



INSIGHT

CORPORATE HUMAN RIGHTS RESPONSIBILITY, STATES' DUTY TO PROTECT AND UN GPs' NATIONAL ACTION PLANS: SOME THOUGHTS AFTER THE UK 2016 NAP UPDATE

MARCO FASCIGLIONE*

ABSTRACT: With the recent update of its 2013 National Action Plan (NAP) the UK Government has given account of the process of implementation of the 2011 UN Guiding Principles on Business and Human Rights (GPs). In particular, the UK Government has listed the achievements made and the actions taken over the past two years in this regard. This *Insight* analyses the basic elements of the UK 2016 NAP Update, their relationships with the Guiding Principles and the other NAPs. It also focuses on some specific issues raised by the 2016 Update analysis: the polycentric notion of corporate human rights due diligence; the debate over the extraterritorial application of corporate human rights due diligence and of corporate policies on human rights; the role of State-business nexus and the possible hierarchy amongst the three Pillars of the GPs.

KEYWORDS: National Action Plans – UN Guiding Principles – UK – duty to protect – human rights – corporate due diligence.

I. INTRODUCTION

In May 2016 the UK has updated the National Action Plan (NAP) adopted in 2013 (herein-after also referred to as the "Update")¹ in order to implement the 2011 UN Guiding Principles on Business and Human Rights (GPs). The Update follows public consultations held by the UK Government with the aim of deepening some of the elements contained in the three pillars of the GPs as well as the increasing emphasis within the business community on the importance of reporting and corporate transparency from the point of view of the GPs' enforcement process. Accordingly, the 2016 Update has allowed the UK Gov-

* Researcher of International Law, Institute for Research on Innovation and Services for the Development – National Research Council (IRISS-CNR), m.fasciglione@iriss.cnr.it.

¹ UK Government, *Good Business. Implementing the UN Guiding Principles on Business and Human Rights*, May 2016.

ernment to account for the achievements made, and actions taken, over the past two years with regard to, *inter alia*: a) the developments which have taken place at the international level since the NAP was first published, including guidance on the implementation and the experience of other countries; b) the role played by the Government in helping the business sector to fulfil its responsibility to respect human rights, and in creating a secure, predictable, and fair environment for corporate sector, wherever they operate. The Update constitutes the occasion for some preliminary thoughts on the process of implementation of NAPs, a process based on the State duty to protect human rights enshrined in the first Pillar of the 2011 UN Principles, and to reflect on some specific issues raised with regard to the business and human rights debate.

II. THE FOUNDATION OF NAPs ROADMAP: THE 2011 UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AND THE “PROTECT, RESPECT AND REMEDY” FRAMEWORK

On 16 June 2011, the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights, developed by Harvard's Professor John Ruggie, the UN Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises (hereinafter, SRSG). The GPs aimed to concretise the former UN “Protect, Respect and Remedy” Framework developed by the same SRSG² and included in the 2008 Report *Protect, Respect and Remedy: a Framework for Business and Human Rights to the UN Human Rights Council* (the Framework).³ The Framework, it is well known, consisted of three core principles: a) the duty of States to protect human rights; b) the corporate responsibility to respect human rights; and c) the need for greater access by victims to effective judicial and non-judicial remedies. The UN Human Rights Council welcomed the Framework and requested that SRSG to lay down “concrete and practical recommendations” for its implementation. In November 2010, the SRSG issued a draft of Guiding Principles on Business and Human Rights. The draft Principles were open for comment for three months and received approximately 90 submissions from the business community, NGOs, international organizations, academics, and governments. After considering written submissions and engaging in consultations with various stakeholders, the SRSG submitted the revised and final text of the GPs to the Human Rights Council in March 2011. On 16 July 2011, the Human Rights Council endorsed the Principles by a specific resolution.⁴

² Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 21 March 2011, UN Doc. A/HRC/17/31.

³ Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations, 7 April 2008, UN Doc. A/HRC/8/5.

⁴ See Human Rights Council, Resolution 17/4 of 6 July 2011, *Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/RES/17/4. As far as literature on the UNGPs see:

However, the GPs do not aspire to create binding international law or to impose obligations on transnational corporations (TNCs). Rather, their "normative contribution lies [...] in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved".⁵ They, also, do not aim to offer a plug-and-play tool kit for identifying corporate human rights responsibilities. On the contrary, the Principles offer a sliding-scale approach for corporate actors, based on their size and, ostensibly, their location. In the words of the SRSR "when it comes to means for implementation [...] one size does not fit all".⁶

As far as the responsibility for human rights violations is concerned, the GPs aim to "clearly differentiate the respective roles of businesses and governments and make sure that they both play those roles".⁷ Accordingly, while governments should retain the exclusive responsibility for protecting and fulfilling human rights obligations, the litmus test for corporations under the GPs is merely aimed to assess whether corporations and other enterprises respect human rights. The GPs, in effect, are intended to build on the implications of existing standards and practices for States and businesses, rather than create new international law obligations. As with the Framework, they represent *soft* rather than *hard* law (but with the possibility that they may evolve over time into hard law or otherwise inform standards of care).

The GPs, also, track the structure of the Framework, with each substantive section addressed to one of the three pillars. Accordingly as far as the first Pillar, GPs reiterate the State's core duty to protect human rights (Principle 1), recommending, *inter alia*, that States should address any gaps in laws and policies requiring businesses to respect human rights, provide guidance to businesses on how to respect human rights, and encourage or require reporting by businesses on their human rights performance (Principle 3), exercise adequate oversight with respect to contractual relationships and ensure respect for human rights by State-controlled enterprises (Principles 4-6), promoting human rights through multilateral institutions dealing with business-related issues (Principle 10). As far as the second Pillar is concerned, the GPs call on business enterprises to respect human rights. In particular, businesses must avoid infringing on human rights and address adverse human rights impacts with which they are involved

R. MCCORQUODALE, *International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights*, in L. BLECHER, N. KAYMAR STAFFORD, G.C. BELLAMY (eds), *Corporate Responsibility for Human Rights Impacts*, American Bar Association, 2014, pp. 51-78; L. CATA BACKER, *Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All*, in *Fordham International Law Journal*, 2015, pp. 457-542.

⁵ See GPs, para. 5.

⁶ *Ibid.*

⁷ *Ibid.*

(Principle 11). To do so, businesses should adopt a clear human rights policy statement approved at the most senior levels and embedded in the organization through operational procedures (Principles 15-16) and most important, conduct on-going human rights *due diligence* process to identify, prevent, mitigate and account for how they address their impacts on human rights (Principles 17-21), engage in remediation where they have caused or contributed to adverse human rights impacts (Principle 22), explore ways to respect human rights regardless of the domestic enforcement context (Principle 23b); and treat the risk of contributing to gross human rights abuses through human rights violations as a matter of legal compliance wherever they operate (Principle 23c). With regard to the third Pillar, the GPs call for effective State-based and non-State-based remedial mechanisms for those affected by business-related human rights harms. In particular States should ensure access to State-based judicial and non-judicial grievance mechanisms and facilitate access to non-State-based grievance mechanisms (Principles 25-28). Businesses should establish or participate in non-State-based, operational-level grievance mechanisms to identify, track, and address adverse human rights impacts from their activities (Principle 29). Grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and, in the case of operational-level mechanisms, based on dialogue and engagement (Principle 31).

The demarcation between a State's duty to protect and a corporate responsibility to respect explicitly crystallises the idea of the primary role of States in protecting human rights but also recognises the urgent need for the private sector to take a prominent role in advancing respect for rights. It is just under the State duty to respect that the global efforts to compel States to meet their responsibilities have focused on the process of developing NAPs for implementing GPs. Indeed several actors such as different as independent experts, international organisations, national parliaments and human rights NGOs, since the aftermaths of the adoption of the GPs, have started to urge governments to produce NAPs on business and human rights both in order to assess their own performance in the light of the newly-adopted framework, and in order to develop policy strategies for the full implementation of the GPs. This process has received very much attention, mostly within EU regional systems, and has become a crucial part of the agenda of the UN Working Group on Business and Human Rights, the successor body to the UN mandate that produced the GPs, which since its very first Report has called on States to develop national action plans as a key tool for effective implementation of the GPs.⁸

⁸ See Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 10 April 2012, UN Doc. A/HRC/20/29, para. 68; see also Human Rights Council, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 5 May 2014, UN Doc. A/HRC/26/25, para. 11

III. NAPS ROADMAP AND THE 2016 UK NAP UPDATE

As far as the EU level is concerned, efforts to develop NAPs have been driven, at least partly, by the requests from both the EU and the Council of Europe (CoE) that their member States issue NAPs setting out each country's policies to implement the UNGPs. Indeed, in 2011 the European Commission invited EU countries "to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles".⁹ Finally, more recently the CoE Committee of Ministers urged Member States to "develop and adopt plans on the national implementation of the UN Guiding Principles on Business and Human Rights ('National Action Plans') which address all three pillars".¹⁰ Due to this European lead, it is not surprising, therefore, that the majority of NAPs published to date emanate from EU countries. Since the first NAP launched by the UK in 2013, which is the first Plan adopted worldwide, Denmark, Finland, Italy, Germany, Lithuania, the Netherlands, Norway, Scotland, Spain, Sweden, Switzerland, have all published a NAP or have started the process by establishing domestic policy frameworks setting up the basis for future actions.¹¹ While adopted NAPs vary significantly in both form and content, they share, however, some common key features: they all refer both to the OECD Guidelines for Multinational Enterprises¹² and to the implementation of EU legislation (either relating to procurement or non-financial reporting).

Turning to the 2016 UK's NAP Update, its adoption was necessary in order to allow the UK Government to meet its commitment, fixed in the 2013 NAP, to bring out an updated version of the Action Plan by which to record the achievements and actions taken in the first two years of NAP's working under each of the three Pillars of the GPs. The Update has also constituted the occasion for taking into account a series of developments, concerning the business and human rights field area, that have taken place at the international level since the UK's National Action Plan was first published. In particular, amongst major developments there was the adoption in September 2015 of the UN Global Goals for Sustainable Development, according to which States have agreed to take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking as well as to protect labour rights, promote safe and secure

⁹ See Communication COM(2011) 681 final of 25 October 2011 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, p. 14

¹⁰ See Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2016)3 to the Member States on human rights and business of 2 March 2016, para. 10.

¹¹ Several non-EU countries have published or have committed to developing a NAP or are in the process of doing so. A list of countries involved in the process is available at www.business-humanrights.org.

¹² The OECD Guidelines for Multinational Enterprises, adopted in 1976, were revised in 2011 just with the aim to better align with the GPs and with the corporate human rights due diligence principle. The most recent update of the Guidelines is available at mneguidelines.oecd.org. The OECD Guidelines are supported by National Contact Points (NCPs) who receive complaints of corporate non-adherence to the OECD Guidelines.

working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment.¹³ In the second place, the Update emphasizes the adoption of 2015 G7 Summit Leaders' Declaration according to which G7 States have agreed to "[...] strongly support the UN Guiding Principles on Business and Human Rights and welcome the efforts to set up substantive National Action Plans", to "urge private sector implementation of human rights due diligence" and, with the purpose of enhancing supply chain transparency and accountability, to "encourage enterprises active or headquartered in our countries to implement due diligence procedures regarding their supply chains".¹⁴

The Update mirrors the tripartite structure of the GPs. Accordingly, with regard to the State duty to protect human rights, the Update highlights the existence in the UK of a well-established legal framework protecting human rights and governing business activities. This framework includes employment regulations that require companies not to discriminate against employees on grounds of sex, race, sexual orientation and religious belief, and environmental regulations such as, *inter alia*, the Health and Safety at Work Act 1974, and the Data Protection Act 1998 which applies to companies and ensures respect for the privacy of individuals. Legislation has also been passed to plug specific gaps in the protection of workers such as the Gangmasters (Licensing) Act 2004, which created an agency to prevent the exploitation of workers in agricultural work, shellfish-gathering and related processing or packaging. Similarly, the national framework includes a number of legal instruments disciplining different aspects of good corporate behaviour and respect for human rights. These instruments encompass legislation specifically adopted in order to enforce norms and principles set forth in international treaties (such as the UK Bribery Act 2010, establishing that UK companies are liable in the UK for acts of bribery committed anywhere in the world; the ILO Declaration on Fundamental Principles and Rights at Work adopted in 1998 and the eight core ILO Conventions ratified by the UK on labour standards; the OECD Guidelines for Multinational Enterprises) and also norms attaining to corporate law domain such as the Section 172 of the Companies Act 2006, which establishes, *inter alia*, that in fulfilling their duty to act in a way which they consider would be most likely to promote the success of the company, directors must take into account matters which might have a bearing on that success, including the interests of the company's employees and the impact on the community of the company's operations. This Section was revised in October 2013 spe-

¹³ See General Assembly, *Transforming our world: The 2030 Agenda for Sustainable Development*, adopted on 25 September 2015, UN Doc. A/RES/70/1, and in particular the Sustainable Development Goal 8 and its targets 8.7 and 8.8.

¹⁴ See G7 Summit, Leaders' Declaration, Germany, 7-8 June 2015, p. 5, www.consilium.europa.eu.

cifically for the purpose of ensuring that directors of quoted companies consider human rights issues when making their annual strategic reports.¹⁵

Turning to the actions undertaken by the UK Government in giving effect to the State duty to protect, the Update cites several examples of instruments or mechanisms that have even reinforced both the legal and the policy framework in this field area. The most important achievement, in this respect, is represented by the adoption of the 2015 Modern Slavery Act¹⁶ which, in strengthening the existing criminal legislation punishing modern forms of slavery, applies also to corporate sector and requires to companies covered by the Act to produce a "slavery and human trafficking" statement for each financial year setting out what steps they have taken to ensure that slavery and human trafficking is not taking place in their business and supply chains. The Act, which entered into force on 31 July 2015, also created an Independent Anti-Slavery Commissioner and is supported by the adoption of a Modern Slavery Strategy, as well as by the adoption of a guidance for companies on eliminating slavery through increased transparency in supply chains. Other examples of positive actions undertaken by the UK authorities reside in the adoption of legal instruments, or policy strategies, disciplining the corporate human rights due diligence duty for national companies and this even with extraterritorial effects. Examples of such instruments are given by the UK implementation of the 2012 OECD Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence¹⁷ as well as for the adoption the so-called UK Building Stability Overseas Strategy.¹⁸ The first set of regulations requires national Export Credits Agencies (ECAs) to take into account environmental and social impacts, including relevant adverse project-related human rights impacts. More importantly, ECAs are also mandated to consider any statements or reports made publicly available by their OECD National Contact Points (NCPs) at the conclusion of a specific instance procedure under the OECD Guidelines for Multinational Enterprises. Accordingly, on the basis of this regulations the UK Export Finance has the power to assess any negative final NCP statements a company has received in respect of its human rights record

¹⁵ Several national legislations establishing mandatory supply chain due diligence requirements for companies are under adoption. This is the case, as for instance, of the recent French legislative proposal *relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, which was adopted by the National Assembly of France on first reading on 30 March 2015 (see National Assembly of France, Proposed Law, adopted text no. 501, 30 March 2015, www.assemblee-nationale.fr). According to this proposal companies employing 5,000 or more employees domestically or 10,000 or more employees internationally would be responsible for developing and publishing due diligence plans for human rights and for environmental and social risks. Failure to do so could result in fines of up to 10 million euros.

¹⁶ See Modern Slavery Act 2015, www.legislation.gov.uk.

¹⁷ OECD, Council Recommendation TAD/ECG(2012)5 of 28 June 2012.

¹⁸ UK NAP Update, cit. p. 8

when considering a project for export credit.¹⁹ As far as the Building Stability Overseas Strategy is concerned, it accounts for corporate operations in conflict and fragile third countries with high levels of criminal violence. According to this Strategy, UK Companies operating in these difficult environments are requested to support the implementation of the 2006 OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones as well as of the 2016 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas.

With regard to the corporate responsibility to respect, the Update accounts for the pioneering role of UK companies in this area and underlines the increasing number of entities from the corporate sector with human rights policies and processes to manage and avoid human rights risks embedded in their objectives and operations. From this perspective, the Update highlights the pivotal role played by national authorities in supporting the domestic companies' fulfilment of their responsibility to respect human rights. The Update lists, accordingly, the actions taken in this respect by the UK Government such as the implementation of a guidance to companies on transparency in supply chains,²⁰ the implementation of reporting requirement enshrined in the above mentioned Modern Slavery Act 2015 and the 2015 Analytical Framework for Land-Based Investments in African Agriculture – Due Diligence and Risk Management for Land-Based Investments in Agriculture, jointly developed in 2014 with US, Germany, France, the AU Land Policy Initiative and FAO. This last framework, in particular, aspires to assist corporate investors in aligning their policies and actions with global and continental guidelines on responsible land-based investments, most notably the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) and the Guiding Principles on Large Scale Land Based Investments in Africa (LSLBI).²¹

The Update also accounts for the increasing demand for greater formal reporting by companies on their human rights performance, and affords a crucial weight to this issue. In this area the UK Government has developed some major steps under three perspectives, at the very least. It has promoted within the corporate sector the UNGPs Reporting Framework, the world's first comprehensive guidance for companies to report on how they respect human rights. Secondly, it has urged UK corporate Board Di-

¹⁹ UK NAP Update, cit. p. 8. A part UK, only Italy has mentioned expressly in its NAP the national commitment to the 2012 Common Approaches. Other EU countries, in addressing the role of government's trade and investment activities in the management of human rights challenges, have undertaken different paths by asking to their ECAs generally to commit to the implementation of GPs (Denmark), or by developing specific action plans concerning the modalities in which their investment agencies operate (Spain).

²⁰ See UK Government, *Transparency in Supply Chains: A Practical Guide*, 29 October 2015, www.gov.uk.

²¹ The Framework offers them a due diligence and risk management resource to apply to their land-based agricultural investments. It provides, in particular, advice and highlights best practices related to structuring investments in the most responsible way possible.

rectors in reporting on human rights impact of business operations of companies they lead. Finally the UK Government has started the process of transposition of the 2014 EU Directive on non-financial disclosure.²²

With respect to the access to remedy, the 2016 Update emphasizes the range of judicial and non-judicial mechanisms that ensure access to remedy for human rights abuses by business enterprises both at home and overseas. As far as judicial instruments are concerned, these includes: *a)* employment tribunals providing access to remedy for abuses of labour rights; *b)* civil law mechanism providing judicial avenues for claims in relation to human rights abuses by business enterprises; *c)* and specific criminal law provisions applicable to corporate crimes such as, *inter alia*, those fixed in the Bribery Act 2010, in the Modern Slavery Act 2015, in the Corporate Manslaughter and Corporate Homicide Act 2007 and in the Gangmasters (Licensing) Act 2004. As far as non-judicial mechanisms are concerned, a fundamental role is played by the UK National Contact Point (NCP).²³ Established with the purpose of monitoring the full and effective implementation of the OECD Guidelines for Multinational Enterprises, the UK NCP may consider allegations of non-compliance by UK companies with the Guidelines and has become one of the most effective Contact Points of the entire OECD Guidelines system: as for instance, exactly during the two years period covered by the Update, the UK NCP has delivered a landmark decision in the 2014 *SOCO International Plc.* case.²⁴

²² See Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. The Directive seeks to ensure that large companies in Europe provide a comprehensive and meaningful view of their position and performance. According to the provisions of the 2014 Directive, in fact, companies should provide, as part of their management report, relevant and useful information on their policies, main risks and outcomes relating to at the very least environmental matters, social and employee aspects, respect for human rights, anticorruption and bribery issues, and diversity in their board of directors. EU member States have been granted till to December 2016 to incorporate the requirements of the Directive into their domestic laws.

²³ Other non-judicial mechanisms include the Equality and Human Rights Commission, which monitors and promotes human rights compliance and can conduct inquiries, as well as a considerable number of Ombudsmen, Regulators and other Government Complaints Offices in industry sectors that have various mechanisms to hear complaints, impose sanctions and award compensation.

²⁴ See UK NCP, final statement of July 2014, *World Wildlife Fund (WWF) v. SOCO International Plc.*, www.gov.uk. According to the complainant SOCO's oil exploration activities in Virunga National Park (Democratic Republic of Congo – DRC) did not contribute to sustainable development. Indeed, WWF argued that the stabilization clauses included in the Production Sharing Contract (PSC) agreed with the DRC government in 2010 were unlawful due to their potential ability to adversely affect human rights and environmental protections. Hence the defendant's conduct had to be considered prohibited under existing international agreements and DRC law. The dispute, which received considerable international attention on the media, was accepted by the UK NCP and, after the *Initial Assessment* adopted on February 2014, originated a final agreed joint statement in July 2014 (see *Final Statement Following Agreement Reached in Complaint from WWF International against SOCO International plc.*). In the statement SOCO has agreed not to undertake any exploratory or other drilling in Virunga National Park unless UNESCO and the DRC

IV. NAPs AND THE POLYCENTRIC NOTION OF CORPORATE HUMAN RIGHTS DUE DILIGENCE

Multiple issues are raised by the analysis of the 2013 UK NAP and its 2016 Update and by the comparative analysis among the different existing NAPs. It is impossible to expand upon all these issues here; however some thoughts must be reserved specifically for the three most remarkable topics.

The first issue involves the notion of corporate human rights due diligence, the main component of the GPs second Pillar's principle of corporate responsibility to respect. Indeed, the request to private sector entities to perform human rights due diligence during their business operations and all along the supply chain is a common component of the majority of the legislative initiatives enacted (by UK and by other EU countries) in discharging the duties deriving from the first Pillar of the GPs.²⁵ From this point of view the NAPs roadmap has contributed in emphasizing the... polycentric nature of this notion. In effect, in the context of the GPs, due diligence is not only a basic obligation pending on States in order to meet their first Pillar duties; it is also one of the basic contents of the corporate responsibility to respect human rights. In this regard, corporate human rights due diligence merges two distinct concepts stemming from different fields areas: the due diligence model as applied in corporate business practice and the same concept as applied in international human rights law. While in the first field area due diligence indicates a process of analysis aimed at "identifying intangible factors responsible for undetected and therefore unmanaged risks leading to a common decision based in multi-actor situations facing intangibles and complexity",²⁶ in the human rights domain due diligence indicates a standard of conduct, to be applied for avoiding infringing rights. In substance, the due diligence notion incorporated by the GPs aspires to adapt the human rights due diligence principle as used in international human rights law (enshrined in the Principle 11 of GPs) to the managerial approach to business due diligence (enshrined in the Principle 15 of the GPs). Well, even though this process may be potentially misleading, as it could be used to dilute due diligence legal obligations in voluntary and non-binding requirements for corporate business operations, it relies on the convincing idea

government agree that such activities are not incompatible with its World Heritage status. SOCO has also agreed to perform human rights due diligence by adopting processes "in full compliance with international norms and standards and industry best practice, including appropriate levels of community consultation and engagement on the basis of publicly available documents".

²⁵ Interestingly, the same attitude is recognizable within the EU legislation. Indeed, the abovementioned Directive 2014/95 on the disclosure of non-financial and diversity information requires large public companies to report certain non-financial information and, as a minimum, environmental, social and employee matters, respect for human rights, and anti-corruption and bribery matters, including "a description of the policies pursued by the undertaking in relation to those matters, including *due diligence* processes implemented" (see Arts 19, lett. a) and 29, lett. a) of the amended Directive; the emphasis is added).

²⁶ F. KNECHT, V. CALENBUHR, *Using Capital Transaction Due Diligence to Demonstrate CSR Assessment in Practice*, in *Corporate Governance*, 2007, pp. 423-433, in particular p. 425.

that the enforcement of human rights due diligence duty (even) in corporate contexts can only be performed by mirroring principles and rules regulating due diligence obligations under international human rights law practice.²⁷

V. NAPs AND THE EXTRATERRITORIAL APPLICABILITY OF CORPORATE POLICIES ON HUMAN RIGHTS AND OF CORPORATE HUMAN RIGHTS DUE DILIGENCE

The second issue is raised in connection with the formal statement made by the UK Government that the responsibility to respect human rights applies “wherever [UK companies] operate”.²⁸ This statement, which is common to other NAPs,²⁹ leads to the conjecture that corporate policies, and in particular the corporate human rights due diligence obligation, should apply extraterritorially.³⁰ Well, from this perspective Art. 17 of the GPs appears to afford a significant margin of appreciation to companies in enforcing this duty by noting that human rights due diligence “should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”. The provision, in sum, does not contain any requirement for corporations to conduct due diligence extraterritorially and this is confirmed by the GPs' Commentary, which observes that “[w]here business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all”.³¹ Actually, the GPs adopt an agnostic approach to the extraterritoriality issue, limiting themselves simply to observing that under international human rights law States are neither required to regulate the extraterritorial activities of companies domiciled in their territory, nor are they prohibited from doing so. National authorities, in sum, are free to adopt such standards and Governmental NAPs may be well regarded as a suitable place in which to initiate mechanisms on this complex subject.

²⁷ On this subject see M. FASCIOLONE, *The Enforcement of Corporate Human Rights Due Diligence: From the UN Guiding Principles on Business and Human Rights to the Legal Systems of EU Countries*, in *Human Rights & International Legal Discourse*, 2016, p. 94 *et seq.*

²⁸ See the UK 2016 Update, para. 21.

²⁹ Similar expectations and similar statements may be found, *inter alia*, in the NAP adopted by The Netherlands (p. 14) and by Denmark (p. 6).

³⁰ Interestingly, this position seems having found the support of the EU policy-making institutions. In effect, the European Parliament Resolution P8_TA(2015)0175 of 29 April 2015 on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact highlights how new EU legislation is necessary “in order to create a legal obligation of due diligence for EU companies outsourcing production to third countries, including measures to secure traceability and transparency, in line with the UN Guiding Principles on Business and Human Rights and the OECD MNE Guidelines” (para. 23; emphasis added).

³¹ See the Commentary on Art. 17 of the GPs.

Having said this, human rights practice of monitoring committees, of judicial and non-judicial mechanisms, shows some tendencies towards an extension of the reach of States' obligations in the human rights field area. With regard to economic, social and cultural rights, as for instance, the CESCR has identified, in General Comment no. 14, concerning the right to the highest attainable standard of health, and in General Comment no. 15, concerning the right to water, certain obligations that States parties to the Covenant owe to populations under the jurisdiction of other States when the latter risk being threatened by the activities of private actors.³²

Turning to the civil and political rights realm, statements made by the Human Rights Committee in its 2012 Concluding Observations on the sixth periodic report of Germany disclose promising paths towards the recognition of the extraterritorial application of the corporate responsibility to respect and of GPs Principle 11. The Committee, in effect, encouraged Germany to "set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant *throughout their operations* [and] to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises *operating abroad*".³³

To a certain extent, this expansive approach has been endorsed in civil actions brought before national tribunals in several countries. Again, in this respect, the UK has taken the lead. Under the tort law, indeed, UK courts have been applying for years a duty of care test to UK incorporated parent companies, even to the extent of piercing the 'corporate veil' obstacle and dismissing allegations of *forum non conveniens*, thus affording a certain extraterritorial scope to this duty. Indeed, according to this case-law

³² With reference to the right to the highest attainable standard of health, the Committee observed that "States parties have to respect the enjoyment of the right to health in other countries, and prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law" (see Committee on Economic, Social and Cultural Rights (CESCR), General Comment no. 14 (2000) on the right to the highest attainable standard of health (Article 12 of the of the International Covenant on Economic, Social and Cultural Rights) of 11 August 2000, UN Doc. E/C.12/2000/4, para. 39). With reference to the right to water the Committee called upon States parties "to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries [w]here States parties can take steps to influence other third parties" (see CESCR, General Comment no. 15 (2003) on the right to water (Articles 11 and 12 of the Covenant), UN Doc. E/C.12/2002/11, para. 31).

³³ See Human Rights Committee, Concluding observations on the sixth periodic report of Germany of 30-31 October 2012, UN Doc. CCPR/C/DEU/CO/6, para. 16 (emphasis added). The statements of the Committee originated in the assessment during the analysis of Germany's report on some civil society allegations concerning the involvement of a German company, Neumann Kaffee GmbH, in labour rights violations and illegal eviction of some local communities in Uganda committed by a Neumann subsidiary (Kaweri Coffee Plantation Ltd). These allegations had previously been examined by the German National Contact Point for the OECD Guidelines for Multinational Enterprises (see German NCP, *Wake up and Fight for Your Rights Madudu Group and FIAN Deutschland v. Neumann Gruppe GmbH*, final declaration of 30 March 2011, www.mneguidelines.oecd.org).

there are no reasons in principle why, like any other legal entity or person, a parent company responsible for, or in control of, specific functions at overseas subsidiary operations should not be liable for damage arising from those functions or deficiencies. Such tort cases against TNCs allege harm caused by negligence arising from a breach of a duty of care, which is just based on a due diligence duty. Since they involve claims for compensation and are habitually costly, these cases may serve to achieve critical elements of TNCs' accountability, namely, monetary redress for victims and deterrence against future human rights violations.³⁴ For the sake of clarity it must be noted, however, that opposite views have been argued by the US Supreme Court, in the well-known 2013 opinion in the case *Kiobel v. Royal Dutch Petroleum Co.*, in which the Court by denying that the Alien Torts Claims Act (ATCA) provides the US federal courts with jurisdiction in so-called *foreign-cubed cases* (i.e. cases brought by foreign plaintiffs complaining against foreign defendants for international law violations committed abroad) has circumscribed ATCA's scope of application.³⁵

VI. NAPs AND THE STATE-BUSINESS NEXUS

A third issue, raised by the increasing focus made within international *fora* (UN Working group, CoE, EU, etc.) on the necessity for States to develop NAPs as matter of ... priority, involves the relationships amongst the State duty to protect and the corporate responsibility to respect human rights. Indeed, the emphasis given in such *fora* to the first Pillar's duty, rather than on duties enshrined in the second and third Pillars, has raised the doubt that the State duty to protect human rights might be pushed till to the point to becoming the foundation through which both the second Pillar's corporate responsibility and the third Pillar's access to remedy must be understood and implemented. This, in sum, would imply the creation of a *hierarchy* among the three different Pillars of UNGPs with the effect of displacing the corporate responsibility to respect, subordinating, and conditioning it to State duty to protect.³⁶ What about such fears?

The issue echoes, unavoidably, the debates on the relationships existing amongst States and private actors within the contemporary international human rights legal sys-

³⁴ See among the others, High Court, judgment of 10 November 1995, *Ngcobo and Others v. Thor Chemicals Holdings Ltd and Another*; House of Lords, judgment of 24 July 1997, *Connelly v. R.T.Z. Corporation Plc and Another*. As far as legal literature see R. MEERAN, *Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, in *City University of Hong Kong Law Review*, 2011, pp. 1-41.

³⁵ See US Supreme Court, *Esther Kiobel, Individually and on Behalf of Her Late Husband, Dr. Barinem Kiobel, et al., Petitioners v. Royal Dutch Petroleum Co. et al.*, case no. 10-1491, *certiorari* to the United States Court of Appeals for the Second Circuit, argued 28 February 2012, reargued 1 October 2012, 569 U.S. 2013, judgment of 17 April 2013.

³⁶ See L. CATÀ BAKER, *Focusing on the State Duty to Respect Human Rights. The UN Working Group and National Action Plans*, in *Law at the End of the Day*, 26 February 2014, lbackerblog.blogspot.it.

tem, on the status of corporations in international human rights law, on the evolution of contemporary international law, both as the result of economic and financial interdependence and as result of the process of enlargement of its scope along its horizontal and vertical dimensions, as well as on the modalities available for enforcing human rights obligations of corporate actors. It is impossible to exhaust here such an intricate issue; however, it may be observed that with specific reference to the vertical enlargement of the scope of international human rights law, this process seems to entail the elevation of sub-State interests at international law level and, hence, the enlargement of the entities *participating* to the international legal system:³⁷ there are no reasons to suppose that corporations have to be set aside from this process. However, it is similarly undeniable that, notwithstanding the increasing influence of corporations, States still are powerful actors *vis-à-vis* the greatest majority of businesses operating worldwide. Therefore, even if it is certainly admissible that also private entities may be granted the status of right-holders and of duty-holders under international human rights law, States remain the prime duty-holders within this system. In other words, States remain the ... *engine* of any legal mechanisms aimed at protecting human rights from corporate abuses. In effect, when reasoning on what are nowadays the modalities for enforcing human rights obligations of private economic actors, it must be admitted that, according to the contemporary degree of the evolution of the international human rights legal system, this enforcement may only be realized through the filter of national legal systems. In our point of view, in sum, the emphasis received by the first Pillar's State duty to protect human rights reflects exactly this characteristic and is not something we need to fear.³⁸ Robust NAPs making mandatory the second pillar is precisely consistent to objectives and the *rationale* of the GPs: closing the governance gaps that permit companies to be complicit in human rights abuses abroad and providing clear rules for business.

³⁷ See W. FRIEDMANN, *The Changing Structure of International Law*, London, 1964, in particular pp. 5-19, pp. 45-71, and p. 368; similarly see also R. HIGGINS, *Conceptual Thinking about the Individual in International Law*, in *British Journal of International Studies*, 1978, p. 1 *et seq.* and in particular p. 5; from the same author see, also, *Problems and Processes. International Law and How We Use it*, Oxford, 1995, p. 50.

³⁸ This leading role played by States in the process of responsabilization of corporate sector is even more plain once considered the difficulties encountered during the newly started negotiations within the UN Open-ended Intergovernmental Working Groups for a Treaty on Transnational corporations and human rights. Since their inception indeed, it has become clear that without a wide-ranging consensus of States, the codification process will have few chances to gain success and will be destined to follow the same destiny of its prominent predecessors: the UN Code of Conduct for Transnational Corporations and the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (see Human Rights Council, Draft Report of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 6–10 July 2015. On this issue see M. FASCIGLIONE, *Towards a Human Rights Treaty on Transnational Corporations and Other Business Enterprises: The First Session of the UN Open-ended Intergovernmental Working Group*, in *Diritti umani e diritto internazionale*, 2015, pp. 673-680).

VII. CONCLUSIONS

National Action Plans can serve as a unifying framework for developing the State duty to protect human rights. But NAPs can also turn, if wrongly managed, into a means of avoiding that duty by a misguided focus on corporate regulation detached from the connections to unifying principles of human rights at the heart of the GPs' First Pillar. Indeed, while the ultimate object of NAPs is to enable States to better regulate corporate human rights behaviour, this ultimate objective cannot be achieved until States build their own regulatory and administrative capacities. From this perspective, "human rights capacity building is at the core of the State duty to protect human rights under the first Pillar as it requires States to undertake their own assessment of their laws, legal cultures, and behaviours relevant to the exercise of human rights and affirming conduct in the economic and regulatory structures of States".³⁹ However, also from the GPs second Pillar's perspective, NAPs play an equally fundamental vanguard role. Indeed, they constitute the policy framework through which to enhance the implementation of the corporate responsibility to respect human rights and the due diligence duty of corporate actors, too. Underlining this circumstance is a paradox more apparent than real. It is, on the contrary, perfectly consistent with the contemporary level of evolution of the international human rights legal system, in which the enforcement of human rights obligations *vis-à-vis* corporations still depends on mechanisms of protection activated within national legal systems. The NAPs roadmap highlights, ultimately, how the role of States, enterprises and the international community, in the current context of the business and human rights project, remains fluid, contingent and undefined. The choices made by each of these critical players will determine the shape of business and human rights governance systems for some time to come.

³⁹ L. CATA BACKER, *Moving Forward the UN Guiding Principles*, cit., p. 491.

