Chapter 7.* Corporate due diligence as a tool to respect human rights

"From Individual Rights to Common Responsibilities"
Ruud Lubbers in 'Inspiration for Global Governance'**

7.1 Introduction

The human rights doctrine has long focussed upon what States should do to further promote the enforcement of human rights standards. In this chapter, the attention will shift to the role of business. The work of Professor John Ruggie[1] – 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 is indicative of the wide recognition of the relevance of business in the advancement of human rights.[2]

In April 2008, Ruggie proposed a policy framework 'Protect, Respect, Remedy' to the UN Human Rights Council (Ruggie Report or Report).[3] The framework rests on three pillars: (i) the State duty to protect against human rights abuses by third parties, including businesses; (ii) the corporate responsibility to

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** Ruud Lubbers, 'Epilogue – From Individual Rights to Common Responsibilities', in: Ruud Lubbers, Willem van Genugten, Tineke Lambooy, *Inspiration for Global Governance – The Universal Declaration of Human Rights and the Earth Charter* (Kluwer: Deventer, 2008), pp. 89-96.

1. John Ruggie is a Professor at Harvard John F. Kennedy School of Government.
2. See also an introduction on this subject by the author and Professor Willem van Genugten in Chapter 2: "The Universal Declaration of Human Rights: Catalyst for Development of Human Rights Standards," in: Ruud Lubbers, Willem van Genugten, Tineke Lambooy, *Inspiration for Global Governance – and the Universal Declaration of Human Rights and the Earth Charter* (Kluwer: Deventer 2008), pp. 55-66, esp. §14.
3. UN HRC (General Assembly), 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, "Protect, Respect and Remedy: a Framework for Business and Human Rights"', 7 April 2008, UN Doc A/HRC/8/5.

respect human rights, 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. The policy framework was unanimously welcomed by the Members of the UN Human Rights Council. 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.[4] This marks the first time in 60 years that the Council[5] and the international community have taken a substantive policy position on the combination of business and human rights.

The Report addresses the complex question of the scope of corporate social responsibility. This chapter 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, *i.e.* human rights law and corporate law, which were long considered unrelated. The main focus of this chapter 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 found itself.

Section 7.2 of this chapter will address the history and practice of 'due diligence' as this concept has been used in securities law practice (*i.e.* the law applicable to the trading of shares and debt paper). This will be followed in section 7.3 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 7.2 and 7.3 is grounded in international transactions, the legal base of the argumentation can be found in Dutch law. For a US law perspective, reference is made to the

4. HRC Resolution 8/7, 'Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (18 June 2008) A/HRC/Res/8/7 [§§1, 4]; UN HRC (General Assembly), 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 April 2009) A/HRC/11/13. See also: the websites of Shell, at: http://www.shell.com/; Akzo Nobel, at: http://www.akzonobel.com/ and Amnesty International, at: http://www.amnesty.org/; all websites accessed on 12 August 2010.
5. And its predecessor, the UN Commission on Human Rights (UNCHR).

interesting paper of John Sherman III and Amy Lehr on the same topic.[6] Section 7.4 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 7.5 will therefore elaborate on this. Subsequently, to establish a concrete bridge between theory and practice, section 7.6 will mention existing 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 7.7. 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.

7.2 Corporate practice – History 'due diligence'

Due diligence is not a new concept. The term 'due diligence' in corporate practice stems from American securities law. When a company wishes to attract capital from the public at large – *i.e.* 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', *i.e.* 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 in which 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.

6. J. Sherman III and A. Lehr, 'Human rights due diligence: is it too risky?', Corporate Social Responsibility Initiative Working Paper No. 55, February 2010, Cambridge, MA: John F. Kennedy School of Government, Harvard University; at: http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_55_shermanlehr.pdf, accessed on 12 August 2010.

Countries employ different systems to supervise the quality of a prospectus. In the US, federal and state securities laws as well as stock exchange rules give detailed instructions on how to prepare a prospectus.[7] In the EU, the Prospectus Directive, implemented in national legislation in EU Member States, prescribes which subjects need be covered in a prospectus.[8] Typically, a draft of the prospectus has to be approved by a national supervisory authority before it can be made public.[9] The rationale of this system is to protect investors against misleading or fraudulent information on securities sales.

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 the lead manager. This was for example the case after the IPO of World Online (WOL) in the Netherlands in March 2000. WOL was a European Internet Service Provider (ISP), which came to prominence in the late 1990s dotcom

7. 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 (*i.e.* 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. *E.g. 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: Lucinda A. Low *et al* (ed.), *The International Practitioners,* Deskbook Series, 2nd Ed. (ABA Publishing, Chicago 2003) 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).
8. Directive 2003/71/EC: Directive of the European Parliament and the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [2003] OJ L345/64, and Commission Regulation (EC) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and the dissemination of advertisements. See also: J.P. Franx, Chapter 15, '*Inhoudelijke prospectusvereisten*' [*requirements regarding the content of prospectuses*], in: D. Busch *et al* (ed.), *Onderneming en Financieel Toezicht* [Company and Financial Supervision] (Kluwer: Deventer, the Netherlands, 2007).
9. In the Netherlands, the prospectus has to be approved by the AFM pursuant to article 5.21 Wft. Subsequently, it can be used to offer securities throughout the EU, provided that the AFM as the representative of the host Member State has provided a certificate of approval. 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).

boom. After the IPO, 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, the issuer of the shares, 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.[10]

Often, when an issuing company performs poorly, and does not offer sufficient recourse, the investors turn to the bank that organised the public sale of the shares. They will state that they were misled, *i.e.* 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 so 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.[11]

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10. 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. 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 (*i.e.* USD 6.04) and the share issue price at the IPO in March 2000 (*i.e.* 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.

11. Besides *WOL* (note 10), 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 →

7.3 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 (*e.g.* 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, *e.g.* the issuing or sale of publicly traded securities or a public offer; others concern the preparation of a private transaction, *i.e.* a transaction that is not concluded via the stock exchange.

Divestments, selling off part of a business or a subsidiary company, or a privatisation, *e.g.* 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 (*i.e.* 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 (*i.e.* 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.

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contained in a prospectus; *MeesPierson BoterenBrood*, DSC 8 May 1998, JOR 98/110 (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, JOR 2008/209 (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 L149 [§§ 22-39], also underlines the responsibility of a seller of financial products. Implemented in the Netherlands in the *Wet oneerlijke handelspraktijken* [Act on the unfair trade practices], which introduced articles 6:193a – 193j DCC 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).

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 (*e.g.* concerning natural resources); a management agreement (*e.g.* the exploitation of a chain of cinemas or hotels); turn-key projects (*e.g.* building a power plant); transport contracts; and infrastructural contracts (*e.g.* 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 of a more practical nature. The results of a due diligence process can assist the negotiators in shaping the deal, and will uncover any material risks. 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 first explain which actors can be involved in a due diligence process.

7.3.1 Who performs the due diligence process?

Due diligence is a catch-all 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.[12] To add them in, human rights lawyers and experts would need to be engaged.[13]

12. Based on the author's experience as a practitioner. Sample due diligence questionnaires demonstrate this; see e.g. S. Pickard, Due Diligence List: www.duediligencelist.com, (Writers Club Press, New York Lincoln Shanghai, 2002) or see: http://www.meritusventures.com/template_assets/pdf/diligence.pdf, accessed on 12 August 2010, included in Annex I in fine.
13. *E.g.* the Danish Institute for Human Rights, at: http://www.humanrights.dk/; and the consultancy firm Aim for Human Rights, at: http://www.humanrightsimpact.org/; both sites were accessed on 12 August 2010; AidEnvironment, at: http://www.aidenvironment.org/landingpage.aspx, accessed on 17 July 2009. See further section 7 below on HRIAs.

A due diligence investigation renders the best results when the experts work together as a team in which information is shared and issues are 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 put aside. Communication by the team members can best take place by organising a kick-off meeting in which the company sets out the intended project or transaction, and explains what its goals are in respect of the due diligence process. Company representatives or the lead counsel co-ordinating the process will explain the procedural and the substantial parameters for the 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.

7.3.2 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.

7.3.2.1 Capital markets transactions – legal reasons and scope

As section 7.2 explained, a due diligence investigation 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, 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 7.2 that the EU Prospectus Directive details the information which has to be included in a prospectus.[14] This indirectly determines the main subjects that 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 could 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

14. Articles 5 (content prospectus) and 13 (approval prospectus).

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 types 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 performing an insufficient due diligence assessment. Commonly, the standard applied to determine professional liability is whether the professional has acted in the same professional manner as another skilled professional would have done in his place. Consequently, it is important to keep up-to-date with best practices.[15]

7.3.2.2 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.[16] 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." It thus refers to the European Charter of Fundamental Rights adopted in 2000.[17] The Preamble to this Charter reads:

> This Charter reaffirms, (…) the rights as they result, in particular, from (…) the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of (…) of the European Court of Human Rights. Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations. The Union therefore recognises the rights, freedoms and principles set out hereafter.

15. *ABN-AMRO CoopAG* (note 11). In short: the lead manager of the sale of the Coop notes argued in court that it relied on the information contained in the Coop AG annual accounts which were approved by German accountants. The Court held that a lead manager itself should evaluate such accounts to ensure that they provide a correct picture. In this case, the annual accounts did not reveal that a number of subsidiaries were loss-making. This was considered misleading by investors. For further reading: M. Brink, '*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, esp. p. 445.
16. 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)).
17. *I.e.* the Charter of Fundamental Rights of the European Union, 2000/C 364/01-22.

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

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.[18] This information can be provided in the prospectus, but it can also be communicated in other ways, *e.g.* through annual reports, sustainability reports, and websites.

18. 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. Furthermore, please see: www.UNPRI.org, accessed on 12 August 2009, to find out which institutional investors are signatories to the Principles for Responsible Investment (PRI), and for information on socially responsible investment (SRI). PRI signatories have pledged that they will integrate environmental, social and governance factors (ESG) in their investment decisions. Human rights are specifically mentioned. The importance of SRI was also confirmed in the PRI Academic & Practitioners Conference 2010 'Mainstreaming responsible investment' (May 2010, Copenhagen), in which the author participated. The growing importance of sustainability indices of stock exchanges such as the FTSE4 Good for raising the standards for best practices in corporate behaviour has been highlighted by Catharina (Rieneke) Slager, 'What gets measured gets managed? Responsible Investment indices and responsible corporate behavior', paper available at: http://www.unpri.org/academic10/Paper_15_Rieneke_%20Slager_What%20gets%20measured%20gets%20managed.pdf, accessed on 12 August 2010. Furthermore, see: *e.g.* D. Brooksbank, 'Norway's €1.9bn Nestlé stake under scrutiny', in *Responsible Investor*, 21 September 2009, at: http://www.responsible-investor.com/home/print/norway_nestle_stake/, accessed on 12 August 2009. See also: E. Umlas, *Human Rights and SRI in North America: An Overview*, PhD; January 2009, at: http://www.reports-and-materials.org/Umlas-Human-Rights-and-SRI-Jan-2009.pdf, accessed on 12 August 2010 *re* due diligence in relation to SRI, and referring to the framework of Ruggie.

7.3.2.3 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.[19] 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]);[20] however, the buyer must clearly communicate which facets are important for him, so that the seller understands which information he needs to provide the buyer with.[21] Moreover, on the buyer rests a duty to enquire and investigate whether the target-object or business fulfils his expectations (‘*onderzoeksplicht*’ [investigation duty]).[22] An exchange of information by the parties as part of the preparation for the transaction, and to discharge their duty of care, is usually called a ‘due diligence’ investigation.[23] If a party has not adequately performed such due diligence, this may 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

19. Article 6:248 DCC *re* pre-contractual good faith. See further: B. Wessels, *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.
20. *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.
21. *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.
22. 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.
23. See for scholarly analyses: H. Kersten, ‘Het due diligence onderzoek’ [the due diligence investigation], *Dossier Ondernemingszaken* [journal on corporate law subjects], 2001-47, pp. 28-33; M.M. Van Rossem, *Garanties in de praktijk* [representations and warranties in practice] (Kluwer: Deventer 2002), p. 210; H.J. de Kluiver, ‘*Overnamecontracten, letters of intent en guaranties*’ [acquisition agreements, letters of intent and representations and warranties], *Dossier Ondernemingszaken* [journal on corporate law subjects], 2001-47, pp. 34-43. W. de Nijs Bik, ‘Mededelings- en onderzoeksplichten bij (bedrijfs)overname’ [disclosure and enquiry duties in relation to a business acquisition], in *Ondernemingsrecht*, 16, 2003, pp. 627-631; W. de Nijs Bik, ‘*Het due diligence-onderzoek*’ [the due diligence investigation], in *Bedrijfsovername* [acquisition of a business], 2nd ed. (Kluwer: Deventer →

matters appear not to be to his liking. He could have found that out before, and is expected to have done so.[24] On the other hand, if a seller remains silent about some crucial fact, *e.g.* 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.[25]

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 on 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?

7.3.2.4 Private transactions due diligence – integrating human rights?

Generally, as 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 in a due diligence questionnaire exchanged between the parties before the investigation commences (see Annex 7.1, *in fine*).[26] However, since many companies operate globally, human rights violations become a business risk relevant for consideration. Being accused of human rights abuse, or complicity thereto, is bad news for a company. It can severely damage its

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2005), pp. 51-73. For an analysis of European tort law and the duty of care, see: C. Van Dam, *European Tort Law* (Oxford: Oxford University Press, 2006). He states that the tort of negligence in both common law and civil law jurisdictions generally "consists of three elements: a duty of care, a breach of that duty and consequential damage" (p. 502).

24. Articles 6:228 DCC *re dwaling* [mistake] and 6:265 *re* rescission. See *e.g.*: *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 22).

25. *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.

26. Pickard, *supra* note 12.

reputation.[27] It therefore seems rational to 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, accept the inherent risk or alternatively, back out of the intended transaction.

7.3.3 Other reasons for executing due diligence

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. Other drivers for a due diligence investigation are:[28]

- evaluating possible synergies for a merger, *e.g.* in the type of business activities or geographical markets, new opportunities or innovative approaches;
- verification of assumptions regarding the business or the price offered;
- avoidance of 'skeletons in the cupboard' (unexpected liabilities);
- finding arguments for renegotiating the price;
- examining whether permission from third parties is required for the transaction, *e.g.* pursuant to legislation or contractual 'change of control' clauses.[29] Certain transactions require government consent, *e.g.* in the

27. R. Van Tulder, A. Van der Zwart, *International Business-Society Management. Linking corporate responsibility and globalisation* (Routledge: London and New York, 2006). See also: chapter 9 (Shell in Nigeria). Information on business and human rights can also be found, at: http://www.business-humanrights.org/Home, accessed on 12 August 2010.
28. This list is based on the author's experience as a corporate lawyer and on the *Loyens & Loeff Handbook: Due Diligence Law and Practice* (1997, 2nd edition 2003), *i.e.* an in-house handbook of which she was the author. See also Brink (*supra* note 15), pp. 67-73.
29. '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. The rationale is that upon a change of a controlling interest by one party, the other party does not have to deal with an undesirable new party – the new owner. They are quite common in debt and lease agreements as well as in substantial supplier contracts. See further: D. Rankine, M. Bomer, G. Stedman, *Due diligence: definitive steps to successful business combination* (Pearson Education Limited: Harlow, Essex, 2003), at p. 94.

Netherlands, for the sale of a bank, permission has to be obtained from the Minister of Finance; for transactions with a EU dimension, the approval of the EU Commission is required pursuant to EU competition law;
- to optimise the transaction structure (*e.g.* to consider legal and tax variations: a share or asset purchase? Should a new company be incorporated to acquire the new business? If so, under which jurisdiction?);
- identification of 'conditions precedent'[30] which are applicable to concluding the transaction (*e.g.* supervisory board or shareholders' approval, consultation with unions or works councils, third-party consent);
- preparation of the 'representations and warranties' that will become part of the transaction documentation;[31]
- to substantiate taking a decision on concluding the transaction: YES or NO?
- to avoid mismanagement and directors' liability (due to unfunded investment decisions);[32] and
- to prepare a to-do-list concerning improvements which need to be made after the transaction has been concluded.

In sum, there are various reasons for companies to commence a commercial due diligence investigation. Some reasons are aimed at gaining a better understanding of the target business. Other reasons are more transaction-related, such as the preparation of the best tax structure for the acquisition or joint venture, or the analysis of which steps need to be taken before the transaction can take place. There are also reasons of a more practical nature: to find assets over which to demand a security right. To date, companies did not consider human rights concerns as a typical subject to be included in a due diligence assessment.

30. 'Conditions precedent' refers to the conditions, which if not fulfilled, could impede the execution of the contractual obligations. The completion of a due diligence investigation can be a condition precedent to the obligation to complete the purchase.
31. *ABP/Hoog Catherijne supra* note 24.
32. 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 (*i.e.* prior knowledge concerning the target company) led to the judgement 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.

7.3.4 How is the due diligence process executed?

How does one carry out a due diligence process? As may have become clear, a corporate due diligence concerns a factual investigation into the affairs of a business and into factors that may impact its results. A legal due diligence consists of an examination of the legal, tax and financial structure of a company or a project. It is very important to make any obstacles or hidden liabilities transparent to the counterparty before concluding the transaction. These could also concern human rights issues.

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, *e.g.* 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. Reference is made to Annex 7.1 *in fine*.

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 and produces its products. It is also necessary to understand 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 the company is mentioned. If the parties agree, stakeholder interviews can also be made part of the due diligence assessment.

7.3.5 When do parties execute a due diligence process?

Figure 7.1 depicts a typical transaction timeline. A due diligence inspection typically starts quite early on in the process and generally 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 in the final phases of a transaction, parties are still exchanging information (partly due to practical reasons because transactions involve complex matters, *i.e.* it takes time to collect everything, partly due to strategical reasons, *i.e.* late disclosure of important information sometimes affects the negotiation results less than information provided in an earlier phase of the negotiations).

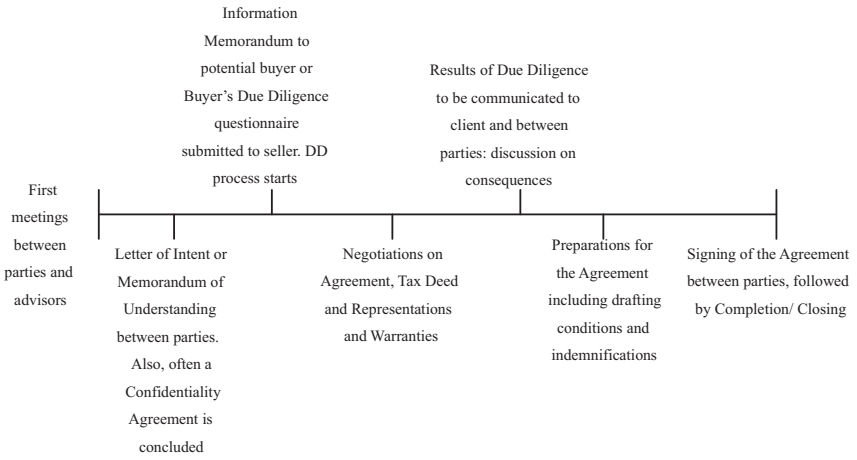

Figure 7.1 Timing of a due diligence process in corporate practice

7.3.6 Conclusion on corporate due diligence processes

This section has demonstrated in which way human rights impact research could fit into current corporate due diligence 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 experts, which is in line with the fact that these investigations are often performed by multi-disciplinary teams. Human rights experts in turn can make use of existing HRIA tools (section 7.6). 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 in order to prepare a prospectus, as well as in any private transaction due diligence investigation.

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

7.4 Due diligence in human rights law

International human rights treaties require of the parties to such treaties, *i.e.* the State Parties, to ensure that their citizens can enjoy human rights. The obligations on State 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, but also that they should take measures to assure that the rights will not be violated and will be fulfilled.

The duty to protect is commonly referred to as a 'positive obligation' (or 'responsibility from omission' or 'duty of due diligence').[33] 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.[34] 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.[35] As States obviously 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, *i.e.* the State is expected to employ all possible means and measures to prevent violations.

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33. A. Nollkaemper, *Kern van het international publiekrecht* [Basics of International Law], 2nd ed. (Boom Juridische Uitgevers: Den Haag, 2005), p. 255. A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), pp. 318 and 334, and see: pp. 317-436 for a systematic analysis of positive obligations under selected human rights treaties.
34. Nollkaemper, *supra* note 33, p. 256; Clapham, *supra* note 33, pp. 521-523.
35. ECHR, *X and Y v. The Netherlands*, A. 8978/80, 26 March 1985, Series A., No. 91, p. 23, §22. Regarding article 8 ECHR 'Right to Family Life', the Court judged that this right creates obligations for States which involve 'the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals themselves'. Clapham suggests that these types of statements have had important implications beyond the state duty, *e.g.* the extension of human rights into the private sphere. According to him, it has meant that national courts may consider that a private actor has human rights obligations which stem from the ECHR. He refers to it as 'the horizontal, third party, or *Drittwirkung* effect of the relevant Convention article'.

The term 'due diligence' is often used 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?[36] 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.[37] 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 proportionate to the degree of risk of harm in the particular instance. The measures can include legislative, administrative and other actions, including the establishment of suitable monitoring mechanisms to implement the measures.[38]

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

7.4.1 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 clearly indicate that the measures need to include remedies for victims and penalties for perpetrators in order to make the rights effective. Additionally, the States Parties' obligations are sometimes formulated

36. Nollkaemper, *supra* note 33, 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 or their citizens.
37. M.N. Shaw, *International Law*, 5th ed. (Cambridge University Press: Cambridge, 2003), pp. 764, 770.
38. *Supra* note 37, p. 760. See also: the UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003) §1, 'General measures of implementation of the Convention on the Rights of the Child, which emphasised the element of monitoring: 'the Committee… has identified a wide range of measures that are needed for effective implementation, including the development of special structures and monitoring, training and other activities in Government, parliament and the judiciary at all levels'.

in such a manner that they explicitly extend to third party acts, *i.e.* parties other than state agents. International law might therefore demand of States that they 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]

Or, article V of the Genocide Convention (1948) which 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 a 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 organisation*." [Emphasis added][39]

Article 2 of the International Covenant on Civil and Political Rights (ICCPR, 1966) stipulates in respect of the States Parties' obligations:

> 2. …each State Party … undertakes to … adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3…undertakes: (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have *an effective remedy*… (c) To ensure that the competent authorities *shall enforce such remedies* when granted. [Emphasis added]

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

39. In a situation in which a Danish bank refused to provide a loan to a Moroccan person, Mr. Ziad Ben Ahmed Habassi, the Danish authorities were found to have failed to investigate properly the alleged discrimination by the non-state actor in order to protect him effectively from racial discrimination. See: *ZIAD Ben Ahmed Habassi v. Denmark,* Communication no. 10/1997, UN Doc. CERD/C/54/D/10/1997, 6 April 1999, pp. 10-11.

Human and Peoples' Rights (ACHPR, 1981) placed similar duties on State Parties.

By article IV.2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), the State Parties to this Convention also pledged to act in respect of third parties:

> To adopt legislative, judicial and administrative measures to *prosecute, bring to trial and punish* in accordance with their jurisdiction *persons* responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons. [Emphasis added]

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) has been in the forefront of efforts to make it clear that States have positive duties to protect individuals from violent acts of other individuals and groups. Respectively, Articles 2 (e),(f) and 5(a) cite that the State Parties commit:

> 2(e) To take all appropriate measures to eliminate discrimination against women *by any person, organisation or enterprise*; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women […].
> 5(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of *prejudices and customary and all other practices* which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. [Emphasis added]

The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee)[40] builds on the concept of due diligence under general international law to protect individuals from infringements of their rights committed by non-state actors. See its General Recommendation 19 (1992), paragraph 9, which focused on how to prevent violations:

> Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with *due diligence* to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation. [Emphasis added][41]

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40. This is an expert body with the mandate to watch over the progress for women made in those countries that are the States Parties to the CEDAW. The Committee monitors the implementation of national measures to fulfil this obligation and makes recommendations on any issue affecting women to which it believes the States Parties should devote more attention.
41. General Recommendation, No. 19, [§ 9], UN Doc. A/47/38 (1992), p. 5.

This was followed by similar wording in the UN Declaration on the Elimination of Violence Against Women (1993). Article 4(c) was adopted by consensus and avows:

> States should exercise *due diligence* to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons. [Emphasis added][42]

The references to due diligence in these last two texts have been used to develop a set of positive obligations for States with regard to violence by non-state actors.[43] 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), *i.e.* 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' (*i.e.* the treaty body to the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)). This Committee recommended:

> (…) the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by *private persons or entities* (…). There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise *due diligence* to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[44] [Emphasis added]

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42. UN Doc. A/RES/48/104, Resolution of 20 December 1993.
43. Amnesty International, 'Respect, protect, fulfil – Women's human rights. State responsibility for abuses by 'non-state actors'', AI Index IOR 50/01/00, §4.
44. General Comment No. 31 [§ 8], 2004, UN Doc. HRI/GEN/1/Rev.8, 2006: 'Compilation of general comments and general recommendations adopted by human rights treaty bodies'. Concerning due diligence, see also: General Comment No. 16 [§ 27], 2005.

The Inter-American Commission on Human Rights (2008),[45] and the political bodies of the Council of Europe (2002)[46], and the UN General Assembly (2004)[47] have also recognised due diligence standards as requiring swift and effective action against perpetrators of human rights. 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.[48] Ertürk has consistently noted that where the State fails to act with due diligence to prevent violence, including by private actors operating in the private sphere, or to investigate and punish such violence or provide compensation, the State can be held internationally responsible for the infringement upon a human right by private acts.

The above quotations provided some examples of the use of the term 'due diligence' in human rights law. 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 interpreted its meaning in specific cases.

7.4.2 Jurisprudence

'Due diligence' was first used in *Velásquez Rodriguez v. 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 judgement 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 ACHR had been violated, because of the involuntary disappearance of Mr. Velásquez. The Court argued that Honduras could be held liable: "not because of the act itself, but

45. '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 and 65]; '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].
46. 'Committee of Ministers Recommendation No. Rec., 2002, p. 5 to Member States on the Protection of Women against Violence', §II; Appendix [§§ 34-41, 45] and Explanatory Memorandum [§§ 90-92].
47. UNGA Res. 58/147 (19 February 2004) 'Elimination of Domestic Violence Against Women'.
48. 'Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk'. The due diligence standard as a tool for the elimination of violence against women, 20 January 2006, E/CN.4/2006/61, §§ 61-64, 101-103.

because of the lack of *due diligence* to prevent the violation or to respond to it as required by the Convention."[49] [Emphasis added]. 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.[50] [Emphasis added]

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."[51] 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.[52] 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."[53] 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 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.

On 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. *E.g.*, according to this Court, the Right to Life of article 2 entails the obligation to take appropriate steps for the

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49. *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (Ser. C) No. 4, 29 July 1988 [§§ 172-175]. The Inter-American Commission on Human Rights had submitted this case to the Inter-American Court of Human Rights.
50. *Supra* note 49 [§§ 173-174].
51. *Supra* note 49 [§ 176].
52. *Supra* note 49 [§ 177].
53. *Supra* note 49 [§ 177].

safeguarding of life within its jurisdiction.[54] A similar due diligence standard as applied in *Velásquez* was used by the European Court in *Osman v. United Kingdom* (1998).[55] 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 (the introductory paragraph of section 7.4). 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].[56]

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 diligence standard in various cases was presented in the

54. Shaw, *supra* note 37, p. 332, referring to *LCB v. United Kingdom*, 9 June 1998.
55. *Osman v. the United Kingdom* (Appl. 23452/94) ECHR 28 October 1998, Reports 1998-VIII [§§115-122].
56. *Supra* note 55 [§116].

brief submitted by Interights in the domestic violence case of *Nahide Opuz v. Turkey* (2001).[57] Interights, the 'international centre for the legal protection of human rights', was a third party intervener on 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.[58] Beyond the obligation to take action when an official complaint is lodged, or – under special circumstances – when the victims' complaints have been withdrawn

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57. *Nahide Opuz v. Turkey*, 9 June 2009, (Appl. 33401/02), at: http://www.kahdem.org.tr/?p=232, accessed on 12 August 2010. See: legal brief Interights of 21 July 2007 [§§ 8-22], at: http://www.interights.org/view-document/index.htm?id=237, accessed on 12 August 2010. Interights referred to: *Z and Others v. the United Kingdom* (Appl.29392/95) ECHR, 10 May 2001-V33 [§ 73]; *E and Others v. the United Kingdom* (Appl. 33218/96) ECHR 590, 26 November 2002. See: E/CN.4/2006/61, 20 January 2006 [§§ 20-23]*; A. v. the United Kingdom*, judgement of 23 September 1998 [§ 22], *Reports of Judgments and Decisions* 1998-VI [§22]; *Okkalı v. Turkey* (Appl. 52067/99) ECHR 2006 [§ 70,73-75]; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (Appl. 13178/03) ECHR 12 October 2006 [§ 53]*; Akkoc v. Turkey* (Appl. 22947/93) and (Appl. 22948/93) ECHR 10 October 2000 [§ 77]; *Isayeva and Others v. Russia*, (Appl.57947/00,57948/00 and 57949/00) ECHR 24 February 2005 [§§ 208-213]; *Menesheva v. Russia* (Appl. 59261/00) ECHR 2006 [§ 64]; 13 *M.C. v. Bulgaria* (Appl. 39272/98) ECHR 2003-XII [§ 151].

58. *Osman vs the United Kingdom*, *supra* note 55 [§ 116]. Interights' legal brief, *supra* note 57 [§ 14], referring to ECHR, *Z and Others v. the United Kingdom* (Appl. 29392/95), 10 May 2001-V33 [§ 73]; *E. and Others v. the United Kingdom* (Appl. 33218/96), 15 January 2003, ECHR 763 [§ 88]. See: UN Doc. E/CN.4/2006/61, 20 January 2006, pp. 20-23 [§§ 20-23, 88].

(*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."[59] 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 v. Turkey.*[60] A particularly high degree of vigilance is then required of the State.

Along the same lines was *Maria da Penha v. 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.[61] 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 7.4.1 *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'.[62]

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, vulnerable groups of women such as migrant women and young women and girls – has been confirmed in *Ximenes-Lopes v. Brazil; Pueblo Bello Massacre v. Colombia*; and *Mapiripán Massacre v. Colombia.*[63]

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59. ECHR, *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 other v. Georgia,* 3 May 2007, Application. No. 71156/01 [§ 97].
60. *Mahmut Kaya v. Turkey,* 28 March 2000*,* (Appl. 22535/93), *ECHR 2000-III* [§ 127].
61. Inter-American Commission on Human Rights, *Maria da Penha v. 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].
62. *Supra* note 61 [§ 20].
63. IACtHR, *Ximenes-Lopes v. Brazil,* Inter-Am. Ct. H.R. (ser. C) No.149, p. 85 (4 July 2006); *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, p. 113 (31 January 2006); *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, p. 111, (15 September 2005).

In *A.T. v. 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) (mentioned in section 7.4.1 *supra*).[64] 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 the 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 useful mechanisms to combat violence against women in various cultures worldwide.[65] With the same focus, a critical analysis was made in 2006 by Professor Ineke Boerefijn.[66] 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, *i.e.* without violence. In other words: the fulfilment of a human right obligation should not be measured by employing efforts, but – instead – by realising results.[67]

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64. CEDAW Commission*, A.T. v. Hungary*, Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (2005) [§§ 9.2, 9.6].
65. Benninger-Budel, C. (Ed.), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff Publishers, Nijhoff Law Specials, 2008), vol. 73.
66. I. Boerefijn, *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.
67. Boerefijn, *supra* note 66, 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 (see section 7.5 *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.

7.4.3 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. Over the last two decades, a growing concern about human rights abuses or complicity thereto by corporate actors has emerged. Without intending to discuss this subject in depth, a few examples will be given in this section.[68] In 1995, people all over the world were concerned about the possible involvement of the Dutch-UK oil company Shell in the execution of Ken Saro Wiwa and other human rights abuses by the military regime in Nigeria.[69] In response to a communication alleging human rights abuses by the Nigerian government, the African Human Rights Commission (AHRC) 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.[70] 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.[71] Nonetheless, the decision shows that this Commission explicitly acknowledged that the fulfilment of

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68. For an overview hereof, see generally Clapham, *supra* note 33; Muchlinsky, P., *Human Rights and Multinational Enterprises* (Oxford: Oxford University Press, 2007); N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability* (Intersentia: Antwerpen, 2002); and S. Joseph, *Corporations and transnational human rights litigation* (Hart Publishing: Oxford and Portland Oregon, 2004). See also: L. Enneking, 'Crossing the Atlantic? The political and legal feasibility of European Foreign Direct Liability Cases', in *The George Washington International Law Review*, Vol. 40, No. 4, 2009, pp. 903-938; and N.M.C.P. Jägers, M.J.C. Van der Heijden, 'Corporate human rights violations: The feasibility of civil recourse in The Netherlands,' in *Brooklyn Journal of International Law,* 33(3)*,* 2008, pp. 833-870.
69. Chapter 9 (Shell in Nigeria).
70. African Human Rights Commission, *Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*, ACHPR/COMM/A044/1 (27 May 2002) [§§ 2, 59-67]. The Communication and the decision of the Commission are available on: CESR, Nigeria, at: http://cesr.org/nigeria, accessed on 12 August 2010. See also: F. Coomans, 'The Ogoni Case Before the African Commission on Human and Peoples' Rights', in *International and Comparative Law Quarterly*, Volume 52, 2003, pp. 749-760. He draws attention to a *Note verbale* 127/2000 submitted in October 2000 to the Commission by the Nigerian Government. Then new President Obasanjo admitted that "there is no denying that a lot of atrocities were and are still being committed by the oil companies in Ogoniland and indeed in the Niger Delta area". The Commission concluded that ACHPR had been violated.
71. Jägers 2002, *supra* note 68, p. 219.

economic, social and cultural rights can be threatened by the behaviour of multinational corporations.[72]

Companies' behaviour can however also be tested under national law. In 1996, Wiwa's son and others commenced civil law proceedings against Shell in the US.[73] The cases were brought under the Alien Tort Claims Act (ATCA), a 1789 statute granting non-US citizens the right to file suits in US courts for international human rights violations, and the Torture Victim Protection Act (TVPA), which allows individuals to seek damages in the US for torture or homicide, regardless of where the violations take place. The original meaning and purpose of the ATCA are uncertain. However, scholars have surmised that the Act was intended to assure foreign governments that the US would act to prevent and provide remedies for breaches of customary international law, especially breaches concerning diplomats and merchants. The complainants against Shell also alleged that the company had violated the Racketeer Influenced and Corrupt Organisations Act (RICO) and New York state law.[74] These cases were settled in 2009.[75]

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 ATCA, domestic US law, for alleged human rights violations connected with the construction of the Yadana gas pipeline.[76] In 1992, Total contracted with the Myanmar government to obtain rights to produce, transport, and sell natural gas from an offshore

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72. Clapham, *supra* note 33, p. 434.
73. As Ken Saro Wiwa's family members did not feel safe in Nigeria anymore, they had moved to the US.
74. US District Court, New York, *Wiwa v. Royal Dutch Petroleum* (Shell), 28 February 2002, LEXIS 3293, Docket Nos. 99-7223[L]; US Appellate Ct, 2nd 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, 2nd Circuit, *Royal Dutch Petroleum Co.* vs *Wiwa*, 14 September 2000, 226 F.3d 88; US Supreme Ct, *cert. denied*, 26 March 2001, 532 US 941. Selected legal documents can be found on: http://wiwavshell.org/resources/legal documents/, accessed on 12 August 2010.
75. Shell paid 15 million dollars 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, accessed on 10 May 2010.
76. US Appellate Ct, 9th Circuit, *Doe* vs *Unocal*, 18 September 2002, LEXIS 19263. The legal documents can be accessed Earth Rights, at: www.earthrights.org/legal/doe-v-unocal, accessed on 12 August 2010. The 9th Circuit rejected the district court's ruling that plaintiffs had to show Unocal's "active participation". Unocal also confronted the question whether forced labour was a violation of the law of nations for purposes of ATCA jurisdiction. The court had no difficulty concluding that it was, observing that "forced labor is so widely condemned that it has achieved the status of a jus cogens violation [of international law]" [at 29]. *Ius cogens* norms are norms of international law that are binding on nations even if →

location in Myanmar. The project involved construction and operation of a gas pipeline running through the interior of Myanmar to Thailand. Unocal obtained a 28 per cent interest in this project from Total. According to plaintiffs, the terms of the project called for the Myanmar Military to protect the gas pipeline. Plaintiffs alleged that the Myanmar Military forced them to work on and serve as porters for the pipeline project. Plaintiffs further alleged that in connection with security for the project, the Myanmar Military subjected them to murder, rape, and torture. 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. The parties released the following joint statement:

> The parties to several lawsuits related to Unocal's energy investment in the Yadana gas pipeline project in Myanmar/Burma announced today that they have settled their suits. (…) the settlement will compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region. These initiatives will provide substantial assistance to people who may have suffered hardships in the region. Unocal reaffirms its principle that the company respects human rights in all of its activities and commits to enhance its educational programs to further this principle.[77]

In 2000, the Sub-Commission on Promotion and Protection of Human Rights (wound up in August, 2006), *i.e.* 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[78]), had begun to analyse the possibilities for developing 'Universal Human Rights Norms for Companies'. The Sub-Commission was composed of twenty-six experts whose responsibility were to undertake studies, particularly in light of the Universal Declaration of Human Rights, and make recommendations to the UNCHR. These experts operated through seven thematic working groups. The Sub-Commission

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they do not agree with them. Crucially, the Ninth Circuit did not require that plaintiffs put forward evidence that Unocal knew "the precise crime that the principal intend[ed] to commit" or the manner in which its actions would lead to crimes by the Myanmar Military. Rather, it was enough that Unocal "knew that acts of violence would probably be committed [by the host government] as a result of Unocal's conduct, which included "payments" to the Myanmar Military and "instructions where to provide security and build infrastructure" [at 36, 62-63]. See also Clapham *supra* note 33, pp. 255-261.

77. Earth Rights, *supra* note 76, at http://www.earthrights.org/print/1362, accessed on 12 August 2010.

78. The UN Human Rights Council is a subsidiary body of the UN General Assembly. It was established by the UN General Assembly Resolution A/RES/60/251 on 15 March 2006 in order to replace the UNCHR.

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."[79] The Working Group prepared a set of draft norms and disseminated this as widely as possible, so as to encourage governments, intergovernmental organisations, NGOs, transnational corporations, other business enterprises, unions, and other interested parties to provide any suggestions, observations, or recommendations. The comments received were evaluated and used for the final version of the norms. 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.[80] The Commentary on the Norms pointed to global trends which had increased the influence of multinationals 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 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." Furthermore, the Commentary drew attention to the fact that "new international human rights issues and concerns are continually emerging and that [companies] […] often are involved in these issues and concerns, such that further standard-setting and implementation are required at this time and in the future."[81] 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 […]." The Commentary explains this norms as follows (under A.1.b.):

79. UN Doc. E/CN.4/Sub.2/RES/2001/3, Resolution of 15 August 2001.
80. 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) UN Doc. E/CN.4/Sub.2/2003/12Rev.; 'Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', 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 at p. 52, 2003.
81. The Commentary also pointed at the OECD MNE Guidelines and the Global Compact Principles.

> 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][82]

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 (see chapter 6) should do.[83]

Two years later, there was still complete uncertainty as to whether the Norms would form the basis for a legally binding instrument, and which monitoring mechanisms would be set up in order to ensure that they will be complied with. 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. Later on, this mandate was confirmed by the UNHRC, In 2008, the mandate was renewed and expanded. The post has been fulfilled from the beginning by Ruggie as was indicated in section 7.1. In particular, the Special Representative

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82. Commentary, *supra* note 80.
83. See *e.g.* S.S. Thorsen, A. Meisling, Perspectives on the UN Draft Norms, pp. 1-13; paper discussed at the IBA/AIJA conference on Corporate Social Responsibility held in Amsterdam in 2004, in which conference the author participated. The paper is available at: http://www2.ohchr.org/english/issues/globalisation/business/docs/lawhouse2.doc, accessed on 12 August 2010. The paper states: "The Norms are comprehensive seen in relation to core human rights conventions. Paragraph 12 serves as a "catch-all" paragraph; however, the paragraph does not offer much advise to business. From a preliminary analysis a few shortcomings to the remarkable work could be identified: (i) The Norms decided to include corporate environmental responsibility though this area is traditionally dealt with outside the human rights framework; (ii) The Norms have mixed a 'rights-based' approach with an 'issues-based' approach. The Norms emphasize in particular consumer protection and security personnel, though one could argue that there is no such need since human rights have to be protected within companies' total sphere of influence and in relation to all stakeholders; (iii) Some of the paragraphs are too far-reaching in scope when reading the wording of such paragraphs. However, the Commentary in most instances loosens the tough conditions prompted by first appearance. Other paragraphs are expanded in reach through the Commentary; (iv) Challenging concepts like the precautionary principle are adopted without clear descriptions. It is suggested to approach the formulation of Norms for business on a more straightforward rights-based formula taking the outset in the only universally agreed standards *i.e.* the International Bill of Human Rights", pp. 1-2.

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, *i.e.* 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.

7.4.4 Conclusion on due diligence in human rights law

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

7.5 Corporate due diligence as referred to by Ruggie

Against the background of corporate and human rights law standards as set out in the sections 7.2-7.4, it will be interesting to examine in which way 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 per cent of those violations were conducted by the companies themselves, the remainder concerned indirect corporate-related human rights abuses, through subcontractors, local governments or suppliers.[84] Many of the abuses occurred in the extractive industry and timber logging, but abuses in the consumer products supply chain were also noted. Corporate-related

84. 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].

human rights abuses often have environmental concerns too. Ruggie states that: "(…) environmental concerns were raised in relation to all sectors and translated into impacts on a number of rights, including the right to health, right to life, rights to adequate food and housing, minority rights to culture, and the right to benefit from scientific progress."[85] He mentioned that access to clean water "was raised in 20 per cent of cases, where firms had allegedly impeded access to clean water or polluted a clean water supply." Ruggie considers these abuses a consequence of economic globalisation.

7.5.1 Governance gaps versus accountability gaps

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 sufficiently 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."[86] How to narrow and ultimately bridge the governance gaps in relation to human rights is what Ruggie sees as our fundamental challenge. From a human rights law perspective, however, these gaps have been referred to as 'accountability gaps', *i.e.* that corporate conglomerates need not account for their worldwide activities against the same standards everywhere.[87] Ruggie, though, chooses to refer to them as 'governance gaps' in order to emphasise

85. *Supra* note 84, p. 3.

86. Ruggie 2008, *supra* note 3, §3; UN HRC (22 April 2009) UN Doc A/HRC/11/13, 22 April 2009, §7.

87. *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], organised by Nederlands Juristen Comité voor de Mensenrechten [Dutch Committee for Human Rights] and the NGO Stand Up For Your Rights on 23 June 2009 in Amsterdam, the Netherlands, in which the author participated <http://media.leidenuniv.nl/legacy/Voorlopig_Programma_23juni09.pdf> accessed on 2 September 2009. See also: E. Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges,' in *Northwestern Journal of International Human Rights*, Vol. 6, Issue 2, Spring 2008, pp. 222-261, at: http://www.law.northwestern.edu/journals/jihr/v6/n2/2/, accessed on 12 August 2010; C. Broecker, '*Better the Devil You Know' – Home State Approaches to Promoting Transnational Corporate Accountability*', Paper New York University School of Law, 2009, at: http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=christen_broecker, accessed on 12 August 2010; European Parliament, News, 'European Parliament Report Proposes Human Rights Global Governance of Businesses', 18 May 2009, at: http://www.globalgovernancewatch.org/on_the_issues/european-parliament-report-proposes-human-rights-global-governance-of-businesses, accessed on 12 August 2010.

that the current systemic problems can only be solved when governments, companies and civil society accept their common responsibilities in realising global governance.[88] 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 (*e.g.* 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. Criticasters of Ruggie's approach do not agree with him, and allege that his report only encourages 'good' companies to use due diligence but that it will not bring any change in respect of 'bad' companies' practices.[89]

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 a gap. Ruggie's framework intends to fill this gap by guiding

88. Presentation by Ruggie, Conference 'Business and Human Rights' (1 December 2008), Wassenaar, the Netherlands, at: http://www.oesorichtlijnen.nl/wp-content/uploads/Uitnodiging%20bedrijfslevendag.pdf and http://www.minbuza.nl/dsresource?objectid=buzabeheer:59586&type=pdf, accessed on 19 May 2010; Dutch Department for Foreign Affairs, '*2008 Rapportage over de uitvoering van de mensenrechtenstrategie*: *Naar een menswaardig bestaan*' [2008 Report on the Implementation of human rights strategies 'To a decent existence'], 27 March 2009, at: http://www.tweedekamer.nl/images/31263-27bijlage_tcm118-185145.pdf, accessed on 12 August 2010. This approach aligns with the idea that governments, business and civil society should operate as a partnership, an idea elaborated upon in the Earth Charter, which reads under 'Universal Responsibilities' [Preamble]: "to realize these aspirations, we must decide to live with a sense of universal responsibility, identifying ourselves with the whole Earth community as well as our local communities." *Supra* note 2 [§ 80].

89. *E.g.* Misereor/The Global Policy Forum Europe, *'Problematic Pragmatism – The Ruggie Report 2008: Background, Analysis and Perspectives*', June 2008, at: http://www.cidse.org/uploadedFiles/Publications/Publication_repository/policy_paper_Misereor_background_Ruggie_report_june08_EN.pdf, accessed on 12 August 2010. Their general reaction to the Ruggie Report is: 'Thus Ruggie's reports falls way short of the expectations of civil society organisations. 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: C. Ochoa, American Society of International Law, ASIL Insights – Vol 12, No. 12, 18 June 2008, at: http://www.asil.org/insights080618.cfm, accessed on 12 August 2010; 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, at: http://www.amnesty.org/en/library/asset/IOR40/018/2008/en/fa1e737c-6ad9-11dd 8e5e43ea85d15a69/ior400182008en.html, accessed on 12 August 2010.

companies on how to respect human rights. He relies on CSR as a tool to achieve this.

7.5.2 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, *i.e.* States, companies and civil society.[90] The framework mainly focuses on three founding principles: Protect, Respect and Remedy. These concepts are also used in human rights law and the UN Draft Norms, as has become apparent in section 7.4. 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.

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, 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, *i.e.* 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.[91] It underlines that

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90. 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' (see section: 7.4.3 *supra*). The concept of 'common but differentiated responsibilities is well known in the fields of international environmental law and sustainable development. See *e.g.* A. Hildering, *International Law, Sustainable Development and Water Management* (Eburon-Delft, 2004), pp. 35-40, 149-150.

91. Prominent law firms have issued differing legal advices on how to interprete the legal impact of the Ruggie Report: Watchell, Lipton, Rosen & Katz LLP advises their clients that the Ruggie framework would "impose on corporations the obligation to compensate for the various deficiencies of the countries in which they perform their business". Martin Lipton & Kevin S. Schwartz 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, accessed on 12 August 2010. On the other hand, Weil, Gotshal & Manges LLP explains to its clients that "the Special Representative's mandate does not include the ability to impose new binding legal obligations on corporations." Weil, Gotshal & 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, at: http://amlawdaily.typepad.com/amlawdaily/files/weil_gotshal_response_to_un_report_on_human_rights_and_business_final.pdf, accessed on 19 May 2010. In their view, a due diligence process can only bring issues to the attention of a company, having the effect that a company can avoid liability in the tort of negligence which uses the stricter threshold of reasonable foresight of harm. Due diligence prevents litigation rather than act as a trigger for it. Van Dam, C., 'Launch of the Report of the International Commission of Jurists 'Corporate Complicity & Legal Accountability" →

Ruggie did not wish to take a stance in the ongoing discussion regarding the question whether international human rights treaties apply to companies. Human rights lawyers typically argue that the norms captured in those treaties do apply.[92] Companies on the other hand, predictably take the stance 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.[93]

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 (*e.g.* the examples mentioned in section 7.4.3 *supra*). Introducing national laws can be part of the State duty to protect. A failure to respect such laws can subject a company to domestic jurisdiction. 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? Another question is whether the applicable legal system offers adequate access to justice and remedies to victims of the violations?[94] These questions relate to the remedy pillar. They are difficult to answer, and are part of current studies and of discussion between

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(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 […]. Moreover, this is a dynamic area of the law in which the standard of due care will evolve with the opinions in society. What was accepted as proper behaviour yesterday can be considered to be negligent behaviour today."

92. See *e.g.* Clapham, *supra* note 33, pp. 266-270, 317-334 tries to establish direct applicability on the basis of customary international law and human rights treaties' bodies' recommendations; Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993), pp. 137-138; Jägers 2002, *supra* note 68, pp 36-38, 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, *supra* note 68, pp. 514-518, 536 bases his on ethical business practice. See furthermore: Anna Triponel, 'Business & Human Rights Law: Diverging Trends in the United States and France', in *AM. U. INT'L L. REV.*, 2008, pp. 856-912.

93. Outlined by *e.g.* J. Abrisketa, 'Blackwater: mercenaries and international law', in *Fride Comment,* October 2007, at: http://www.fride.org/descarga/blackwater.english.pdf, accessed on 12 August 2010; P.W. Singer "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law," in *Columbia Journal of Transnational Law*, Vol. 44, No. 2, 2004, pp. 521-549.

94. *Doe v. Unocal, supra* note 76: 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 v. Shell*, The Hague District Ct, the Netherlands, (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 (defence by Shell) under IV.7, available at: http://www.milieudefensie.nl/globalisering/activiteiten/shell/the-people-of-nigeria-versus-shell, accessed on 12 August 2010. With regard to enforcement, see also the →

policy makers and legislators.[95] 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 7.4 *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, for example, imply that a company adopts a specific recruitment and training programme to implement anti-discrimination policy in a workplace.[96] In general, performing a due diligence exercise 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 this corporate due diligence aspect.

7.5.3 The corporate duty to apply due diligence

Under the "corporate duty to respect human rights," the Report introduces the concept of due diligence.[97] 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.[98] [Emphasis added]

The concept of corporate due diligence "describes the steps a company must take to become aware of, prevent and address adverse human rights impacts,"

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report of the Dutch Social Economic Council, 'Duurzame globalisering: een wereld te winnen' [on sustainable globalisation: a world to be won], SER Advisory Report, 2008-06E, p. 41, available at: http://www.ser.nl/~/media/Files/Internet/Talen/Engels/2008/2008_06/2008_06.ashx, which records about the difficult access to labour law lawyers in China.

95. Castermans, A.G., 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 <http://www.p-plus.nl/beelden/castermans.pdf. An English translation is available at: https://openaccess.leidenuniv.nl/bitstream/1887/15699/2/ENG+NL+report+on+legal+liabilityof+parent+companies+(transl+31+May+2010).pdf, accessed on 12 August 2010; and Enneking, *supra,* note 68, pp. 910-913; Enneking, *supra* note 68, pp. 910-913.
96. Ruggie 2008, *supra* note 3 [§ 55].
97. Ruggie 2008*, supra* note 3 [§ 25].
98. Ruggie 2008*, supra* note 3 [§ 25].

which according to the Report includes considering the international Bill of Human Rights and the core ILO Conventions.[99] In a footnote, Ruggie referred to the definition of due diligence provided by Black's US Law Dictionary: "the diligence, [*i.e.* 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."[100]

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".[101] When searching for the standard of knowledge that companies should aspire towards, Ruggie proposes to use the 'should have known' standard:

> Legal interpretations of "having knowledge" vary. When applied to companies, it might require that there be actual knowledge, or that the company "should have known", that its actions or omissions would contribute to a human rights abuse. Knowledge may be inferred from both direct and circumstantial facts. The "should have known" standard is what a company could reasonably be expected to know under the circumstances.[102]

The same standard – have or ought to have knowledge – is used in international law (section 7.4.2 *supra*). Also in corporate law, due diligence implies a duty to investigate and 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 7.3.2 *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."[103] Evidently, three sets of factors

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99. Ruggie 2008, *supra* note 3 [§ 58]. The Bill of Rights consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights. The 1998 ILO Declaration on Fundamental Principles and Rights at Work declares four core principles as laid down in several separate conventions to be applicable to all Member States regardless of ratification, as these principles are considered to lie at the heart of the ILO's *raison d'être* (Article 2). The Conventions relating to the following rights must be respected, promoted and realised: (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced or compulsory labour; (3) the effective abolition of child labour; and (4) the elimination of discrimination in respect of employment and occupation.
100. *Black's Law Dictionary*, 8th edition, West Group, United States, 2006. Ruggie 2008, *supra* note 3 [§ 25].
101. Ruggie 2008, *supra* note 3 [§ 57].
102. Ruggie 2008, *supra* note 3 [§ 79].
103. Ruggie 2008, *supra* note 3 [§ 25].

need to be considered when undertaking 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; (iii) whether the company might contribute to abuse through the relationships connected to its activities.[104] These factors will be further addressed in the following subsections.

7.5.4 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."[105] 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 attention will be paid to the cost of labour rather than to any local labour-related human rights issues. 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."[106]

It is useful to illustrate the 'country-context issues'. As regards safety issues, a company feels a responsibility to 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 children.[107] Companies usually try to protect their employees from harm whilst living abroad and working for the company. If a company didn't do that and an accident were to occur, it would prove difficult in the future to find employees who would be willing to take on such a challenge. At the same time,

104. Ruggie 2008, *supra* note 3 [§ 57].
105. UN HRC (General-Assembly), 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (John Ruggie) – Implications of "complicity" and "sphere of influence"', 15 May 2008, UN Doc. A/HRC/8/16 [§ 20].
106. Ruggie 2008-2, *supra* note 105 [§ 20].
107. Shell 'Security in Nigeria', at: http://www.shell.com/home/content/nigeria/about_shell/issues/security/security.html, accessed on 12 August 2010. Also see: Pepsi – Cola website, at: http://www.pepsico.com/, accessed on 12 August 2010. Since 2002, safety of employees is a core value 'The New Pepsi Challenge: World Class Safety', at: http://ehstoday.com/safety/ehs_imp_78693, accessed on 12 August 2010.

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 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.[108] 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.[109]

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108. UN HRC (General Assembly), 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Further steps toward the operationalization of the "protect, respect and remedy" business & human rights' (9 April 2010), UN Doc. A/HRC/14/27 [§§ 66-67]. And see: UN Secretary General 'Introduction to human rights due diligence', 5 April 2010, at: http://www.srsgconsultation.org/index.php/main/discussion?discussion_id=7, accessed on 12 August 2010.

109. Examples: The operations of Vedanta Resources Plc, a mining corporation in India resulting in the ecological degradation that threatens the livehoods 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, accessed on 12 August 2010; 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,* p. 175; the operations of Shell Nigeria resulted in misery in the Ogoni Delta; see Chapter 9 (Shell in Nigeria); 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,* p. 397; 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: J. Catalinotto, *Papua New Guinea's Indigenous people v. Barrick Gold*, 6 June 2009, at: http://www.workers.org/2009/world/papua_new_guinea_0611/, accessed on 12 August 2010.

Consequently, companies can contribute substantially to the reduction of human rights offences by doing their homework and considering local human rights issues to be a part thereof. Getting a better grip on these 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'.[110]

The Ruggie Report takes the position that when companies do business in failed states and conflict zones, they need to implement an even 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.[111] 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.[112]

Illustrative of the importance to perform a study of the country risks is the case *Presbyterian Church of Sudan v. Talisman Energy, Inc*. In 1998, the Canadian oil company, Talisman Energy, Inc. ('Talisman') acquired a 25 per cent 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, *e.g.* 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 thirteen 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.[113]

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110. 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 allow Coca Cola to use groundwater. See: about this conflict: '*The Right to Water under the Right to Life: India*', at: http://www.righttowater.org.uk/code/legal_7.asp, accessed on 12 August 2010; Indian Resource Center, '*Coca-Cola spins out of control in India*', 15 November 2004, at: http://www.indiaresource.org/campaigns/coke/2004/cokespins.html, accessed on 12 August 2010; '*Compensation claims against Coca-Cola to move forward*', 14 October 2008, at: http://www.indiaresource.org/news/2008/1056.html, accessed on 12 August 2010; '*Coca-Cola Liable for US$ 48 Million for Damages – Government Committee*', 22 March 2010, at: http://www.indiaresource.org/news/2010/1003.html, accessed on 12 August 2010; Coca Cola Company, *Sustainability Review* (2006; 2007/2008; 2008/2009), p. 31, at: http://www.thecoca-colacompany.com/citizenship/pdf/2008-2009_sustainability_review.pdf, accessed on 12 August 2010. P. Senge, 'Unconventional Allies: Coke and WWF Partner for Sustainable Water', in: *The Necessary Revolution. How Individuals and Organisations are Working Together to Create a Sustainable World* (Doubleday: NY, 2008), pp. 77-95.

111. Ruggie 2008, *supra* note 3 [§ 48].

112. Ruggie 2008, *supra* note 3 [§ 47].

113. Second District, New York, *Presbyterian Church of Sudan v. Talisman Energy, Inc*, 12 September 2006, 453 F. Supp. 2d 633, pp. 641-661 and US AppelateCt 2d Circuit, 2 October 2009, US Doc. No. 07-0016-cv. The US District Court held that to establish →

As Ruggie pointed out in a meeting in the Netherlands where he presented his framework, we are not talking 'rocket science'.[114] 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.

7.5.5 The human rights impact

Regarding the second factor which forms part of the due diligence process proposed by Ruggie, *i.e.* the human rights impacts, the Report explains that: "A company should analyse potential and actual impacts arising from its own activities on groups such as employees, communities, and consumers."[115] It is recommended that a basic human rights due diligence process should include the following elements:[116]

- *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 involved 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

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accessorial liability for violations of the international norms prohibiting genocide, war crimes, and crimes against humanity, plaintiffs were required to prove, *inter alia*, that Talisman provided substantial assistance to the Government of the Sudan with the purpose of aiding its unlawful conduct. The Appelate Court agreed, and affirmed dismissal on the ground that plaintiffs had not established Talisman's purposeful complicity in human rights abuses. See on this case: S. J. Kobrin, Oil and Politics: Talisman Energy and Sudan, in *International Law and Politics*, Vol. 36, No. 2/3, 2004, pp 425-456, at p. 426. S. J. Kobrin, '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, pp. 21-24, at: http://www.lawofthefuture.org/assets/693/AC2009_outlines.pdf, accessed on 12 August 2010.

114. Presentation Ruggie, *supra* note 88.
115. Ruggie 2008-2, *supra* note 105 [§ 21].
116. Ruggie 2008-2, *supra* note 105 [§§ 60-63]; Ruggie 2010, note 108 [§§ 85, 59]; and Sherman, note 6.

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 7.2 and 7.3 were mostly event-driven, *i.e.* 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 that conduct 'broader periodic assessments' be conducted 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.[117] They also resemble the elements that form part of a corporate internal control & management information process such as the COSO framework, introduced in the US, and referred to by various corporate governance codes and acts.[118] Using an internal control & management information process 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

117. See section 5.5 of this book (Corporate anti-corruption programmes).
118. See section 5.2 of this book (Internal control). *E.g.* the Dutch Corporate Governance Code (Frijns Code); the UK Corporate Governance Code (Combined Code); the US Sarbanes-Oxley Act, sections 302 and 404.

not be a big step. In that respect, companies could use the guidance offered by frameworks developed for 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 could serve dual purpose: to manage the risks to the company and the risks to society.[119]

7.5.6 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 external relationships connected with 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.[120] 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, *i.e.* 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 of reasoning, 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.[121] In addition, what can be done is to make these concerns part of the contractual agreements. Interesting

119. Ruggie 2010, *supra* note 108 [§ 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.

120. Ruggie 2008-2, *supra* note 105 [§ 22].

121. Ruggie 2008-2, *supra* note 105 [§ 59]. An example thereof has been demonstrated in the G-Star case, where assessments were carried out by professional audit companies. See: Chapter 10.1 (The International CSR Conflict and Mediation).

corporate best practices are those introduced by Philips, G-Star, Nike and Wal-Mart.[122] 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.[123] An interesting decision on supply-chain issues has been rendered by the UK 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.[124]

A third category of 'third-party relationships' concerns a company's ties with the local authorities. In section 7.5.4, examples were given of human rights violations by local authorities in connection with (future) corporate activities. *E.g.* '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.[125] 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

122. See section 6.7 of this study.
123. Knowledge from corporate law practice. See further: the 'Rabo Annual Sustainability Report 2008' at: 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; 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. All sites accessed on 12 August 2010.
124. Final statement by the UK NCP: *Afrimex (UK) Ltd*, 28 August 2008, at: http://www.berr.gov.uk/files/file47555.doc, accessed on 12 August 2010. NCPs are established in most of the OECD Member States and OECD Adhering States. Complaints about corporate conduct allegedly violating the OECD MNE Guidelines can be filed with the NCP of the Member State that is the home state of the company involved. NCPs offer good services to mediate such complaints and – if unsuccessful – they publish a decision on the case.
125. Chapter 9 (Shell in Nigeria) and the examples provided in note 109.

'sphere of influence' and 'complicity' can assist in answering these questions. He issued a detailed report thereon.[126] 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." 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."[127] 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."[128]

7.5.7 Due diligence: when?

As has become 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.[129] 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.[130] It would not be too big 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 7.3 *supra*, in such a situation,

126. Ruggie 2008-2, *supra* note 105 [§ 4]. Also: International Commission of Jurists 'Corporate Complicity and Legal Accountability', in *Criminal Law and International Crimes*, Vol. 2, 2008, p. 24. In Ruggie 2010, *supra* note 108, [§§ 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.
127. Ruggie 2008-2, *supra* note 105 [§ 4].
128. Ruggie 2008-2, *supra* note 105 [§ 12].
129. For example: KPMG International – Forensic Services, at: http://www.kpmg.com/SG/en/WhatWeDo/Advisory/Transactions_Restructuring/Forensic/Pages/default.aspx and Daylight Accounting, at: www.daylightforensic.com/, accessed on 12 August 2010.
130. See section 5.2 (Corruption and corporate governance).

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 return, annual accounts and report, and – as the case may be – its sustainability report prepared.

7.6 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 law has been 'translated' into practical frameworks for business actors, *i.e.* the 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.[131] Business can profit from their knowledge and skills. An HRIA is basically an assessment of the affairs of a company 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);[132]
– Human rights indicators for sustainability reporting – GRI G3 guidelines (GRI);[133]
– 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).[134]

Since every company is organised differently, 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

131. See *supra* note 13.
132. 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/, accessed on 12 August 2010.
133. 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 two reports of GRI, '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/, accessed on 12 August 2010.
134. All HRIAs listed have websites explaining their tool. For BLIHR, see: http://www.human-rights-matrix.net/assets/ES%20final.pdf, accessed on 12 August 2010. See also: *supra* note 13.

the size of investment."[135] 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.[136]

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 containing many practical recommendations.[137] 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, as poor people tend to be more susceptible to participating in unhealthy experiments that generate some income. Other recommendations emphasise that a pharmaceutical company can contribute to fulfilling the Right to Health.[138] Examples are:

- providing access to medicine by extending the company's supply channels in order to bring the medicines closer to the people, also those living in rural areas;
- to provide good quality, up-to-date and clear instructions on how to use the medicine, the safety aspects and side-effects; in relevant languages, if useful illustrated by drawings for illiterate people;
- developing medicines that can resist variations in temperature as electricity for cooling is not always reliable in developing countries;
- cooperating with local companies in the production of generic medicines and controlling quality;
- prices should be differentiated in line with local living standards;

135. Ruggie 2008-2, *supra* note 105 [§ 23].
136. Ruggie 2008-2, *supra* note 105 [§ 24].
137. 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 ('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'), website accessed on 12 August 2010.
138. 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, accessed on 12 August 2010.

– invest in research and development in treatment for neglected tropical diseases, *i.e.* diseases that only occur in the Third World and for which treatment is not very profitable;[139]
– 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;[140]
– use impact assessments to help pharmaceutical companies to ensure that their human rights policy is consistently integrated across all of the company's activities;
– disclosure and transparency activities of pharmaceutical companies and their subsidiaries (disclosure of all advocacy and lobbying positions and the impact of companies' activities); and
– appropriate accountability and monitoring mechanisms for pharmaceutical companies (including external monitoring mechanisms, such as an Ombudsman with oversight of a company's human rights responsibilities, including those relating to access to medicines).

Other industries have also developed codes of conduct including human rights standards specific to the industry. These standards are useful when determining the scope and extent of a due diligence process. For example, the garment industry can follow the Social Accounting 8000 standards and audit regime aimed at managing ethical workplace conditions throughout the global supply chain (SA 8000). This approach has found satisfactory solutions to respect human rights in countries that do not recognise the freedom of association and collective bargaining.[141] The extractive industry has developed various codes of conduct. Some pertain to security issues, including instructions on how to deal with private security forces (*e.g.* VPSHR); others pertain to avoid corruption and complicity with governmental abuses (*e.g.* PWYP and

139. *E.g.* tuberculosis, malaria, blinding trachoma, buruli ulcers, cholera, dengue/dengue haemorrhagic fever, racunculiasis, fascioliasis, human African trypanosomiasis.
140. 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. *E.g.*, GSK grants voluntary licences on a case-by-case basis. It granted its first voluntary licence in 2001 for producing and selling ARVs to Pharmacare, sub-Saharan Africa's largest generics company. The licence now covers both the public and private sectors across sub-Saharan Africa; *Supra* note 137 [§ 75].
141. *E.g.* Article 4.2 of the SA 8000 guidelines suggest to implement human rights grievance committees and employees' representative bodies. See: www.sa-intl.org, accessed on 12 August 2010.

EITI).[142] 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.[143] For timber, one can buy certified timber such as FSC.[144] The certification process includes environmental and human rights due diligence assessments. In other words, by buying certified timber, a company 'outsources' its due diligence review.[145] Soy and palm oil production have organised 'round tables' with stakeholders. The round-table mechanism intends to institutionalise a shareholder dialogue,

142. Voluntary Principles on Security and Human Rights, at: http://www.voluntaryprinciples.org/; Publish What you Pay, at: http://www.publishwhatyoupay.org/; Extracting Industries Transparency Initiative, at: http://eitransparency.org/; all websites accessed on 12 August 2010. A number of gold companies have signed up to the Responsible Jewellery Council (RJC), which has a code of conduct for mining companies as well as up the gold supply chain. 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, at: http://www.icmm.com/about-us/icmm-history, accessed on 12 August 2010. ICMM's Sustainable Development Framework outlines principles supported by reporting guidelines (GRI Mining and Metals Supplement) as well as third party assurance. However this is at a corporate level for the time being (rather than a site level). For site performance, the most well known system is the Mining Association of Canada's Towards Sustainable Mining. It also includes third party review via a multi-stakeholder panel, but the topics that are covered do not go across all corporate social responsibility topics. See also: J. Spinelli (Daylight Forensic & Advisory), 'Foreign Corrupt Practices Act Due Diligence in Mergers & Acquisitions', *Ethishere ™ Institute* (online news service), 13 May 2009, at: http://ethisphere.com/foreign-corrupt-practices-act-due-diligence-in-mergers-acquisitions/, visited on 12 August 2010, illustrating that extensive FCPA due diligence is needed when operating in a high-risk industry (*e.g.* oil), in high-risk countries and in deals with government owned organisations.

143. World Bank, Development Policy Lending 2006 http://siteresources.worldbank.org/PROJECTS/Resources/DPLretro06f.pdf. IFC, *IFC Environmental and Social Standards*, 30 April 2006 http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards; *The International Finance Corporation's new environmental and social requirements*, at: http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pr_BackgroundNoteES/$FILE/Background+Note+-+New+ES+Standards.pdf. Also see: L. Baker, Bretton Woods Project, May 2007, *The World Bank and human rights. Caution on World Bank developments*, at: http://www.ifiwatchnet.org/sites/ifiwatchnet.org/files/The_World_Bank_and_human_rights-%20at%20issue.pdf. All sites accessed on 12 August 2010.

144. Forest Stewardship Council (FSC) is an NGO which has developed a certification system for sustainably produced timber. Certification requires compliance with the FCS Principles and Criteria for responsible forest management. See further: http://www.fsc.org/pc.html, accessed on 12 August 2010.

145. 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 Chapter 6.

partly to assure that no human rights will be violated by the production. Other reasons concern ecological matters and the loss of biodiversity.[146]

These examples demonstrate that various sectors have identified industry-specific human rights issues recognised by all involved, *i.e.* 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 *e.g.* 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 undertake a full human rights due diligence assessment.

7.7 Dilemmas

In the previous section it has been argued that performing an 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 upon 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, *i.e.* 'Remedy' aims to address this question, but that pillar was not the subject of this chapter. 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 access to a due diligence report, the situation is as follows. Certain jurisdictions, such as the UK and the US, recognise the concept of 'pre-trial discovery' or 'document disclosure'. In

146. 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, accessed on 12 August 2010.

the US, this doctrine forms part of civil procedural law.[147] This concept does not exist under Dutch law.[148] There is only one provision in Dutch Civil Procedure law that deals with a party's right to request documents (*i.e.* article 843a). In practice, it appears difficult and sometimes impossible to obtain documents that are in the possession of opponents who are unwilling to submit them. The requesting party must (i) have a legitimate interest, which will only be the case where an evidential interest exists; (ii) specify the desired documents in sufficient detail so that it is possible to determine which documents are meant and why the requesting party has a legitimate interest in them (this condition is designed to prevent so-called 'fishing expeditions'); and (iii) the documents must 'relate' to a legal relationship (based on contract or tort) to which it is a party. As regards due diligence reports, there are examples of cases in which the claimant was allowed to receive a copy. In *BVR/Ho-Cla,* a report prepared by a financial adviser for the buyer of a company was concerned. The court considered this document to 'relate to' the legal relationship between the buyer and the seller as laid down in their Share Purchase Agreement (*i.e.* the third condition mentioned above had been fulfilled).[149]

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, management need to have good arguments if they nevertheless decide to invest. Good corporate governance supposes a rational and good business-informed decision.[150]

147. Federal Rules of Civil Procedure (2007), Rule 26 (incorporating the revisions that took effect on 1 December 2007).

148. M. van Hooijdonk and P. Eijsvoogel, *Litigation in the Netherlands. Civil Procedure, Arbitration and Administrative Litigation* (Kluwer Law International: The Hague, 2009), pp. 25-26. H. Uittien, Gedwongen verstrekking van due diligence-rapportages [Forced provision of due diligence reports], in *Tijdschrift voor de Rechtspraktijk* [Journal for the law practice], 1 January 2007, pp. 19-23.

149. *BVR/Ho-Cla*, Den Bosch CoA 28 September 2004 (JOR 2005/23); similarly: *Verder Holding/Hagemeijer,* Amsterdam District Court 13 April 2005 (JOR 2005/142); *Aegon/ Dexia*, Amsterdam District Court, 3 November 2004 (JOR 2004/326) concerning a request for due-diligence documentation, which was rejected because it was not sufficiently specified and, firstly, the Court had to decide on the scope of the information duty.

150. OGEM, *supra* note 32; Ruggie 2009, *supra* note 4 [§ 82]. Ruggie suggests that there are two scenarios where due diligence could bring additional liability. Either when "the company gains knowledge of possible human rights violations", and then "violations occur" and "the company's prior knowledge gets out," or when "the company publicly misrepresents what it finds in due diligence and that fact becomes known." It is important to note that this →

Another pressing 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 to not act diligently.[151] 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, SA 8000, round tables). But it will remain difficult to demarcate the exact scope of a due diligence. This needs to be determined on a case-by-case basis. 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 enjoy the same civil rights as white people. Shell asserted that it did so in South Africa during the Apartheid regime.[152] Other companies claim that they improved labour-related human rights in China because they created employee-representative bodies.[153] These companies point to the 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. However, the outcome will vary from case to case.

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liability is not because of performing due diligence *per se*. In fact, the decisive factor in both is how the company responds to new information: "The point of human rights due diligence is to learn about risks and then to take action to mitigate, and not to ignore or misrepresent the findings."

151. Presentation by Ruggie, *supra* note 88.

152. Shell, 'Embracing the Process of Black Economic Empowerment in Shell', at http://www.shell.com/home/content/zaf/aboutshell/who_we_are/our_values_and_principles/bee/, accessed on 12 August 2010.

153. Regarding the operations of Timberland in China, see: M. Ma, 'The Story of Ying Xie – Democratic Workers' Representation in China as a Tool for Better Business', in: A. Nadgrodkiewicz (ed.), *From Words to Action: A Business Case for Implementing Workplace Standards – Experiences from Key Emerging Markets* (Center for International Private Enterprise and Social Accountability International: Washington DC/New York 2009, pp. 6-24, at p. 11.

7.8 Summary and concluding remarks

In this chapter, it has been contended that the Ruggie Report offers a valid and interesting contribution to the discussion on the responsibilities and practice concerning the role of business in the field of human rights. Ruggie's approach aligns with the tradition of human rights law and it fits into the current practices of businesses. The 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. The aim of the chapter was to demonstrate that by using the term 'due diligence', Ruggie established a link between two areas of law, *i.e.* 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.

As an introduction to current corporate practice, the second and third sections of this chapter discussed the legal basis for and the practice of due diligence in a securities and contract law context. Securities law generally obliges a company that intends to issue securities (the issuer) and the bank that assists the issuer in selling the securities (the lead manager) to prepare a prospectus. Since this document needs to contain facts about the securities to be issued, the company's business and risks that could occur, the issuer and the lead manager have to conduct a full investigation to collect the information. In corporate practice this is called a due diligence investigation. Enforcement takes place, partly preventively, *i.e.* authorities have to approve the prospectus before publication, and partly curatively, *i.e.* parties who suffered damages because of false information in the prospectus can claim damages from the issuer and the lead manager on the basis of tort law. Prospectus liability is generally based on the doctrine of misleading advertisements, a species of tort.

In respect of a private transaction, *e.g.* a merger, business acquisition or finance transaction, the law commonly does not explicitly require parties to carry out a full due diligence investigation. Often, however, legal doctrine states that parties to a private transaction have a duty to communicate on the material aspects of the transaction in order to avoid that any of the parties enters into the transaction guided by false presumptions. Under Dutch law, it is explicitly prescribed that the selling party has a duty to inform the buyer of any material issues, and that the buying party has a duty to investigate the object of the transaction to ascertain that it complies with his expectations (*onderzoeksplicht en mededelingsplicht*). In other jurisdictions similar rules can be distilled from the case law. In general, it can be concluded that the parties to a private transaction are free to decide on the scope of their due diligence research. Due diligence benefits the party performing the investigation, hence he has an interest in an analysis with a scope and depth which is suited to the intended transaction. If he does not practice due diligence, his legal options could be limited. For example, under Dutch law it will be more difficult for him to

demand a rescission of the agreement on the basis of the doctrine of mistake (*dwaling*), or to claim damages under contractual guarantees (*ABP v. Hoog Catherijne*).

This chapter has also 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 noted that the EU Prospectus Directive of 2003 explicitly states that it observes the fundamental rights and principles recognised in the 2000 EU Charter of Fundamental Rights. Apparently, the EU considers human rights compliance also to be important in the context of capital market regulation on business transactions. Consequently, 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. Moreover, when any human rights issues would emerge in respect of the issuer, it is certainly at risk of reputational damage, which could also impact share value. From a business perspective, it appears rational to prevent this by conducting an adequate due diligence assessment. Being 'human rights compliant' also facilitates becoming qualified for capital markets sustainability indices.

Concerning private transactions such as mergers and acquisitions, it has been argued that it is in the spirit and goal of performing a due diligence investigation to reveal any and all material issues regarding the target company and its worldwide business activities. Just like any other material subject, such as environmental pollution, difficulties in attracting loans, currency risks, fraud or corruption, so is the subject of human rights. An HRIA could assist. This seems especially important if the company that intends to acquire or finance the target company considers itself a socially responsible company that has underwritten human rights in its policies or codes of conduct. For a responsible company it is important to avoid a situation whereby the newly acquired target company damages the acquirer's good reputation. Besides looking at reputation risks in acquisition situations, for any company that is practicing corporate social responsibility, making use of HRIAs will contribute to materialising intentions.

The practical side of this is not too difficult: for a long time, international organisations, scientific institutions and NGOs have been preparing and testing HRIA tools which can be used to evaluate a company's business activities in the context of human rights compliance. Some companies have even actively cooperated with HRIA developers to test these instruments in practice.

Although the focus of this chapter was on how the corporate community can contribute to reducing human rights abuses by applying due diligence, the fourth section of this chapter elaborated on the meaning of 'due diligence' as used in international law. Various international treaties and declarations impose on States the obligation to apply due diligence to protect their citizens from human rights abuses. Accordingly, the due diligence standard presents a method

for measuring whether a State has fulfilled its obligations to prevent and respond to human rights abuses. Case law, starting with the landmark decision in *Velásquez*, showed 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. The Inter-American Court of Human Rights concluded that Honduras had not practised due diligence to prevent that the human right to life of Mr Velásquez was violated. 'All means at his disposal' implies that all strategies, instruments and tools should be utilised, as became clear by the type of actions that the English authorities had employed to avoid abuse against Mr Osman and his son. The authorities investigated the complaints, visited locations and studied a psychiatric report to establish whether they were at risk. In that case the European Court of Human Rights judged that the authorities had employed due diligence. The same Court noted in this and other cases that "measures taken to provide effective protection for vulnerable persons should include reasonable steps to prevent ill treatment of which the authorities *had or ought to have had knowledge*". [Emphasis added]. The *Nahide Opuz* and *Georgia* cases made it clear 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." This should be understood in a context which is particularly opaque and where victims are often reluctant to report violence. These cases displayed that a particularly high degree of vigilance is required of the State when human rights are at stake, also when there is a threat that third parties may abuse them.

Although these standards were recorded in cases pertinent to a State's legal duty to respect human rights, they can be regarded 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 Commission, have been elaborated on in the Ruggie framework. The manner in which this 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 7.5 elaborated on situations identified by Ruggie in which companies should be alert to avoiding corporate-related human rights abuses and are expected to employ due diligence. 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; (iii) whether the company might contribute to abuse through external relationships connected to its activities. As has been concluded before, these three factors are 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. As human rights situations are dynamic and pre-existing conditions will change with the entry of a high impact business operation, Ruggie recommends that the assessment of impacts take place regularly throughout the life of a project or activity, whether triggered by project milestones, regular cycles (*e.g.* periodic performance reviews), or changes in any of the issues related to the scope of a company's responsibility to respect human rights: context, activities, and relationships.[154]

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. Drawing a parallel with the international law duty of States, the company can be expected to invest sufficient effort to find out what really happened, and – if this reveals an abuse – to determine how to respond. Can the situation be remedied? Can the victim or victims be helped or compensated? What does it mean for the future practices of the company? Do internal corrective measures have to be taken, or new policies drafted and implemented? 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.[155] Or there might be a situation in which individual victims cannot be identified because the local State's practice is particularly hard on all citizens as is the case in Myanmar. If we follow the line of the human rights case law, also in those situations it can be expected of a company that it commences an investigation into any potential human rights risks related to its business activities in such a State with a view to preventing them from occurring. Another difficult situation develops when a company is interested in doing business in a failed state or conflict zone. Its activities may positively impact citizens, although negative effects are also imaginable. 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 a developing area. Due diligence can contribute substantially to CSR, and hence to the protection, respect and fulfilment of individual human rights. As Ruud Lubbers, the former prime-minister of the Netherlands, has said this: "From

154. Ruggie 2010, *supra* note 108.

155. Chapter 9 (Shell in Nigeria) and chapter 10 (CSR-conflict and mediation). In a situation like the Shell operations in Nigeria during the dictator Abache 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.

Individual Rights to Common Responsibilities".[156] The responsibility of companies is considered in a moral context, although there are some instances where legal considerations also play a role. Translating this responsibility into tools which can be used in daily practice, a number of HRIA instruments have been identified in section 7.6. These tools can already be applied. Since different concerns per geographical area and industry play a role, best practices developed by frontrunners are worth examining, such as those mentioned regarding pharmaceutical companies.

In the Ruggie approach, the private sector plays a prominent role in contemporary thinking on the UN and the way in which it can achieve its many different tasks, including those in the field of human rights. As Kofi Annan emphasised in his 2005 report entitled "In larger freedom: towards development, security and human rights for all": "States […] cannot do the job alone […] we need an active civil society and a dynamic private sector" and "the [UN] goals […] will not be achieved without their full engagement."[157] The author believes in this 'partnership approach'. Businesses need to engage and can play a better role in respecting human rights when they are prepared. Due diligence investigations can assist in all kinds of situations.

156. Ruud Lubbers, 'Epilogue – From Individual Rights to Common Responsibilities', in: Ruud Lubbers, Willem van Genugten, Tineke Lambooy, *Inspiration for Global Governance – The Universal Declaration of Human Rights and the Earth Charter* (Kluwer: Deventer 2008), pp. 89-96.

157. UN General Assembly A/59/2005 (21 March 2005) [§ 20].

Annex 7.1 Due diligence checklist

(source: http://www.meritusventures.com/template_assets/pdf/diligence.pdf)

I. Financial Information

A. Annual and quarterly financial information for the past three years	B. Financial Projections	C. Capital Structure	D. Other financial information
1. Income statements, balance sheets, cash flows, and footnotes	1. Quarterly financial projections for the next three fiscal years a. Revenue by product type, customers, and channel b. Full income statements, balance sheets, cash	1. Current shares outstanding	1. Summary of current federal, state and foreign tax positions, including net operating loss carryforwards
2. Planned versus actual results	2. Major growth drivers and prospects	2. List of all stockholders with shareholdings, options, warrants, or notes	2. Discuss general accounting policies (revenue recognition, etc.)
3. Management financial reports	3. Predictability of business	3. Schedule of all options, warrants, rights, and any other potentially dilutive securities with exercise prices and vesting provisions	3. Schedule of financing history for equity, warrants, and debt (date, investors, dollar investment, percentage ownership, implied valuation and current basis for each round)
4. Breakdown of sales and gross profits by: a. Product Type b. Channel c. Geography	4. Risks attendant to foreign operations (*e.g.*, exchange rate fluctuation, government instability)	4. Summary of all debt instruments/bank lines with key terms and conditions	
5. Current backlog by customer (if any)	5. Industry and company pricing policies	5. Off balance sheet liabilities	
6. Accounts receivable aging schedule	6. Economic assumptions underlying projections (different scenarios based on price and market fluctuations)		

A. Annual and quarterly financial information for the past three years	B. Financial Projections	C. Capital Structure	D. Other financial information
	7. Explanation of projected capital expenditures, depreciation, and working capital arrangements		
	8. External financing arrangement assumption		

II. Products

A. Description of each product
1. Major customers and applications
2. Historical and projected growth rates
3. Market share
4. Speed and nature of technological change
5. Timing of new products, product enhancements
6. Cost structure and profitability

III. Customer Information

A. List of top 15 customers for the past two fiscal years and current year-to-date by application	B. List of strategic relationships	C. Revenue by customer	D. Brief description of any significant relationships severed within the last two years.	E. List of top 10 suppliers for the past two fiscal years and current year-to-date with contact Information
(name, contact name, address, phone number, product(s) owned, and timing of purchase(s))	(name, contact name, phone number, revenue contribution, marketing agreements)	(name, contact name, phone number for any accounting for 5 per cent or more of revenue)	(name, contact name, phone number)	(name, contact name, phone number, purchase amounts, supplier agreements)

IV. Competition

A. Description of the competitive landscape within each market segment including:
1. Market position and related strengths and weaknesses as perceived in the market place
2. Basis of competition (*e.g.*, price, service, technology, distribution)

V. Marketing, Sales, and Distribution

A. Strategy and implementation	**B. Major Customers**	**C. Principal avenues for generating new business**	**D. Sales force productivity model**	**E. Ability to implement marketing plan with current and projected budgets**
1. Discussion of domestic and international distribution channels	1. Status and trends of relationships		1. Compensation	
2. Positioning of the Company and its products	2. Prospects for future growth and development		2. Quota Average	
3. Marketing opportunities/marketing risks	3. Pipeline analysis		3. Sales Cycle	
4. Description of marketing programs and examples of recent marketing/product/ public relations/media information on the Company			4. Plan for New Hires	

VI. Research and Development

A. Description of R&D organisation	**B. New Product Pipeline**
1. Strategy	1. Status and Timing
2. Key Personnel	2. Cost of Development
3. Major Activities	3. Critical Technology Necessary for Implementation
	4. Risks

VII. Management and Personnel

A. Organisation Chart	B. Historical and projected headcount by function and location	C. Summary biographies of senior management, including employment history, age, service with the Company, years in current position	D. Compensation arrangement	E. Discussion of incentive stock plans	F. Significant employee relations problems, past or present	G. Personnel Turnover
			1. Copies (or summaries) of key employment agreements			1. Data for the last two years
			2. Benefit plans			2. Benefit plans

VIII. Legal and Related Matters

A. Pending lawsuits against the Company	B. Pending lawsuits initiated by Company	C. Description of environmental and employee safety issues and liabilities	D. List of material patents, copyrights, licenses, and trademarks	E. Summary of insurance coverage/any material exposures	F. Summary of material contacts	G. History of SEC or other regulatory agency problem, if any
(detail on claimant, claimed damages, brief history, status, anticipated outcome, and name of the Company's counsel)	(detail on defendant, claimed damages, brief history, status, anticipated outcome, and name of Company's counsel)	1. Safety precautions	(issued and pending)			
		2. New regulations and their consequences				