<sup>57</sup> Furthermore, the Court expressed that it was important to assess what the authorities knew or ought to have known about the imminent risk that a violation of a human right was to take place:

it was sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which *they have or ought to have knowledge*. This is a question which can only be answered in the light of all the circumstances of any particular case. (emphasis added)<sup>58</sup>

However, based on the factual evidence presented in this case, the Court considered that the police did not have nor ought to have such knowledge. The results from the investigation conducted by the police –which included exchanging information with a psychiatrist – did not suggest that the son was at risk from the teacher, less so that his life was in danger. The Court's conclusion recorded no violation of Article 2 by the United Kingdom authorities.

After the *Osman* Case, the case-law of the European Court and the European Commission of Human Rights developed further on positive State duties in relation to violations by non-State actors. A useful overview of the Court's position on the due

<sup>55</sup> Shaw, *op.cit.* (note 38), p. 332, referring to *LCB vs the United Kingdom*, 9 June 1998.

<sup>56</sup> ECtHR, *Osman vs the United Kingdom*, 28 October 1998, Application No. 23452/94, *Reports 1998-VIII*, [§§ 115-122].

<sup>57</sup> See the introductory paragraph of section 4.

<sup>58</sup> *Osman vs the United Kingdom*, *supra* note 56, [§ 116].

diligence standard in various cases was presented in the brief submitted by Interights in the domestic violence case of *Nahide Opuz vs Turkey* (2001).<sup>59</sup> Interights, the ‘international centre for the legal protection of human rights’, was a third party intervener in the case. In this case, Opuz had alleged that the Turkish authorities had failed to protect the right to life of her mother and that they were negligent in the face of repeated violence, death threats and injury to which she and her mother were subjected. The Court concluded:

Despite the withdrawal of the victims’ complaints, the [Turkish] legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. [the murderer] on the basis that his violent behaviour had been sufficiently serious to warrant prosecution and that there had been a constant threat to the applicant’s physical integrity. Turkey had therefore failed to establish and apply effectively a system by which all forms of domestic violence could be punished and sufficient safeguards for the victims be provided. Indeed, the local authorities could have ordered protective measures under Law no. 4320 or issued an injunction banning H.O. from contacting, communicating with or approaching the applicant’s mother or entering defined areas. On the contrary, in response to the applicant’s mother’s repeated requests for protection, notably at the end of February 2002, the authorities, apart from taking down H.O.’s statements and then releasing him, had remained passive; two weeks later H.O. shot dead the applicant’s mother.

The Court concluded that the Turkish authorities had not shown due diligence in preventing the violence and had therefore failed to protect the right to life of the applicant’s mother.

Examining the depth of a State’s due diligence obligation, it appears that the European Court applies a ‘knew or ought to have known’ standard.<sup>60</sup> Beyond the obligation to take action when an official complaint is lodged, or – under special circumstances – when the victims’ complaints have been withdrawn (*Nahide Opuz*), the Court has held that ‘even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that [serious violations] might have occurred.’<sup>61</sup> This should be understood in a context which is particularly opaque and where victims are often reluctant to report violence. Certainly in the event that prior cases of violence have been reported, there can be little doubt that the State has sufficient ‘knowledge’ to trigger the requirement of close scrutiny and adequate measures of protection. This is all the more apparent in situations of a general pattern of abuse, such as was the case in *Kaya vs Turkey*.<sup>62</sup> A particularly high degree of vigilance is then required of the State.

<sup>59</sup> ECtHR, *Nahide Opuz vs Turkey*, 9 June 2009, Application No. 33401/02, at: [www.kahdem.org.tr/?p=232](http://www.kahdem.org.tr/?p=232). See legal brief Interights of 21 July 2007, [§§ 8-22] at: <http://www.interights.org/view-document/index.htm?id=237>.

<sup>60</sup> *Osman vs the United Kingdom*, *supra* note 56, [§ 116]. Interights’ legal brief, *supra* note 59 [§ 14] analysed this by referring to ECtHR, *Z and Others vs the United Kingdom*, 10 May 2001, Application No. 29392/95, ECHR 2001-V33 [§ 73] and ECtHR, *E. and Others vs the United Kingdom*, 15 January 2003, Application. No. 33218/96, ECHR 763, [§ 88]. See UN Doc. E/CN.4/2006/61, 20 January 2006, [§§ 20-23, 88].

<sup>61</sup> ECtHR, *97 Members of the Gldani Congregation of Jehovah’s Witnesses and 4 other vs Georgia*, 3 May 2007, Application. No. 71156/01, [§ 97].

<sup>62</sup> ECtHR, *Mahmut Kaya vs Turkey*, 28 March 2000, Application No. 22535/93, ECHR 2000-III, [§ 127].

Along the same lines was *Maria da Penha vs Brazil* (2001), in which case the Inter-American Commission on Human Rights stressed that the State's obligation is not limited to eliminating and punishing violence, but also includes the duty of prevention.<sup>63</sup> Referring, amongst others, to the state duty defined in Article 7(b) of the Convention of Belém do Pará to exercise due diligence to prevent human rights violations (section 4.1. *supra*), the Commission argued:

This means that, even where conduct may not initially be directly imputable to a state (for example, because the actor is unidentified or not a state agent), a violative act may lead to state responsibility 'not because of the act itself, but because of the lack of due diligence to prevent the violation or respond to it as the Convention requires'.<sup>64</sup>

The Commission concluded that Brazil had violated Ms Fernandes' rights by delaying for more than 15 years the prosecution of her abusive husband for the attempted murder, despite the clear evidence against the accused and the seriousness of the charges. The Commission found that the case could be viewed as 'part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors.' Subsequently, the specific obligation which the Convention of Belém do Pará imposes on States to take additional measures to affirmatively protect the rights of women – in particular, women such as migrant women and young women and girls – has been confirmed in *Ximenes-Lopes vs Brazil*; *Pueblo Bello Massacre vs Colombia*; and *Mapiripán Massacre vs Colombia*.<sup>65</sup>

In *A.T. vs Hungary*, the CEDAW Committee expressed the view that Hungary had failed to fulfil its obligations and had thereby violated the rights of the individual under the CEDAW, including the Articles 2(e) and 5(a) (section 4.1. *supra*).<sup>66</sup> The Committee recommends to Hungary to undertake the following remedies:

[To] take immediate and effective measures to guarantee the physical and mental integrity of A.T. and her family; and [to] ensure that A.T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance and that she receives reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights(...) [to] assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women.

Despite its growing popularity of the standard of due diligence as a tool for promoting greater State accountability, this standard has also been criticised. Carin Benninger-Budel contends that the content and scope of due diligence obligations remain vague. Against the backdrop of contemporary issues that pose threats to women's rights, she has examined how the due diligence standard and other strategies can be applied as

<sup>63</sup> Inter-American Commission on Human Rights, *Maria da Penha vs Brazil*, Case 12.051, Report No. 54/01, OEA/Ser./L/V/II.111, doc. 20 rev. At 704 (2000), 16 April 2001 [§§ 5,20,54,56,58].

<sup>64</sup> *Idem*.

<sup>65</sup> IACtHR, *Ximenes-Lopes vs Brazil*, 4 July 2006, Series C, No. 149, p. 85; IACtHR, *Pueblo Bello Massacre vs Colombia*, 31 January 2006, Series C, No. 140, p. 113; and IACtHR, *Mapiripán Massacre vs Colombia*, 15 September 2005, Series C, No., pp. 132, 111.

<sup>66</sup> CEDAW Commission, *A.T. vs Hungary*, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003, 2005, [§§ 9.2,9.6].

useful mechanisms to combat violence against women in various cultures worldwide.<sup>67</sup> With the same focus, a critical analysis was made in 2006 by Professor Ineke Boerefijn.<sup>68</sup> She opined that State efforts based on due diligence do not suffice. She argued that if violence against women is still daily practice in many countries, exercising due diligence is apparently not enough. She argues that a State must *guarantee* a satisfactory situation, that is without violence. In other words: the fulfilment of a human right obligation should not be measured by employing efforts, but – instead – by realising results.<sup>69</sup>

#### 4.3. UNIVERSAL HUMAN RIGHTS NORMS FOR COMPANIES?

The preceding sections have described the development of the concept of due diligence obligations for States in international human rights law. The term has also surfaced in the debate on the responsibilities of corporations for human rights.

The last two decades, a growing concern about human rights abuses or complicity thereto by corporate actors emerged. Without intending to discuss this subject in depth, a few examples will be depicted in this section.<sup>70</sup> In 1995, all over the world, people were concerned about the possible complicity of the Dutch-UK oil company Shell with the execution of Ken Saro Wiwa and other human rights abuses by the military regime in Nigeria.<sup>71</sup> In response to a Communication alleging human rights abuses by the Nigerian Government, the African Human Rights Commission stated in 2002, amongst others, that the Nigerian Government should have protected its citizens from non-State actors with regard to the right to housing. The Commission also stressed that the Government ‘should not allow private parties to destroy or contaminate food sources’. Additionally, it referred to violations by private actors in the context of its finding of a violation of the right to life and integrity of the person.<sup>72</sup> Like other human right treaties, the regional human rights system of Africa does not provide for a mechanism where private parties can be held directly accountable for human rights violations under the ACHPR.<sup>73</sup> Nonetheless, the decision shows that this

<sup>67</sup> Benninger-Budel, C. (ed.), *Due Diligence and Its Application to Protect Women from Violence*, Nijhoff Law Specials, Martinus Nijhoff Publishers, Dordrecht, 2008, Vol. 73.

<sup>68</sup> Boerefijn, I., ‘De blinddoek opzij. Een mensenrechtenbenadering van geweld tegen vrouwen’ [The blindfold put aside. A human right approach of violence against women], inaugural lecture of 8 December 2006, Maastricht University, the Netherlands, pp. 14-15.

<sup>69</sup> *Ibidem*, pp. 16-17. The same question has been raised in respect of the Ruggie proposal that companies should employ due diligence to avoid human rights abuses. Critical remarks were published after the release of the Ruggie Report (section 5 *infra*) contending that corporate best efforts are not enough to avoid human rights abuses; it was argued that legal liability is needed to solve this problem.

<sup>70</sup> For an overview hereof, see, generally, Clapham, *op.cit.* (note 34); Muchlinsky, P., *Human Rights and Multinational Enterprises*, Oxford University Press, Oxford, 2007; Jägers, N., *Corporate Human Rights Obligations: in Search of Accountability*, Intersentia, Antwerpen, 2002; and Joseph, S., *Corporations and transnational human rights litigation*, Hart Publishing, Oxford and Portland Oregon, 2004. See also Enneking, L., ‘Crossing the Atlantic? The political and legal feasibility of European Foreign Direct Liability Cases’, *The George Washington International Law Review*, Vol. 40, No. 4, 2009, pp. 903-938.

<sup>71</sup> Lambooy and Rancourt, *loc.cit.* (note 28).

<sup>72</sup> African Human Rights Commission, *Social and Economic Rights Action Center/Center for Economic and Social Rights vs Nigeria*, 27 May 2002, ACHPR/COMM/A044/1, [§§ 2,59-67]. The Communication and the decision of the Commission are available on: CESR, Nigeria, <http://cesr.org/nigeria>.

<sup>73</sup> Jägers *op.cit.* (note 70), p. 219.

Commission explicitly acknowledged that the fulfilment of economic, social and cultural rights can be threatened by the behaviour of multinational corporations.<sup>74</sup>

However, companies' behaviour can be tested under national law. In 1996, Wiwa's son and others commenced civil law proceedings against Shell in the US.<sup>75</sup> The cases were brought under the Alien Tort Claims Act.<sup>76</sup> These cases were settled in 2009.<sup>77</sup> Other cases, often cited in the literature regarding human rights and business, concern the role of the oil companies Unocal Corporation (California) and Total S.A. (France) in Myanmar (formerly Burma). In 1997, villagers filed suits in the US against Unocal and Total under the Alien Tort Claims Act, for alleged human rights violations connected with the construction of the Yadana gas pipeline.<sup>78</sup> The plaintiffs did not allege that Unocal employees physically carried out any human rights violations. Rather, plaintiffs claimed that Unocal was aware of the Myanmar Military's abuses, and that Unocal's involvement in the project and its dealings with the Myanmar Military rendered it liable for these abuses. In 2005, a settlement was reached.<sup>79</sup>

In 2000, the Sub-Commission on Promotion and Protection of Human Rights (wound up in August, 2006), that is the main subsidiary body of the former UN Commission on Human Rights (UNCHR, which was replaced in 2006 by the UNHRC, the UN Human Rights Council),<sup>80</sup> had begun to analyse the possibilities for developing 'Universal Human Rights Norms for Companies'. The Sub-Commission had asked the Working Group on the Working Methods and Activities of Transnational Corporations to 'contribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights'.<sup>81</sup> In 2003, the Sub-Commission unanimously adopted the 'Norms on the Responsibility of Transnational Companies and Other Business Enterprises with Regard to Human Rights' (the UN Draft Norms), and the Commentary thereto.<sup>82</sup> The Commentary on the Norms pointed at global trends which had increased the influence of multinational companies on the economies of most countries and in international economic relations. It noted that these companies 'have the capacity to foster economic well-being, development, technological improvement

<sup>74</sup> Clapham, *op.cit.* (note 34), p. 434.

<sup>75</sup> As Ken Saro Wiwa's family members did not feel safe in Nigeria anymore, they had moved to the US.

<sup>76</sup> US District Court, New York, *Wiwa vs Royal Dutch Petroleum* (Shell), 28 February 2002. LEXIS 3293, Docket Nos. 99-7223[L]; US Appellate Ct, 2<sup>nd</sup> Circuit, 15 September 2000, LEXIS 23274; US Supreme Ct., *certiorari* denied (*certiorari* [cert.] is a type of writ seeking judicial review), 26 March 2001. US Appellate Ct, 2<sup>nd</sup> Circuit, *Royal Dutch Petroleum Co. vs Wiwa*, 226 F.3d 88, 14 September 2000; US Supreme Ct, cert. denied, 532 US 941, 26 March 2001). Selected legal documents can be found on: <http://wiwavshell.org/resources/legal-documents/>.

<sup>77</sup> Shell paid USD 15 million to the plaintiffs. The plaintiffs set up a trust for the benefit of the Ogoni people. The Settlement Agreement and Mutual Release and the Kiisi Trust Deed, all dated on 8 June 2009, can be accessed at: [http://wiwavshell.org/documents/Wiwa\\_v\\_Shell\\_agreements\\_and\\_orders.pdf](http://wiwavshell.org/documents/Wiwa_v_Shell_agreements_and_orders.pdf).

<sup>78</sup> US Appellate Ct, 9<sup>th</sup> Circuit, *Doe vs Unocal*, 18 September 2002, US App LEXIS 19263. The legal documents can be accessed at: [www.earthrights.org/legal/doe-v-unocal](http://www.earthrights.org/legal/doe-v-unocal). See also Clapham, *op.cit.* (note 34), pp. 255-261.

<sup>79</sup> Earthrights, *ibidem*, at: [www.earthrights.org/print/1362](http://www.earthrights.org/print/1362).

<sup>80</sup> UNGA Res. A/RES/60/251, 15 March 2006.

<sup>81</sup> UN Doc. E/CN.4/Sub.2/RES/2001/3, Resolution of 15 August 2001.

<sup>82</sup> Norms, UN Doc. E/CN.4/Sub.2/2003/12Rev., 2003; Commentary, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, 2003; Sub-Commission Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11, 2003, at p. 52.

and wealth’, but can also ‘cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities.’<sup>83</sup> The UN Draft Norms recognise that ‘States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including assuring that transnational corporations (...) respect (...) human rights’ (Norm A.1.). In addition, regarding business, the same norm requires: ‘Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law...’ In line with human rights law jurisprudence, the Commentary explains this norms as follows (under A.1.b.)

Transnational corporations and other business enterprises shall have the responsibility to use *due diligence* in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from the abuses of which they are aware or ought to have been aware (...). Transnational corporations and other business enterprises *shall inform themselves of the human rights impact* of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses. (emphasis added)<sup>84</sup>

However, when the UN Draft Norms and the Commentary were presented to the then still existing UNCHR for approval, it turned out that there was not enough support among States for their adoption. In particular, the business community had widely advocated that it found the wording on the one hand to be very broad, causing ambiguity regarding their related legal duties, and on the other hand ‘coming too close’. The latter argument related to the fact that self-regulation should do.<sup>85</sup>

Due to the continuing lack of certainty on the application of human rights to companies, the UNCHR decided in 2005 to request the UN Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises. The post has been fulfilled from the beginning by Ruggie as was indicated in section 1. In particular, the Special Representative was commissioned to develop a framework for providing more effective protection against corporate-related human rights abuses. This resulted in the report released in April 2008, that is the Ruggie Report, which attributes a prominent role to corporate due diligence, and in which Report many of the elements of the UN Draft Norms can be retraced, as will become apparent in the next section.

#### 4.4. CONCLUSION ON DUE DILIGENCE IN HUMAN RIGHTS LAW

In sum, since the beginning of the 1990s, various international instruments utilised the term ‘due diligence’ to qualify the State’s legal duty to prevent human rights abuses.

<sup>83</sup> The Commentary also pointed at the OECD MNE Guidelines and the Global Compact Principles.

<sup>84</sup> Commentary, *supra* note 82.

<sup>85</sup> See, for example, Thorsen, S.S. and Meisling, A., ‘Perspectives on the UN Draft Norms’, paper discussed at the IBA/AIJA conference on Corporate Social Responsibility, Amsterdam, 2004, [www2.ohchr.org/english/issues/globalization/business/docs/lawhouse2.doc](http://www2.ohchr.org/english/issues/globalization/business/docs/lawhouse2.doc).

Various international human rights bodies have consistently followed the line that where a State does not undertake adequate action, it may be held internationally responsible for violations, also when they were committed by private parties. Furthermore, international courts have developed jurisprudence on positive obligations, which demonstrates that although the State obligation is not absolute, a State has to exercise ‘due diligence’ in preventing violations, protecting against them, and investigating, prosecuting and providing redress in the event of a breach. The term ‘due diligence’ also surfaced in the Commentary to the UN Draft Norms on the responsibility of companies regarding human rights, which was prepared by a working group of the former UN Sub-Commission on Promotion and Protection of Human Rights. Although the Draft Norms were not approved by the UNCHR, they can be considered the groundwork on which Ruggie proceeded with his framework.

## 5. CORPORATE DUE DILIGENCE AS REFERRED TO BY RUGGIE

Against the background of corporate and human rights law standards as set out in the sections 2-4, the way in which the Ruggie Report describes *corporate* due diligence in relation to human rights abuses will be examined in this section. But firstly, a short exposé will be provided of Ruggie’s point of view on business and human rights and complementary governance.

Research carried out at Ruggie’s request showed that over the period 2005-2007 more than 320 corporate-related human rights violations were reported. Approximately 59 percent of those violations were conducted by the companies themselves, the remainder concerned indirect corporate-related human rights abuses, through subcontractors, local governments or suppliers.<sup>86</sup> Many of the abuses occurred in the extractive industry and timber logging, but also abuses in the consumer products supply chain were noted. Corporate-related human rights abuses often have environmental concerns too.<sup>87</sup> Ruggie considers these abuses a consequence of economic globalisation.

According to Ruggie, globalisation whereby the scope and impact of economic activity are global, as opposed to still mainly State-based law systems, has resulted in ‘governance gaps’ concerning business and human rights. The background of these governance gaps can be found in the practice that international human rights treaties and the bodies established by them are apparently not very well focussed on the role of companies in relation to human rights. These gaps ‘create the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation.’<sup>88</sup> How to narrow and ultimately bridge the governance gaps in relation to human rights is what Ruggie sees as our fundamental challenge.<sup>89</sup> Ruggie emphasises that the current systemic problems can only be solved

<sup>86</sup> UNHRC GA, ‘A Survey of the Scope and Pattern of Alleged Corporate-Related Human Rights Abuse’, UN Doc A/HRC/8/5, 23 May 2008, [§ 58 and Add.2].

<sup>87</sup> *Ibidem*, p. 3.

<sup>88</sup> Ruggie 2008 (note 4) [§ 3]; UN HRC, UN Doc A/HRC/11/13, 22 April 2009, [§ 7].

<sup>89</sup> From a human rights law perspective, however, these gaps have often been referred to as ‘accountability gaps’, i.e. that corporate conglomerates need not account for their worldwide activities against the same standards everywhere. E.g. presentation by Kamminga, M., ‘Leidt de benadering van John Ruggie tot het sluiten van de ‘accountability gap?’ [Does the Ruggie approach result in closing the accountability gap?], Symposium ‘Mensenrechten en Bedrijfsleven’ [Human rights and business], 23 June 2009, Amsterdam, [http://media.leidenuniv.nl/legacy/Voorlopig\\_Programma\\_23juni09.pdf](http://media.leidenuniv.nl/legacy/Voorlopig_Programma_23juni09.pdf). See also Duruigbo, E., ‘Corporate Accountability and Liability for International Human Rights Abuses: Recent

when governments, companies and civil society accept their common responsibilities in realising global governance.<sup>90</sup> His approach aspires to find pragmatic solutions supported by those actors who have to implement them in daily practice rather than to initiate a new legal path that can theoretically close the legal gaps (for example by proposing an international human rights treaty imposing duties directly on companies). The latter approach may take many years to become effective and enforceable; if the required international political support can be acquired at all.<sup>91</sup>

In sum, the reality that compliance with human rights standards by business actors has not been effectively incorporated in human rights instruments can be considered as a gap. Ruggie's framework intends to fill this gap by guiding companies on how to respect human rights. He relies on corporate social responsibility as a tool.

## 5.2. RUGGIE'S MODEL FOR 'COMPLEMENTARY GOVERNANCE'

The Ruggie Report proposes to use a *principle-based policy framework* which rests on the concept of 'common but differentiated responsibilities' for the social actors, that is States, companies and civil society.<sup>92</sup> The framework mainly focuses on three foundational principles: protect, respect and remedy. These concepts are also used in human rights law, including the UN Draft Norms, as has become apparent in section 4. These three principles or pillars are said to form a complementary whole in that each actor supports the others in achieving progress. The second pillar will be portrayed in this section 5.

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Changes and Recurring Challenges', *Northwestern Journal of International Human Rights*, Vol. 6, No. 2, Spring 2008, pp. 222-261, [www.law.northwestern.edu/journals/jihr/v6/n2/2/](http://www.law.northwestern.edu/journals/jihr/v6/n2/2/); and Broecker, C., 'Better the Devil You Know' – *Home State Approaches to Promoting Transnational Corporate Accountability*, Paper New York University School of Law, 2009, [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=christen\\_broecker](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=christen_broecker).

<sup>90</sup> Presentation by Ruggie, Conference 'Business and Human Rights', 1 December 2008, Wassenaar, the Netherlands, [www.minbuza.nl/dsresource?objectid=buzabeheer:59586&type=pdf](http://www.minbuza.nl/dsresource?objectid=buzabeheer:59586&type=pdf).

<sup>91</sup> Criticasters of Ruggie's approach do not agree with him, and allege that his report only encourages 'good' companies to use due diligence to avoid human rights abuses but that it will not bring any change in respect of 'bad' companies' practices. E.g. Misereor/The Global Policy Forum Europe, 'Problematic Pragmatism – The Ruggie Report 2008: Background, Analysis and Perspectives', June 2008, [http://www.cidse.org/uploadedFiles/Publications/Publication\\_repository/policy\\_paper\\_Misereor\\_background\\_Ruggie\\_report\\_june08\\_EN.pdf](http://www.cidse.org/uploadedFiles/Publications/Publication_repository/policy_paper_Misereor_background_Ruggie_report_june08_EN.pdf). Their general reaction to the Ruggie Report is: 'Thus Ruggie's reports falls way short of the expectations of civil society organizations. With his "principled pragmatism" approach, Ruggie formulates what he feels is politically feasible given the forces that be in society but does not state what would be desirable and necessary to protect human rights. Although John Ruggie repeatedly stressed that he rejects any legally binding instruments to regulate companies at global level, because (i) treaty-making can be "painfully slow"; (ii) a treaty-making process "risks undermining effective shorter-term measures to raise business standards (...)", and (iii) serious questions remain "about how treaty obligations would be enforced"'. See also Ochoa, C., American Society of International Law, ASIL Insights – Vol 12, No. 12, 18 June 2008, <http://www.asil.org/insights080618.cfm>; Amnesty International, *Submission to the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business enterprises*, July 2008, <http://www.amnesty.org/en/library/asset/IOR40/018/2008/en/fa1e737c-6ad9-11dd-8e5e-43ea85d15a69/ior400182008en.html>.

<sup>92</sup> Although not very explicit, the same view can be found in the UN Draft Norms and the Commentary, which limit the corporate obligation to protect human rights to 'their respective spheres of activity and influence' (section 4.3. *supra*).



Although the human rights regime ‘rests upon the bedrock role of States’, the Ruggie Report stresses that companies have the responsibility to respect human rights, and this, independently of States’ duties. Whereas the State has a ‘duty’ to protect, Ruggie indicates that companies have a ‘responsibility’ to respect. The difference between a duty, that is a legal obligation derived from being party to international human rights conventions, and responsibility, which can only be considered a semi-legal or moral obligation, is remarkable.<sup>93</sup> It underlines that Ruggie did not wish to take a stance in the ongoing discussion regarding the question whether international human rights treaties apply to companies.<sup>94</sup>

Lack of jurisdiction under international treaties to try a company does not mean that a company is under no (international) legal obligation regarding human rights compliance. Beyond dispute is the fact that national laws can impose obligations of a human rights nature on companies (see for instance, the examples mentioned in section 4.3. *supra*). Introducing national laws can be part of the State duty to protect.

In case of corporate-related human rights abuse, the question emerges which national law system is applicable: the host country’s system or the multinational’s home country?<sup>95</sup> Another question is whether the applicable legal system offers

<sup>93</sup> Prominent law firms have issued differing legal advices on how to interpret the legal impact of the Ruggie Report. See Lipton, M. and Schwartz, K.S. of Wachtell, Lipton, Rosen & Katz, ‘A United Nations Proposal Defining Corporate Social Responsibility For Human Rights’, 1 May 2008, p. 1; available at: [http://amlawdaily.typepad.com/amlawdaily/files/wachtell\\_lipton\\_memo\\_on\\_global\\_business\\_human\\_rights.pdf](http://amlawdaily.typepad.com/amlawdaily/files/wachtell_lipton_memo_on_global_business_human_rights.pdf); and Weil, Gotshal and Manges LLP, ‘Corporate Social Responsibility for Human Rights: Comments on the UN Special Representative Report Entitled ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’, 22 May 2008, available at: [http://amlawdaily.typepad.com/amlawdaily/files/weil\\_gotshal\\_response\\_to\\_un\\_report\\_on\\_human\\_rights\\_and\\_business\\_final.pdf](http://amlawdaily.typepad.com/amlawdaily/files/weil_gotshal_response_to_un_report_on_human_rights_and_business_final.pdf). Van Dam, C., ‘Launch of the Report of the International Commission of Jurists “Corporate Complicity & Legal Accountability”’, lecture, London, 28 October 2008, rightly points out that although John Ruggie’s work does not focus on legally binding rules, his work will inevitably have impact on these rules, particularly in the area of due care: ‘In this respect, there is no clear line to draw between binding rules of care and voluntary rules of care. The concepts are mutually influencing each other...’

<sup>94</sup> Human rights lawyers often argue that the norms captured in those treaties do apply. Companies on the other hand, predictably disagree and argue that since companies are not parties to human rights treaties, the obligations set out therein have no direct application to them and are a concern of governments. See on this discussion the following authors. Clapham *op.cit.* (note 34), pp. 266-270 and 317-334, tries to establish direct applicability on the basis of customary international law and human rights treaties’ bodies’ recommendations; Clapham, A., *Human Rights in the Private Sphere*, Clarendon Press, Oxford, 1993, pp. 137-138; Jägers, *op.cit.* (note 70), pp. 36-38 and 47, grounds this view on the doctrine of *ius cogens* and/or through the horizontal application of human rights obligations, also known as *Drittwirkung*; Muchlinsky, *op.cit.* (note 70), pp. 514-518 and 536, bases his standpoint on ethical business practice. See also: Abrisketa, J., ‘Blackwater: mercenaries and international law’, in *Fride Comment*, October 2007. Available at: <http://www.fride.org/descarga/blackwater.english.pdf>; Singer, P.W., ‘War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law’, *Columbia Journal of Transnational Law*, Vol. 44, No. 2, 2004, pp. 521-549.

<sup>95</sup> *Doe vs Unocal*, *supra* note 78: Unocal argued that the laws of Myanmar were applicable. Also, Shell argued that the Dutch court was incompetent in The Hague District Ct, *Oguru, Efanga, Vereniging Milieudefensie vs Shell* (Doc. no. 2009/0579), ‘Incidentele conclusie houdende exceptie van onbevoegdheid, tevens voorwaardelijke conclusie van antwoord in de hoofdzaak’ [writ arguing *forum non conveniens* and defence by Shell] of 13 May 2009 under IV.7 available at: [www.milieudefensie.nl/globalisering/activiteiten/shell/the-people-of-nigeria-versus-shell](http://www.milieudefensie.nl/globalisering/activiteiten/shell/the-people-of-nigeria-versus-shell).

adequate access to justice and remedies to victims of the violations? These questions relate to the remedy pillar. They are difficult to answer, and are part of current studies and of discussion between policy-makers and legislators.<sup>96</sup> But, as noted, Ruggie is not looking to become an arbiter in legal-theory disputes.

Interestingly, although the Report states that companies have a responsibility to respect human rights rather than a duty, it specifically explains that besides doing ‘no harm’, respecting human rights also entails to take ‘positive steps’. The same approach was noted in section 4. *supra* in respect of the State duty to protect against human rights violations. States are also expected to employ proactive behaviour when it comes to protecting citizens against human rights violations by third parties, and, as recent case-law shows, to preventing violations. Positive steps can imply that a company adopts a specific recruitment and training programme to implement anti-discrimination policy in a workplace.<sup>97</sup> In general, performing a due diligence process is depicted as a pre-condition and therefore a pivotal instrument for companies to realise their respect for human rights. The next sections will go into more detail on corporate due diligence.

### 5.3. DUE DILIGENCE

Under the ‘corporate duty to respect human rights’, the Report introduces the concept of due diligence.<sup>98</sup> It states:

Yet, how do companies know that they respect human rights? Do they have systems in place enabling them to support the claim with any degree of confidence? Most do not. What is required is *due diligence* – 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. (emphasis added)<sup>99</sup>

The concept of corporate due diligence ‘describes the steps a company must take to become aware of, prevent and address adverse human rights impacts’, which according to the Report includes considering the international Bill of Human Rights and the core ILO Conventions.<sup>100</sup> In a footnote, Ruggie referred to the definition of due diligence provided by Black’s US Law Dictionary: ‘[T]he diligence, [that is such a measure of prudence, activity, or assiduity, as is] reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation.’<sup>101</sup>

<sup>96</sup> Castermans, A.G. and Van der Weide, J.A., ‘De juridische verantwoordelijkheid van Nederlandse moederbedrijven voor de betrokkenheid van dochters bij schendingen van mensenrechten, arbeids-, of milieunormen in het buitenland’ [The legal responsibility of Dutch holding companies for complicity of subsidiaries in regard of human right abuses, violations of labour and environmental norms], 15 December 2009, available at: [www.p-plus.nl/beelden/castermans.pdf](http://www.p-plus.nl/beelden/castermans.pdf) [English translation available at: [https://openaccess.leidenuniv.nl/bitstream/1887/15699/2/ENG+NL+report+on+legal+liability+of+parent+companies+\(transl+31+May+2010\).pdf](https://openaccess.leidenuniv.nl/bitstream/1887/15699/2/ENG+NL+report+on+legal+liability+of+parent+companies+(transl+31+May+2010).pdf)]; and Enneking, *loc.cit.* (note 70), pp. 910-913.

<sup>97</sup> *Supra* Ruggie 2008 (note 4)[ § 55].

<sup>98</sup> *Ibidem*, [§ 25].

<sup>99</sup> *Idem*.

<sup>100</sup> *Ibidem*, [§ 58].

<sup>101</sup> *Ibidem*, [§ 25]; and *Black’s Law Dictionary*, 8<sup>th</sup> ed., West Group, United States, 2006.

Ruggie has indicated that he will develop practical guiding principles on due diligence in his mandate extension. Nonetheless, already in a number of reports produced by him, or by experts at his request, we find clear suggestions as to how to conduct a due diligence process. As an overall comment, the Ruggie Report asserted that the process must be ‘inductive and fact-based’.<sup>102</sup> When searching for the standard of knowledge that companies should aspire towards, Ruggie proposes to use the ‘should have known’ standard. This standard exhibits ‘what a company could reasonably be expected to know under the circumstances’.<sup>103</sup> The same standard – *have or ought to have knowledge* – is used in international law (section 4.2. *supra*). Also in corporate law, due diligence implies a duty to investigate to acquire knowledge. Certainly when professional parties are involved, a similar standard is often used: could the party have known the facts if he had conducted adequate due diligence (section 3.2. *supra*)?

As regards the scope of the due diligence investigation, the Report contended: ‘The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities.’<sup>104</sup> Evidently, three sets of factors need to be considered in performing a due diligence investigation: (i) the country context in which the corporate activities take place; (ii) the human rights impacts that the activities may have within such a context; and (iii) whether the company might contribute to abuse through the relationships connected to its activities.<sup>105</sup> These factors will be further addressed in the following subsections.

#### 5.4. THE COUNTRY CONTEXT

Pertaining to the country context, it has been indicated that ‘[a] company should be aware of the human rights issues in the places in which it does business in order to assess what particular challenges such context may pose for them.’<sup>106</sup> That means that a company is to take the time and effort to study the particularities of the country and its political context before taking the final decision to go there and to become involved. This may sound obvious to a human rights lawyer, but the reader should bear in mind that companies are primarily focussed on business opportunities. It is more probable that they pay attention to the cost of labour than to any labour-related human rights issues that may locally be recurrent. Even so, it is more likely that a company will invest time in searching for the best quality of a certain material or product than in investigating whether there are any human rights issues concerning the supply chain. Actually, the information is easy to find, as Ruggie points out: ‘Such information is readily available from reports by workers, NGOs, Governments and international agencies.’<sup>107</sup>

It is useful to illustrate the ‘country-context issues’. As regards safety issues, a company feels a responsibility for its employees, especially its expat employees. It hires cars for them with security guards, or it arranges expat housing in special guarded compounds including the provision of schooling facilities for their

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<sup>102</sup> *Ibidem*, [§ 57].

<sup>103</sup> *Ibidem*, [§ 79].

<sup>104</sup> *Ibidem*, [§ 25].

<sup>105</sup> *Ibidem*, [§ 57].

<sup>106</sup> UNHRC GA Report of Ruggie of 15 May 2008, UN Doc. A/HRC/8/16, [§ 20].

<sup>107</sup> *Idem*.

children.<sup>108</sup> Companies usually try to avoid that their employees be harmed when living abroad while working for the company. If a company would not do that, and any accident occurs, it will be difficult in the future to find employees who will take up such a challenge. At the same time, companies – in general – are less apprehensive when problems tend to occur concerning local employees or subcontractors. Even less so when human rights abuses occur against local people beyond their visual field.

Imagine the situation in which a company acquires a licence to start a soya or palm oil production on a large area of land, or buys a piece of land for mining or for constructing a factory. At the moment that the company obtains the ownership documents or the exploitation rights from the ‘competent authorities’, the area will supposedly have been ‘cleared’, and the company will not see any reason to ask ‘difficult questions about human rights compliance’. Companies usually consider human rights a public matter. The company will regard its project and the jobs it will generate as a positive contribution to the local economic development. However, the reality in many emerging and developing countries is that former inhabitants of such land have commonly not been asked for their consent to relocate; nor have they been compensated. Also, people of neighbouring areas have typically not been consulted about the new plan to allow factory operations. An assessment of potential risks for neighbours in connection with the future pollution of the soil, water or air, has often not been conducted. The behaviour of the local authorities might even be in violation of existing domestic laws.<sup>109</sup> In any case, a possible result for the local people is that they have lost their home and also the possibility to live in a traditional agricultural setting. For them, there is no other choice left than – when lucky – taking up a job in the new factory.<sup>110</sup>

Consequently, companies can contribute substantially to the reduction of human rights offences when they do their homework and consider local human rights issues to be a part thereof. Getting a better grip on the challenges will pave the way for finding solutions. Dealing in a responsible way with the rights of local communities will help a company in the long run to be appreciated and to maintain its ‘licence to operate’.<sup>111</sup>

<sup>108</sup> Shell ‘Security in Nigeria’, at: [www.shell.com/home/content/nigeria/about\\_shell/issues/security/security.html](http://www.shell.com/home/content/nigeria/about_shell/issues/security/security.html). Also see Pepsi-Cola website [www.pepsico.com/](http://www.pepsico.com/). Since 2002, safety of employees is a core value ‘The New Pepsi Challenge: World Class Safety’ [http://ehstoday.com/safety/ehs\\_imp\\_78693](http://ehstoday.com/safety/ehs_imp_78693).

<sup>109</sup> UNHRC GA Ruggie Report of 9 April 2010, UN Doc A/HRC/14/27, [§§ 66-67]. And see [www.srsconsultation.org/index.php/main/discussion?discussion\\_id=7](http://www.srsconsultation.org/index.php/main/discussion?discussion_id=7).

<sup>110</sup> Examples: the operations of Vedanta Resources Plc, a mining corporation in India resulting in the ecological degradation that threatens the livelihoods of many Indian tribal people; see Report of the Joint Committee on Human Rights of the UK House of Lords, House of Commons, First Report of Session 2009-10, Vol. II, 16 December 2009, pp. 137-139, 161-164, 182, at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5ii.pdf>; the British mining company, Monterrico Metals, started an exploitation project without the proper consent of local communities in Peru that led to violence and torture, see *The Indigenous World 2006*, [§ 175]; the operations of Shell Nigeria resulted in misery in the Ogoni Delta; see Lambooy and Rancourt, *loc.cit.* (note 28); Indigenous people from Talsa village in Northern Jharkhand in India face displacement as a result of nearby open-cast uranium mine – the Uranium Corporation of India Ltd, 25 May 2009; *The Indigenous World 2006*, [§ 397]; and the Canadian-based Barrick Gold Corporation was involved in the displacement of more than 1000 people in Papua New Guinea who were forcibly evicted, by police officials, who burnt their homes; see Catalinotto, John, *Papua New Guinea’s Indigenous people vs Barrick Gold*, 6 June 2009, [www.workers.org/2009/world/papua\\_new\\_guinea\\_0611/](http://www.workers.org/2009/world/papua_new_guinea_0611/).

<sup>111</sup> Coca Cola lost its licence to operate in the Indian state of Kerala for at least a year in 2004/2005 due to the fact that the local communities were suffering droughts and did not

The Ruggie Report takes the position that when companies do business in failed States and conflict zones, they even need to implement a more proactive corporate human rights policy. This is required in order to prevent human rights abuses by the company itself or complicity through the involvement of or cooperation with third parties.<sup>112</sup> Failed States are characterised by: (i) an absence of the rule of law; (ii) generally a governance breakdown; and/or (iii) a pattern of sustained violence.<sup>113</sup>

Illustrative of the importance to perform a study of the country risks is the case *Presbyterian Church of Sudan vs Talisman Energy, Inc.* In 1998, the Canadian oil company, Talisman Energy, Inc. ('Talisman') acquired a 25 percent stake in the Greater Nile Petroleum Operating Company Limited, a joint oil and pipeline development in Sudan, when it purchased the Canadian company Arakis Energy Corporation. Later-on, Talisman was accused of committing gross human rights violations, for example complicity with the Sudanese Government in forced displacement of non-Muslim Sudanese living in the area of Talisman's oil concession. In 2001, the Presbyterian Church of Sudan and 13 Sudanese individuals, filed suit in a US court under the Alien Tort Claims Act against Talisman. After a campaign by NGOs targeting institutional investors, Talisman decided to leave Sudan. It sold its stake.<sup>114</sup>

As Ruggie pointed out in a meeting in the Netherlands where he presented his framework, we are not talking 'rocket science'.<sup>115</sup> With a common sense approach it will soon be clear whether an investment or transaction takes place in a failed State and whether the company's activities will contribute to human rights abuses. He mentioned as an example that if a company furnishes gas to a local military vehicle, it has to question itself if that vehicle could cause any harm to local people. If so, he commented, abstain, cancel the transaction or withdraw your business.

## 5.5. THE HUMAN RIGHTS IMPACTS

Regarding the second factor which forms part of the due diligence process proposed by Ruggie, that is the human rights impacts, the Report explains that '[a] company should analyse potential and actual impacts arising from its own activities on groups

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allow Coca Cola to use groundwater. See, about this conflict, '*The Right to Water under the Right to Life: India*', [www.righttowater.org.uk/code/legal\\_7.asp](http://www.righttowater.org.uk/code/legal_7.asp); Coca Cola Company, *Sustainability Review*, 2006; 2007/2008; 2008/2009, [www.thecoca-colacompany.com/citizenship/pdf/2008-2009\\_sustainability\\_review.pdf](http://www.thecoca-colacompany.com/citizenship/pdf/2008-2009_sustainability_review.pdf), p. 31. Senge, P., 'Unconventional Allies: Coke and WWF Partner for Sustainable Water', in: *The Necessary Revolution. How Individuals and Organizations are Working Together to Create a Sustainable World*, Doubleday, New York, 2008, pp. 77-95.

<sup>112</sup> *Supra* Ruggie 2008 (note 4)[§ 48].

<sup>113</sup> *Ibidem*, [§ 47].

<sup>114</sup> Second District, New York, *Presbyterian Church of Sudan vs Talisman Energy, Inc.*, 12 September 2006, 453 F. Supp. 2d 633, pp. 641-661 and US Appellate Ct 2<sup>nd</sup> Circuit, 2 October 2009, US Doc No. 07-0016-cv. See on this case Kobrin, S.J., 'Oil and Politics: Talisman Energy and Sudan', *International Law and Politics*, Vol. 36, No. 2/3, 2004, pp. 425-456, at p. 426. Kobrin, S.J., 'Who Has the Obligation to Protect and Respect Human Rights: The Problem of Responsibility in a Networked World Economy', Paper summary presented in Workshop III, HiiL Conference, available at: [www.lawofthefuture.org/assets/693/AC2009\\_outlines.pdf](http://www.lawofthefuture.org/assets/693/AC2009_outlines.pdf), pp. 21-24.

<sup>115</sup> Presentation Ruggie Wassenaar, *supra* note 90.

such as employees, communities, and consumers.’<sup>116</sup> It is recommended that a basic human rights due diligence process should include the following elements:<sup>117</sup>

- *Policies*. Companies need to adopt a human rights policy.
- *Impact assessments*. Companies must take proactive steps to understand how existing and proposed activities may affect human rights. The scale of a human rights impact assessment will depend on the industry and the national and local context. Assessments should take place on an ongoing basis. Special attention should be paid to assessing impacts before major internal decisions or changes that could have human rights implications, such as new market entry, a merger or joint venture, a new product launch, or an internal policy change. Generally, broader periodic assessments are necessary to ensure that no significant issue is overlooked. Any assessment should include explicit references to internationally recognised human rights.
- *Integration*. Leadership from the top is essential to embed respect for human rights throughout a company, including in key processes such as resource allocation, recruitment, procurement and the evaluation of employees and divisions. Also, training is essential to ensure consistency, as well as capacity to respond appropriately when unforeseen situations arise. Employees should be trained, empowered, and incentivised to fulfil their company’s responsibility to respect human rights.
- *Tracking and reporting performance*. Regular updates of human rights impact and performance are crucial. Adequate oversight should be instituted to ensure that the responsibility to respect is being met, for example by incorporating it into the control systems and assigning managerial or Board accountability. Confidential means to report non-compliance, such as hotlines, can also provide useful feedback on how the company’s human rights programme functions.

The Ruggie framework insists that each of these components is essential, and that without them, a company cannot know and show that it is meeting its responsibility to respect rights. Where ‘due diligence’ in human rights law mainly is used as a *standard* to test whether a State party has applied adequate measures to protect individuals and to prevent human rights abuses, the Ruggie framework bases itself on the concept of due diligence as a *process* as it is known in the corporate due diligence practice. But the corporate due diligence investigations set out in the sections 2 and 3 were mostly *event-driven*, that is necessary in the event of an intended IPO, merger, acquisition or finance agreement. The Ruggie framework however, aims for an *on-going process*. It recommends to conduct ‘broader periodic assessments’ in addition to the *ad hoc* assessments. Pondering on the four elements presented above leads to the supposition that they follow the same lines as corporate in-house programmes to avoid corruption.<sup>118</sup> They also resemble the elements that form part of a corporate internal control and management information process such as the COSO framework, introduced in the US, and referred to by various corporate governance codes and

<sup>116</sup> Report of Ruggie of 2008, *supra* note 106, [§ 21].

<sup>117</sup> *Ibidem*, [§ 60-63]; Ruggie Report 2010, *supra* note 109, [§ 85, 59]; and Sherman and Lehr, *loc.cit.* (note 7).

<sup>118</sup> Lambooy, T.E. and Figueroa, V., ‘Corruption and corporate governance: “in control” requires an anti-corruption programme’, submitted for publication to IBOR, an international legal journal by mid 2010. See section 5 of that article.

acts.<sup>119</sup> Using an internal control and management information system is essential for governing a large company. It is also necessary to generate reliable and complete information for the preparation of annual accounts, annual reports and sustainability reports. To include questions on corporate human rights performance in these types of corporate risk management programmes would not be a big step. In that respect, companies could use the guidance offered by frameworks developed for human rights impact assessments, that is the HRIAs. They contain the relevant questions and provide assistance in measuring and understanding corporate human rights impacts. It would be practical to integrate an HRIA, because all risks and issues, material to the company, would then become apparent in one oversight system which makes it easier for management to deal with them. It can serve dual purpose: to manage the risks to the company and the risks to society.<sup>120</sup>

## 5.6. THIRD-PARTY RELATIONSHIPS

The third factor concerns third-party relationships. The issue here is to examine whether the company might contribute to human rights abuse through any relationships connected to its activities. The Ruggie Report recommends analysing the track records of third parties – with which the company intends to do business – in respect of the use of violence and corruption. The question is whether the company might be associated with harm caused by such entities.<sup>121</sup> Third parties include new joint venture partners, subcontractors, agents, suppliers and local authorities. Most business transactions involve cooperation with local partners. The fact that Ruggie mentions third-party conduct as part of the corporate due diligence investigation reflects a wide view of the scope of the responsibility of the business actor. Based on this view, a company cannot discharge its responsibility to respect human rights by hiring agents to perform, or by subcontracting to local parties, any ‘painful or difficult’ parts of the operations, that is those activities that may be at risk of human rights abuses. For example, standard business practice is to hire external (local) security forces to protect company assets such as installations or buildings. If an investigation would reveal that such a security firm has a violent track record, the company should reconsider if this is the right firm to hire. There might be others with a better track record.

Another situation in which a company deals with third parties is the supply chain. Following Ruggie’s line, it seems that a buyer of raw materials or products is supposed to ascertain that these have been produced without violating human rights. This can be done by executing a due diligence assessment into critical stages of the product chain.<sup>122</sup> In addition, what can be done is to make these concerns part of the

<sup>119</sup> *Ibidem*, section 2, elaborating on the Dutch Corporate Governance Code (Frijns Code); the UK Corporate Governance Code (Combined Code); the US Sarbanes-Oxley Act, Sections 302 and 404.

<sup>120</sup> Ruggie Report 2010, *supra* note 109, [§ 69] noted that there are situations in which the company harms human rights and, in doing so, it may also be non-compliant with existing securities and corporate governance regulations by failing to disclose and address stakeholder-related risks.

<sup>121</sup> Report of Ruggie 2008, *supra* note 106, [§ 22].

<sup>122</sup> *Ibidem*, [§ 59]. An example thereof has been demonstrated in the *G-Star Case*, where assessments were carried out by professional audit companies. See Lambooy, T.E., ‘Case Study: the International CSR Conflict and Mediation’, *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* [Dutch journal for mediation and conflict management], Vol. 13, No. 2, 2009, pp. 5-46, at p. 6.

contractual agreements. Interesting corporate best practices are those introduced by Philips, G-star, Nike and Wal-Mart.<sup>123</sup> These companies have included explicit People and Planet considerations in their suppliers' contracts. Human rights violations will then qualify as an 'event of default' which, if not solved, can lead to the termination of the business relationship. Mainstream banks such as the Dutch RABO and British Barclays Bank impose on borrowers the obligation that they guarantee a non-violation of human rights by their business activities. In case of default, ultimately, the loan can be withdrawn.<sup>124</sup> An interesting decision on supply-chain issues has been rendered by the UK National Contact Point (NCP) in the *Afrimex* Case. An English-Congolese raw material trader was questioned about allegations that child labour was used by its suppliers. The trader, or its supplier, was also said to have paid monies ('taxes') to rebel groups that controlled the area of the mines. The NCP came to the conclusion that the trader had not applied 'sufficient due diligence to the supply chain and failed to take adequate steps to contribute to the abolition of child and forced labour in the mines or to take steps to influence the conditions of the mines'. Applying the due diligence recommendations of Ruggie, the NCP stated that the trader had not investigated the complaints in depth.<sup>125</sup>

A third category of 'third-party relationships' concerns a company's ties with the local authorities. In section 5.4., examples were given of human rights violations by local authorities in connection with (future) corporate activities. For example, 'cleaning up' the land often implies forced relocation and violating local people's rights to shelter and food. Even so, if a State does not effectively impose on companies measures to avoid pollution, this can violate people's right to health.<sup>126</sup> This category appears the most difficult one to put into practice. The reason is that it is difficult to determine how far back in time a company should go in investigating the acts conducted by local authorities, or how many links of a supply chain should be investigated. The answer to these questions depends on the type of product and industry. Best practices will develop and change over time as opinions on these issues sharpen. Ruggie has explored whether concepts such as 'sphere of influence' and 'complicity' can assist in answering these questions. He issued a detailed report thereon.<sup>127</sup> As regards 'complicity', he indicated that this 'remains an important concept because it describes a subset of the indirect ways in which companies can have an adverse effect on rights through their relationships. A proper process of due diligence helps companies to manage risks of complicity in human rights abuses.'

<sup>123</sup> Lambooy, T.E. and Rancourt, M-È., 'Private Regulation: Indispensable for Responsible Conduct in a Globalizing World?', in: *Law and Globalisation*, Bocconi School of Law, Milan and VDM Publishing, Saarbrücken, 2009, pp. 90-133, at pp. 108-110.

<sup>124</sup> Knowledge from corporate law practice. See further the 'Rabo Annual Sustainability Report 2008' at: [www.rabobank.com/content/news/news\\_archive/053-Annualsustainabilityreport2008.jsp](http://www.rabobank.com/content/news/news_archive/053-Annualsustainabilityreport2008.jsp); Rabobank 'Group's Statement on Human Rights', 2002, updated 2006, at: [www.rabobank.com/content/images/Human\\_Rights\\_Statement\\_tcm43-37344.pdf](http://www.rabobank.com/content/images/Human_Rights_Statement_tcm43-37344.pdf); and Barclays Bank's 'Managing environmental and social risks in lending', at: <http://group.barclays.com/Sustainability/Responsible-finance/Environmental-and-social-risk-in-lending>.

<sup>125</sup> Final statement by the UK NCP for the OECD MNE Guidelines: *Afrimex (UK) Ltd*, 28 August 2008, [www.berr.gov.uk/files/file47555.doc](http://www.berr.gov.uk/files/file47555.doc).

<sup>126</sup> Lambooy and Rancourt, *loc.cit.* (note 28) and the examples provided in note 110.

<sup>127</sup> Report of Ruggie 2008, *supra* note 106, [§ 4]. See also International Commission of Jurists, *Corporate Complicity and Legal Accountability*, Vol. 2, 'Criminal Law and International Crimes', 2008, p. 24. In the Ruggie Report 2010, *supra* note 109, pp. 74-76, Ruggie hinted at various companies that have been implicated in human rights-related international crimes and argues that proper due diligence might prevent such situations.



Ruggie thus linked ‘complicity’ to the third factor of a due diligence process. In respect of ‘sphere of influence’, Ruggie declared that this ‘is too broad and ambiguous a concept to define the scope of due diligence with any rigour.’<sup>128</sup> He pointed at the fact that there are two very different meanings of ‘influence’: ‘One is “impact”, where the company’s activities or relationships are causing human rights harm. The other is whatever “leverage” a company may have over actors that are causing harm or could prevent harm.’ According to Ruggie ‘impact falls squarely within the responsibility to respect; leverage may only do so in particular circumstances.’<sup>129</sup>

## 5.7. DUE DILIGENCE: WHEN?

As becomes apparent from the various reports of the Special Representative, a company is typically expected to perform a human rights due diligence investigation in a situation where it intends to engage in new operational contracts with a local government or with a local third party. In comparison, in precisely such situations, companies obtain the services of forensic accounting firms that have in-depth knowledge of the country and the business to perform due diligence operations to uncover possible corrupt practices or accounting fraud.<sup>130</sup> The motivation for a company to do so can be varied: trying to be a responsible corporate citizen, or a fear of falling within the jurisdictional ambit of the US Foreign Corrupt Practices Act.<sup>131</sup> It would not be much of a hurdle to add to the investigation team one or more HRIA specialists in order to find out about the local human rights situation.

The same remark is valid for a situation in which a company plans to acquire a local company or to purchase operational assets or land to expand its business operations. As has been demonstrated in section 3 *supra*, in such a situation, any well organised company will perform a commercial, legal and tax due diligence investigation.

Furthermore, regarding all existing operations, the Ruggie Report advises carrying out human rights due diligence assessments on an on-going basis. This could for instance be included in the annual process that a company has to go through to collect the relevant information to have its tax returns, annual account and report, and – as the case may be – its sustainability report prepared.

## 6. HRIA TOOLS AND SECTOR APPROACHES

The myriad of human rights conventions and other instruments are very important but sometimes not very practical to work with – implying thousands of pages and often in a difficult ‘legal language’. Over the years international human rights have been ‘translated’ into practical frameworks for business actors, that is the so-called ‘human rights impact assessment’ (HRIA) instruments. Some even offer an industry-specific approach. Scientific institutions, NGOs and human rights consultants have developed these HRIAs and it is they that conduct them.<sup>132</sup> Business can profit from their knowledge and skills. An HRIA is basically an assessment of the affairs of a company

<sup>128</sup> Report of Ruggie of 2008, *supra* note 106, [§ 4].

<sup>129</sup> *Ibidem*, [§ 12].

<sup>130</sup> For example KPMG International – Forensic Services, at: [http://www.kpmg.com/SG/en/WhatWeDo/Advisory/Transactions\\_Restructuring/Forensic/Pages/default.aspx](http://www.kpmg.com/SG/en/WhatWeDo/Advisory/Transactions_Restructuring/Forensic/Pages/default.aspx) and Daylight Accounting, at: [www.daylightforensic.com/](http://www.daylightforensic.com/).

<sup>131</sup> Lambooy and Figueroa, *loc.cit.* (note 118), section 5.2.

<sup>132</sup> See note 14.

which reveals (potential) human rights impacts of the company's activities, leading to recommendations on how to improve performance. In addition, the process will help a company to gather information for its public reporting, and hence improve internal information streams, which will ultimately contribute to a better corporate performance as risks can be better dealt with. HRIAs seem perfectly adapted to be used in the due diligence suggested by Ruggie. The most familiar ones are:

- Human Rights Compliance Assessment (Danish Institute for Human Rights);<sup>133</sup>
- Human rights indicators for sustainability reporting – G3 guidelines (Global Reporting Initiative; GRI);<sup>134</sup>
- Global Compact: Human Rights Translated – A Business Reference Guide (Monash University, Australia); and
- Guide for Integrating Human Rights into Business Management (online tool; 2nd edition 2009) (Business Leaders Initiative on Human Rights).<sup>135</sup>

Since every company is differently organised, due diligence processes come in various forms. The Ruggie Report anticipates that a company's approach depends on 'the country context, the nature of the activity and industry, and the size of investment.'<sup>136</sup> It is expected of a company that it performs a more detailed due diligence assessment concerning its own operations and subsidiaries abroad, than in regard to suppliers that are several links away from the company's activities.<sup>137</sup>

An interesting example of how to differentiate human rights issues per industry can be found in the report by the UN Special Representative on the Right to Health. In cooperation with the UK-based pharmaceutical multinational company GlaxoSmithKline (GSK), he has prepared a report comprising many practical recommendations.<sup>138</sup> In order to address any potential negative impacts, the report proposes that pharmaceutical companies adhere to clear ethical guidelines when testing on people, especially when it concerns people in developing countries, because poor people tend to be more susceptible to participating in unhealthy experiments that earn some income. Other recommendations emphasise that a pharmaceutical company

<sup>133</sup> For example Shell cooperated with the Danish Institute for Human Rights concerning the development of this instrument. See Human rights training, tools and guidelines, [http://www.shell.com/home/content/environment\\_society/society/human\\_rights/training\\_tools\\_guidelines/](http://www.shell.com/home/content/environment_society/society/human_rights/training_tools_guidelines/).

<sup>134</sup> It is noted that the G3 connects to the Global Compact Principles and the Earth Charter. For a company that adheres to one or both of these codes, the G3 makes it easy to report on human rights compliance. See also two reports of GRI, *Realizing Rights* and *UN Global Compact: 'A resource guide to corporate human rights reporting'* and *'Corporate Human Rights Reporting: An analysis of Current Trends'*, 2009, <http://www.globalreporting.org/CurrentPriorities/HumanRights/>.

<sup>135</sup> For BLIHR, see [www.humanrights-matrix.net/assets/ES%20final.pdf](http://www.humanrights-matrix.net/assets/ES%20final.pdf). See also *supra* note 14.  
<sup>136</sup> Report of Ruggie 2008, *supra* note 106, [§ 23].

<sup>137</sup> *Ibidem*, [§ 24].

<sup>138</sup> Report 18 May 2009; UN Doc. A/HRC/11/12/Add.2. Various scandals have been reported over the years. See, for example, 'Pfizer to Pay \$75 Million to Settle Trovan-Testing Suit', *Washington Post*, 31 July 2009, at [www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073001847.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073001847.html) ('Pfizer signed a USD 75 million agreement with Nigerian authorities to settle criminal and civil charges that the pharmaceutical company illegally tested an experimental drug on children during a 1996 meningitis epidemic').

can contribute to fulfilling the right to health,<sup>139</sup> by investing in research and development in treatment for neglected tropical diseases, that is diseases that only occur in the Third World and for which treatment is not very profitable;<sup>140</sup> and by providing licences to developing states, including non-exclusive commercial voluntary licences and non-commercial voluntary licences, in order to ensure an adequate access to medicines.<sup>141</sup>

Other industries have also developed codes of conduct including human rights standards specific to the industry. These standards are useful when determining on the scope and extent of a due diligence process. For example, the garment industry follows the Social Accounting 8000 standards and audit regime aimed at managing ethical workplace conditions throughout the global supply chain (SA8000). This approach has found satisfactory solutions to respect human rights in countries that do not recognise the freedom of association and collective bargaining.<sup>142</sup> The extractive industry has developed various codes of conduct. Some pertain to security issues, including instructions on how to deal with private security forces (for example Voluntary Principles on Security and Human Rights); others pertain to avoid corruption and complicity with governmental abuses (for example Publish What You Pay and Extracting Industries Transparency Initiative).<sup>143</sup> Large infra-structural projects are frequently (partly) financed by multilateral financial institutions such as the World Bank or the International Finance Cooperation (IFC). These organisations impose their own human rights standards on lenders, such as that people will be duly compensated when they have to move from their land because of new public works.<sup>144</sup> For timber, one can buy certified timber such as FSC.<sup>145</sup> The certification

<sup>139</sup> GSK and other pharmaceutical companies are also active in establishing public-private partnerships (PPPs) aimed at contributing to the Millennium Development Goals. See GSK 'Corporate Social Responsibility Report 2008', at <http://www.gsk.com/responsibility/downloads/GSK-CR-2009-full.pdf>, pp. 37, 59-61, 72, 73.

<sup>140</sup> For example tuberculosis, malaria, blinding trachoma, buruli ulcers, cholera, dengue/dengue haemorrhagic fever, racunculiasis, fascioliasis and human African trypanosomiasis.

<sup>141</sup> Non-exclusive voluntary licences are meant to increase access, in low-income and middle-income countries, to all medicines. Exclusive licences, on the other hand, based on the Western intellectual property regime, hinder access to medicines because the treatment becomes unaffordable for the local population in developing and least developed countries. *Supra* Report 18 May 2009, *supra* note 138, [§ 75].

<sup>142</sup> For example Article 4(2) of SA8000 guidelines suggest to implement human rights grievance committees and employees' representative bodies. See [www.sa-intl.org](http://www.sa-intl.org).

<sup>143</sup> Voluntary Principles on Security and Human Rights, [www.voluntaryprinciples.org](http://www.voluntaryprinciples.org); Publish What You Pay, [www.publishwhatyoupay.org/](http://www.publishwhatyoupay.org/); Extracting Industries Transparency Initiative, <http://eitransparency.org/>. A number of gold companies have signed up to the Responsible Jewellery Council (RJC). The International Council on Mining and Metals (ICMM) was formed in 2001 to represent the world's leading companies in the mining and metals industry and to advance their commitment to sustainable development, [www.icmm.com/about-us/icmm-history](http://www.icmm.com/about-us/icmm-history). See also Spinelli, J. (Daylight Forensic & Advisory), 'Foreign Corrupt Practices Act Due Diligence in Mergers & Acquisitions', *Ethisphere<sup>TM</sup> Institute* (online news service), 13 May 2009, at <http://ethisphere.com/foreign-corrupt-practices-act-due-diligence-in-mergers-acquisitions/>, illustrating that extensive FCPA due diligence is needed when operating in a high-risk industry (for example oil), in high-risk countries and in deals with government owned organisations.

<sup>144</sup> World Bank, 'Development Policy Lending 2006', <http://siteresources.worldbank.org/PROJECTS/Resources/DPLretro06f.pdf>. IFC, 'IFC Environmental and Social Standards', 30 April 2006 [www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards](http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards); The International Finance Corporation's new environmental and social requirements [www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pr\\_BackgroundNoteES/\\$FILE/Background](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pr_BackgroundNoteES/$FILE/Background)

process includes environmental and human rights due diligence. In other words, by buying certified timber, a company ‘outsources’ its due diligence review.<sup>146</sup> Soy and palm oil production have organised ‘round tables’ with stakeholders. The round-table mechanism intends to institutionalise a shareholder dialogue partly to assure that no human rights will be violated by the production. Other reasons concern ecological matters and the loss of biodiversity.<sup>147</sup>

These examples demonstrate that various sectors have identified industry-specific human rights issues recognised by all involved, that is companies, civil society and governments. To take notice hereof can help in designing a human rights due diligence process. There are also industries that generally lack effective codes of conduct on human rights issues for example real estate development (in particular hotels and golf courses), tourism, fisheries, meat, tobacco and weapons. For companies in those sectors, it would be particularly useful to make a full human rights due diligence assessment.

## 7. DILEMMAS

In the previous section it has been argued that performing a HRIA can be fitted into the existing corporate due diligence practice in a relatively easy way. It will all depend on the corporate decision to embark on this path. Having said this, there are certainly unanswered questions. One of these is the question in which way the Ruggie framework works out for victims of corporate-related human rights abuses. Does it improve their position? The third pillar of the framework, that is ‘Remedy’ intends to address this question, but that pillar was not the subject matter of this article. Related thereto, the question has been raised whether a *third party* – for instance an NGO concerned with human rights issues, or a victim of a corporate-related human rights abuse – should have access to corporate due diligence reports.

As regards an NGO request, the following could be considered. If the company concerned already cooperates with NGOs in performing the due diligence assessment, providing access to the due diligence report could be seen as part of an effective stakeholder dialogue. It could help to define further recommendations to improve company policies. However, if a company only commissions a due diligence report with a view to silencing critics, the answer will probably be different. NGOs and campaigning organisations will sense the ‘cosmetic’ approach by the company management, and will critically review the due diligence report if handed to them.

Regarding a victim of a concrete abuse who wants to get access to a due diligence report, the situation is as follows. Certain jurisdictions, like the UK and the US, recognise the concept of ‘pre-trial discovery’ or ‘document disclosure’. In the US,

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+Note++New+ES+Standards.pdf. Also see Lucy Baker, Bretton Woods Project, May 2007, ‘The World Bank and human rights. Caution on World Bank developments’, [www.if-watchnet.org/sites/if-watchnet.org/files/The\\_World\\_Bank\\_and\\_human\\_rights-%20at%20issue.pdf](http://www.if-watchnet.org/sites/if-watchnet.org/files/The_World_Bank_and_human_rights-%20at%20issue.pdf).

<sup>145</sup> See Forest Stewardship Council at: [www.fsc.org/pc.html](http://www.fsc.org/pc.html).

<sup>146</sup> There are also other certification labels; however, one should evaluate their legitimacy. A programme supported by all stakeholders (rather than one set up by the industry itself) scores highly on legitimacy. See Lambooy and Rancourt, *loc.cit.* (note 123), p. 116.

<sup>147</sup> Palm oil is one of the key ingredients for Unilever. See the report ‘Palm Oil: Sustainable Future, 2002’, at: [http://www.unilever.com/images/Palm%20Oil%20-%20A%20Sustainable%20Future%202002\\_tcm13-5315.pdf](http://www.unilever.com/images/Palm%20Oil%20-%20A%20Sustainable%20Future%202002_tcm13-5315.pdf).

this doctrine forms part of civil procedural law.<sup>148</sup> This concept does not exist under Dutch law.<sup>149</sup> There is only one provision in Dutch Civil Procedure law that covers the right by a party to request documents, that is Article 843a Code of Civil Procedure. In practice, it appears difficult and sometimes impossible to obtain documents that are in possession of opponents who are unwilling to submit them.<sup>150</sup>

A lesson to be learned from this is that under certain jurisdictions, a documents disclosure request can also pertain to a due diligence report. Hence, there is a risk that such a report will end up in the public domain. Consequently, it will be important for companies based in such a jurisdiction to carefully document any internal decisions that relate to the report. When a due diligence report shows a considerable risk of becoming engaged in human rights abuses in a certain area, the management need to have good arguments if they nevertheless decide to invest. Good corporate governance supposes a rational and good business-informed decision.<sup>151</sup>

Another ardent question for companies is where to draw the line? How deep into the international supply chain and how broad should the due diligence investigation extend? Responding to a question about supply chain management, Ruggie indicated that all links in any supply chain represent companies owing a duty to respect human rights. In other words, a chain consisting of many links does not constitute an excuse for the companies involved not to act diligently.<sup>152</sup> In the opinion of the author the answer will depend on: (i) the available possibilities; (ii) the type of human rights issues; (iii) best practices in the industry; and (iv) the availability of certified operations in the particular industry (FSC, SA8000, round tables). But it will remain difficult to demarcate the exact scope of a due diligence. On a case-by-case basis this needs to be determined. As commercial due diligence has expanded and formalised over time, it can be anticipated that societal expectations of corporate human rights due diligence will also increase over time.

Another dilemma frequently posed is what to do when human rights abuses are likely to occur in a certain type of industry or region. Some companies assert that their activities help to diminish such abuses. For instance, because they hired black employees in a country where black people did not have the same civil rights as white people. Shell asserted that it did so in South Africa during the Apartheid regime.<sup>153</sup> Other companies claim that they improved labour-related human rights in China because they created employee-representative bodies.<sup>154</sup> These companies point at the

<sup>148</sup> Federal Rules of Civil Procedure (2007), Rule 26 (incorporating the revisions that took effect on 1 December 2007).

<sup>149</sup> Van Hooijdonk, M. and Eijssvoegel, P., *Litigation in the Netherlands. Civil Procedure, Arbitration and Administrative Litigation*, Kluwer Law International, The Hague, 2009, pp. 25-26. Uittien, H., 'Gedwongen verstrekking van due diligence-rapportages' [Forced provision of due diligence reports], *Tijdschrift voor de Rechtspraak* [Journal for the law practice], Vol. 1, January 2007, pp. 19-23.

<sup>150</sup> *BVR/Ho-Cla*, Den Bosch CoA, 28 September 2004 (JOR2005/23); similarly: *Verder Holding/Hagemeijer*, Amsterdam District Ct, 13 April 2005 (JOR2005/142); and *Aegon/Dexia*, Amsterdam District Ct, 3 November 2004 (JOR2004/326) concerning a request for due-diligence documentation.

<sup>151</sup> OGEM, *supra* note 32; and Ruggie 2009 (note 5)[82].

<sup>152</sup> Presentation by Ruggie, *supra* note 90.

<sup>153</sup> Shell, 'Black Economic Empowerment', at [http://www.shell.com/home/content/zaf/aboutshell/who\\_we\\_are/our\\_values\\_and\\_principles/be\\_e/](http://www.shell.com/home/content/zaf/aboutshell/who_we_are/our_values_and_principles/be_e/).

<sup>154</sup> Regarding the operations of Timberland in China, see Ma, M., 'The Story of Ying Xie – Democratic Workers' Representation in China as a Tool for Better Business', in: Nadgrodkiewicz, A. (ed.), *From Words to Action: A Business Case for Implementing*

likelihood that, if they leave, other parties will come in that probably care less about human rights. The argument of these companies is valid, their predictions usually materialise. However, following the Ruggie line: if due diligence research shows that there is a risk that a company's activities contribute to human right abuses, directly or indirectly, it is better to leave. But the outcome will vary from case to case.

## 8. CONCLUSION

This article has demonstrated that by using the term 'due diligence', Ruggie has established a link between two areas of law, that is human rights law and corporate law, which were long considered to be unrelated. This seems a valuable step which will ultimately benefit both business actors and human rights promoters.

It has also been argued in the article that Ruggie's approach aligns with the tradition of human rights law and the standards for due diligence developed by the courts and international human rights bodies. The approach also fits into the current practices of business. Ruggie's recommendations concerning the performance of a due diligence assessment correspond with the standards applicable to the conduct of business partners when they engage in a business transaction.

Sections 2 and 3 analysed whether, and in which way, the subject of human rights can be integrated into common corporate due diligence practice. As regards securities transactions, it has been concluded that when human rights issues play a role in a certain business sector, supply chain or geographical area, it is recommendable to incorporate an HRIA in the due diligence process and to include the outcome in the prospectus. As any human rights issues could affect the company's reputation and impact share value, they are to be considered relevant information which need be disclosed to potential buyers of the shares. Moreover, performing an HRIA helps the company to be 'human rights compliant' which will facilitate becoming qualified for capital markets sustainability indices.

Concerning private transactions like mergers and acquisitions, it has been noted that it is in the spirit and the goal of performing a due diligence investigation to reveal any and all material issues regarding the target company and its worldwide business activities. This has led to the conclusion that the subject of human rights is worth to be investigated and an HRIA could assist the due diligence process. Besides looking at business and reputation risks in acquisition situations, for any company that is practicing corporate social responsibility, making use of HRIAs will contribute to materialising intentions.

Section 4 elaborated on the meaning of 'due diligence' as used in human rights law. It became apparent that the due diligence standard presents a way to measure whether a State has fulfilled its international treaty obligations to prevent and respond to human rights abuses. It was concluded that the duty to exercise due diligence directs the owner of that duty to employ *all means at his disposal* to prevent human rights violations, which includes all possible strategies, instruments and tools. A popular test is the 'had or ought to have had knowledge' test. Even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that serious violations might have occurred. Although these standards were recorded in cases pertinent to a State's legal duty to respect

human rights, they can be considered as a relevant line of thought when reflecting on the moral duty of companies to practice due diligence as set out in the Ruggie Report.

The Ruggie framework can be regarded as a continuation of the work of the former Sub-Commission on Promotion and Protection of Human Rights. Many viewpoints exposed in the UN Draft Norms, developed by this Sub-Commission, have been elaborated on in the Ruggie framework. The manner in which his framework emphasised the need for *global governance*, thereby attributing an important role to companies (alongside with States and civil society), made the framework acceptable for the corporate community.

Section 5 discussed the situations identified by Ruggie in which companies should be alert to avoiding corporate-related human rights abuses and should employ due diligence. Evidently, companies need to consider the country context, any human rights impacts that their activities may have, and whether they might contribute to abuse through third party relationships. As has been concluded before, gaining such information is also relevant from a company perspective when preparing for a capital market transaction or a private transaction. Consequently, Ruggie's model aligns well with current corporate practice. The main issue is to start using HRIAs and making them part of normal business operations, preferably on an on-going basis.<sup>155</sup>

In practice, especially when complaints about corporate activities are being made by individuals or civil society organisations, it makes sense for a company to inspect these seriously.<sup>156</sup> If we follow the line of the human rights case-law, it can also be anticipated of a company that it commences an investigation into the *potential* human rights risks related to its business activities in order to prevent them. When a company is interested in doing business in a failed State or conflict zone, its activities may positively impact citizens, although negative effects could also be imagined. Hence, Ruggie's clear recommendations: in failed States and conflict zones, business should act very proactively or stay away.

Concluding, 'corporate due diligence and human rights' is definitely an area in development. Due diligence can contribute substantially to corporate social responsibility, and hence to the protection, respect and fulfilment of individual human rights. As Ruud Lubbers, the former prime-minister of the Netherlands, has portrayed this: 'From Individual Rights to Common Responsibilities'.

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<sup>155</sup> Ruggie Report 2010, *supra* note 109.

<sup>156</sup> A complicated situation occurs when a civil society organisation does not want to identify specific victims, while putting forward the argument that the victims are afraid of repercussions by the company or the State. In a situation like the Shell-Nigeria one during the dictator Abacha period, this could have been the case; in the *G-Star* Case, the Dutch and Indian campaigners did not disclose the names of victims stating that they were afraid of repercussions by the company such as dismissal. See Lambooy and Rancourt, *loc.cit.* (note 28); and Lambooy *loc.cit.* (note 123).



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