J Bus Ethics (2013) 116:799–814
DOI 10.1007/s10551-013-1822-z

Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights

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Received: 22 July 2012 / Accepted: 1 July 2013 / Published online: 6 August 2013

Abstract The 'Guiding Principles on Business and Human Rights' (Principles) that provide guidance for the implementation of the United Nations' 'Protect, Respect and Remedy' framework (Framework) will probably succeed in making human rights matters more customary in corporate management procedures. They are likely to contribute to higher levels of accountability and awareness within corporations in respect of the negative impact of business activities on human rights. However, we identify tensions between the idea that the respect of human rights is a perfect moral duty for corporations and the Principle's 'human rights due diligence' requirement. We argue that the effectiveness of the 'human rights due diligence' is in many respects dependent upon the moral commitment of corporations. The Principles leave room for an instrumental or strategic implementation of due diligence, which in some cases could result in a depreciation of the fundamental norms they seek to promote. We reveal some limits of pragmatic approaches to coping with business-related human rights abuses. As these limits become more apparent, not only does the case for further progress in international and extraterritorial human rights law become more compelling, but so too does the argument for a more forceful discussion on the moral foundations of human rights duties for corporations.

Keywords Human rights · Ruggie Principles · Corporate responsibility · Moral rights · Moral duties

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Introduction

In this article we argue that there is an unresolved tension in the way the UN Guiding Principles (UNHRC 2011a, 'Principles') on Business and Human Rights are formulated. On the one hand, the human rights responsibilities of business enterprises are defined in terms of due diligence but, on the other hand, this very due diligence approach falls short of the requirements implied by the respect of human rights as a perfect moral duty, i.e. a duty admitting no exception in favour of inclinations to refrain from acting on it. To the extent that the effectiveness (effectiveness is here understood as prevention and mitigation of business-related human rights abuses) of due diligence cannot be tested reliably, corporations have leeway when performing due diligence, which in some cases may result in an ineffective implementation of the Principles. More particularly, if people working in corporations do not share the vision that human rights are universal, and do not accept these rights as absolute moral constraints, human rights due diligence becomes an ambiguous concept. The scope of our argument is limited to a subset of human rights obligations for corporations that is based on a distinction between perfect and imperfect duties.

After the following introductory remarks that further spell out the framework of our argument, the sequel of the paper is structured as follows. First, we provide an overview of the Principles' conception of human rights due diligence. Second, we return to the very notion of human rights and clarify that, insofar as they are understood as fundamental moral rights, they imply perfect universal duties for corporations. In the remaining sections, we spell out possible tensions between the idea that the respect of human rights is a perfect duty for corporations and the Principles' due diligence requirement.

In legal systems, where states enact and enforce laws that guarantee protection from human rights abuses, corporations fulfil their duties to respect human rights by complying with such laws. Where nation states violate human rights or fail to protect human rights through adequate legal protection, the question about the existence, nature, scope, demands and realisation of human rights duties for corporations becomes practically relevant. International law and national laws with an extraterritorial reach that could give legal force to the duties of corporations in cases where other states fail do not overcome the currently fragmented order of the law (see for an overview Clapham 2010, pp. 237–270). In light of the difficult progress of international human rights law and well-known nation state failures, reliance must be placed on alternative measures that involve the participation of non-state agents, including corporations, to close 'governance gaps' and move towards a more satisfactory level of worldwide human rights protection. In the words of John Ruggie, the 'Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (SRSG) such gaps 'create the permissive environment within which blameworthy acts by corporations may occur without adequate sanctions or reparation' (UNHRC 2010, p. 12).

The Principles constitute the most recent notable effort to remedy the problematic situation. They provide guidance on the implementation of the United Nations' 'Protect, Respect and Remedy' framework (Framework) and make up the final report of the SRSG's work. The Framework and its Principles offer advice to governments and businesses on how better to prevent and remedy the adverse effects of business in human rights terms. The Principles have been endorsed by the United Nations Human Rights Council and have been widely acclaimed by states, the European Union, international organisations, corporations and their representative organisations. They have also prompted disappointment among human rights advocates for not suggesting more substantial measures (see for example International Federation for Human Rights 2011; Human Rights Watch 2011).

The Framework's distinction between the state's 'duty to protect' and the 'corporate responsibility to respect' reflects the conventional division between the roles of states and non-state actors in relation to human rights (cf. Ruggie 2007; McCorquodale 2009). The Principles prefer the term 'responsibility' to 'duty', since the latter may evoke the notion of legal constraint. The term 'duty' is therefore reserved for the first pillar of the Framework, which describes and reiterates the obligations of states under international law to protect against human rights abuses. By distinguishing between duties to 'protect' and responsibilities to 'respect', it is made clear that it is not up to corporations to assume the role of the state (even where it fails) to prevent human rights violations committed by others (Nolan and Taylor 2009).

The self-constraint of the Principles with respect to corporate responsibility is deliberate. The Principles have no ambition to set new substantive standards. The risk of rejection may have been too high. Learning lessons from the failure of the United Nations' former initiative, the 'Norms on Transnational Corporations and Other Business Enterprises', was the starting point of the SRSG's mandate (cf. Catá Backer 2011; Ruggie 2007). The approach taken is one of 'principled pragmatism' (cf. for example U.N. High Commissioner for Human Rights 2010), meaning that feasibility guides efforts to better address business-related human rights challenges.

As the Principles hardly express the nature and justification of corporate responsibilities to respect human rights, some authors have criticised that the Framework's account of human rights responsibilities of business enterprises are implicitly grounded on pragmatic, enlightened self-interest or strategic considerations rather than on moral duty (see e.g. Arnold 2010; Cragg 2012; Muchlinski 2012; Bishop 2012).[1] Arnold (2010) has argued that the Framework would have more meaning if we interpreted human rights neither in a legal sense (there are cases in which prevailing legal frameworks do not effectively account for human rights) nor in a political sense (whereby rights only have to be respected on the basis of previously made agreements), but in a moral sense: human rights are considered as minimal ethical requirements that are universally valid. Arnold (2010, p. 384) writes, 'TNCs must meet basic human rights obligations in all of their operations regardless of whether such duties are recognised by host nation laws, or whether host nations enforce such laws, because they are comprised of agents on whom human rights duties are binding'. This conception of human rights implies that the duty to respect them is an absolute side-constraint of doing business, or, to use Arnold's more down-to-earth expression, 'a necessary cost of doing business'. Cragg (2012), in a similar vein, argues that the respect of human rights as an explicit ethical obligation would provide the responsibility to respect with a stronger justificatory foundation. We agree with these suggestions. In this article we elaborate on this vision and spell out a further set of arguments, focusing on the centrepiece of the Framework's

[1] Bishop (2012) cautions, however, that if we assume moral human rights obligations for corporations, we presuppose that corporations, mere legal entities, are awarded legal rights in order to be able to fulfil such obligations, and points out that awarding such rights could in itself raise the danger that human rights are violated. As a result, Bishop proposes that the human rights obligations of corporations should be limited by limits on the rights of corporations.

notion of corporate responsibility, the 'human rights due diligence' requirement.

Human Rights Due Diligence According to the Principles: Making Human Rights Manageable

The Principles consider the 'corporate responsibility to respect human rights' as a management, governance and communication process: Business enterprises fulfil their responsibilities to respect human rights through three measures: (1) issuing a 'policy commitment', (2) conducting 'human rights due diligence', and (3) by providing possibilities for remedial action (UNHRC 2011a, principle No. 15). The 'human rights due diligence' requires from corporations to have knowledge about, to monitor and to mitigate the human rights impacts of their operations. It is an ongoing process that consists of an assessment of actual and potential human rights impacts of a business enterprise's activity, which must be integrated into decisions about which measures to take in order to respond to the identified human rights impacts. Then, the response must be 'tracked'. The 'tracking' requirement is a post-decision analysis of the response's effectiveness. Finally, business enterprises are expected to communicate their due diligence efforts to interested parties. Since human rights due diligence determines the response of corporations to human rights issues, realises a coherent application of the policy commitment throughout the organisation and is a prerequisite for any voluntary initiative to offer access to extra-legal remediation to rights-holders, we could say that due diligence is the heart of Principles' conception of corporate responsibility to respect human rights (cf. Catá Backer 2011, p. 202). Ruggie (2011) summarises the human rights due diligence requirement as 'the ability of a business enterprise to know and show that it respects rights'.

Requiring businesses to carry out due diligence in order to meet human rights responsibilities is that human rights issues and their relevance for business become discernible and manageable through a template, with which management is already familiar (cf. McCorquodale 2009). Even corporations that had no human rights policy or no analytical pattern to put such a policy into practice, are able to draw from the due diligence notion in order to integrate human rights issues into established management routines. To illustrate the point, Ruggie (2011) relates the analogy made by a Royal Dutch Shell Manager that while no petroleum or mining engineer would dream of drilling a hole in the ground without first conducting extensive seismic analysis, corporations, carrying out human rights due diligence, must now acquire 'social seismic skills'—to assess and address their actual and potential adverse human rights impacts on people and communities.

A wide implementation of the Principles throughout the business community would result in the creation of a new information record about human rights impacts of business activity that would be disseminated to the public. This record would not only contain new information, but would also bundle a corporation's existing stakeholder-related information as far as it touches on human rights issues. One of the principal promises of human rights due diligence lies in the heightened awareness of corporations' human rights impacts and in the heightened accountability of corporations to the public in these matters. Corporations cannot anymore turn a blind eye to human rights issues. In this respect the requirement to conduct human rights due diligence—despite being a process—could possibly influence the contents of substantive norms. Muchlinski (2012), for example, maintains that the information, response and communication requirements of human rights due diligence could change the way the corporate objectives are defined, which would alter fiduciary duties that directors owe to a corporation. That the Principles' human rights due diligence concept may shift the axioms of corporate governance and corporate objectives with consequences for the content of legal fiduciary duties and other substantive duties is an ambitious proposition. It remains to be seen, if courts or subsequent legislation will be ready to accept it.

In the following we argue that, as things stand today, there are tensions between due diligence as a requirement for fulfilling human rights responsibilities and the 'pragmatic approach' defended in the Framework. The effectiveness of due diligence may be weakened without the idea that human rights contain perfect duties for business enterprises.

Human Rights Violations as Absolute Red Flags

In this section we will spell out that some human rights imply universal, perfect and negative moral duties for corporations. We will argue further in the paper that due diligence, as defined by the Principles, is at most a helpful tool when a corporation takes this duty seriously, but ambiguous in the absence of a strong underlying moral commitment to human rights. In order to establish our claim we recall some fundamental definitions and distinctions.

The Fundamental Moral Character of Human Rights

First, some basic elements of human rights should be reviewed at this point. Human rights as basic rights are 'natural' in the sense that Hart (1955) uses this expression to argue that the equal right of all men to be free is a natural right. First of all, it is a right that all people who are

capable of making choices have, qua rational human beings, and not as members of a society. And second, it is not a right that is created on the basis of a voluntary action (see Hart 1955, pp. 175–176).

Not all the fundamental rights that are listed in the Universal Declaration of Human Rights can be considered as 'natural' in this sense[2] but, arguably, many can be derived from Hart's equal right to be free. We return to this issue below. It is important to stress first, however, that the focus here is on the idea that fundamental rights are rights that people have qua people, the validity of which is independent of any official institution. In other words, these are fundamental moral rights. Not only does their validity not depend on governments or legislation but also, on the contrary, the validity of governmental actions and laws depends on the respect of human rights (Pogge 2002). The notion of human rights fundamentally expresses a deep moral concern for all human beings that in principle should outweigh all other concerns, non-moral ones and even moral ones, in some cases, like the respect of property rights. These basic rights are in principle valid everywhere without exception. Underlying the principle of universal human rights is, obviously, the rejection of moral relativism.

A second element, related to the limits that human rights put on government and legislative action, is that we usually talk about human rights violations in the context of political action. To quote Pogge, 'a murder committed by a mailman, even if on duty, would hardly count as a human-rights violation' (Pogge 2002, pp. 59–60). Crimes like torture, rape or murder are not automatically qualified as human rights violations if they are committed by ordinary people without any political protection or political power. Human rights violations seem to be in the first place expressions of 'official disrespect'. The reason for this is not that ordinary people or corporations cannot violate human rights. They can. It is rather because of the fact that the power to enforce rules is concentrated in the state that we focus on the role that the state has to play in the prevention of the violation of human rights (Cf. Wettstein and Waddock 2005, p. 305). But it should be stressed that even if these violations, committed by individuals, imply a violation of their victims' fundamental moral rights, and, strictly speaking, are a violation of a human right, although the expression is only exceptionally, like, e.g. in the case of discrimination in a corporation, used in these contexts.

Despite the fact that some human rights violations may be much more severe than others, and despite the fact that it may be difficult to draw a very precise line between what we usually call human rights violations (with the dimension of official disrespect) and ordinary crimes committed by individuals, the common thread here is that we are talking about situations in which people's fundamental, i.e. intrinsically valid, moral rights have been violated. Intrinsic validity relates to two ideas: first, no reference to whatever prevailing legal framework can justify the violation, and second, no consideration of another nature (economic interest or moral particularism) either. For instance, 'the right not to have one's life taken directly as a means to any further end' can be qualified as an exceptionless, 'absolute' human right (Finnis 1980, p. 225).

A consequence of this is that only trade-offs between different human rights violations are acceptable, not between human rights violations and other considerations. There may be a conflict between freedom of expression and the principle of non-discrimination (should we accept racist opinions in the public sphere?) but we cannot weigh up a human right against an economic interest. For example, it is pointless to calculate whether the economic interest of the alleged complicity of Shell in the execution of the Nigerian author Ken Saro-Wiwa[3] exceeds the 15.5 million dollars they paid for a settlement of this case on the eve of a trial in New York. It was inacceptable to kill Ken Saro-Wiwa, whatever the profit Shell could make by being complicit in this killing.

It may be helpful to formulate the exceptionless and absolute character of human rights in the vocabulary of moral obligations. Human rights, understood as fundamental moral rights of humans qua humans, necessarily imply *perfect* duties, i.e. duties admitting no exception in favour of inclination to refrain from acting on it. Perfect duties have to be fulfilled *to the fullest extent possible* (Kant 2002/1785, pp. 24–25).

Categories of Moral Duties and Human Rights

For the sake of clarity, let us consider the different types of moral obligations. Moral duties may be perfect or imperfect, universal or specific, and negative or positive. First, contributing to other people's happiness, for example being nice towards the neighbours, is an imperfect duty. We should do it, but we are allowed do it to some extent. For example, we may limit the number of people that we consider to be our neighbours: is someone who lives 10 houses further in the

[2] So called claim-rights, like the right to education or the right to healthcare, are not natural in the second sense: they are created on a voluntary basis. Moreover, they cannot be derived from a negative conception of freedom. The 'liberties' follow directly on from the equal right to freedom. See Wenar (2011) for a discussion of these notions.

[3] "The oil giant Shell has agreed to pay $15.5 m (£9.6 m) in settlement of a legal action in which it was accused of having collaborated in the execution of the writer Ken Saro-Wiwa and eight other leaders of the Ogoni tribe of southern Nigeria" (The Guardian, Tuesday 9 June 2009). See Wettstein (2012) for an interesting discussion of this case.

street still a neighbour? We are also sometimes allowed to pursue other objectives: I do not have a duty to make a nice chat with my neighbour when I am in a hurry. Moreover, our neighbours do not have a strong claim on me being nice. They could not sue me if I would not say hello.

Perfect duties are determinate in two respects. It is well defined what one is obligated to do or not to do, and the individuals to whom we should discharge a particular obligation are well identified (Buchanan 1996, p. 28). Imperfect duties are indeterminate. There is a large degree of freedom in choosing what we should do and to whom we should do it. There is an infinite range of possibilities here.

The differences between perfect and imperfect duties have implications for the notion of moral failure. Buchanan (1996, p. 31) has proposed the terms moral backsliding and moral laxity to indicate the difference. Moral backsliding is a failure with respect to a perfect duty: you know perfectly well that you have wronged some particular individual because of some determinate action that you failed to do, whatever the reason (greed, selfishness, lack of courage, etc.). In fact, you have failed to respect a clearly defined duty. With respect to imperfect duties, the moral failure is different and more subtle: you could have done better, even if no particular individual can claim that he or she has been wronged. Typically, in discussions about business ethics or CSR, business leaders easily admit that in some aspect of their business practices they could do better in terms of CSR. This stance implies that they did not really do anything wrong, but that they were not zealous or virtuous enough. The flexibility of imperfect duties creates therefore, as Buchanan (1996, p. 31) has stressed, 'powerful temptations for moral laxity'. As some human rights imply perfect duties, we will have to ask whether the Principles seem more appropriate to combat moral backsliding or whether they are principally aimed at restricting moral laxity. We will come back on this point below.

Another fundamental distinction is between positive and negative duties. The distinction is distinct from the previous one. Negative duties are duties not to do something, to withhold from acting, i.e. an omission. For example, we have a negative duty not to enslave people, and in general, not to harm people. Positive duties are duties to do something. For example, we have a duty to help the poor. Imperfect duties are generally positive ones, i.e. duties of beneficence such as the duty to help the needy (Buchanan 1996, p. 29), rather than negative duties. Positive imperfect duties are, moreover, limited in the sense that such duties do not imply a duty of supererogation. When the costs of helping all the needy are excessive, it is accepted that one limits one's aid. Especially with respect to corporations, which are permanently in a competitive environment, it is permitted not to discharge positive obligations up to the point of losing all competitive advantages.

It should be noted, here, in passing, that the notion of imperfect duties is an interesting one because it allows some flexibility in our lives. Imagine what our lives would look like if they were regulated only by perfect duties. Moreover, as O'Neill (1996) has pointed out, imperfect obligations to which there are no claim-rights linked on the side of those towards whom we have the obligations are not meaningless at all. It makes totally sense to say that I have the moral obligation to visit my old parents from time to time even if they do not have a claim-right on these visits. The reverse move, i.e. ascribing claim-rights to right-holders without clearly defining the mechanism that should make these rights effective, i.e. by attributing perfect positive duties, is controversial to some extent. Some have argued, pessimistically, that this has the effect that these rights become in fact vacuous (O'Neill 1996). However, one can also interpret the attribution of claim-rights (like art. 25 of the Universal Declaration) as fundamental principles that will gradually be institutionalised and positivized (Campbell 1999) or as fundamental principles that already imply a still imperfect, but stringent imperfect positive duty on people who are able to contribute to their realisation (Stemplowska 2009).

A last distinction that is important here is between specific and universal duties. Some moral obligations concern particular individuals or groups, one's children or a corporation's employees for example. Other obligations, like the obligation not to enslave someone, are universal, since they concern all humans. Universal duties may not only be perfect (like in the last example, i.e. not to enslave) but also imperfect, like the duty to be courageous or fair, in general (Lea 2004, p. 208).[4]

Perfect Human Rights Duties of Corporations

After having made these distinctions, we should ask which kind of moral obligations related to human rights may legitimately be attributed to corporations.[5] First of all, corporations have many specific perfect duties: negative

[4] According to O'Neill (1996, p. 142), universal imperfect duties correspond to social virtues.

[5] Here we use the expression "moral responsibility of a corporation" in a loose sense. We are aware that this expression hides a complex issue of collective moral agency and moral responsibility. A corporation cannot be treated as a human being, because, first, it is a legal construction, and second, responsibility is necessarily collective. List and Pettit (2011) have recently developed an interesting theory of collective (moral) agency that can be read as a theoretical underpinning of the position defended by Peter French (1984) in the 1980s debate about whether or not we may attribute moral agency to a corporation. For our purpose here, the very general and minimal assumption that it is possible to judge, from a moral viewpoint, collective decisions of an organisation like a corporation, is sufficient. We leave aside here the very difficult question of how to relate the collective responsibility to the individuals who are somehow part of the corporation. The expression 'China does not respect human rights' faces similar although not totally identical problems. Cf. List and Pettit (2011).

ones such as not to harm their employees by exposing them to an unsafe work environment and positive ones like paying their employees. All these are specific positive and negative perfect duties that are well defined. But other moral obligations as well are attributed to corporations, notable to be socially responsible. It has been argued that, in general, corporate social responsibility is composed of a set of imperfect, positive, and specific duties. Corporations have a moral obligation to take into account the interests of their stakeholders (other than the shareholders), but these stakeholders do not always have a claim in terms of legal rights on the corporation (Lea 2004). If they had one, the duty of the corporation would become a specific perfect duty. Corporations as players in a competitive environment do not have the negative duty not to harm their competitors, as long as competition remains regular and fair. The latter limit already points to the idea that even in a competitive and profit-seeking environment, the principle that 'anything goes' is not accepted. There are some fundamental moral standard that limits all corporate actions, among which human rights are paramount. If we assume the conception of universally valid moral rights of humans qua humans as valid, then it follows, for corporations, that they have, minimally, a perfect, universal, negative duty not to violate these rights.

Three points have to be clarified here. First, the scope of the rights that are covered by this obligation should be limited. Second, the distinction between the negative duty not to violate actively human rights and the positive duty to actively contribute to the avoidance of one's own or some other actors violation of human rights may be difficult to make in a clear-cut way. Third, consequentialist arguments may only very exceptionally brought in against the duty to avoid complicity in human rights abuse.

The first point concerns the adequate scope of the subset of human rights that actually imply perfect duties for corporations. Negative perfect duties imply that one has to respect other people's rights and to withhold from violating them. We cannot go into the longstanding debate about the indivisibility of the set of human rights in great detail here. However, from the outset the SRSG opted for a very broad definition of human rights, including the universal declaration of rights, the International Covenant on Economic, Social and Cultural Rights and the eight ILO core conventions. This rather large scope implies that the Framework's set of human rights contains liberties as well as claim-rights, to which correspond, in principle, positive duties, although it is not at all clear the extent to which non-state actors, and even state actors, should discharge the latter duties (Lea 2004).[6] A corporation certainly has the perfect duty not to be complicit in the torturing of union militants by the army for example. Arguably, it has the duty to help the population in case of famine, but the extent to which it has this duty is indeterminate, and depends on the degree of excessiveness of the cost; it is therefore imperfect.

Undoubtedly, the fact that the Framework has opted for this broad set of human rights may well explain, although not justify, the weaknesses we will spell out in a moment. Had the set been limited to liberties (political and civil rights), thereby excluding claim-rights, it would have been easier to draw the lines of moral failure.[7] The fact that the Framework includes imperfect duties at some point in the set opens the door to arguments and moral failures in terms of degree rather than in terms of inacceptable moral backsliding. In the remainder of this article, we will leave aside the issue of scope and limit our discussion to basic rights that imply perfect duties such as the right not to be tortured. The question, then, is whether the Principles are an adequate tool for corporations to deal with their perfect duties in this respect.

Secondly, the perfect negative duty not to violate human rights may imply, in complex circumstances, the positive duty of anticipating possible risks of human rights violations. The negative duty implies positive action to avoid the risk of a human rights violation. This does not only bear on prevention but also on complicity. The notion of complicity covers the situation in which a corporation benefits indirectly from human rights violations of governments. The negative duty not to harm implies that a corporation could be expected to terminate contracts with governments that torture prisoners, if such contract termination could effectively influence the government's behaviour. However, the ultimate underlying justification of these actions is a negative duty, i.e. not to torture or not to commit acts which are complicit with torture, more precisely not to do business if this business would make torture possible. The negative duty includes therefore positive actions to avoid beneficial complicity. Some authors go even further and argue that, since human rights are fundamental moral rights, corporations are responsible for human rights on the basis of their leverage, i.e. their ability to influence others' actions through their relationships (Wood 2012). Or, even stricter, corporations that are in a position to give assistance to those who are victims of human rights violations, without even indirectly benefiting from these violations, and fail to do so are morally blamably of 'silent'

[6] Even if one agrees with Shue (1996), who convincingly argues that the distinction between negative and positive rights is fuzzy and that there is a basic right to subsistence, it is obvious that the Framework's scope nevertheless contains rights that go beyond subsistence.

[7] Admittedly, in practice the line between the two types of rights is not so strict, as Shue (1996) has convincingly argued.

complicity, i.e. (Wettstein 2012). We are sympathetic to these visions, congenial to the positive duty to help people in danger that actually prevails in some European legislations like, e.g. in France, but, as its defenders themselves admit, it clearly is controversial insofar as it implies a positive duty on private actors, abroad, to constrain others to respect human rights. We recall that the Principles have in principle confined duties to protect to the state.

Be that as it may, our argument merely hinges on the idea that the negative duty not to violate fundamental moral rights may imply positive duties to avoid complicity and other risks of human rights violations.

Third, it is important to indicate that, confronted with a perfect duty, the weight of consequentialist arguments is limited. Take the example of the presence of the French multinational Total in Burma (for a case study see Renouard 2007). One of the arguments often used to justify the presence of a multinational corporation in a non-democratic country is that, in terms of consequences, its presence does not make any difference because, if the corporation decides to leave the country, its place will be taken by a competitor. As a consequence, collaboration with an oppressive regime is a crime that does not increase the number of victims there would be anyway. However, this type of utilitarian argument was criticised by Williams (1973). It matters, in terms of integrity, whether it is me or someone else who commits a crime. If the respect of human rights is a perfect duty, it is morally unacceptable to commit a violation, even if someone else would commit it anyway.

Williams (1973) qualifies his position by adding that the violation may possibly avoid a much stronger violation by someone else. He gives the example of Jim who, in some South American town, faces a strange dilemma. Twenty Indians will be executed, but if Jim, as an honoured visitor, accepts the privilege of killing one of them, the 19 others will be freed. In this case, we have to weigh up the loss of integrity with a much more severe crime. In the case of Total, the opposition leader Aung Sang Suu Kyi, who initially severely condemned the presence of Western multinationals in Burma, ultimately tempered her disapproval because she was convinced that non-Western multinationals would have an even worse impact *in terms of human rights violations* (Renouard 2007, p. 90). We admit that this argument may be intrinsically valid in exceptional circumstances, but of course, it is difficult to make the argument convincingly, because we always lack the counterfactual on which it is based. Only with hindsight we sometimes can estimate that, after all, the option to stay was the better one. It should be noticed that this consequentialist argument is particular in the sense that it comes down to weighing up two violations of human rights and not to weighing up a human rights violation against economic interests. Therefore, it does not imply that the more general point that 'it does not make a difference, therefore everything is allowed' would be acceptable in other cases.

The Relationship Between 'Human Rights Due Diligence' Concept and Perfect Duty

We now put forward the implications, when one assumes that the respect of human rights is a perfect (universal) duty for corporations, especially (but not only) in cases where nation states fail to offer protection, and explain the difference it makes to one's interpretation of the Principles' due diligence requirement.

Due Diligence is Neither Necessary Nor Sufficient to Meet Perfect Duties

Principle No. 15 lists three requirements for business enterprises to fulfil responsibilities to respect human rights, among them the performance of 'due diligence' (see above). From the perspective of a perfect moral duty, human rights due diligence is not a necessary requirement. We can well imagine a corporation that is able to prevent or mitigate business-related human rights violations without carrying out the formalised information assessment and monitoring that the Principles stipulate. Neither is due diligence sufficient for fulfilling a perfect duty. It is not excluded that a corporation that has taken the above mentioned measures still fails to prevent or mitigate business-related human rights violations. We could still interpret the wording of Principle No. 15 in coherence with a perspective that views the 'corporate responsibility to respect human rights' as based on a perfect moral duty, but only to the extent that 'human rights due diligence' effectively contributes to preventing or mitigating business-related human rights violations. Under such an understanding Principle No. 15 would be interpreted as putting forward, neither necessary nor sufficient moral requirements of human rights respect, but rather propose a practical management tool to meet moral duties.

Nevertheless we can read that large corporations are reacting to the Framework and its Principles by making their policies and practices 'Ruggie-proof' (see for example Williamson 2011).[8] In other words, by implementing internal processes required under the Principles corporations are striving to be shielded against blame for not respecting human rights. Implicit in this understanding is a

[8] The SRSG neither invented, nor claimed credit for the term "Ruggie-proof", but he does not hesitate to cite it either (see e.g. Ruggie 2011).

view that due diligence performance can function as a proxy for meeting responsibilities. Due diligence, in this light, would become a sufficient requirement for fulfilling duties after all. From the perspective advocated here, however, if a corporation causes or is complicit in human rights violations, even a proper due diligence will not change the fact that the corporation violated its moral duties. Having adequate due diligence policies and procedures in place does not discharge of moral duty, if they eventually fail.

There is indeed some potential for misunderstanding in this respect, in particular, if we do not distinguish between due diligence's significance with regard to being morally responsible and legal policy questions about adequately sanctioning corporate irresponsibility. When the SRSG declares that corporations conducting human rights due diligence should not be 'automatically and fully absolved' from criminal liability for complicity in human rights abuse (see UNHRC 2011a, commentary to Principle No. 17), he refers to the role of due diligence in the context of attributing a criminal law sanction to a corporation. Not meant is the possibility of (non-automatic and partial) release from moral responsibility despite having caused or contributed to human rights violations. As said, due diligence, even if properly carried out cannot discharge of a perfect duty. The distinction between 'being morally responsible' and being legally sanctioned is important for understanding the context, in which due diligence has gained significance in legal liability regimes. We will turn to this aspect in the following section, and afterwards assess the limits of due diligence outside of the legal context.

Due Diligence in Corporate Liability Regimes

Although the Principles have no legal quality,[9] the SRSG drafted them against the backdrop of the development of international human rights law and extraterritorially applicable national provisions that offer legal remedies for victims of human rights abuses. Despite existing governance gaps (see above), the SRSG observes an 'expanding web of potential corporate liability for international crimes' (SRSG 2008). Consequently, the commentary to the Principles suggests that business enterprises should treat 'human rights risk' as a 'legal compliance' issue (UNHRC 2011a, p. 21). The Principles thus anticipate a denser legal coverage of business-related human rights abuses by attributing a role to human rights due diligence that is similar to the role 'due diligence' plays in existing legal corporate liability regimes.

In such regimes 'due diligence' generally has exculpating functions that, due to the vastness of the subject, we can only briefly outline here.

Due diligence plays a central role in the legal policy discussion about the most appropriate approach, under which corporate entities can be held liable for harmful actions committed by their agents (see for discussions and various standpoints, e.g. Laufer 2011; Bittle and Snider 2011; Clarkson 1996; Ferrell et al. 1998). The concern for some is that sanctioning the corporation (either in tort law through damages or in criminal law through fines or rejection of business permits, etc.), could in some cases unjustly hurt its stakeholders (shareholders, employees, etc.). Legal policy solutions in civil liability law range from alleviating vicarious liability through due diligence exculpations to confining the scope of vicarious liability and letting due diligence determine 'organisational' or similarly labelled liability as an independent basis for a claim against the corporation. Criminal laws that seek to overcome the 'societas delinquere non-potest' principle must provide a corporate basis or alternative to the notions of 'fault' or 'culpability', so that legal entities can be sanctioned under criminal law (see Clarkson 1996). Faulty due diligence processes could provide this basis, simultaneously providing the limits of corporate criminal liability. Or, finally, due diligence could have a moderating impact on how to calculate a penalty, which is the approach of the US Federal Sentencing Guidelines (see e.g. Ferrell et al. 1998). More generally, Pieth and Ivory (2011) observe an international trend in corporate criminal law towards a 'due diligence model of corporate liability'. This being said, the value of due diligence is not unquestioned in legal policy research, in particular, if we take into account the difficulties of empirically assessing the effectiveness of due diligence with regard to preventing harm to others or reducing corporate crime (see e.g. Laufer 2011). Arguably, legal policy still has not identified ideal solutions for adequately sanctioning corporations for misconduct of their agents without doing injustice to stakeholders.

It is too early to say whether the Principles' due diligence requirement will influence present legal regimes, under which corporations could possibly become liable for human rights abuses or complicity in human rights violations. Dhooge (2008), for example, proposes that human rights due diligence become a means of defence for corporate defendants under the U.S. Alien Tort Claims Act.[10]

[9] Cf. UNHRC 2011a, p. 13 et seq, "The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions".

[10] The Principles might have influence on the application of the US Alien Tort Claims Act in the future. At the time of writing, however, the U.S. Supreme Court has not rendered its decision in Kiobel v. Royal Dutch Shell. In consequence we cannot tell to which extent the Principles influenced the decision.

To sum up, the thrust of due diligence in legal regimes is to discharge the defendant, if it can demonstrate and document a certain standard of precaution taken.

Due Diligence Outside of the Legal Context and Appropriate Action

Presently, however, the Principles' 'human rights due diligence' requirement is meant to function also independently of legal liability, more particularly to fill 'governance gaps', where legal liability is insufficient or absent. It will be now be argued that the implementation of a due diligence process outside of a legal context may exacerbate problems of lacking effectiveness of due diligence, if a corporation does not manage the respect of human rights as a perfect duty.

Due Diligence Without Liability: Lacking Verification of Due Diligence Effectiveness

The idea that underlies due diligence is that a due diligence process can effectively achieve a normative goal, which in our context is the prevention and mitigation of business-related human rights abuse. For this reason, due diligence, properly understood, would require managers to use the collected and analysed information as a basis for making decisions towards the normative goal that due diligence is supposed to serve (Taylor et al. 2009). If a corporation made use of its due diligence process in order to reach conclusions on how to best prevent or mitigate human rights abuse, there is no tension between perfect duty and due diligence. In this light due diligence would become the preparatory step for a responsible decision. By contrast, if a corporation focused primarily on documenting a due diligence process to protect itself from blame, while not being primarily concerned that the corporation's decisions effectively curb business-related human rights abuse, the perfect duty would be violated. Without the possibility to reliably verify the effectiveness of a corporation's due diligence system it is difficult for the outside observer to tell which corporation carries out due diligence efforts with the aim of effectiveness, and which corporation does not.

Where legal procedures are available that abide by fundamental principles of the rule of law and guarantee an independent adjudication based on the preponderance of evidence, there is a good chance for (or, at least, there is a threat of) an examination of a due diligence's effectiveness in the individual case. The problem, however, is that the Principles' human rights due diligence concept is also conceived as a means to address the problem of 'governance gaps' that are the result of the absence of effective legal remedies for victims of human rights abuse. The effectiveness of human rights due diligence outside of the legal context seems to go unchecked.

It is true that a fair legal procedure is not the only opportunity to analyse a company's due diligence efforts. We could theoretically contemplate other social systems that would also offer a possibility to assess the involvement of corporations in human rights abuse and verify the effectiveness of their due diligence management. However, present extra-legal evaluation systems are still insufficient. They rely on the self-assessment of corporations, on independent human rights audits (which are necessarily superficial compared to legal procedures because independent auditors have no powers to summon witnesses, force disclosure of documents, etc.), or diplomatic intervention.[11] It remains to be seen if the Principles' 'Remedy' requirement that corporations interact with rights-holders and organisations that defend rights-holders' interests (see UNHRC 2011a) could evolve into more stable processes that are able to bring about reliable and verified facts about corporate activity. For the time being we can at least question if corporations will actually perform effective due diligence in the absence of legal pressures.

We should recall that any serious due diligence process is burdensome. Depending on a corporation's exposure to human rights issues, properly implementing human rights due diligence could be very costly. Human rights due diligence, as conceived by the Principles, places heavy information management burdens on corporations since assessment, tracking and analysis should not only include internal evaluations and consultation of publicly accessible information, but also broader stakeholder involvement as well as external expert advice (see UNHRC 2011a).[12] To reach a superior level of information assessment some corporations may draw support from pre-formatted analysis tools such as the 'Human Rights Compliance Assessment Quick Check' designed by the Danish Institute for Human Rights (2006) or the Business Leaders Initiative on Human Rights' online tool 'The Guide for Integrating Human

[11] By "diplomatic intervention", we understand the mediation and conciliation processes under the OECD Guidelines for Multinational Enterprises through "National Contact Points".

[12] As human rights due diligence necessitates the involvement of stakeholders, it appears that the Principles' due diligence process follows the logic of a social norm system that is constituted through and enforced by collective actions of stakeholders participating in the system itself, and based on disclosure (Catá Backer 2011, 203). Yet, the Principles do not contemplate the participation of affected stakeholders such as local communities, workers, customers, investors and individual rights-holders as an organised response to corporate information assessment and communication but rather as a means for corporations to fulfil their due diligence responsibility. Therefore, branding human rights due diligence as a social norm system appears to be premature and contingent on the way stakeholders will actually react to corporate human rights due diligence, and on whether stakeholders will take advantage of corporate human rights communication and consultation in order to enter into a meaningful dialogue with corporations.

Rights into Business Management' (BLIHR 2009). However, if corporations apply such analysis tools thoroughly and attempt to provide satisfactory answers to the questions these tools raise (instead of check-boxing selected issues), they might need to engage in significant investigative efforts. Many corporations already deal with processes that require a profound investigation into the effects of corporate activity, for example in the field of combating corruption, money-laundering or fraud. Since human rights issues are not less intricate than these matters, we could suppose that human rights due diligence efforts, taken seriously, would generate comparable administrative costs. A further difficulty, where we could draw a parallel to corruption, money-laundering and fraud prevention, is that corporations conducting human rights due diligence effectively would also need to scrutinise managers' and employees' activities, which might impinge upon the human rights of employees or managers—in particular with regard to privacy. A similar problem has been already observed in other investigative contexts (see for example Baer 2009). Finally, the communication element of human rights due diligence complicates the relatively heavy information management burden placed upon corporations. The investigation into facts that are relevant for the assessment of a business's human rights impacts could produce or uncover sensitive information that a corporation would prefer to keep confidential. Investigations could, for example, lead to the creation of an information record that third parties can use against the corporation in litigation (cf. Sherman and Lehr 2010). Prevention of these risks might conflict with the level of transparency that the Principles expect from corporations.

In the light of the potential costs and risks of a proper due diligence endeavour, and taking into account that that existing evaluation processes cannot produce sufficient evidence that allows conclusions about the effectiveness of a corporation's attempt at due diligence, the moral commitment of a corporation or lack thereof becomes a decisive factor for the importance and means that a corporation will attribute to its human rights due diligence process. Corporations that manage human rights responsibilities as a perfect moral duty would make an effort to render their due diligence processes the most effective they reasonably can, because associated risks and costs cannot outweigh the violation of a human right. In the absence of legal pressures, other corporations might spend less care. We suggest that there is a risk that corporations pay more attention to form than substance, because the observance of the form is easier to document and disclose. It is not unrealistic that a few corporations would even feel tempted to mount a façade of implementing human rights due diligence, when proper due diligence efforts are too costly, produce an information record that could be used against the corporation, or impose decisions that conflict with the corporation's financial objectives.[13]

In conclusion, the effectiveness of human rights due diligence depends either on the moral commitment of corporate managers in the sense that human rights contain perfect moral duties or on more intensive coverage of international and extraterritorial human rights law or more reliable extra-legal review systems. In this light, without moral commitment human rights due diligence is a weak instrument for closing governance gaps, and rather requires that governance gaps are already closed.

Appropriate Action and Perfect Duty

The Principles' 'human rights due diligence' requirement provides that the findings of due diligence must be integrated across the organisation at suitable levels so that it can take appropriate action (Principle No. 19). Principle No. 19(b) contains a substantive provision that outlines how to take appropriate action in the face of an identified human rights risk. Appropriate action is contingent upon the business enterprise's implication in a human rights violation and the extent of its leverage in addressing an adverse impact. Three qualities of implication are distinguished (cf. UNHRC 2011a, p. 18 et seq.): 'causation', 'contribution' and 'direct link'. In the cases of 'causation' and 'contribution', corporations are expected to take measures to prevent and cease their impact, and in the case of contribution, also to use their influence to change the practices of the person or entity who is committing the harm. In the case of a 'direct link', a corporation must weigh several factors, such as the business's influence over the harming entity, the severity of the abuse, the fact whether the termination of the relationship with the harming entity results in adverse human rights consequences and the question whether a relationship is 'crucial' to the business.

The Principles clearly do not allow moral backsliding with respect to cases of 'causation' and 'contribution', and insofar are in line with a perfect duty conception of human rights. However, 'direct links' permit certain trade-offs that also include considerations (for example whether the relationship to the harming entity is crucial to the business) that could not be taken into account, when performing a perfect moral duty. The SRSG mentions that in the case of a 'direct link' corporations should endeavour to end a business relationship with a harming entity, but that if the

[13] We are not suggesting that all corporations would engage in such crudely rational behaviour, but that it is not unrealistic that some will (cf. Heath 2009, who suggests that agency and other economic theories based on rational behaviour would be helpful analysis tools as they operationalize "a certain form of moral scepticism" and show "what the consequences of generalised immorality would be").

corporation chooses not to, it should be able to 'demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences—reputational, financial or legal—of the continuing connection' (UNHRC 2011a, p. 19). This passage of the SRSG rather cautions against moral laxity than moral backsliding.

The problem is that the Principles provide scarce guidance on how to interpret the boundaries of 'causation', 'contribution' and 'direct link' respectively. While the Principles to some extent integrate the notion of 'leverage'-based responsibility (Principle No. 19(b) (ii)) they do not draw on well elaborated categories of indirect corporate complicity used in the business and human rights debate (see for a discussion of different categories Clapham and Jerbi 2001; Wettstein 2010, 2012) that would have helped understanding the substantive content of appropriate action. Since to date there is no other authoritative interpretation of the mentioned categories, corporations conducting due diligence have considerable leeway in qualifying these terms, which effectively results in discretionary judgment of what goes through as 'appropriate action'.[14] The exercise of this discretion will then eventually depend on a corporation's moral commitment to respect human rights.

According to the Principles, below the threshold of a 'direct link', there is no particular corporate responsibility. The distinction between 'direct' and other links puts limits to what we legitimately may require on behalf of a corporation as an effort to avoid complicity with human rights violations. For example, we should accept that corporations, just like consumers, are not responsible for human rights violations all the way down the supply chain. At some point, it may be simply unavoidable to use resources that are remotely linked to practices that are intrinsically unacceptable. In moral philosophy, an unlimited requirement in ethical perspective, i.e. a requirement to do action 'beyond the call of duty' is called supererogation. Due diligence as a means to avoid supererogation is justified, meaning that a corporation determines the quality of its links to possible violations and normatively assesses the limit of its 'call of duty'. The limitation that due diligence allows, could, by contrast, if respecting human rights is not considered to be a perfect duty, lead a corporation to engage in a policy of exculpation by invoking the remoteness of links between the corporation's activities and human rights violations. If a corporation's objective is not to fulfil a perfect moral duty, that is, to genuinely avoid human rights violations, but rather to curb possible reputational damage due to human rights violations, it could still make progress with a due diligence approach. However, if the prospected damage to reputation is small enough, and the supererogation argument not evidently abusive, the due diligence approach and its limitations can be instrumental and used as an exculpation policy. If ever an NGO reveals a corporation's involvement in human rights abuse, the corporation can readily draw on a list of due diligence measures it has taken in order to communicate its discharge of responsibility.

Although the Principles do not promote an instrumental implementation of human rights due diligence (meaning that due diligence is implemented only with the objective to limit damage to the corporation rather than to effectively prevent and remedy human rights violations), they do not provide any safeguard against companies actually managing human rights due diligence instrumentally. The Principles, as we argue in the next section, display some ambiguity in this respect by placing the process in a risk management perspective.

Perfect Duty and Risk Management

Apart from using due diligence in order to discharge duties, corporations, more generally, may invest in due diligence efforts in order to manage risks. The risk management function of due diligence becomes important in commercial transactions. Due diligence typically accompanies or precedes contract negotiations and is performed with the aim of reducing commercial risk stemming from information asymmetries between contracting parties. For example, credit institutions may conduct a due diligence investigation of the prospective debtor before entering into a loan contract. In the context of sales, the law or a contract may limit a buyer's warranties with the consequence that the buyer has an interest in thoroughly analysing the acquisition target. The corporation that conducts due diligence in these contexts does not seek to discharge a duty owed to others, but seeks to prevent entering into transactions or making business decisions that result in disadvantageous consequences for the corporation (this does not exclude that managers may be discharging duties owed to a corporation by organising and carrying out due diligence). In these contexts due diligence bears a risk management function.

The Principles endorse a risk management perspective of human rights due diligence (see UNHRC 2011a, p. 16), which, as mentioned, has the advantage of providing corporations with a familiar management template to deal with human rights issues. However, a risk management perspective may create ambiguities with regard to the nature of risk and the objectives of risk management.

[14] The fact that the SRSG recommends that corporations draw guidance from independent expert advice to assess appropriate action in complex cases (cf. UNHRC 2011a, p. 19) does not speak against our basic finding that the assessment of the degree of a corporation's implication in human rights remains discretional.

Problematic Concept of Human Rights Risk

Although the term 'risk' is broad and vague, and its exact meaning may vary among different professions, managerial contexts and academic disciplines, 'risk' will at least express some form of relationship between present expectations and uncertain future outcomes.

Identifying a human rights violation is rather the result of a normative assessment of behaviour than a prediction. Unlike tornadoes and earthquakes, human right violations are acts for which ultimately some persons may be held morally responsible. If the perpetrator is a corporation—let us say it imposes inhumane working conditions upon its employees—the violation of human rights does not happen by hazard but as a consequence of the corporation's decisions. If a corporation does business with a military regime that is notorious for severe human rights violations, the corporation does not take a risk that it may possibly contribute to the violation of human rights. It positively knows that its actions are linked with people who neither respect nor protect human rights. The real question here is whether the corporation's involvement with the regime, after analysis of the involvement's nature and intensity, is tolerable or not. This is not a question of risk, but one of purely normative assessment.

The difficulties in relating human rights violations to the notion of risk can be overcome with the help of two intellectual constructs. Firstly, by 'human rights risk' we could understand a risk rather for the corporation than for the violation of human rights. In this light we speak about the risk that a business enterprise will suffer negative consequences from the fact that somebody else's human rights are violated. With Power (2004) we may qualify such risk as 'secondary risk' for the corporation, meaning that a grievance for others may have repercussions on the corporation in the form of legal liability or reputational damage. Some may view human rights due diligence exclusively in terms of preventing and mitigating business and legal risks for a corporation (see for example Sherman and Lehr 2010).

However, such a perception of human rights risk is incompatible with managing human rights as a perfect duty. If a corporation seeks to carry out its human rights responsibilities as a perfect duty, a more appropriate approach would be to view risk as the unawareness or insufficient knowledge about a corporation's negative impact on human rights. In this perspective human rights due diligence is first and foremost a task of information analysis that can benefit from the analytical arsenal employed in risk management processes. Just as risk management techniques are designed to increase the knowledge about risk so that an entity can better pursue its objectives in the light of this knowledge, human rights due diligence could be designed to increase knowledge about human rights violations so that a corporation knows better how to prevent and mitigate them (see for this approach also Taylor et al. 2009). The Principles seem to endorse this perception of 'human rights risk' (see UNHRC 2011a, p. 16):

> Human rights due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the corporation itself, to include risks to rights-holders.

The implications of this approach for corporate risk management practice, however, are not clear.

Ambiguity with Regard to 'Human Rights Risk' and Management Objectives

Habitually, the objective of corporate risk management is identical to the objective that the corporation pursues—in whatever terms the organisational members of a business enterprise may define such objectives. Meulbroek (2002), for example, presupposes that shareholder value maximisation is the overall corporate objective, and perceives risk management as being in the service of this goal.[15] The concept of 'strategic risk taking' puts forward that risk management should encompass risk tolerance and risk taking to the extent that this serves the strategic goals of a business (see for example Damodaran 2007). Risk prevention and mitigation are only alternatives to risk tolerance or active risk taking. Strategic risk management approaches are usually adopted to deal with financial risk so that their application is questionable in fields where active risk taking is morally less tolerable (legal compliance, discrimination, workplace safety). However, it is not unrealistic to assume that, also in these contexts, at least some corporations will formulate some strategy for 'risk taking'.

As said, at first sight it appears that the Principles do not subscribe to such a corporation-related risk management perspective. In the SRSG's commentary above (UNHRC 2011a, p. 16) we read that human rights due diligence 'goes beyond' management of 'risk to the corporation itself' to also encompass managing risks for rights-holders. In addition, the SRSG, concerned that corporate law may be an impediment to a human-rights-orientated managerial

[15] In practice risk managers will probably not always think of maximising shareholder value or fulfilling other objectives, but simply deal with risks that a corporation commits itself to prevent (workplace safety incidents, legal non-compliance). Yet, it would be unrealistic to assume that the structure and decision-making processes of risk management are detached from corporate objectives and the strategies to achieve them.

approach that goes beyond profit or value maximisation, conducted a comparative study and essentially found that corporate law neither promotes nor hinders the integration of human rights objectives into corporate management processes and legal duties of executives (UNHRC 2011b). This may be one indication that a business enterprise's enlightened self-interest is, contrary to what Cragg (2012) argues, not the sole account of the Principles' due diligence requirement, and that human rights risk management may indeed result in a shift of corporate axioms as suggested by Muchlinski (2012).

Still, in other official statements, the SRSG attributed a dual thrust to human rights risk management and acknowledged the purpose of human rights due diligence as also managing the corporation's (enlightened) interests in the light of the potential adverse human rights impacts of its own operations (see for example UNHRC 2009, para. 51):

> Businesses routinely employ due diligence to assess exposure to risks beyond their control and develop mitigation strategies for them, such as changes in government policy, shifts in consumer preferences, and even weather patterns. Controllable or not, human rights challenges arising from the business context, its impacts and its relationships can pose material risks to the corporation and its stakeholders, and generate outright abuses that may be linked to the corporation in perception or reality. Therefore, they merit a similar level of due diligence as any other risk.

In this passage two different risk management objectives ('material risks to the corporation and its stakeholders') are integrated into one risk management context. It could be that the SRSG assumes that preventing 'human rights risk' as a 'secondary risk' for the corporation is aligned with preventing risks for the rights-holder. If this was true, there would be no ambiguity in the Principles with regard to risk management. The economic interest of the corporation and the interest of the rights-holder not to have human rights violated would be aligned and the only problem lies in the fact that managers—lacking proper due diligence—are not aware of this. Sustainable approaches to risk management that also address human rights as a risk issue (for example Spedding and Rose 2008, pp. 313–366) argue along similar lines. Taylor et al. (2009) contend that human rights due diligence generally results in lesser costs and higher profits for the corporation. However, at least in some cases, it is realistic to assume that even in the light of an optimal assessment and analysis of existing information, a lucrative business opportunity or the effective prevention of financial harm to the business, even in the long term, comes at the cost of tolerating or contributing to human rights abuse.

In such cases the corporation's risk management would need to know how to dissolve a conflict between different objectives. The corporation would need internal priority norms or internal adjudication instances that enable decision-makers to arbitrate conflicts between the objectives put forward by different management units. For example, we could well imagine the case that managers in a corporation's business development department propose an action that is not compatible with a measure recommended by managers of the same corporation who carry out human rights due diligence processes. Who will eventually prevail, or how an internal compromise might look like, will depend on the quality of the corporation's moral commitment to respecting human rights as a perfect duty: If the corporation's impact on human rights abuse is genuinely not considered remote, no strategic or financial consideration should prevail over the need to prevent the abuse. Of course, nowhere in the Principles is it stipulated that corporations have the right to violate human rights if this turns out to be profitable. However, the pragmatic approach that underlines the view that it might be profitable to respect human rights is implicitly suggesting that it is a consideration to take into account, whereas, in principle, it is not. From a perfect duty perspective the message (not conveyed by the Principles) should be: even if you lose money, there are things that you are not allowed to do.

If it is realistic to assume that secondary risk to the corporation is not fully aligned with risk of human rights violations, the Principles' dual stance on risk management is ambiguous. Practice guidelines devised by business initiatives and human rights consulting firms reproduce this ambiguity by stressing the strategic benefits to the corporation of being aware of human rights rather than explaining that the respect of human rights may be paramount to other business objectives. For example, the risk assessment of the 'The Guide for Integrating Human Rights into Business Management' (BLIHR 2009) perceives risk in terms of operational, financial and reputational risk to the corporation, and maintains that awareness of human rights issues can be key to a good management of risks, for example by 'establishing a social licence to operate in a particular area through considering the human rights of local communities'. The 'Implementation Guidance Tools' of the 'Voluntary Principles on Security and Human Rights' initiative (2012) is an example for a risk management approach to human rights that takes both risk dimensions (the corporation and the rights-holder) into account without prioritizing one or the other. The law firm Foley and Hoag (that hired John Ruggie as senior advisor in July 2011), integrates human rights issues into its CSR practice with a 'secondary' risk management perspective, helping clients 'anticipate social, ethical, and environmental accountability challenges and limit their risks by

incorporating internationally recognised standards into their strategies and operations and relationships with stakeholders' (Altschuller 2011).

To the extent that human rights prevention and mitigation is overridden by other risk management objectives of the corporation, the corporation engages in trade-offs that a perfect duty conception of human rights respect does not allow.

Conclusion

In this article we have shown that the corporate responsibility to respect human rights contained in the Principles and its due diligence concept are appealing to corporations, because they make human rights manageable. They can increase the awareness and accountability of corporations with regard to the impact of their activities on human rights. Nevertheless, we have also argued that the Framework's pragmatic approach in the shape of due diligence and its lack of moral foundation of the duty to respect human rights allow for an instrumental or strategic implementation of the Principles, which in some cases could conflict with the normative objectives that the Principles try to achieve. In particular, we have argued that the effectiveness of human rights due diligence is in many respects dependent upon the moral commitment of the corporation and its managers. In this perspective, the conception of human rights as universal ethics is not explicitly advanced by the Principles. However, such a conception could become a prerequisite of the Principles' success in preventing business-related human rights violations. We have confined our argument to human rights obligations that can be qualified as perfect and universal moral duties, aware that the Principles set forth a more far-reaching scope of human obligations for corporations. We do not disagree with such far-reaching obligations, but concede that our argument may be less persuasive with regard to duties other than perfect moral duties.

We conclude with some suggestions for further research. Empirical research may become relevant over time. As some consulting firms are already providing specific consultancy on human rights due diligence, the limits of pragmatic approaches to human rights might become more apparent in corporate practice. A few years from today, a widespread implementation of the Principles would provide a vast field for empirical research that could shed more light on the practice of human rights due diligence and perhaps confirm, refine or refute the arguments developed in this article. To the extent that our worries are confirmed empirically, there should be even more pressure in favour of international and extraterritorial national human rights legislation, as well as a more thorough discussion of the ethical foundations of human rights.

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