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Corporate Responsibility to Respect Human Rights Defenders Under the UNGPs and Steps Towards Mandatory Due Diligence

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Abstract
Besides state actors, non-state actors and particularly private companies target human rights defenders (HRDs) and violate their rights to intimidate and stop them from challenging their interests. Despite the absence of responsibility of non-state actors in international human rights law, the United Nations Guiding Principles on Business and Human Rights (UNGPs) set out global standards and acknowledge the role of HRDs in the promotion of human rights, urging corporations to work closely with defenders. Considering the effectiveness of the UNGPs, the article explores the potential for protecting HRDs within the framework and concludes that the UNGPs could be utilised to enhance the protection of defenders in relation to business activities. It also suggests that current efforts of implementation would be strengthened by mandatory human rights due diligence laws at the national and regional levels, and emphasises that a clear inclusion of corporate responsibility to respect defenders is required, as it would be beneficial for both sides, defenders and business enterprises.

Keywords Corporate responsibility · Human Rights · Human Rights defenders · Due diligence

Introduction

Human Rights Defenders[1] (hereinafter HRDs) play a crucial role in protecting and promoting the realisation of human rights. More accurately, they work to turn the promise of the Universal Declaration of Human Rights (UDHR) into reality. They stand up against violence, denounce abuses of human rights, demand actions and

[1] The most commonly used term is 'human rights defenders', but the abbreviation 'HRDs' is also widely used. They are also referred to as human rights activists or just defenders.

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work to create a better world. They hold governments accountable for their human rights obligations under international human rights law or under national and regional laws, while they speak up against business impact on human rights. In essence, 'HRDs seek the promotion and protection of civil and political rights as well as the promotion, protection and realisation of economic, social and cultural rights' (OHCHR.org 2018). For these reasons, it is widely accepted that the work of HRDs is of great importance to the advancement of human rights, democracy and the rule of law (Council of Europe, Commissioner for Human Rights 2018).

The term 'human rights defenders' sparks intense debate over its precise meaning (Koula 2019). Broadly, it encompasses those who speak out against human rights violations or actively promote and protect human rights. HRDs can be individuals or organisations dedicated to advancing human rights. For example, Amnesty International stands out as a prominent defender, being the largest non-governmental organisation (NGO) fighting against injustice and human rights abuses (McPhail 2009). Individuals advocating for their own rights, such as LGBTQ+ community members and trade unionists, are also considered HRDs. While primarily focused on safeguarding their rights, they may also fight for the rights of others. Lawyers, journalists, and ordinary people advocating for human rights can play a crucial role in defending the rights of other individuals, blurring the lines between self-advocacy and advocacy for others. The article uses 'HRDs' to encompass this diverse range of people and organisations defending human rights.

Defenders are usually named after the type of human rights they fight for. For example, women advocating for women's rights are known as Women Human Rights Defenders,[2] while those fighting for environmental issues are Environmental Human Rights Defenders. Regardless of their focus, HRDs challenging powerful entities, including governments, face hostility and attacks. The article does not focus on the violations committed against a particular category of defenders. Rather, it seeks to emphasise the corporate responsibility for the violations against all HRDs.

When it comes to perpetrators, state authorities are the most common perpetrators of abuses against HRDs, as they seek ways to intimidate and stop them from challenging government's policy and interests. Despite traditionally being duty-bearers for human rights, states paradoxically serve as both violators and guarantors of these rights in the context of HRD abuses (Nash 2015). State authorities, including police, security forces, and national intelligence agencies, can be directly or indirectly implicated in violations, such as arbitrary arrests, torture, illegal searches, and surveillance (OHCHR 2004). In addition to these violations and attacks against defenders, the criminalisation of HRDs has emerged as a recent trend and a method of abuse. Restrictive laws undermining freedom of association, expression, and peaceful assembly, along with unfounded prosecutions and the misuse of existing laws, are common tactics used to hinder defenders in their activities (Frontline Defenders 2023). Failure to serve justice for the violations and crimes committed against defenders results in high levels of impunity for crimes committed against HRDs, perpetuating further abuses against them (Koula 2020). Non-state actors

[2] Women Human Rights Defenders are also female activists fighting for any right and freedom.

also commit human rights violations. The term 'non-state actors' includes individuals, corporations, groups and organisations not being state agents and mechanisms (Clapham 2017). That means a range of people may be responsible for abuses against defenders. However, according to the UN Special Rapporteur on the situation of HRDs, individuals, private corporations and the news media are among those non-state actors who are most regularly accused of abusing HRDs (UNGA 2010).

The article focuses on highlighting violations against HRDs by private corporations and subsequently discusses corporate responsibility regarding defenders' rights in international human rights law. Defenders actively monitor state and corporate activities, advocating for business accountability, particularly in areas like land rights, labour rights, and indigenous rights (ISHR 2015), putting themselves at significant risk, as discussed below. Despite ongoing efforts to establish a treaty on business and human rights (UN HRC 2022), international human rights law currently lacks obligations on private groups and corporations akin to those on states. However, there is a gradual shift, with non-legally binding obligations derived from the second pillar of the United Nations Guiding Principles (UNGPs), outlining corporate responsibility to respect human rights. Even without a legally binding obligation, violations against defenders can harm business reputations and result in substantial operational and legal costs (ISHR 2015). Any attack on or hindrance of defenders' human rights work also undermines the concept of corporate responsibility, mandating private corporations to adhere to human rights standards (Vidal-Leon 2013). As mentioned earlier, private corporations are among the violators of defenders' rights. However, it should be noted that some companies may support defenders if such support serves their financial interests and social profile. On this basis, "HRDs and Private Corporations" section not only looks at examples and various types of abuses perpetrated by companies against defenders, but also explores the motives behind acts of such support as well as their reluctance to protect HRDs or collaborate closely with them. Once the article establishes that business enterprises commit violations against defenders, "The Gap in Protection and United Nations Guiding Principles of Business and Human Rights (UNGPs)" section examines corporate responsibility for human rights in international law, focusing on the UNGPs. While not extensively analysing the framework's strengths and weaknesses, the article recognises it as a relatively new and evolving concept. "UNGPs and HRDs: Can the UNGPs effectively protect HRDs?" section then relates the framework to HRDs, considering whether the UNGPs could be utilised to enhance the protection and work of defenders connected to corporate activities and discussing how different actors, such as states, corporations, UN bodies and civil society, can and should give effectiveness to the UNGPs in ensuring companies respect the rights of HRDs.

The central argument of this article is that defenders could benefit from the UNGPs based on the notion that, if used more effectively, it would enhance corporate responsibility to respect the rights of defenders, creating a safer environment for them to work towards the realisation of human rights without distractions. Furthermore, it would also be beneficial for businesses, as they could involve defenders in business activities, such as consultations on human rights matters, gaining allies who could contribute to their efforts in fulfilling human rights due diligence. In the absence of a treaty on business and human rights, the UNGPs could provide effective

protection for defenders. Additionally, current efforts would be strengthened by the introduction of mandatory human rights due diligence laws at the national and regional levels. "Steps towards Mandatory Due Diligence" section addresses some national initiatives that mandate due diligence, as well as the European Union (EU) draft proposal for a Directive, indicating that corporate responsibility to respect human rights is no longer purely voluntary. Despite the advancements in laws and practices and promising legislative initiatives, the current EU proposal, aimed at establishing a legal framework for business responsibilities regarding human rights and the environment, lacks an official reference to HRDs. Therefore, the EU Directive, as well as similar future initiatives, should include a focus on HRDs to emphasise corporate responsibility to respect defenders.

The article employs a doctrinal approach to comprehend and analyse the provisions of the UNGPs and legal advancements in the business and human rights system. However, it primarily utilises socio-legal research to understand business behaviour and motives, evaluating the effectiveness of the UNGPs concerning defenders while considering the challenges they face and their specific needs. The article relies on various sources, including soft law and policy documents, research reports, journal articles, books, and non-governmental organisation websites. In "HRDs and Private Corporations" section, the article provides a series of examples illustrating corporations targeting and attacking defenders to silence them, as well as those committed to protecting and promoting HRDs. These examples also reveal shifts in corporate attitudes towards human rights when interests are at stake, highlighting the motives behind corporations adopting human rights profiles.

HRDs and Private Corporations

Private Corporations Attacking HRDs

Private corporations[3] are responsible for serious abuses against defenders in an attempt to intimidate, prevent them from carrying out their human rights work and silence them. Since 2015 more than 2200 threats, murders, and other types of attacks against HRDs related to business activities have been reported. Global Witness found that more than three people defending their land rights and environment were killed on average every week in 2018 with attacks orchestrated by mining and logging companies as well as agribusiness (Global Witness 2019).

Numerous violations against defenders advocating for environmental and land rights have been reported to the UN Special Rapporteur on the situation of HRDs (UNGA 2010). A prominent case involves Berta Isabel Cáceres Flores, the general coordinator of the Civic Council of Popular and Indigenous Organisations of Honduras (COPINH) and the recipient of the 2015 Goldman Environmental Prize for South and Central America. Leading protests against large mining, dam-building,

[3] The term 'private corporations', business', 'multinational corporations (MCNs)', 'business actors', 'transnational corporations', and 'companies' are used interchangeably.

and logging projects, she was tragically murdered in March 2016 (Human Rights Watch 2017). Eight men faced charges in connection with her murder, two of whom had previously worked for the dam-building company overseeing the construction (Ford 2017). Following the Inter-American Commission on Human Rights' refusal to investigate Cáceres's murder, an independent group of experts was established. Their findings indicated that the murder was a planned operation conceived by senior executives of Desarrollos Energéticos SA (International Advisory Group of Experts 2017). Eventually, a court in Honduras convicted the former energy executive of Desarrollos Energéticos, Roberto David Castillo, of planning Cáceres's killing. He was sentenced to 22 years and 6 months in prison (BBC News 2021), while his colleagues involved in the murder have already been convicted and received lengthy prison sentences (Business and Human Rights Resource Centre 2022).

In 1995, during the Abacha military regime in Nigeria (1993–1998), several environmental human rights activists were executed for condemning and opposing the collaboration between the oil multinational corporation 'Shell' and the Nigerian government in oil rich Ogoniland, which would lead to the expulsion of the local population (Bantekas and Oette 2013). Weeks prior to execution, numerous NGOs worldwide called on Shell to intervene, use its influence, and put pressure to prevent the government from harming the HRDs. However, Shell declined to intervene in local affairs and politics, resulting in the killing of environmental rights defenders. This contradicts Principle 2 of the UN Global Compact, which was agreed upon later, and provides that a business is complicit in human rights abuse if, through its own actions or failure to act, it enables another to carry out human rights abuses, knowing that the act or omission could provide such assistance (UN Global Compact 2016).

Furthermore, another common method employed by corporations to target defenders involves the use of litigation as a tool to silence HRDs challenging their activities. This practice, known as Strategic Litigation against Public Participation (SLAPPs), is distinct in its aim to silence those playing a watchdog role in society. Recent research by the Business and Human Rights Resource Centre revealed that between 2015 and 2018, multinational corporations filed 24 SLAPPs against 71 HRDs, seeking damages exceeding $904 million (£693 million) (Aba and Zbona 2019). Although not a new phenomenon, SLAPPs were conceptualised in the United States during the 1960s and 1970s. In the 1960s, these lawsuits were first brought against civil rights activists advocating for a boycott of white merchants in Clairborne County, Mississippi, to pressure corporate leaders and government bodies to end racial discrimination (Adams 1989). Despite taking various forms, SLAPP suits are essentially claims designed to cast suspicion on defenders and divert their attention from their human rights work (Murombo and Heinrich 2011; Trende 2006). Regardless of the lawsuit's outcome, the underlying strategy is to financially exhaust defenders by compelling them to spend substantial amounts on legal defence and, more crucially, to distract them from their work (Gilbert 2018). Numerous examples illustrate such unjustified legal actions against HRDs. For example, since 2016, the Thai-owned poultry farm, Thammakaset Company, has filed over 13 criminal and civil charges against 14 defenders, including Andy Hall, who reported labour rights abuses to the Department of Protection and Labour Welfare (Hall 2019).

Moreover, as mentioned earlier, state authorities are identified as the perpetrators directly responsible for abuses against HRDs. However, it is noteworthy that Information, Communication, and Technology (ICT) companies have also played a role in helping states target HRDs, thus contributing to the violations against them. These companies have been found to share personal data of HRDs or sell surveillance tools used to target defenders, a practice inconsistent with the UNGPs (ISHR 2015). For example, in United Arab Emirates (UAE), state authorities begun targeting and harassing young Blackberry users who intended to attend an unlawfully banned protest (Notley and Hankey 2012). They also arrested the 18-year-old key organiser, Badr Ali Saiwad Al Dhoh, using his BlackBerry Personal Identification Number (PIN). During the popular Egyptian Revolution of 2011, citizens and human rights activists raided the State Security Agency's (amn al-dawla) headquarters where they found secret police files with copies of defenders' online communication, such as emails and SMS, and evidence that proved that their online activities were being monitored (Notley and Hankey 2012). Particularly, the 26-year-old activist Basem Fathi found files containing information about his personal life and his daily routine (Stecklow et al. 2011). More recently, in July 2022, Forbitten Stories along with Amnesty International released the findings of a major investigation into the use of the notorious Pegasus spyware[4] and the leaks of around 50,000 phone numbers of defenders, journalists and lawyers from all over the world who have been selected as persons of interests by NSO client states, such as Mexico, India, Hungary and UAE (Amnesty International, undated).

It is key to note here the involvement of private businesses in abuses against defenders might harm their reputation. In the Shell's example above, following the activists' execution by the Abacha regime, Shell's public image was damaged, while the company suffered such a financial distress that it had to change its business ethics and revised its human rights policy (Bantekas and Oette 2013). Surveys have shown that consumers may not be interested in finding out whether production occurred ethically, but they may be influenced by reports of a corporation's involvement in human rights violations (ISHR 2015). In particular, consumers appear to be ready to boycott goods from corporations that they are involved in violations of human rights, while they may also be willing to pay more for products sold by business that respect human rights (Amengual et al. 2022). The reputational harm, which may, in turn, have a damaging economic impact on the company, is along with the 'court of public opinion' one of the factors that force a company to respect or even promote human rights (Wheeler 2015).

Private Corporations in Support of HRDs

In addition to the numerous private corporations involved in attacks against defenders, there are some companies taking the opposite approach, speaking out for them

[4] Pegasus is a hacking software-spyware developed by the Israeli cyber-arms company NSO Group that can be covertly installed on mobile phones and can turn the device into a remote camera and microphone.

and providing comprehensive support to HRDs. For instance, companies business associations, experts issued statements, expressing their deep concern at Andy Hall's criminal defamation (Business and Human Rights Resource Centre 2018), while Finnish retailer S-Group CEO testified at his trial and through Freedom Fund, provided €12,000 (£10,216) deposit to appeal the Thai's Court decision that order the defenders to pay €270,000 (£230,000) in civil defamation damages to Thammakaset Company (Hall 2019). In addition, several Nordic companies and a Thai poultry firm provided funds to pay for bail, fines, and legal costs for all those defenders who spoke out against labour rights abuses.

Furthermore, several civil society organisations called on FIFA sponsors to take a stand against brutal violations against migrant workers at the construction sites for the Qatar 2022 World Cap. Visa and Coca Cola released statements in support of workers, condemned human rights violations and urged FIFA to take all necessary actions and work closely with Qatari authorities to prevent and remedy any human rights abuse (Business and Human Rights Resource Centre 2015). In a more recent statement, Coca Cola praised FIFA for dealing with past challenges effectively (Coca Cola 2022). Companies also contribute to the realisation of human rights acting as defenders themselves. For example, in 2015, 379 businesses and other stakeholders, including mammoth multinational corporations such as Coca Cola, Amazon and Goldman Sachs, issued a statement to the United States Supreme Court in support of same-sex marriage (Kaufman 2017).

The truth is, though, companies consider carefully whether the benefits of advocating human rights and HRDs outweigh the risks. As previously noted, an organisation's human rights policy and stance on social justice are predominantly shaped by commercial and reputational interests. Illustratively, Tiffany & Co, Leber Jeweler, and Brilliant Earth issued statements urging the Angolan government to drop all charges against HRD Rafael Marques, who exposed human rights violations in the diamond industry (ISHR 2015). Notably, none of these corporations had business operations in Angola, eliminating potential losses. However, when the promotion of human rights conflicts with business interests, companies may be hesitant to condemn violations against HRDs due to fears of financial repercussions. For instance, when Swedish Foreign Minister Margot Wallström criticised Saudi Arabia's human rights record, companies with strong human rights commitments, like H&M and Volvo, expressed concerns about the economic consequences of such considerations (Tripathi 2015). Even Coca Cola, recently a vocal defender of human rights, faced accusations in the past of using paramilitary groups to torture and murder trade unionists challenging the company's interests in Colombia (UNGA 2015). In numerous states, including Haiti, Indonesia, and the United States, the company denied workers the right to form and be represented by unions (Workers Revolutionary Party 2019). This dissonance between a company's statements and actions illustrates that business actors can act like chameleons regarding their interests and human rights protection. Therefore, it can be argued that an organisation's position on human rights should not solely rely on their statements.

The above examples sought to illustrate how companies may attack HRDs or simply refrain from supporting them if they find doing so would harm them financially. In this sense, a pressure question of international human rights law arises: besides

any reputational and economic harm that a business might suffer, can a private corporation be held accountable for human rights violations committed against HRDs under human rights law? The following section seeks to answer this question, considering the corporate responsibility for human rights in international human rights law.

The Gap in Protection and United Nations Guiding Principles of Business and Human Rights (UNGPs)

The responsibility of non-state actors for human rights violations is a rather controversial and challenging issue in international human rights law, as all human rights treaties concern states and constitute sets of obligations for states. International human rights law applies first and foremost to the state in the sense that it holds ultimate public power over its people (Rodley 1993). Evidently, non-state actors play their own role in the enjoyment of human rights, so some regulation seems to be necessary. However, private corporations are not bound by human rights law; rather, as legal entities are entitled to human rights protection. Their conducts should be regulated by domestic law, while are primarily ignored by international law. Under international law, the general rule is that the only conduct that may be attributed to the state is that of its organs that 'exercise legislative, executive, judicial or any other functions, whatever position they hold in the organisation of the state' (ILC 2001), which creates a loophole in relation to where responsibility for human rights violations committed by businesses is located in international law.

In "HRDs and Private Corporations" section, the article presented a series of examples in which corporations either independently attacked defenders or colluded with state authorities. In these cases, their actions, although connected to the state, cannot be attributed to it, creating a gap in international law. Consequently, the only entity with international human rights obligations appears to be the state, leaving the responsibility for abuses committed by private corporations unregulated. One could argue that only those whose rights have been violated by state actors can be considered 'fortunate' in the sense that the state is obligated to respect and ensure human rights, providing a remedy, while there are no corresponding human rights obligations on corporations (Santerallí 2008).

While private corporations do not have legal obligations under international human rights law, they have a duty to protect fundamental human rights. In particular, the UDHR provides that 'every individual and every organ of society […] shall […] promote respect for these rights and freedoms' (UDHR 1948) as well as 'everyone has duties to the community in which alone the free and full development of his personality is possible' (UDHR 1948). In short, the UDHR does not impose direct obligations on private corporations to refrain from acts constituting violations of human rights. It calls all individuals and organs of society upon to respect human rights. In essence, to safeguard and respect the fundamental rights and freedoms enshrined in the UDHR, everyone, including business actors, should refrain from taking measures that would result in the violation of human rights. Similarly, the Declaration on HRDs is more specific stating that 'no one shall participate, by act

or by failure to act where required, in violating human rights and fundamental freedoms' (the Declaration on HRDs 1999). In other words, the Declaration is addressed not only to states and defenders, but also to non-state actors including private corporations who should refrain from impeding the enjoyment of human rights by HRDs. Essentially, the responsibility of corporations appears to be limited to a general duty of all non-state actors to respect the fundamental rights and freedoms, but they cannot be held responsible for human rights abuses in the absence of domestic laws regulating their conduct. States remain the main bearers of human rights obligations and the only ones that could be held accountable for human rights infringements under international human rights law.

For many years significant efforts were made to impose direct human rights obligations on multinational corporations (MCNs). This is because some multinational corporations are considerably wealthier than even fairly rich countries. Notably, it has been found that the combined profits of the top 10 companies would make them the third wealthiest country globally, surpassing economically prosperous states like Japan, Russia, and Spain.[5] Despite human rights consistently being a high priority on the agenda for many companies, the majority opposed most of these efforts for international regulation. States, too, have been hesitant to extend state features, including human rights obligations, to private corporations. This reluctance stems from a fear of undermining their sovereign position of power within a national context (Clapham 2017). In addition, they emphasise the belief that the State itself is better placed to effectively regulate actions and address human rights violations within its jurisdiction (Ronen 2013).

In 2003, the UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (the Norms) represented the first effort to impose on businesses a range of human rights obligations similar to those placed on states under international human rights law. The proposed obligations were twofold: the responsibility of states and, 'within their respective spheres of activity and influence', the obligation of transnational corporations to 'promote, secure the fulfilment of, respect, ensure respect of and protect human rights' (The Norms 2003). The comprehensive set of implementation provisions indicated that the Norms aimed to be more than mere aspirations for social conduct, extending beyond the realm of soft law. NGOs, including Amnesty International, Human Rights Advocates, and Human Rights Watch, along with academics, welcomed the Norms for potentially establishing a balance between the obligations of states and private corporations regarding human rights (Bachmann and Miretski 2012). However, states and businesses opposed the Norms for their respective reasons. Given that international human rights law is more state-centric than other areas of international law, states were unwilling to grant state-like features to business corporations, fearing a potential threat to sovereignty (Kinley and Chambers

[5] For instance, in 2017 Walmart earned more money than Belgium. In addition, the world's 10 richest corporations have a combined market capitalisation of £6.8 trillion, making them the third-largest country based on GDP in the world. The companies follow the US and China, with total GDPs of £16.5 trillion and £10.93 trillion respectively.

2006). On the corporate side, business actors were resistant to accepting corporate responsibility beyond self-regulation, a widely accepted model in business and human rights (Augenstein 2022). Due to these reasons, the Draft Norms ultimately failed and were abandoned.

In 2011, the UN Special Representative on Business and Human Rights, John Ruggie, following several years of consultations with businesses, governments, civil society institutions and victims of corporate human rights violations proposed the UNGPs. The latter was unanimously endorsed by the UN Human Rights Council, as a set of guidelines for states and private companies to prevent human rights violations and address abuses committed in business operations (the UNGPs 2011). John Ruggie has argued that the reason why the UNGPs gained acceptance and were finally adopted is because they do not, by themselves, impose direct human rights obligations on private corporations (Ruggie 2017).

The Guiding Principles consist of three pillars: (1) the state duty to protect human rights against violations by third parties, including corporations; (2) the corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing the rights of others; and (3) greater access to effective remedies, both judicial and non-judicial, for victims of corporate human rights abuse (Bantekas and Oette 2013). Each pillar outlines specific duties and responsibilities for governments and businesses to prevent and address human rights abuses in business operations and provide remedies when such abuses occur. Notably, the Guiding Principles do not establish new human rights obligations beyond those existing in international human rights law, and they are not legally binding, falling within the spectrum of soft law. The primary advantage of adopting rules in soft law is that states willingly commit to obligations they might otherwise resist (Boyle 2014, 2019). In the case of the Guiding Principles, states would unlikely impose direct or indirect human rights obligations on private companies without their consent, thus avoiding creating hard law. Despite their non-legally binding nature and the fact that they reiterate existing human rights obligations for states, the UNGPs serve as a valuable reference point for the protection and promotion of human rights in business operations.

Regarding the first principle, the state duty to protect, the Guiding Principles reiterate existing state obligations under international human rights law. Principle 1 specifically provides that ‘states must protect against human rights abuses within their territory by third parties, including business enterprises, through effective legislation, regulation and adjudication’ (the UNGPs 2011). As mentioned earlier, some colossal multinational corporations may possess more wealth than certain affluent countries, making them more powerful than governments. Consequently, any state’s attempt to regulate a company’s approach to human rights might lead to tensions between the state and the company. To address this, states should adopt a ‘smart combination’ of mandatory measures, a strong enforcement mechanism, and voluntary measures aimed at preventing and addressing corporate-related human rights issues while encouraging business compliance (Augenstein 2018; Gilad 2010).

In respect of corporations, Principle 11 affirms that ‘business enterprises should respect human rights, avoid infringing on human rights of others and address adverse human rights impacts […] including taking adequate measures for their prevention, mitigation and where appropriate, remediation’(the UNGPs).

In other words, to meet the responsibility to respect human rights, private companies should act *diligently*. The term refers to the process of identifying and addressing the human rights impact of their business operations and network as well as potential remedies depending on the nature of abuse (The UN Working Group on Business and Human Rights undated). The use of the term 'human rights due diligence' in the UNGPs seems to be a strategic and intentional move by the authors, considering that 'due diligence' is a familiar term among business professionals, human rights defenders, and governments, albeit with varying interpretations by each group (Bonnitcha and McCorquodale 2017).

The nature of human rights also encompasses the duty to redress its violations. This is reflected in the Latin statement *ubi jus ibi remedium*, meaning that for every violation of a right, there must be a law providing a remedy (Oxford Reference undated). No matter who is the violator if anyone's rights have been violated, the state has the duty to carry out prompt investigation and provide the victim with reparations. Failure to enact the necessary laws and provide the victim with an effective remedy contravenes with the principle of due diligence under human rights law. In respect of the UNGPs, the state should not only enhance their judicial system, enabling it to address human rights abuses efficiently, it should also ensure that domestic judicial mechanisms are able to effectively deal with business-related human rights violations. On the other hand, the duty to provide remedies does not apply to business enterprises because as non-state actors, they are not obligation holders. However, under the UNGPs, where business enterprises have caused or contributed to human rights violations, despite their best practices and due diligence, their responsibility to respect human rights also requires active engagement in remediation (the UNGPs 2011). In other words, it is their responsibility to ensure effective mechanisms for addressing grievances either from their employees or the consumers and community who have been adversely impacted by their business operation or to cooperate with other actors that work to provide remedies.

The UNGPs constituted an important breakthrough, setting out global standards for addressing and preventing the adverse impact on human rights in business-related operations. However, persistent critique of the form and substance of the UNGPs, such as the lack of enforceability and accountability or insufficient focus on remedies, has been raised (Rodríguez-Garavito 2017; Wolfsteller and Li 2022; Deva 2020). More importantly, the voluntary implementation of the UNGPs appears to be insufficient. Physical and legal attacks against HRDs, the rise in child labour to 160,000 million worldwide, lack of accountability for workplace disasters killing thousands of workers, are only a few examples which can show that the UNGPs have been insufficient (Caller et al. 2021). Notably, in 2018 the Working Group on Business and Human Rights reported to the General Assembly that the majority of private corporations have not adopted policies that meet the requirements set by the UNGPs or they simply do not have due diligence human rights practices at all (UN Special Procedure 2018). The unprecedented Covid-19 crisis also unveiled the fragility of value chains, the vulnerabilities in global business operations and most importantly, the weakness of voluntary corporate action in addressing the impact of the crisis on human rights, when it comes to business operations.

In considering effectiveness, it is important to acknowledge though, the UNGPs and the concept of due diligence were introduced to the framework of business and human rights only in 2011, and its implementation has been sporadic. Therefore, any assessment of effectiveness should be conducted within this relatively short timeframe (Ruggie et al. 2021; McCorquodale and Nolan 2021). However, in this almost 13-year period, several countries have developed National Action Plans (NAPs) to implement the UNGPs at the national level. These plans outline specific measures and initiatives taken by governments to promote business respect for human rights. As will be seen in "Steps towards Mandatory Due Diligence" section, countries such as the Netherlands, and France have made significant progress in implementing their NAPs, including establishing legal frameworks that provide for human rights due diligence, and promote responsible business conduct (Child Labour Due Diligence Act 2017; The Duty of Vigilance Law 2017). Additionally, over these years, colossal companies, such as Adidas and Unilever, have embraced the UNGPs (Adidas and Unilever websites Undated), while industry initiatives have emerged to promote the implementation of the UNGPs in specific sectors. For instance, the Responsible Jewellery Council (RJC) has developed standards for responsible business practices in the jewellery supply chain, including respect for human rights (RJC website undated).

In relation to the normative value of the Principles, the 'gravitational force' of the UNGPS became apparent in the early years, as international and regional bodies actively sought to align themselves with the UNGPs through resolutions, declarations, cross-references, and even integration into their own normative frameworks (Krisch et al. 2020). These left no doubt about the prominent role that the UNGPs would play in the field of business and human rights. While the UNGPs framework seeks development through voluntary commitments by states and corporations, in the past few years the UNGPs have gained ground in the direction of binding norms. In *Kaliña and Lokono Peoples v. Suriname case*, the Inter-American Court used the UNGPs to determine whether Suriname was in breach of its obligations under the American Convention (Kaliña and Lokono Peoples v. Suriname 2015). More recently, in 2021, in *Milieudefensie v RDS*, the District Court in the Hague relied on the UNGPs to understand and determine the global standard of expected conduct for business enterprises, establishing that the understanding of corporate responsibility for human rights goes 'over and above compliance with national law and regulations' (Milieudefensie et al. v Royal Dutch Shell 2021). The use of UNGPs by judicial bodies, although limited, is a sign that the UNGPs may have a 'life beyond the soft law nursery which raised them' in the future (Mackay 2018). Moreover, the international community is nowhere near a treaty on business and human rights. Besides efforts since 2018, it has become evident that major states have conflicting interests and differing interpretations of the treaty's content (Mikullovci 2023), but this is outside of the scope of this article. However, the key point here is the value of a framework rooted in a system that lacks another instrument of similar content and higher normative value should not be underestimated (Deva 2021).

In essence, the ongoing violations of labour rights and rights of defenders, raise concerns regarding the effectiveness of the UNGPs. However, it is important to note that this framework is relatively new and still emerging, having been established

after extensive disagreements and tensions. The legal development and slight progress observed so far indicate potential for further advancement in the future.

UNGPs and HRDs: Can the UNGPs effectively protect HRDs?

The duties of states and the responsibilities of business under the three pillars also extend to HRDs. The UNGPs recognise the critical role of defenders as part of the business and human rights system, acknowledging their significant role in the realisation of human rights, the necessity of HRDs turning into allies of companies, and the importance of their work not being obstructed (the UNGPs 2018). As stated in ”The Gap in Protection and United Nations Guiding Principles of Business and Human Rights (UNGPs)”section, Pillar II sets out corporate responsibility which refers to the normative expectation that business enterprise should ensure human rights wherever they operate. In fact, the corporate responsibility to respect human rights does require active engagement with defenders who raise concerns about the adverse effects of policies on people or the environment (UN HRC 2021). Essentially, the responsibility of companies to respect the rights of HRDs is understood as their responsibility to respect defenders, allowing or even enabling them to carry out their work without experiencing abuses or threats, and thus undisturbed. In addition, companies should involve HRDs to assist them in fulfilling human rights due diligence.

The question that arises here is whether the UNGPs can effectively protect and possibly strengthen the work of HRDs. The obvious answer to this question seems to be that, for the time being, no; the UNGPs are not effective in ensuring companies respect HRDs, as evidenced by the continued attacks by corporations against HRDs. However, this section argues that if different actors were to rely on them more effectively, and considering their growing normative value, as discussed above, the UNGPs can be a great platform for defenders. The section begins by examining how states can employ the UNGPs to safeguard defenders. It then explores what corporations should do, underscoring the importance of partnerships. The discussion concludes by addressing the roles of UN bodies and civil society. “UNGPs and HRDs: Can the UNGPs effectively protect HRDs?” section relies on the UN Working Group on Business and Human Rights Guidance, particularly on HRDs, to analyse how different actors can and should give effectiveness to the UNGPs in ensuring companies respect the rights of HRDs. While there are various ways in which the UNGPs could be utilised to support HRDs, this section focuses on the most significant ones, allowing room for future research and analysis.

The UN Working Group on the issue of human rights and transnational corporations and other business enterprises, also known as the UN Working Group on Business and Human Rights Guidance, (hereinafter the Working Group) issued a report focused on HRDs connected to business activity, the increasing risks to defenders challenging the interests of business enterprises. A special report on HRDs from the Working Group that is mandated to promoting and facilitating the implementation of UNGPs marks a significant milestone for HRDs involved in business activities, enhancing the existing understanding of corporate

responsibility towards defenders' rights as well as offering significant guidance outlining the actions that states and corporations should undertake under the UNGPs. It is not the first time that the Working Group has brought groups that disproportionately experience adverse impact of business activities disproportionately and differently in the spotlight. In 2019, the Working Group submitted a report on the Gender Dimensions of the Guiding Principles, which emphasised the adverse and disproportionate impact of business activity on women and girls and provided detailed guidance to private corporations as well as states on adopting a gender perspective in implementing the UNGPs (UN HRC 2019).

Under Principle 1 the State should ensure that all individuals, including defenders involved in business activities within their jurisdiction, are not targeted by business actors. In relation to defenders now, besides states refraining from using the legal system to criminalise the legitimate activities of HRDs, it is recommended that new and existing policies that shape business practices should promote the role of the State in protecting defenders related to business activities (UN HRC 2021). Especially, stated-owned or state-controlled companies should also be among the first business actors who would embed policies for the protection of defenders and the promotion of their work into their conducts (Ineichen 2018).

More importantly, legislative initiatives promoting mandatory due diligence should serve as a vehicle to safeguard defenders by incorporating requirements for consultation, access to information, and access to effective remedies within the due diligence laws (UN HRC 2021). As will be seen below, significant progress towards mandatory due diligence has been made in some states and the European Union (EU), so expansion of legislation to include provisions to protect defenders through consultation, access to information, and access to effective remedy would promote not only their protection, but also the promotion of human rights. Notably, the Working Group emphasises the need for inceptives to business including use of trade-based incentives, export credit and public procurement to obtain commitments from them to the respect and protection of defenders (UN HRC 2021). Additionally, if a business is discovered to have caused or contributed to harm against a defender, or if it fails to proactively take measures to prevent harm, once aware of the risk, it should face appropriate sanctions or consequences (UN HRC 2021). Essentially, the combination of incentives, sanctions, and penalties serves as both a deterrent and an encouragement for businesses. This, combined with the potential for reputational harm in the event of failure to comply with human rights, can strengthen their commitment to practicing due diligence.

To comply with this duty, states should also enact Anti-SLAPP laws that address a common tactic used to target defenders. Anti-SLAPPs provide mechanisms for the early dismissal of SLAPPs brought against defenders (Levi 2017), thus safeguarding freedom of speech and shielding defenders from being trapped in lengthy legal proceedings that prevent them from promoting human rights. France, Spain, and California, for instance, have introduced legislation incorporating provisions aimed at protecting individuals from abusive legal actions in relation to their expression of opinions and public engagement (Ley Orgánica 2/2015, Loi sur la Consommation 2013, the California Code of Civil Procedure, Section 425.16).

On the other hand, corporate responsibility to respect human rights under Principle 11 includes the corporation's responsibility to respect the rights and freedoms of everyone, including defenders. In the context of HRDs, corporate responsibility can take various forms. Particularly, corporations should refrain from actions that obstruct, hinder or stigmatise the work of HRDs (UN HRC 2021). This includes avoiding intimidation, harassment, or violence against HRDs, as well as abstaining from engaging in activities that might indirectly contribute to human rights abuses against them. Companies should also conduct thorough assessments of potential human rights risks and impacts associated with their operations, including identifying risks faced by HRDs. This necessitates a deep understanding of the local context, consultation with relevant stakeholders, and the implementation of suitable measures to prevent or mitigate any adverse impacts on HRDs. Moreover, companies should refrain from initiating frivolous legal actions, such as SLAPPs, or reporting them to authorities to intimidate them. It is essential to acknowledge that SLAPPs not only lack a legal foundation, but also are incompatible with responsible business practices, undermining the credibility of a corporation's commitment to upholding human rights on a broader scale.

It is essential for companies to strengthen human rights due diligence by engaging openly and establishing partnerships with defenders, civil society organisations and trade unions as an expert resource that enables business to understand the concerns of the society and identify the necessary actions to realise human rights and act diligently. Partnerships between companies and defenders can take various forms, including the dissemination of knowledge about current best practices, raising awareness of pertinent human rights issues, engagement in joint projects, provision of training and advisory services, establishment of rights-related standards, and monitoring of these provisions (Birchall 2020). To maximise the benefits of the partnership with defenders, companies should provide them with access to their policies and information regarding their practices, enabling them to offer appropriate advice and contribute to the formulation or revision of their human rights policies. A noteworthy example of partnership that exists between business coalitions such as Microsoft, Unilever, Adidas, and Ben & Jerry's, and NGOs, like Business and Human Rights and the International Service for Human Rights (ISHR), as well as HRDs is the Business Network and can play a leading role in partnerships.

This partnership serves as a unique platform for businesses, investors, civil society, and defenders to come together and exchange information and insights on the intersection of business and human rights (Business Network website undated). With ten meetings throughout the year, it offers numerous opportunities to learn from one another and share lessons learnt in this field. This could serve as a model for industry coalitions that currently lack partnerships with defenders, such as the Responsible Business Alliance (formerly known as the Electronic Industry Citizenship Coalition) (Responsible Business Alliance website undated), as well as individual corporations responsible for implementing the UNGPS.

Furthermore, businesses demonstrating a commitment to the rights of HRDs through policies and procedures can promote engagement with human rights within corporate realms (Birchall 2020), thereby enhancing human rights due diligence. For example, business enterprises dedicated to the protection of HRDs, such as

Adidas and BHP,[6] should set the standard in their sector and industry by sharing their knowledge and practices. Conversely, companies like Marks and Spencer,[7] which have consistently prioritised the implementation of the UNGPs and adopted policies consistent with the Principles but lack a clear policy on the protection of HRDs in relation to business activities, should recognise that their responsibility to protect and respect human rights extends to safeguarding defenders or refraining from violating their rights and freedoms. To remain committed to the UNGPs mission, they need to develop progressive policies and practices in support of defenders.

Despite exercising due diligence, instances of abuses against defenders may still occur. In such cases, justice should be served, and reparation should be provided.[8] States should ensure the legal system is able to provide justice and redress, while companies should have grievance mechanisms in place that facilitate redress and reparations.

Moreover, UN bodies, National Human Rights Institutions (NHRIs) as well as civil society organisations should continue monitoring and reporting abuses committed by private corporations against defenders, bringing non-compliance with the UNGPs to the fore (Birchall 2020). Through raising awareness, publicly identifying wrongdoers, and applying pressure on businesses and states to adhere to the UNGPs, these actors can enhance the protection of HRDs, promote the inclusion of HRDs in the business and rights ecosystem, and facilitate remedies for defenders. This, in turn, contributes to the effective implementation of the UNGPs and strengthens due diligence. For instance, capturing the gravity of threats and abuses against HRDs could also ensure the crimes committed against defenders do not remain unpunished and justice has been served (Ineichen 2018). Notably, following the murder of the prominent defender Berta Cáceres, more than 1000 NGOs in 110 countries condemned the murder and called for justice (CIDSE 2016). While local authorities initially concluded that the murder was a common crime, as seen in "HRDs and Private Corporations" section, it was finally found that the senior executives of Desarrollos Energéticos SA were behind the crime. They were all accused of conceiving the plan and hiring the gunmen and received long prison sentences.

Given the ongoing violations against defenders and misconducts and other violations in the business sector, as stated earlier in the article, the effectiveness of the UNGPs can be called into question. However, the UNGPs are a relatively new and evolving framework, which gains increasing normative value and paves the way for mandatory due diligence, as highlighted in the subsequent section. There is also already sufficient guidance and support available concerning HRDs, and if states, businesses, UN instruments, and civil society use them effectively, the UNGPs can

[6] Adidas Group has adopted a longstanding policy of non-harm and non-interference in connection with the activities of defenders, including those who actively speak out against Adidas businesses. BHP is also committed to respecting the work of HRDs. BHP Human Rights Policy Statement.

[7] Marks and Spencer are committed to promoting human rights and sustainability but at the moment there is no reference to human rights defenders.

[8] Examples of remedies could be compensation for all damages suffered by people affected by corporate-based human rights violations, rehabilitation which could cover medical, psychological and legal services to restore the victim.

serve as a means of safeguarding HRDs. With a treaty on a long way of being finalised, the UNGPs appear to be one of the most effective ways of protection for HRDs related to business conducts. However, implementation efforts would be strengthened by the introduction of mandatory human rights due diligence laws at the national and regional levels.

Steps Towards Mandatory Due Diligence

There is a growing number of states worldwide that require private companies to set up their own due diligence plan indicating that corporate responsibility is no longer strictly voluntary. A prominent example is the French Duty of Vigilance Law, which requires businesses to set up a 'vigilance plan' that should identify potential risks and contain a series of adequate measures to prevent and address an adverse impact on human rights (Schilling-Vacaflor 2021; Clere 2021). Similarly, the Dutch Child Labour Due Diligence Act obliges all companies to assess whether their services or goods have been produced utilising child labour as defined by the International Child Labour Guidance for Business (Child Labour Due Diligence Act 2017). If there is reasonable presumption that these goods and services have been created with the aid of child labour, they should set up a plan which stop and prevent child labour in their supply chains. In the event of violation of the act, there are serious administrative and criminal sanctions in place that ensure the adoption and implements of an action plan if required.

Besides national laws that strengthen corporate responsibility for human rights, the European Commission has been committed to introducing mandatory due diligence legislation on EU level. The recent pandemic has increased the need for action on business and human rights and in 2020 the EU Commissioner for Justice announced his intention to draft a proposal on human rights due diligence (Rose 2020). In response to the EU Commission's announcement, the European Parliament Committee on Legal Affairs (JURI) adopted a report which made a series of recommendations to the Commission on mandatory corporate due diligence. The final report was adopted on 10 March 2021 with 504 votes in favour, 79 against and 112 abstentions European Parliament 2021). After two years, in February 2022, the EU Commission published its long-anticipated proposal for a Directive on human rights and environmental due diligence. The draft requires large EU companies and third-country companies with extensive business activity in the Union to undertake due diligence for actual and potential adverse human rights and environmental impact throughout their operations and to take preventative and remediation measures for identified human rights and environmental harms (EU Commission 2022). Company's failure to conduct effective due diligence will result in costly fines for the company and its senior executives as well as civil liability to allow those affected to sue the company (EU Commission 2022).

The draft Directive is still at the very first stage of legislative proposal and will undergo review and debate before it is adopted by the Council and Parliament. That means the draft released by the Commission is subject to changes. In the first draft there is no reference to HRDs, but amendments highlighting that

defenders are at the forefront of the consequences of adverse environmental and human rights impacts worldwide have been suggested (EU Parliament 2023), which is a promising step. It is therefore essential to explicitly extend corporate responsibility to respect the rights of HRDs in the legal framework, ensuring that failure to comply with this responsibility can lead to legal consequences. Undoubtedly, the EU Directive represents a significant step towards mandatory due diligence at the regional level, and this legislation could serve as a model for national and other regional jurisdictions. It is therefore crucial for the final text of the Directive to recognise that corporate responsibility goes hand in hand with active involvement of defenders in the business and human rights system, as businesses can benefit greatly from the expertise of HRDs in human rights matters. It is important for the drafters to carefully consider the recommendations put forth by the UN Working Group, but to engage HRDs effectively, business enterprises should cease targeting them or employing legal tactics to obstruct their activities, involve them in their activities and the formulation or revision of policies, giving them access to information about their operations and partners and provide remedies in cases of violations. The Directive should include both voluntary and mandatory measures, as well as incentives for businesses that work with defenders.

Interestingly, the EU Directive may be the first instrument which is aimed at ensuring business responsibilities for the respect of human rights at regional level. Only a few years ago, this potential would seem simply impossible in the sense that states and companies would not be willing to accept a model where non-state actors would carry human rights obligations; each for their own reasons, as explained elsewhere. The final text of the Directive may take years to be determined, but once it is adopted and implemented, it will pave the way for more initiatives on business and human rights, which would strengthen the implementation of the UNGPs. In the meantime, the discussions on a treaty will continue and the idea of a binding instrument will ripen. Whether those instruments are feasible and whether or not they will set out obligations of result, granting states a margin of appreciation in taking measures with regards to business operation or will impose direct legal obligations on private corporations are matters that require further consideration and research. The establishment of a tribunal that would deal with cases of human rights violations committed by companies based on the International Criminal Court model is another matter that also needs discussion. Despite the great amount of work that needs to be done, the EU initiative is a decisive first step towards the regulation of corporations and non-state actors on international level. The clear inclusion of the responsibility to respect the rights of defenders serves two purposes: on the one hand, it ensures a safe environment for the work and life of defenders and their undisturbed activities, and on the other hand, it promotes the involvement of defenders in various business operations as valuable resources, thereby enhancing corporations' efforts in fulfilling human rights due diligence. Both ultimately contribute to the greater realisation of human rights.

Conclusion

With the exception of a few corporations that stand out as positive examples by protecting or collaborating with defenders, private corporations often intimidate, attack, and silence HRDs who challenge the interests and policies of powerful business actors or adjust their policies according to their interests. This targeting of defenders by businesses has a significant impact on the realisation of human rights. Therefore, this article explored the most efficient way to protect HRDs in the context of business activities. In the absence of a treaty on business and human rights, the most obvious option is the UNGPs. While there are strengths and weaknesses to the UNGPs, the argument here is that the Principles provide a framework for businesses to practise due diligence and respect the rights of HRDs. The effectiveness of the UNGPs in relation to defenders can be enhanced by various actors, including states, the UN, and civil society, working together to help businesses protect defenders. This collaborative effort aims to create an environment that allows defenders to carry out their work without fear of abuses or threats, enabling them to contribute to the realisation of human rights and pushing towards the evolving concept of human rights due diligence. With their support, corporations can align with and adhere to human rights standards.

The article would not omit that despite the absence of a binding treaty, efforts to establish human rights due diligence are gaining ground, which was once considered impossible. The emergence of mandatory due diligence initiatives at the regional level indicates a shift towards more organised and widespread attempts to regulate such practices in the future. Consequently, the use of UNGPs for the protection of HRDs that is being suggested, and the evolution of the concept of mandatory due diligence can progress in parallel. The dialogic encounter that may arise from this can benefit various issues related to business and human rights that have required discussion and research over the years.

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