THE CHALLENGE OF IMPLEMENTING THE UN ‘PROTECT, RESPECT AND REMEDY’ FRAMEWORK BY STATES AND THE EUROPEAN UNION THROUGH THE UN GUIDING PRINCIPLES: THE BRITISH, SPANISH AND ITALIAN CASES

Marta BORDIGNON

Coordinatore: Ch.ma Prof. ssa Donatella MORANA
Tutor: Ch.ma Prof. ssa Maria Clelia CICIRIELLO

Anno Accademico 2012/2013
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“I am under no illusion that the conclusion of my mandate will bring all business and human rights challenges to an end. But Council endorsement of the Guiding Principles will mark the end of the beginning.”

John Ruggie

Speech for the presentation of the UNGPs to the UN HR Council, March 2011

“Ognuno può suonare senza timore e senza esitazione la nostra campana. Essa ha voce soltanto per un mondo libero, materialmente più fascinoso e spiritualmente più elevato. Suona soltanto per la parte migliore di noi stessi, vibra ogni qualvolta è in gioco il diritto contro la violenza, il debole contro il potente, l’intelligenza contro la forza, il coraggio contro la rassegnazione, la povertà contro l’egoismo, la saggezza e la sapienza contro la fretta e l’improvvisazione, la verità contro l’errore, l’amore contro l’indifferenza”.

Adriano Olivetti

“Il mondo che nasce”, 2013
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ACKNOWLEDGEMENTS

At the closing point of this long academic journey, I wish to thank all the people which have contributed to it in different ways.

First of all, I would like to thank Prof. Maria Clelia Ciciriello, for her support and guidance during these last years. For his continuous encouragement and for his fundamental role in getting closer me to the business and Human Rights field, I would express my gratitude to Prof. Alessandro Costa: I will be always grateful to him, even for the great professional opportunities he offered me. Furthermore, I would show my appreciation to Prof. Luigi Daniele and all the Researchers of the International and European Union Law - Law Department, University of Rome ‘Tor Vergata’.

My research work has also deeply benefited from my experience as a member of the Research Group on Human Rights and Economy: to all my colleagues and friends a special acknowledgement for their intellectual and professional support and their ongoing feedbacks.

For the time and professional experience they devoted in the present study, I am indebted to the representatives of the Italian and Spanish Ministries I have met during the interview campaign conducted early in 2014. In particular, a sincere thanks to: Cons. Ugo Colombo Sacco (General Direction for Globalization, Ministry of Foreign Affairs); Dr. Rossella De Rosa (Secretariat of OECD NCP Italy, Ministry of Economic Development); Dr. Danilo Giovanni Festa (General Director for the Third Sector, Ministry of Labour and Social Policies); Dr. Jaime Hermida Marina (General Direction of Foreign Affairs, Multilateral, Global and Security Affairs, HR Office, Spanish Ministry of Foreign Affairs). Among the researchers and practitioners I had the honour to know during the last year, a hearty thanks to: Prof Carmen Marquez Carrasco (Professor of International Public Law and International Relations, Law Faculty, University of Seville); Maria Prandi (Business & Human Rights, Spain); Mauricio Lazala (Business and Human Rights Resource Centre); Anna Bulzomi (IPIS Researcher); Sara Blackwell (ICAR’s Legal and Policy Associate); Andreas Graf (Swisspeace Project Officer Business & Peace).

For each moment which I have had the chance to share with my dearest friends, for their care, patience and endless support, I sincerely thank: Alessandra, Chiara, Daniela, Enrica, Elisabetta and Matilde, friends of all time and mates of funny moments; Evelina, Priscilla and Roberta, colleagues become friends during the PhD period. Special thanks go to Giada, for all the infinite conversations on our common interest and love for Human Rights, to Pietro, my first and tireless supporter, and to Giuliana, for the hours we spent on Skype encouraging each other and dreaming on a bright future.

The deepest gratefulness goes to my family and especially to my parents for their inestimable love: to them I dedicate this thesis.
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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>AU</td>
<td>African Union</td>
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<td>BHR</td>
<td>Business and Human Rights</td>
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<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>BRC</td>
<td>Business Responsible Conduct</td>
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<tr>
<td>CEO</td>
<td>Chief Executive Officer</td>
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<tr>
<td>CERSE</td>
<td>Consejo Estatal de la RSE (State Council of CSR)</td>
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<td>COREPER</td>
<td>Committee of Permanent Representatives</td>
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<td>CSOs</td>
<td>Civil Society Organizations</td>
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<td>CSR</td>
<td>Corporate Social Responsibility</td>
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<tr>
<td>ECA</td>
<td>Export Credit Agency</td>
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<tr>
<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>EITI</td>
<td>Extractive Industry Transparency Initiative</td>
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<td>EU</td>
<td>European Union</td>
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<td>FCO</td>
<td>Foreign and Commonwealth Office</td>
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<td>FIDH</td>
<td>International Federation for Human Rights</td>
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<td>FPS</td>
<td>Foreign Policy for Sustainability</td>
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<td>ICT</td>
<td>Information and Communication Technologies</td>
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<td>ILO</td>
<td>International Labor Organization</td>
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<td>MEP</td>
<td>Member of European Parliament</td>
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<td>MNEs</td>
<td>Multinational Enterprises</td>
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<td>NAP</td>
<td>National Action Plan</td>
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<td>NCP</td>
<td>National Contact Point</td>
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<td>NGOs</td>
<td>Non-Governmental Organizations</td>
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<td>NHRIs</td>
<td>National Human Rights Institutions</td>
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<tr>
<td>OAS</td>
<td>Organization of American States</td>
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<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
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<td>OUA</td>
<td>Organization of African States</td>
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<td>OBR</td>
<td>Overseas Business Risk Service</td>
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<tr>
<td>SOE</td>
<td>State-Owned Enterprise</td>
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<td>UKTI</td>
<td>UK Trade and Investment</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCTAD</td>
<td>UN Conference on Trade and Development</td>
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<td>UNGPs</td>
<td>UN Guiding Principles</td>
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<td>WG</td>
<td>Working Group</td>
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INTRODUCTION

The protection of the fundamental Human Rights has acquired an increasing relevance within the International Community since the adoption by the UN General Assembly of the Universal Declaration of Human Rights in December 1948, followed at regional level by other legal instruments, such as the European Convention on Human Rights and Fundamental Freedoms. The evolution of this concept in the last 65 years, especially related to the relationship between Human Rights and all the sectors of civil community, has led to the emergence of a possible interconnection between Human Rights and business activity. In particular, since the appointment of the UN Secretary-General’s Special Representative for Business and Human Rights, Prof. John Ruggie, the International Community has focused its attention on the issue of alleged Human Rights violations committed by businesses. Prof. Ruggie was appointed by the UN Secretary-General Kofi Annan in 2005 in order «to identify and clarify standards of corporate responsibility and accountability regarding human rights; to elaborate on State roles in regulating and adjudicating corporate activities; to clarify concepts such as “complicity” and “sphere of influence”; to develop methodologies for human rights impact assessments and consider state and corporate best practices» (SRSG 2009).

Furthermore, in the last decade there was an increase of cases involving multinational and transnational enterprises, allegedly accused of violating fundamental rights. On one side, this has led to broadly consider the concept of business participation in activities potentially impacting Human Rights, and, on the other side, it has underlined the role of States and International Organizations in this field. To this regard, the UN Guiding Principles on Business and Human Rights (hereinafter UNGPs) have been endorsed by the UN Human Rights Council in its Resolution 17/4 in June 2011. The main objective of these Principles, as recognized by the UN Council, is to provide a better and more comprehensive implementation of the UN ‘Protect, Respect and Remedy’ Framework - unanimously approved by the UN HR Council in 2008 and based on the three pillars identified by the UN Working Group on
Business and Human Rights - as well as to improve the global recognition of the relevance of business and Human Rights issue. Moreover, the Working Group (hereinafter WG) - established by the UN Council in the same Resolution - aims to promote the exchange of experiences and good practices between States and relevant stakeholders, in order to explore the existing mechanisms and possible remedies for allegedly corporate-related Human Rights abuses. As far as concerns the role of States in this regard, thanks to the UN Annual Forum on Business and Human Rights held in Geneva in the last two years (December 2012 and 2013), the WG has had the opportunity to meet all the relevant stakeholders and actors involved, thereby applying its strategy of embedding the UNGPs in global governance frameworks, while also disseminating these Principles as common reference points in the wider field. To this end, the Forum has been useful in order to encourage the translation of theoretical principles into policies and institutional measures by policy-making actors and CSOs. Furthermore, during the 1st UN Forum in December 2012, the WG presented the survey conducted among UN Member States with the aim of better understanding the innovations and changes made in implementing the Guiding Principles. The survey was carried out through a business-like questionnaire and verifies possible next steps in addressing potential gaps in business and Human Rights, as well as sharing some general trends, on the basis of which jointly discuss the way forward with CSOs and stakeholders. The final results has been summarized in a Report by the UN Human Rights Council in June 2013 and will be considered for the development of the present work.

In this regard, the main International Organizations and their member States have had to deal with this topic, addressing several constraints, such as the implementation at national level of the grievance mechanisms and the compliance with relevant legal norms and principles. About the latter, the doctrine had not agreed yet about the legal sources to be considered as the core ones regarding business and Human Rights, especially because of the prevalence of non-binding instruments. However, the scholars agreed on the necessity to identify, apart from the Bill of Rights, other legal sources among
the ones adopted in the last decades by some International Organizations, such as the International Labour Organization (ILO) and the Organization of Economic Cooperation and Development (OECD), in order to extend the concerned legislation and improve the level of Human Rights protection. Moreover, States are also required to put in place all the possible mechanisms to ensure the access to remedies at national level and, at the same time, to facilitate the judicial cooperation at international level. All these issues are tightly connected with the so-called Ruggie’s Framework, that is the first example of a collection of Human Rights principles and norms related to business activities and directed both to enterprises and States.

As far as concerns the role of States in this regard, there are some good examples of how to approach this issue, especially in the Anglo-Saxon countries and in the Northern European ones. In these cases, the problems regarding the Human Rights protection in business sector have already been addressed and solved through the adoption of new legal instruments and the analysis of the possible future impacts of business activities on fundamental rights at domestic level. One of the objectives of this thesis is, indeed, to analyse these practices, by collecting data and documents in order to verify the existence of some best practices that could be implemented in other countries worldwide. In particular, in the present study will be compared the initiatives recently implemented by three European Union Member States, as provided by the last European Union Communication about Corporate Social Responsibility (hereinafter CSR) strategy. Given that, the thesis has been structured in four chapters: (i) the first one concerns the relevant legal framework related to Human Rights in general and in relation with business, by focusing in particular on the UN Framework, in addition to the study of the legal sources endorsed by other International Organizations; (ii) the second one analyses in depth the UNGPs, especially the two pillars concerning the role of States in this field; (iii) the third chapter, instead, shifts the point of view to the European Union action in this sector, collecting all the legal instruments implemented by the European Union since 2000 in relation with CSR and BHR; finally, (iv) the last one contains a global overview of recent States and
NGOs initiatives on BHR, the three selected case studies - United Kingdom, Spain and Italy - and the data gathered during the interview campaign conducted.

Through these four chapters will be demonstrated the developments in the last three years regarding the role played by States in: (a) implementing legally binding and no-binding instruments containing relevant provisions regarding the protection of Human Rights by violations committed in the business sector and the functioning of the related grievance mechanisms; (b) adapting their concerned action to the international and European legal initiatives on business and HR; (c) addressing the problem of State responsibility and complicity in corporate-related HR abuses; and, (d) raising the awareness of public institutions, enterprises, NGOs and other relevant stakeholders in this field.
CHAPTER 1

THE INTERNATIONAL RELEVANT LEGAL FRAMEWORK

1.1 The international and regional legal sources for the protection of Human Rights

The adoption in 1948 of the Universal Declaration of Human Rights by the UN General Assembly\(^1\) represented the first step in developing a common ground for the protection of fundamental rights. In fact, the provisions of the internationally recognized text of the Declaration are aimed at spreading worldwide the core values of HR and their relevance for all the aspects of human life. As already known, the Declaration has inspired in the following years a set of binding legal instruments reflecting the willingness of the International Community to address injustices and violations of the fundamental human freedoms, in order to achieve the universal enjoyment of Human Rights. The content of the Declaration could thus be defined as the cornerstone of the following treaties and customary law principles regarding HR, as well as the first globally attempt to recognize some core values as inalienable and equally applicable to all human beings. In the next paragraphs of this chapter will be introduced the main legal sources related to HR in general with a special focus on business and HR, starting from the Bill of Human Rights and some most recent legal instruments, such as the UN ‘Protect, Respect and Remedy’ Framework.

As far as concerns the Bill of Human Rights, it is composed by the Universal Declaration of Human Rights - already mentioned above - and the two International Covenants on Civil and Political Rights and on Economic, Social

\(^1\) UN General Assembly Resolution 217 A (III) of 10 December 1948.
and Cultural Rights, adopted in 1966\(^2\). The Universal Declaration is the result of the experience of the II World War and was elaborated in less than two years thanks to the commitment of all the UN member States of that time and of a Drafting Committee, composed of representatives from all over the world. It is interesting to remark that the Chairwoman of the Committee, Eleanor Roosevelt - widow of the US President F. D. Roosevelt - played a significant role in the adoption of the Declaration, thanks to her capacity to find a common ground, at the beginning of the Cold War era, among the different personalities involved. The Declaration consists of a preamble and 30 articles, setting forth the Human Rights and fundamental freedoms to which all human beings, everywhere in the world, are entitled, without any discrimination. The first three articles could be considered as the core ones, since they list the main fundamental freedoms that should be guaranteed to all people, such as the rights to life, freedom and security of the person, through the enforcement of the principles of equality and non-discrimination. The following articles (from Art. 4 to Art. 21) set out the main civil and political rights, such as the freedom of opinion and expression, the right to a nationality and to own property. The second part of the text regards the rights that everyone could enjoy as a «member of a society»: from article 22 to article 27, indeed, are listed the economic, social and cultural rights, such as the right to work and to education. The concluding articles, from 28 to 30, recognize the possibility for everybody to live in an international and social environment, where all the rights listed above should be fully realized, by stressing the responsibilities which an individual has to deal with.

In spite of its original denomination of *declaration* - and thus defined by the classical International Law as a non-binding source - it has been universally recognized as part of customary International Law. Furthermore, as already stressed, due to the great number of fundamental rights contained in this document, States are obliged to guarantee a set of freedoms, that will be deepened and more precisely defined in the International Covenants. In this

\(^2\) UN General Assembly Resolution 2200 A (XXI) of 16 December 1966.
sense the compulsory nature of these norms does not derive from the type of source where they are contained, but from the universal value of their content.

Such core principles, such as *universality, interdependence and indivisibility, equality and non-discrimination*, entail both rights and duties to all the actors involved and have been repeated in numerous of treaties, customary law, agreements and provisions at international, regional and national level. In particular, basing on the commitments expressed in the Universal Declaration, the two International Covenants on Civil and Political Rights and on Economic, Cultural and Social Rights, entered into force in 1976. They contain almost the same rights already enshrined in the Declaration, making them binding for all the States parties of the Covenants, due to their compulsory nature of international treaties. As recalled in General Comment No. 31 of the UN HR Committee\(^3\), the nature of the legal obligation imposed on States parties to the Covenants is reflected, on one side, in the common article 2 that provides State parties obligation towards rights-holders; on the other side, it exists an *erga omnes* obligation for all the UN Member States under the UN Charter to universally promote the protection of HR and fundamental freedoms. Nowadays, the State parties of both Covenants are almost all the States represented in the UN General Assembly\(^4\): this means that almost the entire International Community should abide by the commitments defined in the Covenants and in the Optional Protocols.

The first Optional Protocol to the International Covenant on Civil and Political Rights was adopted together with the approval of the Covenant in 1966, whilst the second one was approved in 1989, aiming at the abolition of the death penalty. The other Covenant has only an Optional Protocol, adopted in 2008 and entered into force in May 2013. The Preambles of both Covenants are identical and recall at the same time the States duty to promote HR and the individual responsibility to ensure HR protection, through the full enjoyment of all the civil and political as well as the economic, social and cultural rights, all

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\(^3\) CCPR/C/21/rev.1/Add.13 dated May 26\(^{th}\), 2004.

\(^4\) The State parties of the International Covenant on Civil and Political Rights are 167; the State parties of the International Covenant on Political Rights and on Economic, Cultural and Social Rights are 161 (source https://treaties.un.org)
over the world. Article 1, 3 and 5 are also almost the same in both Covenants: article 1 states the universal principle of self-determination and sets forth that all peoples are free to determine their political status and to contribute to their economic and social development. Article 3 re-affirms the principle of equality of women and men, whilst article 5 provides safeguard against the limitation of any HR and any misinterpretation of the Covenants’ content, by requiring to the States the commitment in abiding by the full enjoyment of all HR. The following articles exactly list all the rights, whilst the final article 28 provides for the establishment of a HR Committee responsible for supervising the implementation of the Covenants. Regarding the last article, the First Optional Protocol to the Covenant of Civil and Political Rights enables the HR Committee to receive communications from individuals claiming to be victims of alleged HR violations. If the communication is considered to be admissible by the Committee, it will be transmitted to the State party allegedly accused to be involved in HR violations. Within six months, the State party should present a written statement to the Committee, to explain the matter and the remedies provided, if any. Under the Second Optional Protocol to the Covenant of Civil and Political Rights, the Committee could also receive communications from individuals under the jurisdiction of States that have not abolished the death penalty.

Nearly all the international legal instruments on HR adopted within the UN system elaborate principles set out in the Universal Declaration, including the Preambles of both Covenants, that recognize the Universal Declaration role in enforcing the respect of fundamental freedoms. For more than 25 years, indeed, the Universal Declaration was considered only a «standard of achievement for all peoples and all nations», whilst only with the enter into force of the Covenants, States have recognized the legal, as well as the moral obligation to protect HR and promote their respect. Also in many legal sources adopted at regional level, it is possible to find out some references to the Universal Declaration, as for instance in the Preamble of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and of the Inter-American Convention on HR, and in article II of the African Charter.
As far as concerns these regional treaties, in chronological order, the first one was the European Convention on Human Rights and Freedoms, endorsed in 1950 by the Council of Europe and entered into force in 1953. Six years later was opened the European Court of Human Rights, which can rule on individual and State claims, alleging the violation of civil or political rights set out in the Convention. In more than 50 years, the Court has delivered about 16,000 judgements, mainly related to the breach of article 6 (right to a fair trial) or article 1 of the Protocol No.1 (protection of property). Regarding its competences, under article 34 of the ECHR, the European Court of Human Rights “may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation”, enabling all the European citizens and NGOs to file a suit regarding the protection of their fundamental rights.

Since 1959 the Member States of the Council of Europe have worked for implementing new protocols aimed at improving and strengthening their supervisory mechanism: the first and more important result was achieved in 1998 with the adoption of Protocol No.11, that provided the establishment of a unique structure, comprising the Court and the Commission of Human Rights. The second relevant reform was brought by the adoption of the Protocol No.14 in 2010, establishing a new admissibility criterion - named a “significant disadvantage” for the applicants - and by introducing a new judicial formation for the simplest cases. The last two Protocols adopted in 2013, No. 15 and 16, introduced - respectively - a reference to the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention’s Preamble, and allowed the Court to give advisory opinions on questions such as the Convention’s interpretation or the application of the fundamental freedoms defined in the Convention.

For more than 50 years, this was the unique European treaty concerning HR, until the adoption in 2000 of the European Union’s Charter of Fundamental Rights by the European Council, presently incorporated into the Lisbon Treaty and thus binding for all the European Member States since 2009. Accordingly, the regional objective of this Charter was to consolidate the value of the
fundamental rights applicable within the EU system, by reassuring that no new obligations will be entailed to States due to the approval of this document. In fact, the rights listed in the EU Charter are mainly traceable in the constitutional traditions, in the EU Convention on Human Rights and Freedoms and in the UN Universal Declaration, although lot of them have not been recognized yet as EU principles. In the classical view of International Law, there is a two-fold approach to the HR principles: on one hand, they imply a positive obligation for States to provide their citizens with the enjoyment of their economic and social rights, whilst, on the other hand, they require the negative obligation for States to abstain from acting against civil and political rights of their citizens. Instead, the idea that, in the Charter’s view there are no new duties for States, has allowed the adoption of the text, although the issue of enforceability in Courts of some positive obligations might arise. Moreover, some concerns about the possibility to directly invoke the Charter’s provisions (either rights or principles) are visible, by clearly defining which norms could be enforceable or not (Art. 52 (5)).

Following the EU example, also the Organization of the American States (OAS) and the African Union (AU) have adopted some years later, respectively, the Inter-American Convention on Human Rights and the African Charter on Human and Peoples’ Rights.

The Inter-American Convention, that entered into force in 1978, has strengthened the Inter-American existing system for the protection of HR by increasing the effectiveness of the HR Commission and by creating a Court, as well as by changing the legal nature of the instruments that provide the functioning of the Inter-American HR system. The Preamble of the Convention states that its purpose is «to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.» The first part of the

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3 Art. 52 (5) states: «The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.»

Convention regards States’ obligations to respect the fundamental freedoms recognized therein and lists the civil and political rights it protects. Concerning the economic, social and cultural rights the Convention only provides the commitment of States to cooperate through every legislative measures in order to achieve the full enjoyment of these rights. The second part of the Convention, finally, establishes the main means for the HR protection, namely the Inter-American Commission on HR and the Inter-American Court of HR. Under the Convention and in contrast to the European system for the protection of HR, the Inter-American Court of HR could not receive any claims by individuals or groups of individuals, but only by State Parties of the Convention or by the Inter-American Commission on HR. Individuals could lodge a complaint with the Inter-American Commission on HR that rule on the admissibility of the claim, referring it to the Court only if the State fails to abide by the recommendations given by the Commission or if it considers the case of particular interest. The Inter-American Court has a twofold mandate as judicatory and advisory body, providing judgements on alleged violations of the HR listed in the Convention or advisory opinions on the interpretation of the Convention, other treaties and domestic law. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) was adopted on November 16, 1999 by the OAS General Assembly and recognizes the tight interconnection between the two sets of rights. The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, instead, was approved by the OAS General Assembly in 1990, after the unsuccessful tentative to include any provision about death penalty in the Convention.

The African Charter on Human and Peoples’ Rights - also referred to as the Banjul Charter - has entered into force in 1986, being the last international legal instrument for the protection of HR adopted at regional level. As it is arguably understandable, the process that leads to the elaboration of this document has addressed several problems, such as the hostility of some African governments towards regional HR protection and the wrong perception of this kind of document as useless, due to the existing UN system for the
protection of HR. Notwithstanding, thanks to the endorsement by the OAU (Organization of African Unity, now African Union) Assembly of the African Charter, the main features characterizing the Charter could be pointed out: (i) the inclusion of the so-called third generation rights (Art. 22-24) since the title of the Charter that refers to peoples, and not only individuals, enlarging the traditional point of view of HR; (ii) the interdependence of all sets of HR through the coexistence of civil, political, economic, social and cultural rights in the same text; (iii) the implementation of rights by stating both rights and duties together; (iv) a great emphasis on the right to development, decolonization and racial discrimination. In addition, the African Union adopted in 2003 the Protocol on the Rights of Women in Africa, considering the provisions of articles 2 and 18 of the African Charter on Human and Peoples’ Rights that enshrines the principle of non-discrimination and the elimination of all forms of discrimination against women. Furthermore, the lack of compliance mechanisms of the original bodies for the enforcement of the Charter’s provisions - the African Commission on Human and Peoples’ Rights established in Art. 30-31 of the African Charter - has been overtaken by the Protocol on the Establishment of an African Court on Human and Peoples’ Rights. With this document, adopted in 1998 and entered into force in 2004, the AU Member States agreed on the creation of a fully-fledged judicial body with eleven judges, with the twofold mandate to determine cases brought before the Court by any State party, the African Commission and African Intergovernmental Organizations, and to provide advisory opinions upon the request of Member States, the AU itself and any of its organs. According to the Protocol (article 5) and to the Rules (article 33) also individuals from States that have accepted the Court’s jurisdiction and NGOs with the status of observer before the African Commission of HR could submit a complaint or an application to the Court. Nowadays, this Court has been merged with the African Court of Justice\(^7\) to create the African Court of Justice and HR, composed by sixteen judges with two main sections, general affairs and Human Rights.

All these regional instruments for the HR protection are thus relevant for understanding the innovative role of the UN action in the field of HR and business. The grievance mechanisms existing at regional level - especially the European one - have been considered as effective tools for addressing HR violations by individuals and NGOs, apart from State Parties. The possibility for private entities to file a suit before a regional Court of HR could be perceived as the starting point for giving access to judicial remedies for HR corporate alleged violations to individuals. On the other hand, the regional Conventions on HR do not provide Courts’ jurisdiction over private entities actions, thus preventing a judgement regarding the allegedly illegal activities committed by transnational enterprises and impacting on fundamental rights.

1.2 A step forward the protection of Human Rights in business sector: the UN ‘Respect, Protect and Remedy’ Framework and the UN Guiding Principles on Business and Human Rights (UNGPs)

Apart from the existing legal instruments at regional and international level described above, the International Community has increased its attention on the issue of HR and business in the last 10 years, through the mandate of the UN Special Representative «on the issue of human rights and transnational corporations and other business enterprises», prof. John Ruggie, and the creation of a related Working Group (WG). The Working Group was established by the UN HR Council with its Resolution 17/4 and it is composed by five independent experts⁸, selected on a balanced geographical basis and for a period of three years. The main tasks of the WG are to promote the Framework and the UNGPs’ dissemination around the world and the best practices on their implementation, to encourage direct visits to countries and support local and national tentative efforts in implementing these instruments. Furthermore, it is responsible for conducting a constructive dialogue with the UN HR Council, other UN Bodies and specialized Agencies, Governments,

⁸ The members of the Working Group, by 1 November 2011, are: Ms. Alexandra Guaqueta (Chair), Mr. Michael Addo, Ms. Margaret Jungk, Mr. Puvan Selvanathan and Mr. Pavel Sulyandziga.
enterprises, CSOs, indigenous peoples representatives and individuals. It is also in charge for organizing the Annual UN Forum on Business and HR - already held in Geneva in 2012 and 2013 - and for annually reporting to the HR Council and the General Assembly.

The work of the Special Representative has been developed in three phases, since its nomination in 2005. His first appointment was the identification of the existing standards and principles related to HR and business, a research that has continued for all the duration of his commitment. The documentation collected during this first phase, and now available online, contains a mapping of alleged HR violations by enterprises, a collection of emerging International HR Law standards, principles and practice and the impact of International Investment Law and Corporate Law on States’ and businesses’ HR policies. In 2007 the mandate of prof. Ruggie was renewed for one more year, marking the beginning of the second phase during which the UN HR Council invited him and his Working Group to submit recommendations and commentaries on the issue. With the aim of creating a focal point around which all the stakeholders involved could converge their actions and expectations, the Special Representative asked to the UN HR Council to promote the endorsement of the ‘Protect, Respect and Remedy’ Framework, realized thanks to the research work conducted since 2005. The Council unanimously welcomed the Framework in its Resolution 8/7, also extending the mandate until June 2011 - namely the third phase - in order to provide an operative tool for Framework’s implementation. All the recommendations provided by the Working Group and the Special Representative should take the form of Guiding Principles, by addressing all the players involved - such as Governments, business enterprises, individuals and CSOs - and by proceeding on the same research basis, already applied.

As far as concerns the ‘Protect, Respect and Remedy’ Framework, it is based on three pillars: (i) the State duty to protect against HR violations by third parties; (ii) the corporate responsibility to respect HR; (iii) the need of a greater access by victims to an adequate remedy. All the pillars are tightly interconnected and they should provide a system of remedial measures, effectively
accessible for all subjects involved. The Framework is the result of many months of public consultations with the relevant worldwide stakeholders (forty-seven international consultations by January 2011, 20 countries visited by the Special Representative and the Working Group), including local ones directly met by Prof. Ruggie and his teamwork. Beyond the endorsement by the UN HR Council, the Framework has also been implemented by a large number of Governments, business associations, enterprises, CSOs and individual investors. Moreover, other international organizations, such as ILO and OECD, have drawn upon by this document for updating or editing their existing legal instruments in the field of HR and business.

The Framework points out some legal duties and the related policies to be implemented by States regarding business and HR that are - as defined by J. Ruggie\(^9\) - «independent» tools that should be used irrespectively, even if the State does not comply with its commitments. Apart from the already existing principles, it establishes new mechanisms that will require additional development in the field of business and HR. As far as concerns the internal structure of the Framework, the **first pillar** - the State duty to protect - is the one that could be easily linked to the traditional HR Law view of States’ obligations. Indeed, these obligations are usually intended as the definition of «*respect, protect and fulfil*». The first category - respect - has to be interpreted as the duty of States to protect by HR abuses committed by third parties, namely private actors, but including businesses: it could be defined as the starting point of the Framework, in order to facilitate its discharge by States. This obligation in International Law derives from treaties and customary law and, as it is recalled in all the UN HR Treaties, it is based on a twofold concept: (i) it implies a negative obligation to refrain from breaching the fundamental rights (*non facere*); (ii) the State ensures the enjoyment of their rights, through the protection of right-holders by third parties abuses (*facere*).

It is also broadly known that this duty is a standard of conduct and for this reason a State should not be accused to be complicit or responsible for a State-

based business that commit HR violations, but if the State fails in preventing
these violations through an effective action or the business is a State Owned
Enterprise (SOE), it could be considered responsible of breaching its HR Law
obligation of adequately addressing HR abuses. Although there are no
provisions in any treaties requiring States to control extraterritorial activities of
their enterprises, there are some provisions recommended by treaty bodies, that
strongly invite States to take steps for preventing HR abuses committed abroad
by multinational corporations, especially if the State is directly involved in the
business, as investor, insurer and owner.

In his recent book ‘Just business’¹⁰, John Ruggie has identified four policy
clusters related to the first pillar and focused on preventive measures that
should be applied in response to HR abuses committed by businesses, whilst
punitive measures are contained in the third pillar. The first cluster is the
International Investment Agreements, including the Bilateral Investment
Treaties (BITs), that could protect foreign investors by possible host-State
violations. At the same time, they could lead to two problems for the host-
Governments: (i) the treaties are locked to the existing regulatory domestic
framework and the adoption of a new law could provoke the reaction of the
investor for a compensation or for the intervention of an arbitration body (ad
hoc panel) for solving the issue; (ii) a greater fragmentation of governmental
policies and agencies could complicate the process of attracting foreign
investments. The second cluster concerns corporate law provisions and security
regulations, that are legally distinct by HR law and principles and provides
how companies have to act. Even if in the last years some Governments have
required to corporations a CSR policy or reporting, in the majority of cases it
does not include - or just in a limited part - the HR issue. The third one is
related to the development of business operations in conflict-affected areas,
where the large number of HR violations cases occurred and where
multinational home-States usually play a great role. The last cluster, finally,
regards the domestic policy fragmentation that becomes more visible when

¹⁰ Ibidem
States participate in multilateral institutions, such as UN, WTO and WB, by supporting different kinds of policies in each international scenario.

As reported by J. Ruggie, some of the most powerful States have strongly reacted to the implementation of the Framework, especially regarding the first pillar’s content. In particular, the United Kingdom has questioned if the general obligation does exist, although accepting that the duty to protect is treaty-based. Moreover, the United States have had a negative reaction about the use of term jurisdiction referred to the territorial extent of the duty. At the end, all the actors involved recognized the State duty to protect as the core principle for the protection against business HR violations.

Regarding the second pillar, related to the business’s role in HR violations, the multinational corporations have to comply with both home and host-States legislations to obtain the license to operate, but it does not mean to be compliant with all the HR laws and principles, also because not all States are parties of all International HR Treaties or enforced them in the same way. In order to establish a standard for governing corporate conduct, three main points should be solved: (i) listing a limited number of rights to be protected; (ii) defining corporate duties; (iii) clarifying the difference between moral, social and legal duties.

(i) Regarding the relevant HR for businesses, it is generally agreed that all the internationally recognized HR should not be affected by corporate activities. Indeed, Ruggie considered the Bill of Rights, together with the ILO Declaration of Fundamental Principles and Rights at Work, as the fundamental HR sources universally accepted. Obviously, depending on the situation, a corporate business should consider also some standards, such as the ones related to the International Humanitarian Law or indigenous peoples’ rights. The core concept is, however, how to define the sphere of influence of business activity and the object of their responsibility. Regarding the first one, the doctrinal debate has led to conceive the corporate sphere of influence as functionally defined - namely the “spatial extension over
which companies project influence”¹¹ - as well as the national jurisdiction of a State. Ruggie does not agree at all with this definition, arguing that in this way it is easier to hold companies responsible for actions not linked to their business or to absolve them where they could prove their lack of influence for activities having an adverse impact on peoples and environment. Indeed, Ruggie prefers to delimit the scope of the corporate responsibility as “non-infringement on the rights of others”¹², such as the actual and possible negative impact that corporate activities may have on HR, also due to their relationship with third parties. When the Framework refers to multinational enterprises, it has to be understood as the entire corporate group, whatever it is organized, whilst third parties have to be intended as business partners, supply chain and other governmental or non-governmental entities linked to business. From these business relationships it could arise the concept of corporate complicity, that has already been spelt out in the “aiding and abetting” ideas, risen to the internationally recognized crimes’ level.

(ii) Starting by the assumption that corporate responsibility already exists as social norm, Ruggie has tried to provide a more precise definition of the corporate responsibility - intended as different from legal duties - to respect HR. In this sense, it was quite difficult to understand what is a social norm and how it could impact on the corporate social conduct, especially because a social norm does imply a sanction, only at social level. This kind of norm is contained in a number of non-binding legal instruments, such as the ILO Declaration or the OECD Guidelines for Multinational Enterprises and it is the ground for the corporate membership of the UN Global Compact Network. Furthermore, it has been increasingly inserted in national CSR Guidelines, endorsed by emerging and developed countries’ Governments. In respect to the possible consequences of the “enforcement” of these norms, although there is no a judicial mechanism aimed at socially sanctioning the breach of this principle,
some of the above mentioned non-binding sources have created non-judicial bodies, as for instance the OECD National Contact Point, that could receive a claim from individuals or group of individuals for alleged corporate HR violations. In conclusion, the Framework has tried to define the basic norm related to corporate responsibility for infringing HR Law, namely the prohibition of violating HR of others.

(iii) Aiming at solving the problem of identifying the peculiar characteristic of a norm, such as legal, social or moral one, prof. Ruggie has proposed to draw up corporate responsibility on functional basis, considering the extension of corporate influence over the sectors of its activity. In this sense, all the activities implying the presence of third parties - differently associated with the enterprise - or implementing by an affiliated company could be considered as relevant for HR violations. Regarding the concept of complicity, Ruggie has analysed its meaning from the legal and non-legal points of view: indeed, it exceeds the judicial implications for having been co-responsible for HR abuses (committed, for instance, by State officials or affiliated businesses), but it could imply the non-legal consequences of reputational damages and costs.

Finally, the most important feature of the second pillar, as stated by Prof. Ruggie, is the operative tool already existing or that should be implemented by businesses, in order to address HR adverse impact. This tool has been identified with the so-called Human Rights due diligence process, that is quite similar to the due diligence for preventing and mitigating other kind of risks, such as the ones coming from merger and acquisition. Due to its tight relationship with the sphere of fundamental rights, the HR due diligence should be conducted periodically over the project development, should include right-holders and should be not limited to calculate risks. To sum up, the Framework delineates the corporate responsibility to protect HR this way: (i) it exists independently of the State duty to protect; (ii) it is defined as non-infringement on the others’ rights; (iii) it consists of the International HR Law; (iv) it is composed by activities committed by corporate businesses or third parties; (v)
it does not imply legal requirements and even if it has provoked some critics from advocacy groups, in Ruggie’s view it was the unique reason for the acceptance by businesses and States of the link between corporate responsibility and International HR standards.

The last pillar, the third one, concerns the duty of State to punish and redress corporate related violations of HR, an action strongly related to the first pillar. At the same time, also businesses are responsible for establishing or participating in the effective implementation of grievance mechanisms, being them judicial and not-judicial. The existing domestic judicial tools do not suffice for addressing the impacts and for this reason a non-judicial body - like the OECD National Contact Point after the upgrade of the OECD Guidelines in 2011 and the inclusion of HR - could be utilized to solve conflicts between corporates and supply-chain partners. The most problematic aspect of the access to remedy pointed out by Ruggie and its Working Group, is the absence of grievance mechanism at operational level and its possible provision by the companies, through agreements with external stakeholders. Fortunately, all the involved actors, such as Governments, NGOs, HR associations and multinational enterprises have positively reacted to the endorsement of the UN ‘Protect, Respect and Remedy’ Framework.

1.3 The other relevant legal sources for the protection of Human Rights in business sector

Given the already analysed international legal binding treaties regarding HR, such as the UN Covenants - and the Universal Declaration, the most relevant non-binding legal instrument for HR protection universally recognized as *jus cogens* by International Law - it is necessary to take into consideration also other legal instruments considered as *soft law* by the International Community. Among the binding instruments, one could mention all the ILO Conventions related to the different sectors of labour rights, such as the inhuman labour conditions, women and child labour, trade unions, etc. In the next paragraphs
will be analysed the main *soft law* sources related to HR and business adopted by international organizations and possibly applied to corporate business.

1.3.1 The UN Global Compact

Within the array of the existing *soft law* sources related to business and HR, the UN Global Compact is a significant tool for businesses to address their negative impact on all the industrial sectors related to fundamental rights. The Ten Principles that compose the Global Compact are grounded on the Bill of Rights, the ILO’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the UN Convention Against Corruption. They regard Human Rights, labour, environment and corruption and have to be endorsed by the CEOs of the enterprise, in order to facilitate the management in elaborating and promoting internal sustainability policies and processes. The main objectives of these Ten Principles are to widespread the knowledge of the UN Global Compact and to better combine the universal power of the UN and the private sector’s engagement in this field. This framework, launched in 1999, has also received the support of the UN General Assembly\(^\text{13}\) and of some governmental forum, such as the G8, in 2011, by enhancing the business's role in the realization of some universally agreed actions, namely the Millennium Development Goals and the Post-2015 Development Agenda. Moreover, in the above mentioned Resolution, the General Assembly has recalled the importance of the Global Compact in promoting the gender perspective at global level. Finally, as far as concerns the internal governance of the Global Compact, it is designed taking into consideration the voluntary character of this initiative: for this reason, the governance framework, following the last revision dated November 2013, is composed of seven entities (Global Compact Leaders’ Summit, Local Networks, Annual Local Networks

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\(^{13}\) In its Resolution ‘Towards Global Partnership’ (A/RES/66/223) the UN General Assembly renewed the mandate of the UN Global Compact Office.
Forum, Global Compact Board, Global Compact Office, Global Compact Government Group). Whilst the Leaders’ Summit is a triennial meeting of all the members, including all the relevant stakeholders, the Local Networks are the executive bodies active in the territory. At present, there are more than 100 networks worldwide and they periodically meet also at regional and local level. Apart from implementing the Ten Principles and pursuing the related objectives, the Local Networks are self-governing and could thus better act in supporting companies and multinational enterprises in respecting the Principles and in creating a multi-stakeholders dialogue. The Global Compact Network Italy was founded in 2002 for giving support to the Italian companies for their better compliance with environmental, labour and social international standards. Since June 2013 it has become an independent legal entity - the Global Compact Network Italy Foundation - thanks to the engagement of 18 different actors, such as companies, universities, research centres and CSOs.

Apart from the UN Global Compact, there are two main instruments within the UN system that could be considered as relevant for the protection of HR in the business sector: the UN Convention on Sustainable Development and the Post-2015 Development Agenda. The UN Convention on Sustainable Development (UNCSD), namely the Rio+20 Conference held on June 20-22, 2012, has defined the “green economy” concept as one of the main tools for combating poverty and enhancing economic and social growth in emerging countries, by requiring a cooperative action among all the stakeholders in order to promote a CSR policy. Finally, the UN action for updating the UN Millennium Development Goals, the so-called Post-2015 Development Agenda, will include new Sustainable Development objectives.

1.3.2 The OECD Guidelines for Multinational Enterprises
The OECD Guidelines for Multinational Enterprises are the more effective recommendations adopted by Governments since 1976 and addressed to multinational corporations, SMEs and supply chain. They provide voluntary principles for a sustainable business conduct in disclosure, Human Rights, employment and industrial relations, environment, combating bribery and extortion, science and technology, competition and taxation areas. They are included in the OECD Declaration on International Investment and Multinational Enterprises and they were updated five times, but the most important review for our interest is the last one, following the endorsement of the UNGPs. All the thirty-four OECD members, plus eleven non-OECD States, are part of the Guidelines, whilst three accredited stakeholders and more than eighty CSOs also adhered to. All the State parties have the duty to widespread the Guidelines’ content and to monitor their implementation by national enterprises and State-based enterprises.

Regarding the 2011 update, the OECD willingness to integrate the HR issue into the existing provisions was promoted also by Ruggie, that in a Discussion Paper on June 2010 reaffirmed his support to the Guidelines’ revision. In particular, Prof. Ruggie proposed some elements to be included in the Guidelines, following the UN ‘Protect, Respect and Remedy’ Framework, already endorsed in 2008. According to Ruggie’s view about the role of States, the Guidelines should also provide an international obligation for States to fulfil their duty to protect HR by alleged business violations. At the same time, as the first pillar of the Ruggie’s Framework affirms the role of States in protecting HR with any possible tools, the Chapter I of the Guidelines underlines the need for a stronger commitment by the States in implementing the Guidelines’ objectives. Regarding Human Rights in general, Ruggie asked for the insertion of all the HR provisions contained in the second pillar of the Framework related to the business

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14 Namely Argentina, Brazil, Colombia, Costa Rica, Egypt, Latvia, Lithuania, Morocco, Peru, Romania, and Tunisia.
15 Business and Industry Advisory Committee (BIAC), the Trade Union Advisory Committee (TUAC) and OECD Watch.
role. Indeed, in the revised version of the Guidelines it has been added Chapter IV, that fully recalls the UN Framework, including both the States’ duty to protect and the corporate responsibility to respect. As it is evident in the introduction of the Chapter, it is directly drawn upon the UN Framework, by recalling that the corporate obligation to respect HR is valid wherever they operate and it is independent by the willingness or ability of States to protect HR. Moreover, even if only in the commentaries, the OECD Guidelines recognize the minimum HR standards of protection set out in the Bill of Rights and in the 1998 ILO Declaration of Principles and Rights at Work. Finally, the other UN legal instruments, such as the ones elaborated regarding the indigenous peoples rights, the individuals otherwise discriminated and the International Humanitarian Law, should be considered by multinational enterprises, especially when they are operating in difficult environments.

With the aim of improving at worldwide level a Business Responsible Conduct (BRC) by enterprises and of enhancing the non-OECD States commitment in this field, the OECD Investment Committee has promoted since 2013 a Global Forum on BRC (the second one will take place in Paris, France, in June 2014). Furthermore, the OECD has recognized its important role in promoting the UNGPs implementation and the need to work more closely with the UN Working Group on Business and HR, in order to ensure a rational and common interpretation of the GPs and to support the role of the OECD National Contact Points (NCPs) as a non-judicial grievance mechanism under the provisions of the third pillar.

1.3.3 The ILO Tripartite Declaration of Principles concerning multinational enterprises and social policy (MNE Declaration)

16 The role and the functioning of the NCPs will be further illustrated in Chapter 2.
The so-called ILO Multinational Enterprise (MNE) Declaration was the result of the need expressed during the 1960s and 1970s of a strong response to the activities of multinational enterprises that negatively impacted all the subjects involved, especially in the developing regions of the world. The ILO action aimed at identifying some international guidelines for governments, enterprises and workers led to the adoption in 1977 of the above mentioned Declaration. The content of this document regard, in particular, the labour and life conditions, the industrial relations, the employment and training and it applies to governments, employers and workers’ organizations. The purpose of the Declaration is to encourage a positive approach of the MNEs to social and economic development and to help them to minimize the impact of their activities especially over the individuals. For this reason, the ILO Governing Body has tried to reach a more broadly - *tripartite* - consensus on a fair conduct that should be put in place by the enterprises in respect to social policy and labour conditions. After the adoption of the ILO Convention of Principles and Rights at Work, the MNE Declaration was revised in 2000 and more recently in 2006 to insert some references to other ILO instruments. About the latter, the ILO Declaration includes all the recognized labour standards, contains an exhaustive list of labour rights and some of the most important concepts have been added in the OECD Guidelines, Chapter V on Employment and Industrial Relations. Although it does not give a precise definition of multinational enterprises, it addresses also to their parent companies or local entities, without any regard to the form of ownership. Moreover, it applies to national companies, specifying that «the principles laid down in this Declaration do not aim at introducing or maintaining inequalities of treatment between multinational and national enterprises.»\(^\text{17}\) Finally, as far as concerns the principles laid down in this legal instrument regarding HR, MNEs are required to respect national and international HR principles and standards, such as

\(^{17}\) ILO MNE Declaration, General Policies, par. 11.
the UN Bill of Rights and the ILO relevant Conventions\(^{18}\), and to consult with national governments and workers’ organizations in order to adapt their actions to domestic development policies. Finally, States must comply with their obligations deriving from the international Conventions they have ratified, whilst «in countries in which the Conventions and Recommendations cited in this paragraph are not complied with, all parties should refer to them for guidance in their social policy.»\(^{19}\) Nowadays, the MNEs and States’ commitment in implementing and respecting this Declaration might be considered as an operative tool for attracting foreign direct investments and for enhancing positive social and labour outcomes of their business activities.

1.3.4 The Extractive Industry Transparency Initiative (EITI) and the ISO 26000

In the wide range of the existing instruments applicable to the protection of HR by the business sector, it should be taken into consideration a recent initiative concerning the extractive industrial sector, also recalled in the Italian National Action Plan 2012-2014 on Corporate Social Responsibility (March 2013). The EITI is a global coalition formed by governments, enterprises and CSOs aimed at better managing the revenues from natural resources exploitation. During their first conference in 2003 they adopted the so-called EITI Principles, twelve principles that affirm the necessity of a sustainable action of national and private institutions in order to protect natural resources and to ensure benefits deriving from them to all citizens. The core mission of the twenty-five compliant countries\(^{20}\) - plus the sixteen candidate

\(^{18}\) ILO Conventions Nos. 29, 87, 98, 100, 105, 111, 122, 138 and 182.

\(^{19}\) ILO MNE Declaration, General Policies, par. 9.

ones\textsuperscript{21} - is to comply with high standards of transparency and accountability through a full disclosure of all the governments and corporate information about the extractive activities related to all natural resources, such as oil and gas, metals and minerals. In 2013 at the Sidney Conference more than 1000 representatives of governments, multinational companies and CSOs, after a two years of open consultation, revised and updated the existing EITI Standards, introducing some news, among which: (i) the definition of their own objectives of each national multi-stakeholders group in the ‘EITI Work Plan’, including the means to be implemented to achieve the goals and the plan to realise them; (ii) news disclosure requirements, for instance for State Owned Enterprises; (iii) the production of an annual activity report not limited to the compliant countries, but extended to all the implementing ones; (iv) the inclusion in the second part of the EITI Standards of seven EITI Requirements, which include the provisions of the 2011 EITI Rules\textsuperscript{22} (now replaced by the EITI Standards).

The ISO 26000 is an international unified standard launched in 2010 by the International Organization for Standardization thanks to a five-years commitment of numerous stakeholders (governments, companies, labour and consumers’ organizations, NGOs) in the field of social responsibility. Differently from other well-known ISO Standards it could not be certificated, because it was intended only as a guidance for identifying an ethical approach to business activities. There are some documents elaborated by the ISO 26000 Working Group, composed of more than five hundred international experts, that provide support for the ISO implementation by its users through the identification of social responsibility good practices and the engagement of the core subjects in the organizational governance.

\textsuperscript{21} EITI Candidate Countries: Afghanistan, Chad, Guatemala, Guinea, Honduras, Indonesia, Sao Tomé and Príncipe, Senegal, Solomon Islands, Tajikistan, The Philippines, Trinidad and Tobago, Ukraine.

\textsuperscript{22} The EITI Rules - that includes the EITI Principles, Criteria, the EITI Requirements, the EITI Articles of Association, the EITI Validation Guide and Policy Notes issued by the EITI Secretariat - have been replaced by the EITI Standards.
2.1 An introduction to the UN Guiding Principles: the need of a focal point

The way towards the endorsement by the UN Human Rights Council of the UNGPs passed through the joint commitment of the UN Working Group, chaired by Dr. Alexandra Guáqueta, and the UN Secretary-General Special Representative Prof. Ruggie, as demonstrated by the discussion during the 1st Annual Forum on Business and Human Rights, held in Geneva in December 2012. Thanks to the results of the first year and half after the endorsement of the GPs, it has been possible to lay out the global trends in implementing the Principles, in particular relating to the Ruggie’s mandate and the efforts done by the Working Group’s members in this sense.

Before to analyse in depth the content of the Guiding Principles, following the method used by John Ruggie in his recent book, the paragraph will concentrate on the expected outcomes of the UN system efforts in this field. In particular, it should take into consideration the Working Group initiatives aimed at monitoring the status of the UNGPs implementation by States and corporations. As stated by Dr. Guáqueta in her opening speech at the 1st UN Annual Forum on Business and Human Rights, the main objectives of the Forum were to report on the level of accessible information and the repository of data - which have been one of the goals of the first phase of the Ruggie’s mandate - to point out few general implementation trends and to work on the way forward. Moreover, during the Forum were presented the results of the two pilot surveys conducted by the Working Group on States and corporations’
actions and that could be useful, especially the one sent to States, for the objective of this research. Regarding the first objective, it is still needed a more transparent and viable access to available information, whilst about the general trends that could be pointed out, it is more useful to firstly analyse the common tendency before to focus on practical cases.

As far as concerns the questionnaires sent to the UN Member States, the Working Group has submitted a Report to the UN HR Council23, summarizing the results of this pilot survey, of which the expected outcomes were related to the elaboration of a methodology for the implementation of the UNGPs and of an annual tool for monitoring the development of this process and reporting the updates to the UN Annual Forum on BHR and, finally, to raise awareness among businesses and States about the UNGPs.

This pilot survey was preceded by a first questionnaire sent to States in 2006 and 200724 by the Office of the High Commissioner for Human Rights, before the endorsement of the Framework and the following GPs. Whilst the first survey was aimed at identifying the State tools for addressing corporate-related HR violations and at defining the State role in CSR policy25, the mandate of the new one is mainly concerned the identification of new trend and innovation in UNGPs’ implementation and the promotion of communication and reporting initiatives by States. The questionnaire was sent to all the one hundred and ninety-three UN Member States, but only twenty-four States have replied and a lot of them not to all the questions. The questionnaire is divided in four sections and it is complemented by an interviews campaign with Government representatives and some examples of a good implementation process presented to the UN Forum. The four sections are related to: (i) general information; (ii) State trends in some focus areas; (iii) five subsections related to (a) general guidance, (b) laws and regulation, (c) policy coherence of State

24 Only 29 States replied in 2009 to the first survey on business and HR: Bahrain, Belgium, Bosnia and Herzegovina, Canada, Chile, Colombia, Croatia, Cyprus, Ecuador, Finland, France, Germany, Guatemala, Honduras, Italy, Japan, Jordan, Lebanon, Mexico, Netherlands, Poland, Portugal, Romania, Rwanda, Spain, Sweden, Switzerland, Tunisia and the UK.
Agencies, (d) integration in investment and trade areas, (e) access to remedy; (iv) recommendations and comments to the Working Group. The questionnaire contains different types of questions, such as multiple choices, with a rating or score (e.g. from low to high) or simply with Yes and No answers. Due to the low number of States that have replied to the questionnaire\textsuperscript{26}, it is very difficult to identify common trends or best practice, but it is evident that some States have taken advantage from this survey for improving their implementation process.

Regarding the key focus areas on which the policy makers are particularly committed, it should be underlined that the reasons for this interest could be several, such as new investment trends, problem arisen in a specific period of time, economic and financial priorities. The following results helped to point out the most relevant aspects considered by the Governmental Authorities, but are not aimed at ranking them:

- 21 States indicated as focus areas gender issues, equal opportunities and discrimination at the workplace; 16 States indicated migrant workers and freedom of association; 15 States reported as core areas: child labour, environmental pollution, impact of vulnerable groups, challenges associated to conflicts, piracy or criminal activity; 13 States pointed out the limited access to water or raise food price, whilst 11 States reported land acquisition, displacement and resettlement, together with CSOs consultation and involvement.

- Regarding the industrial sectors most affected, 12 States indicated oil and gas, consumer products and retail, food and beverage; 11 States indicated manufacturing, infrastructure, utilities and transport; 10 States reported mining, financial services and

\textsuperscript{26} Some of the States have not answered all the questions, only a few number of States replied to the complete questionnaire, others have considered it as too long or useless, whilst others reported some progress in their ongoing UNGPs implementation process. In total, 24 States answered the pilot survey: Australia, Bahrain, Chile, Colombia, Denmark, Dominican Republic, Finland, France, Greece, Guatemala, Italy, Japan, Kazakhstan, Kyrgyz Republic, Latvia, Mauritius, Mexico, Norway, Portugal, Qatar, Romania, Russian Federation, Slovenia, Sri Lanka, Sweden, Switzerland, United States and Yemen. Two States have provided relevant information in form of a letter.
ITC; finally, 2 States listed private security providers or contractors.

On the other hand, the corporate survey was elaborated in collaboration with the Global Business Initiative on HR, the International Chamber of Commerce, the International Organization of Employers and the Corporations and HR Project of the University of Denver. The questionnaire was submitted to one hundred and seventeen individuals of the business sector over an eight-week period, involving enterprises from all the sectors, size, location and ownership: 22 per cent are from extractive sector, 10 per cent from utilities, energy and infrastructure sector; 53 per cent of firms are based in the EU (in eleven different Countries), 15 per cent in North America, 16 per cent in Latin America and the Caribbean (in 6 countries), 6 per cent in Asia-Pacific region and 5 per cent in the Middle East; 21 per cent are large companies (employing over 100,000 people), 23 per cent employed between 30,000 and 100,000 people, 25 per cent between 5,000 and 30,000 individuals, 12 per cent between 1,000 and 5,000 workers and 16 per cent are of small-size (less than 1,000 people); 10 per cent are SOEs, whilst the large majority (58 per cent) are privately owned companies and 32 per cent have other forms of ownership.

The pilot corporate survey was composed of a variety of questions, similar to the State questionnaire and it is divided in three main sections: (i) general information on the company and the respondent; (ii) business current approach and practices in the BHR field; (iii) operational challenges for business.

The main findings outlined by the survey are in line with the expected ones, giving the opportunity to point out the general corporate trends in relation to the BHR and the challenges faced by businesses. To sum up, half of the respondents were involved in the UN Special Representative’s agenda, especially the biggest ones, 96 per cent of the companies had heard of the UNGPs and 86 per cent consider to be involved in the future in the ongoing UN BHR agenda. About the training initiatives aimed at arising the employees’ awareness on HR, the majority of the company (45 per cent) has agreed to organize internal training sessions on BHR, although the main constraints regard the access to financial resources, the time needed to attend the sessions
and the lack of best practices. Regarding the company’s policy commitment, nearly all the respondents (96 per cent) are engaged in volunteering and philanthropy initiatives, whilst 83 per cent reported the existence of a public company commitment to respect HR and 74 per cent have a policy statement to respect HR. The majority of the firms surveyed refers to the most common international HR standards, such as the UN Universal Declaration and the Covenants, the UN Global Compact, the ILO Core Conventions, the OECD Guidelines for Multinational Enterprises and the UNGPs. Furthermore, about the impact of company activities and the perception of the possible negative consequences on local communities and individuals, 51 per cent disagreed on the company awareness of its negative social impact, although they usually engage external HR experts (66 per cent strongly agreed) and they take into great consideration the most vulnerable groups and individuals (47 per cent agreed). The most frequently selected problems in the impact assessment process are related to the difficult identification of the best methodology to be applied to mitigate the negative impact and the lack of an expert group or committee specialized in addressing these issues. Finally, regarding the access to remedy, 67 per cent of the respondents are updating their existing grievance mechanisms to adapt them to the UNGPs criteria, whilst 42 per cent provides for remediation when caused HR harms.

In conclusion, on the one hand the State survey proved the initial commitment of a number of Governments just one year and half after the endorsement of the UNGPs for their implementation, marking the steps forward needed to continue the process, such as the due diligence requirements that will be analysed through the case studies including in the last chapter. On the other hand, the corporate survey suggested that the companies are improving their level of engagement in the BHR field, through the inclusion of HR in their policy commitments and in their impact assessment process.

As already mentioned, the UN Annual Forum was a great occasion for Working Group and all the stakeholders involved to compare and exchange ideas and concerns about business and HR debate, thanks to the large variety of participants, such as specialized UN Agencies (including World Bank and
International Finance Corporation), inter-governmental organizations (including the European Union, the OECD), global governance institutions and regional public finance institutions. Furthermore, another key indicator of the relevance of the UN Forum is the amount of requests coming from the participants, as in total one hundred and twenty requests to support awareness-raising and dissemination initiatives, multi-stakeholders engagement and training. Other interesting issues that were underlined during the 1st UN Forum were the most affected industrial sectors and the challenges faced by multinational corporations and States in the implementation process. Regarding the first point, the sector of greatest interest was the extractive one, because of the 38 per cent of the eighty-one lawsuit cases surveyed by the Business and Human Rights Resource Centre related to mining and oil and gas companies, whilst the second sector - the private security - was counted only for 7 per cent.

As stated several times, the core mission of the UNGPs is to be an authoritative focal point in order to avoid law fragmentation and to promote the creation of a common normative tool to be utilized by the majority of stakeholders. For instance, during the last two years, a lot of initiatives have been implemented, based on the GPs by different international and national institutions, among the others, the UNCTAD (UN Conference on Trade and Development) Investment Policy Framework for Sustainable Development and the CAO IFC and MIGA grievance mechanism Guidelines, based on the effectiveness criteria developed by the UNGPs.

2.2 The internal organization of the UN Guiding Principles: the three pillars

The UN Guiding Principles for the implementation of the ‘Protect, Respect and Remedy’ Framework have been perceived as the step forward in the realization of the Framework, especially because they contain the practical provisions

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27 11 per cent of these requests came from business, 21 per cent from CSOs, 18 per cent from International Organizations, 13 per cent from States and 14 per cent from other stakeholders.
28 The Business and Human Rights Resource Centre is an information hub, financed by the Swiss Department of Foreign Affairs, related to the activity of the UN Special Representative J. Ruggie and the Working Group on Business and Human Rights. It also contains corporate submissions related to alleged HR violations and an archive of all the worldwide cases concerned.
applicable by States and corporations. In fact, the positive reactions to the Framework, first of all by the UN Human Rights Council and thus by States, companies and CSOs, have underlined the necessity to go forward for the elaboration of a common platform for enacting all the provisions contained in the Framework. In particular, on one side, the Framework has allowed States to act more deeply in closing the governance gaps existing about their commitment in the business and HR field, and, on the other side, it has set out the key corporate responsibilities for negatively impacting HR. For these reasons, the UN HR Council extended the Ruggie’s mandate until 2011, requiring a concrete guidance for Governments and companies in the Business and Human Rights (BHR) field.

In spite of the critics coming from a part of the International Law scholars regarding the lack of a legal liability scheme in the UNGPs, they were endorsed by the UN HR Council in its Resolution 17/4 of 16 June 2011, together with the final Report submitted by Prof. Ruggie to the Council (A/HRC/17/31).

As already mentioned, the GPs are composed of the three so-called pillars, following the internal structure of the Framework and preceded by a General Principles section. About the latter, it recalls the subjects addressed by the Principles, namely all the UN States Parties and the enterprises, independently from their size, location, sector and ownership. Each pillar is divided into two internal sections: Section A regarding the Foundational Principles and Section B on the Operational Principles, whilst each principle is followed by a commentary. In the following part of this paragraph will be analysed the more relevant principles of each pillar, in order to provide an exhaustive examination of the content.

The first pillar - reaffirming the State duty to protect HR - contains the provisions for general and particular types of situations occurring to States, laying out (i) the regulatory and policy measures; (ii) a better national and international alignment at institutional level; and (iii) a due diligence policy required by States to companies. Section A contains the first two principles, pointing out the States duty meaning and content.
**Principle 1**: States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

Differently from the remedial measures requested for in the third pillar, this first principle requires States to apply preventive measures in order to promote the rule of law and to improve their control over extraterritorial activities of businesses located in their jurisdiction. Both these actions derive from the International HR Law obligation for States to «respect, protect and fulfil» HR of all the individuals in their territory. In this sense, the lack of control over violations committed abroad by national enterprises could cause States’ breach of their international HR duty, if the responsibility for such abuses may be attributed to them.

**Principle 2**: States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

As pointed out by the Ruggie’s 2010 Report\(^2\), this principle provides the extent of the States control over abroad corporate activities beyond the States obligations deriving from International HR Law. In fact, States should adopt domestic measures with extraterritorial implications - for example regarding the oversea investments - together with the participation in multilateral initiatives - such as the OECD Guidelines for Multinational Enterprises - aimed at addressing HR risks where they might incur.

**GENERAL STATE REGULATORY AND POLICY FUNCTIONS**

**Principle 3**

In meeting their duty to protect, States should:

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(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

This first principle of the Section B requests to States a number of actions, in particular: (a) to prevent to fail in applying the existing laws regulating BHR and to monitor their correct enforcement; (b) to implement regulations in order to correct the lack of provisions regarding BHR in some sectors (e.g. labour law, anti-bribery law, etc.), to promote an higher policy coherence (as requested by GPs number 8 and 9) and to especially review corporate and security laws; (c) to elaborate a HR Guidance for multinational enterprises containing expected outcomes, best practices and the methodology for appropriate diligence policies; (d) to establish financial and non-financial reporting initiatives and requirements, in order to lay out corporate informal policies and public reporting.

About the third point, the commentary points out the role of the National HR Institutions (NHRIs) complaint with the Paris Principles in collaborating with States for better aligning their domestic regulations and policies with their International HR Law obligations and in improving their relationship in this matter with companies and CSOs.

THE STATE-BUSINESS NEXUS

Principle 4: States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from the State agencies,

30 The Paris Principles are a set of international standards which frame and guide the work of National Human Rights Institutions (NHRIs). They were drafted at an international NHRIs workshop in Paris in 1991 and were adopted by the United Nations General Assembly in 1993.
such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

This principle introduces the State-owned enterprises (SOEs) issue, strictly linking alleged HR violations committed by SOEs to the breach of States obligations under International HR Law. Furthermore, another actor should be taken into consideration in relation to the State’s participation in business and financial activities, namely the Export Credit Agencies (ECAs): although they are not directly involved in HR abuses, they could be considered as complicit in any harms done by companies, causing legal problems to home-States. For this reason, also a diligence policy for ECAs is required.

**Principle 5**: States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

This principle regards the privatization process that could be put in place by States with a number of services providers. In this case, States are however responsible for alleged HR abuses committed by privatized entities and they thus need to oversee independent monitoring and accountability mechanisms implemented by these actors.

**Principle 6**: States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

Apart from the control exercised by States over SOEs, ECAs and privatized entities, the GPs require also an oversight of the financial transactions concluded between a State and a company, in order to avoid the breach of National and International Laws.
**Principle 7** regards the States’ role in supporting business respect for HR in conflict-affected areas, an issue that has been analysed also by the Report on BHR in Conflict Regions\(^\text{31}\).

**ENSURING POLICY COHERENCE**

**Principle 8**: States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

This principle focuses on the need of States’ policy coherence at domestic level through both vertical and horizontal actions: the vertical one will consist in the implementation of laws and policies related to International HR Law; the horizontal one will support local and central governmental departments in acting compatibly with States obligations in HR field.

**Principle 9**: States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

Beside the governmental support to the local bodies, the GPs also require to adopt a complaint approach to investment treaties by States, in particular to BITs. In conclusion, about economic or financial agreements, indeed, States should include clauses providing their regulatory commitment to protect both HR and investors. Furthermore, host-States do not have to sign any investment contract that could limit their capacity to adopt laws in favour of HR, under the possibility to be sued because of altering the original financial agreement.

**Principle 10**: States when acting as members of multilateral institutions that deal with business-related issues, should:

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(a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;

(b) Encourage those institutions, within their respective mandates and capacities to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;

(c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

The last principle of the first pillar regards the role of States in multilateral institutions, in particular about the opportunity to adopt collective actions to increase States’ performance in HR through a cooperative action with other States, International Organizations and stakeholders. Finally, States are requested to promote the dissemination of the UNGPs as a common reference point for all the relevant players.

Although the present work is not focused on the corporate responsibility to respect HR, the second pillar has to be considered and analysed as well as the others, even because fourteen of the thirty-one GPs regard corporate responsibility. Apart from Section A - Foundational Principles, the pillar is divided in three main parts: (i) policy commitment, (ii) HR due diligence process and (iii) enabling remedy for any adverse HR impacts (GP No. 15). The first part (GP No.16) enlightens the policy commitment necessary within a company that should include corporate expectations, it should be approved by the CEO and elaborated with internal and external consultants/experts. Finally, it should be sent to all parties involved and it should be incorporated in operational procedures. The second section (GPs No. 17-21) analyses and explains the available tool for addressing HR, namely the due diligence process. In particular, GP No. 17 clarifies the main parameters of this process for the elaboration of a due diligence policy: (i) it should be included in company’s risk management, considering both material and right-holders risks;
(ii) it should vary basing on company size, sector of activity and level of HR violations risk; (iii) it should be ongoing. Principles 18 to 21 elaborate the relevant components of the process, such as the HR impact assessment; the effective integration into internal functions through appropriate actions; the effectiveness of the response; the prevention and mitigation measures that should be communicated through formal or informal reports for addressing HR potential impact or for remedying already occurred damages. In general, the due diligence process should apply to supply chain, Joint Venture partners and security forces and should be implemented by multinational enterprises in the areas at major risk, whilst small and medium enterprises can apply only an informal due diligence. As stated by GP No. 19, (b), (ii), in case of the enterprise has not directly caused the damage, it could use whatever leverage to prevent, mitigate the impact or terminate the relationship with the harmful entity. Finally, the last part (GP No. 22) addresses the case that, although a company has taken all the possible measures to prevent HR impacts and to implement a correct due diligence process, it may cause or contribute to HR violations and thus it should provide effective remedies, with the final aim to mitigate most severe impacts, in terms of scope, magnitude and character. In order to achieve this final objective, the GPs ask for a wider disclosure of information about prevention and mitigation methods, together with a formal reporting for the most probable sectors or operations impacted.

The State duty to protect laid down in the first pillar should become meaningless if the effective access to remedy has not been guaranteed by States. For this reason, Prof. Ruggie decided to include in the third pillar both the judicial and non-judicial grievance mechanisms, State and non-State based, together with the criteria of effectiveness required for these bodies. In his view, all these mechanisms should be the basis for an ideal structure of a wider remedy system for addressing corporate-related HR abuses. Also the last pillar has the same internal organization of the first two ones: GP No. 25 contains the Foundational Principle (Section A), whilst GPs No. 26-31 are related to the Functional Principles (Section B).
Principle 25: As a part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

Recalling the State duty to protect the first pillar, this Principle refers to two different aspects of the obligation, procedural and substantial. As far as concerns the procedural feature, it implies impartial procedures and the lack of corruption or political and social pressure; on the other hand, the substantial characteristic is based on a range of different substantial forms, such as compensation (financial and non-financial), apologies, restitution, rehabilitation or prevention of harm (injunctions or guarantees of non-repetition). Principle No. 25 also provides a definition of grievance mechanisms, comprising all the judicial and non-judicial ones, State-based and non-State based and with a routinized structure. Regarding the State-based grievance mechanisms, they have to be administrated by a judicial branch of the State (administrative, civil or criminal), have a statutory or constitutional basis and have to ensure the participation or the representation through an intermediary of the affected people. Among this kind of mechanism, it is possible to point out: the National Human Rights Institutions, the OECD National Contact Points, Ombudsmen, national Courts and labour tribunals. In this context, the role of States is to facilitate the knowledge and the public awareness of these bodies, as well as to create the ground for a wider system of remedy for corporate-related HR violations, as recalled by Prof. Ruggie.

STATE-BASED JUDICIAL MECHANISMS

Principle 26: States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

The above Principle mainly requests to not provide barriers to prevent the access to remedy and to ensure the functioning of the mechanisms. In the
Commentary to the Principle there has been provided a list of legal, practical and procedural barriers, already identified in the Framework. Although the list is not exhaustive because of the difficult identification of all the barriers arisen and the fundamental differences between each domestic jurisdiction, among the legal obstacles is possible to single out: (i) the avoidance of legal accountability of members of a corporate group thanks to civil or criminal laws’ facilities; (ii) the case of deny by host and home States of judicial access for claimants; (iii) unbalanced level of access to remedy for the majority of people and the members of vulnerable groups. The practical and procedural barriers, instead, refer to the inequality between the financial resources of the claimants and the respondents, creating a great discrimination for the access to remedial procedures and outcomes, especially for vulnerable groups, such as: (i) the high costs of proceedings; (ii) the lack of legal representation or difficulties in finding it; (iii) no class actions or other collective initiatives provided; (iv) State prosecutors have no adequate knowledge and expertise on business and HR.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

*Principle 27*: States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

Differently from the judicial mechanisms, the administrative, legislative or other non-judicial ones play the role to complete or supplement the judicial bodies, when the latter are not required or available. Moreover, following the criteria provided by in GP No. 31, among the possible provisions of remedy are: mediation, adjudicative and rights-compatible processes. Also in this field, it is interesting to analyse the role of the National HR Institutions, that could operate as promoters of the national non-judicial grievance remedies. As for the previous Guiding Principles, also vulnerable and marginalized groups’ rights should be taken into consideration.
NON-STATE BASED GRIEVANCE MECHANISMS

**Principle 28:** States should consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms.

Within the definition of “non-State based grievance mechanisms” are compromised the regional and international grievance bodies, dealing with alleged violations committed by States. These remedies are administrated by corporations and/or by stakeholders, business/industrial associations or multi-stakeholders groups.

**Principle 29:** To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

Principle No. 29 refers to business role in this field and on their level of participation in establishing and promoting this kind of mechanisms, the so-called operational level mechanisms. They can imply the external recourse to a mediation body or an intermediary expert and they fulfil two key functions: (i) the identification of adverse HR impact as part of enterprise’s due diligence; (ii) give the possibility to enterprises to directly and immediately address negative impact. Moreover, they have to comply with the criteria of GP No. 31 through different means and based on size, sector and other parameters, and they work as a component to the State-based mechanisms and do not have to be used to substitute other subjects or entities for solving disputes, such as Trade Unions for labour-related problems.

**Principle 30:** Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanism are available.

Given the increasing number of performance standards or code of conduct endorsed by relevant stakeholders, these should include provisions related to
the availability of grievance mechanisms by the affected subjects, both at individual or plural level.

**EFFECTIVENESS CRITERIA FOR NON-JUDICIAL GRIEVANCE MECHANISMS**

**Principle 31:** In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State bases, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanisms and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

The above criteria are a benchmark for assessing and defining the functioning of a non-judicial grievance mechanism, in order to avoid the sense of
disrespect and distrust for ineffective remedies. The first seven criteria apply to State and non-State based mechanisms, whilst the last one applies to operational-level mechanisms.

To sum up, a grievance mechanism should:

(a) ensure a great level of accountability to all parties, in order to create a relationship based on trust;
(b) avoid the presence of barriers or lack of awareness of its functioning;
(c) disclose information to public opinion about its procedures;
(d) provide the same level of access to information for both enterprises and affected stakeholders;
(e) periodically communicate with both parties in order to update them;
(f) elaborate procedural outcomes compliant with International HR Law;
(g) analyse causes and frequency of cases in order to prevent future harm.

As far as concerns the operational-level mechanisms, the main point is the creation of dialogue between both parties in order to achieve an agreed solution between the company and the claimants. Only if an adjudication is needed, the case should be brought to a third-party mechanism.

Although the Guiding Principles do not provide new International Law obligations, they constitute a high-level legal and normative platform aimed at encompassing not only governments and individuals, but also companies in addressing corporate-related HR violations. If the Framework has defined what should be done in the field of business and HR, the GPs have clarified how to achieve the expected results, both at governmental and corporate level, namely a normative action for the protection of citizens by business-related HR abuses together with the guarantee of the access to judicial remedies and the due diligence policy implemented by enterprises. This concept goes beyond the doctrinal view of mandatory-vs-voluntary instruments, also thanks to the role played by international legal sources in including provisions based on or
related to the UNGPs, after their endorsement by the UN HR Council\textsuperscript{32}. Furthermore, the GPs have contributed to more level the playing field among all the actors involved, such as State, companies, CSOs and individuals. This has been possible through the creation of a common standard related to BHR, on one hand for companies and their action in this regard, and, on the other side, for affected individuals and communities regarding the available tools for an effective access to remedy.

2.3 The judicial and non-judicial existing mechanisms: a focus on the OECD National Contact Points

In the overall view of the existing judicial and non-judicial mechanisms, it was decided to focus the research on the recent emergence of non-judicial grievance bodies, provided by a number of international organizations, such as the IFC Ombudsman (CAO) and the OECD National Contact Points (NCPs). Especially regarding the latter, they could be considered as a relevant and interesting example of a functioning mechanism, easily accessible for individuals and communities and that should solve or contribute to solve business-related disputes. Indeed, this paragraph is aimed at analysing the internal structure and the activity of the NCPs, in particular of the Italian one, thus focusing on some cases already adjudicated.

As provided by the OECD Guidelines for Multinational Enterprises, the adhering States have to comply with additional obligations, together with the actions required to companies and other stakeholders for implementing the Guidelines. One of the main request regards the setting up of a National Contact Point, that is responsible for promoting the adhesion to the Guidelines, maintaining relations with all the other relevant actors (NGOs, business associations, trade unions, workers’ organizations, etc.), handling enquiries and collaborating for the solution of the disputes brought before the NCP. As far as concerns the internal organization of the NCP, each State can decide how to

\textsuperscript{32} As already stated in the first chapter, par. 1.3, some provisions about HR and business have been included in the updated version of some legal binding instruments, such as the 2011 version of the OECD Guidelines for Multinational Enterprises.
structure it, as well as how to arrange effective measures for addressing the instances, especially for alleged non-observance of the Guidelines’ provisions.

Regarding the specific instances that could be brought before the NCPs, in the OECD Guidelines have been pointed out the general procedures that should be applied. The NCPs role regards the implementation of a discussion and assistance platform for stakeholders in an impartial and equitable manner and in compliance with the OECD Guidelines principles and standards. Given that the NCPs are not judicial bodies and they could not adjudicate a case on legal basis, they must operate as diplomatic organisms for solving disputes, providing good offices and consensual or non-adversarial procedures. Any subject could submit an instance to an NCP regarding the non-observance or compliance with the OECD Guidelines provisions; after the submission, the process is thus composed of three phases: (i) a first assessment for deciding if the case should be further examined; (ii) the provision of good offices - based on parties agreement - for facilitating the issue’s resolution and consensus; (iii) a final statement (if the NCP decides to not go forward in the issue; it contains the reason for its decision) or a report (in case of both a reached agreement or not between the parties). Obviously, the basic condition for the success of this process is the good faith of both parties involved.

After the updating of the OECD Guidelines in 2011, three of the most operative NCPs – the British, the Norwegian and the Dutch ones – have promoted the elaboration of Mediation Manual for NCPs, in order to clarify the modalities and features of the informal problem-solving mechanism. In the Amendment of the Decision of the OECD Council on the Guidelines has been drafted the implementation procedures for the NCPs, recalling the above identified characteristics and reaffirming the importance of a great collaboration among the NCPs to share experiences and comments, and the necessity of the access to financial and human resources provided by national Governments. Furthermore, the Procedural Guidance outlines the NCP institutional arrangements, their role in spreading information and in resolving specific instances and how to implement the reporting. Regarding the institutional arrangements, the NCP should be composed of senior
governmental officials, independent experts and representatives of workers organizations and NGOs. Moreover, it should establish and maintain relations with business associations and other representatives of the national business community. Together with the control over the correct implementation of the OECD Guidelines and the compliance with its provisions, the NCP plays the role of promoting information about the OECD Guidelines through any means, such as the online website, and of raising awareness on NCP and OECD activities in this regard. Finally, the NCP has to respond to inquiries coming from other NCPs, business community and NGOs representatives, and non-adhering countries’ Governments. In order to strengthen the relationship between the NCPs and the OECD Investment Committee - the body that is in charge of holding requests from adhering and non-adhering States about the OECD Guidelines content - once a year each NCP has to report to the Committee on its activity related to the instances accepted and solved.

Thanks to the online database available on the OECD NCP website, it is possible to sum up all the instances received by the NCPs since 2000, classified by concerned theme and by industrial sector involved. By a total of about 300 cases, to date 65 per cent regard the employment and industrial relations, 46 per cent general policies and 21 per cent environmental issues; regarding the industrial sector, the majority of instances are related to manufacturing and mining companies.

2.4 The Italian OECD National Contact Point: regulation, activities and tools

The Italian OECD NCP was founded by the Italian Government and thus implemented by the Article 39 of Law No. 273/2002 and by a following Ministerial Decree (former Ministry of Productive Activities) in July 2004. In 2011, it was issued by the same Ministry (now Ministry of Economic Development) another Decree to update the internal organization of the NCP, that is now composed of a General Director, a NCP Committee and a Secretariat. The General Director is the in-charge Director of the Industrial
Policy and Competitiveness Unit and has decision-making powers; the NCP Committee, instead, has a consultative function and is composed of representatives of other Ministries, Business Associations and Trade Unions; finally, the Secretariat, composed of a manager and a number of civil servants, is responsible for managing the daily activity of the NCP - such as the OECD Guidelines promotion - and for receiving and answering to the specific instances. To date, the representatives of civil society are not included in the multi-stakeholders’ group of the Italian NCP, but it is expected to involve the Italian NGOs’ Association, in order to improve the contribution by external actors to the NCP’s action. Since 2011, also the Governmental Conference of State and Regions has been added to the NCP Committee.

Due to the already existing features regarding the tools available for better performing of the required objectives, the Italian NCP has decided to particularly focus on the development of the second pillar provisions, especially related to the Small and Medium Enterprises (SMEs) - due to the Italian industrial economic structure - and to the supply chains issues. For this reason, since 2013 and following the Rana Plaza accident in Bangladesh, the Italian NCP has participated in the OECD NCPs Joint Statement\(^{33}\) regarding the textile industry and involving all the States that having a business in this sector in Bangladesh. Moreover, the Italian NCP has decided to promote the elaboration of an Action Plan with the Italian textile companies operating in Bangladesh, in order to overcome the constraints related to the lack of a CSR approach by enterprises in delocalizing their activity, especially in relation with their performance at national level. With this aim, the Italian NCP has created a working group with five Italian textile enterprises to improve their approach to the CSR field. Among the other initiatives for the promotion of the OECD Guidelines, the NCP: (i) has issued a Guidance for the Due Diligence in the Supply Chain\(^{34}\), whilst the elaboration of other guides, such as for the steel and textile sectors, is ongoing; (ii) has concluded a Memorandum of Understanding


\(^{34}\) OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 2\(^{nd}\) Edition, 2013. It has been already published also the one related to the jeweler’s sector.
with the Association of Italian Bankers (ABI) and the Association of Italian Enterprises (Confindustria) for including a CSR assessment in the criteria for the evaluation of the credit risk of companies; (iii) is collaborating with the Ministry of Foreign Affairs\(^{35}\) for the draft of the Italian NAP on Business and Human Rights and is participating in a OECD project for the "Promotion of Responsible Business Conduct and the OECD Guidelines for Multinational Enterprises in Myanmar". At regional level, the NCP has promoted a project for raising the awareness of the OECD Guidelines through a Memorandum of Understanding with a number of Italian Regions (the last ones are Tuscany and Veneto). Furthermore, the Italian NCP is implementing an interregional project with the Italian regions (the four Regions that are currently participating in the related Working Group are: Liguria, Lombardia, Marche and Tuscany) for elaborating a common index aimed at evaluating the compliance with CSR principles and standards, the already existing best practices in this field and the necessary future steps to be taken for improving the business performance at regional and national level. After the first meeting held in March 2013, the Working Group created two months later has the responsibility to point out the common constraints and priorities already identified by the Regions in the consultation with the Ministry of Labour for the implementation of the CSR NAP. The two final objectives that should be reached are the identification of a set of standard indicators for the evaluation of a compliant performance with the CSR principles and the recognition of awarding criteria for facilitating the adoption of measures compatible with CSR issues, such as awareness campaigns or easier access to funding facilities. The project will be developed in three main phases, from the comparative analysis and data collection to the final definition of awarding standard indicators and awarding criteria (expected for the end of 2014), leading to the implementation and the spread of achieved results.

In addition to the promotional activities, such as the above described ones and the organization or participation at national and international events\(^{36}\), it is

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35 The Italian OECD NCP is also collaborating with the Italian ECA, SACE.
36 OECD 1\(^{st}\) Forum on Responsible Business Conduct (Paris, June 2013); 1\(^{st}\) and 2\(^{nd}\) UN Forum on Business and Human Rights (Geneva, December 2013 and 2013); national events organized for the spread and promotion of the OECD Guidelines provisions and for raising awareness on the CSR issues,
relevant for the present work to underline the role played by the Italian OECD NCP, in collaboration with the Italian Ministry of Labour, in the elaboration, draft and implementation of the 2012-2014 National Action Plan on Corporate Social Responsibility, as requested by the EU Commission in 2011. In particular, the NCP has contributed by adding the chapter related to the importance of the OECD Guidelines as a CSR primary tool. Finally, the Italian NCP is cooperating with the Italian Ministry of Foreign Affairs for the preparation of the NAP on Business and Human Rights, through a study on the national institutional, regulatory and policy framework on businesses and Human rights protection issued by the University of Sant’Anna (Pisa, Italy) upon the request of the Ministry of Economic Development. Both these two last points will be analysed in depth in the last chapter.

As far as concerns the relationship between the activity of the Italian NCP and the provisions of the UNGPs, especially of the third pillar, the NCP could efficiently act as a non-judicial grievance mechanism, easily accessible for individuals, companies and NGOs. To this regard, the Italian NCP has received a specific instance in February 2011, already concluded, by one of the Italian labour trade unions (FIOM-CGIL) versus Eaton s.r.l. (company operating in the automotive sector)\(^{37}\). The company has dismissed in October 2009, 345 workers of its plant in Massa Carrara (Tuscany, Italy) that has shut down its operations due to the international economic crisis and the loss of production. FIOM-CGIL, on behalf of its members previously employed by the above company, has submitted a compliant to the Italian OECD NCP for the alleged violation of the recommendations contained in Chapter V of the OECD Guidelines (2011 edition) concerning Employment and Industrial Relations. In particular, the compliant charged the company with the misleading reasons for closing its Italian plant, not due to the economic crisis but to the intention of delocalize the production in some Eastern Union countries, and with the company’s inability to abide by the EU regulations in the field of employees’ dismissal. In parallel with the opening of the instance before the Italian NCP,

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\(^{37}\) Specific instance prot. n. 37515/2.3.11 submitted to the Italian National Contact Point by the FIOM-CGIL Labour Union of Massa Carrara on 24 February 2011.
thanks to the initiative of the Ministry of Economic Development a negotiating
table with all the Italian parties involved was put in place, together with a
number of individual lawsuits filed before the Court of Massa Carrara by
former Eaton employees. After the decision of the Italian NCP to further
examine the issue, communicated both to the FIOM-CGIL and Eaton
representatives in March 2011, the receipt of written replies by the company
and several meetings with both parties alone and together, the NCP has
adopted the following recommendations: (i) to promote further meetings and
collaboration between the Parties, in order to achieve in good faith a common
and viable solution especially for workers and the regional economic system;
(ii) to provide for the future a major involvement of workers’ representatives
when a relevant change in the business internal organization is expected, in
order to minimize possible future conflicts. Finally, the NCP has welcomed the
settlement issued by the Court of Massa Carrara about the lay-off question, that
has led to the withdraw of the specific instance to the Italian NCP by the
FIOM-CGIL and, in the view of its conciliatory role, the NCP has ensured its
commitment in providing its good offices and assistance to both Parties for a
complete solution of the case.

In June 2013 a group of environmental NGOs has presented before the British,
Italian and American OECD NCP, a specific instance on the alleged HR
violations committed by a consortium that controlled an oil and gas plant
operating in Kazakhstan and asking for a mediation action of all the NCPs
involved. Accordingly to the OECD Guidelines Implementation Measures,
when the instance regard a consortium or a joint venture or a group of
enterprises, the involved NCPs have to appoint a leading NCP, that in this case
will be the British one, whilst the American and Italian ones will give their
support in the following phases of the process. To date, the UK NCP has
published in November 2013 its initial assessment concerned, recommending
to both parties to reach a settlement through a mediation/conciliation
procedure38.

38 The UK NCP Initial Assessment is available on the UK Government website.
2.5 The nexus between the State duty to protect and the access to remedy in International Human Rights Law

This paragraph is aimed at analysing the State duty to protect HR and the right of access to remedy under International Law provisions, in order to better understand the relationship between these two concepts in case of HR violations committed by corporations abroad, in the view of the UNGPs provisions under the first and third pillars.

The State duty to protect is provided by for the HR Committee of the International Covenant on Civic and Political Rights, for protecting individuals by the alleged breach of HR committed also by private entities and persons:

the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.39

Some positions of the Committee of Economic, Social and Cultural Rights and of regional HR Courts and Bodies have reaffirmed the State responsibility for business conduct within its territory. Nowadays, the alleged HR abuses committed by private actors extraterritorially have also acquired relevance in International Law, deriving from the principle established by the famous Corfu Channel case40 of State obligation to forbidden the use of its territory for acts violating the rights of other States. Several UN HR Bodies have recalled the extension of States role in controlling private actors activity, that can lead to HR abuses, also in extraterritorial context. For instance, the Committee on Economic, Social and Cultural Rights has stated that a State should apply legal and political means to positively influence third parties for avoiding HR violations, as provided by the International Covenant on Economic, Social and Cultural Rights and other International Law treaties and norms. Moreover, in its Statement on the Obligation on State Parties regarding the Corporate

39 Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, par. 8, UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).
40 The Corfu Channel case was the first one brought before the International Court of Justice in 1949, related to the accident in the Corfu Strait occurred to two British destroyers in Albanian waters in 1946 (UK v. Albania case).
Sector\textsuperscript{41} it has recalled the necessity of avoiding the infringement of HR norms by companies that have their main location in the home-State, without diminishing or limiting the jurisdiction of the host-State. Focusing on business conduct, also the UN Committee on the Elimination of Racial Discrimination has requested to States a more effective action of control over the activities of companies registered in its territory, as happened for transnational corporations in Canada, that have negatively affected indigenous peoples’ rights\textsuperscript{42}.

Even about the right of access to remedy, a number of UN and regional treaties\textsuperscript{43} provide for the guarantee of this right for victims of HR violations, especially when administrative remedy is not sufficient and the victim has to recourse to judicial one. As already stated in the UNGPs, to be effective a judicial grievance mechanism should have some characteristics (impartiality, cessation of violation and reparation), should ensure the application of all interim measures established by judicial and non-judicial mechanisms - as provided by the Maastricht Principles\textsuperscript{44} -, but it has also to guarantee the right to truth through the disclosure of information to the public related to the violation occurred, as established under the UN Principles and Guidelines on Reparation and other UN HR Council and Committee documents\textsuperscript{45}.

As already mentioned above, both these duties related to States can be also applied outside the home-State territory and jurisdiction for corporate-related HR violations. In fact, the Guiding Principle No. 26 recalls a concerned State action for ensuring the effectiveness of State-based judicial mechanisms and


\textsuperscript{42} Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Art. 9 of the Convention, par. 17, UN Doc. CERD/C/CAN/CO/18 (May 25, 2007).


\textsuperscript{44} Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, principle 38, Maastricht, Netherlands (Feb. 29, 2012).

\textsuperscript{45} UN General Assembly, United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, art.22 (b), UN Doc. A/RES/60/147 (Mar. 21, 2006).
for overcoming the possible legal and practical barriers arising. All these provisions entail the State responsibility at extraterritorial level too, implying the obligation of a strong cooperation between home and host States, in order to guarantee redress for victims. To this scope, after the endorsement by the UN HR Council of the UNGPs, a number of States has started a process of drafting their National Action Plans, with the aim of developing government-led policies for UNGPs implementation. In fact, the NAP should contain all the measures and tools needed for addressing HR violations committed by businesses. To date, as will be further analysed in the fourth chapter, at European level only the United Kingdom, the Netherlands and Denmark have already released their NAPs, respectively in September, December 2013, and April 2014, whilst in the coming months are expected the Italian, Spanish and Swiss ones. At a first analysis of the UK NAP, some gaps are arisen, especially in implementing the State duty to protect and the access to remedy. The latter, indeed, is simply limited to support CSOs and Trade Unions in seeking an effective grievance mechanisms, without facilitating the process or strengthening the existing ones.

Another issue arisen by the analysis of the connection between the State duties provided by the first and the third pillars of the UNGPs, is the State responsibility in International Law for the conduct of its enterprises, that involves both the home and the host-States, together with third States directly or indirectly involved in corporate activities. Focusing on the customary principles of International Law related to State responsibility for corporate-related violations, a first distinction that should be done is between the enterprises partially and/or totally controlled or owned by States (SOEs) and the private ones. Given this distinction, the responsibility of a SOE’s activity could be attributed to the home-State, as for the provisions of article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts of the UN International Law Commission, that could be referred also to legal persons. Furthermore, in case of an enterprise exercises on behalf of a State some governmental functions, its harmful activity could be attributed to the State (article 5 of the Draft Articles on Responsibility of States), although the
activity is implemented outside the territory of the State. In case of a private
company, it should be excluded the possibility to consider a State responsible
for its negative conduct, although, as provided by article 8 of the Draft Project,
it is possible to suppose the home-State responsibility for activities directly or
partially controlled by the State. In both these cases, it should be proved the
“real genuine link” between the State and the company, in order to avoid the
automatic State responsibility for a wide range of business activities, and it
should be also taken into consideration the jurisprudence of the International
Court of Justice in this field.46 More recently, in some cases of corporate-
related HR violations the State has been considered complicit in facilitating or
collaborating to the harmful activity - for example through the provision of
State security forces - when it has been proved that its intervention had mainly
contributed to the wrongful act or its negligence.

Given the above analysis of the more accessible and effective non-judicial
grievance mechanisms, and in order to provide a map of the existing legal
remedies, in the following part of the paragraph will be studied the most
common concerned issues that have caused a great doctrinal discussion. The
first point, already mentioned, is the conflict between home and host-State
jurisdiction and in particular the consideration by home-State Courts of claims
that have not been accepted or adjudicated by the host-State. A substantial
element is the famous Kiobel case47, that has demonstrated the occurrence of
legal barriers to accessing judicial remedies in the US for alleged corporate-
related HR violations committed in a host-State under the federal Alien Tort
Statute (ATS). In this case, the US Supreme Court judgement affirmed that the
ATS can be applied for extraterritorial claims only if the case «touched and
concerns» the United States «with sufficient force.»48 Following this decision, a
number of lower federal US Courts have applied Kiobel dismissing cases only
on the basis that the alleged harm is occurred outside the US, whilst in other
cases, the suits were dismissed basing on an extensive interpretation of Kiobel.
Apart from the possible implication and influence of this case at worldwide

level, promoting a global negative trend about the commitment of home-State for judging business HR violations in place of the host-State Courts, in the European Union legal system the Brussels I Regulation provides that EU Courts can accept the jurisdiction in civil liability suits against private entities or persons domiciled in the EU territory. In recent year, the number of cases related to HR violations committed by companies not domiciled in the EU is increased (e.g. foreign subsidiaries of EU enterprises), this question has arisen at EU level, especially because Brussels I does not include any provisions attributing the regulation of this issue to Member States. Together with the complex structure of the provision of limited liability, this problem poses further barriers to access to remedy.

Another point is the co-called doctrine of *forum non conveniens*, that concerns the possibility for a Court to prevent the moving forward of a case to another jurisdiction considered more appropriate. As demonstrated by a number of cases in the United States, a lot of cases dismissed in the US grounded on this principle, they have never been filed again in another jurisdiction, leaving the victim without remedy and compensation. The situation is different in the EU system, that has rejected the application of the *forum non conveniens*, allowing EU Member States Courts to judge on cases involving alleged HR violations committed by businesses abroad.

Basing on some judicial systems and jurisdictions, companies have argued that they could be criminal liable for HR abuses before a public prosecutor, whilst in other countries they could be judged only under International customary Law or general Tort Law in civil claims. For example, among the EU States the experience shows that companies are not pursued by public prosecutors for criminal claims committed outside the EU territory, although the European Union Law allows extraterritorial cases concerning HR violations. As far as concerns corporate civil liability, in the EU system and in particular among the Member States of the Council of Europe, enterprises could be judged under the European Convention on Human Rights, although EU Courts do not always applied International Law provisions related to claims against businesses.
Another relevant issue related to the interconnection between the two duties contained in the first and third pillars of the UNGPs is the applicable law. After Kiobel, in the US system the application of the host-State law could lead to the emergence of legal barriers for victims of HR violations committed by corporations; at EU level, instead, the Rome II Regulation - applying to tort liability claims in the EU Member States’ Courts - establishes as the applicable one the law of the State where the harm is occurred, although it theoretically allows the application of the home-State law if the host-State does not provide sufficient protection to victims. To date, this last exception has not been affirmed yet, remaining a barrier to effective remedies. Other difficulties for victims could arise from the internal structure of the corporate group. In fact, nowadays the multinational enterprises, as it is clear from their denomination, are delocalized in more countries worldwide and divided in different legal entities with unbalanced degrees of influence on the management organization, especially related to the role played by the parent companies or subsidiaries. For this reason, the transnational and multinational companies have financial and tax facilitations due to their internal organization, but at the same time they could avoid civil liability for the illegal activities of each of their components, creating in this way a legal barrier together with the lack of due diligence provisions in their statute and the difficult access to internal documents for proving the level of subsidiaries’ involvement. In the European Union, these obstacles depend on the law applicable to the case, although the prevalent principle remains the one of limited liability, restraining the possibility to seek reparations for victims of abuses committed by subsidiary companies.

In conclusion - as for the results of the survey⁴⁹ conducted by the International Corporate Accountability Roundtable (ICAR), CORE and the European Coalition for Corporate Justice⁵⁰ - for ensuring effective remedies for alleged


⁵⁰ The International Corporate Accountability Roundtable (ICAR) is a coalition of human rights, environmental, labor, and development organizations that creates, promotes and defends legal frameworks to ensure corporations respect human rights in their global operations. CORE is an authoritative and influential network of NGOs, academics, trade unions and legal experts which brings together the widest range of experience and expertise on UK corporate accountability in relation to international development, the environment and human rights. The European Coalition for Corporate
HR violations committed by enterprises and their subsidiaries, also outside the national jurisdiction, a State should: (i) make policy decisions for enforcing State commitment in this field; (ii) adopt legislative and policy measures related to corporate HR abuses; (iii) examine the existing legal barriers in its jurisdiction and take adequate actions to prevent them.

2.6 Legal barriers to effective judicial remedy: some worldwide case studies

In order to verify that the above described legal barriers exist also in practice and that these have limited in some way the effective compensation, the present paragraph contains two case studies, surveyed by the ICAR experts but also by the Research Group on Human Rights and Economy of the 2nd University of Rome Tor Vergata\(^5\) (Italy), that proved the existence of these legal and sometimes political obstacles in two different law systems, the French and the Peruvian ones, and involving two groups of HR, namely gross HR violations and the right to a safe environment.

The first case considered is the **Amesys case**, linked with the so-called Arab Spring revolutions occurred in Libya in 2011. Amesys is a French technology business specialized in IT programs that enable intelligence organizations to identify possible security dangers and to increase level protection of their information system. In 2007 Amesys signed a contract with Libya Government for delivering analysis hardware - the so-called Eagle system - that have become active in 2009. Basing on some alleged claims, these hardware have contributed to control, monitor and collect information about some of the opponents to the Gaddafi regime that have been consequently arrested and tortured. Although accordingly with the Amesys Report all its business activities are fully compliant with the international and regional conventions

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5 Justice (ECCJ) represents over 250 CSOs present in 15 European States such as FIDH and national chapters of Oxfam, Greenpeace, Amnesty International and Friends of the Earth.

5\(^1\) The Research Group on Human Rights and Economy was established in 2010 by the International Law Chair (Department of Law) of the 2nd University of Rome Tor Vergata (Prof. Maria Clelia Ciciriello) and it is currently coordinated by Prof. Alessandro Costa. The Group has recently published its first book “Banks and Human Rights: Pathways to Compliance” (A. Costa Editor, 2013), focusing on the banks and international financial institutions involvement in alleged HR violations worldwide. I am a member of the Group since 2010.
and principles for the HR protection\textsuperscript{52}, the company decided to divest from the Eagle project in 2012 and sold it to the Advanced Middle East Systems\textsuperscript{53}, probably for avoiding financial consequences due to the ongoing suits related to the case. In fact, in 2011 two French NGOs - namely the Fédération Internationale des Ligues des Droits de l’Homme (FIDH) and the Ligue des Droits de l’Homme (LDH) – have filed a suit against Amesys for alleged complicity in gross violations of HR perpetrated by the Gaddafi regime through the supply of the Eagle hardware and some expertise and know-how. The company has admitted the existence of the signed contract with the Libyan Authorities, at the same time denying the accusation of complicity in torture and other HR violations. In spite of the rapid development of the case through the French Courts, the plaintiffs, and in particular the four people that were arrested and tortured thanks to the use of the Eagle system by the Gaddafi Authorities to identify them, have addressed a lot of barriers in seeking remedies, especially due to some concerns on the impartiality of the prosecutor. According to the Paris Prosecutor’s Office the evidence brought have not allowed the opening of a criminal suits and only thanks to the investigating judge’s commitment the case went ahead\textsuperscript{54} and was brought to Paris’s Tribunal de Grande Instance in May 2012. Currently, the case is managed by the newly formed Paris Prosecutor’s Office, specialized in gross human rights violations, torture and genocide\textsuperscript{55}.

Regarding the legal barriers arisen in this case, apart from the ongoing unstable political situation in Libya and the consequent destruction or disappearance of some materials related to the Amesys case, the most relevant ones are linked with the “civil parties” availability and their difficulties to fully participate to the legal action. Thanks to the commitment of the two French NGOs that have denounced at first the case, have been identified some CSOs partners in Libya

\textsuperscript{53} The Advanced Middle East Systems is now known as Celebro, owned by the French company Nexa Technologies.
\textsuperscript{54} The Paris Prosecutor appealed to the decision of the investigating judge to continue the investigation, but the Court of Appeal rejected the appeal in January 2013: Fédération des Ligues des Droits de l’Homme, “Amesys case: the investigation chamber green lights the investigative proceedings on the sale of surveillance equipment by Amesys to the Khadafi regime” (2013), available at http://www.fidh.org
for supporting their action with the victims in actively participating to the investigation and in seeking an effective remedy. Some social and political barriers were left, such as the problem of communication due to the necessity of a simultaneous translation and the unwillingness of some persons to leave the country for witnessing in France their involvement in the case. The case is still ongoing.

The second case to be surveyed regards the activity of the **Monterrico Metals PLC** in the Rio Blanco copper mine in a northern region of Peru. Under the Peruvian Law, it is required that before the begging of the exploration activities for mining operations, the company has to have the consensus of the local communities, which lifestyle is based on the farming and fishing and that are thus concerned about the possible negative impact of business operations on the environment. For the first time, in 2004 some members of the local communities organized a peaceful march for expressing their concerns about the mine site’s activity, provoking the violent reaction of the police that reacted firing tear gas and the following death of one protester. Although the Monterrico Metals PLC has immediately denied its involvement and complicity in these events, when a year later another peaceful demonstration was organized by the local communities and it led to the death of another protester, the injury of some others and the gather of thousands of protester for three days at the mine site, the Peru’s National Human Rights Ombudsman (CNDDHH)\(^56\) has denounced the illegal occupation of the territory surrounded the site by the company and filed a suit before the Peruvian Courts\(^57\). In spite of these facts and the non-binding referendum held in September 2007 that resulted in a large majority (95 per cent) against the mining operations, the company continued its exploration activities. In 2009, the victims of the violent events occurred in 2004-2005, filed a lawsuit before the London High Court against the Monterrico Metals LCD (UK-based company) and the Rio Blanco Copper SA (company’s Peruvian subsidiary) for the alleged complicity of the leading company in the harms committed against the local communities and the negligence of the parent company. The companies denied their involvement

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\(^{56}\) Coordinadora Nacional de Derechos Humanos: http://derechoshumanos.pe

\(^{57}\) Peruvian Torture Claimants Compensated by UK Mining Company, Leigh Day (July 20, 2011).
and complicity in the alleged claims, appealing to the request of the claimants to add other acts to be considered for the claims. After the dismissal by the Court of this appeal in November 2010, the Monterrico Metals LDC was sold to a Chinese firm and its headquarter was relocated in Hong Kong, leading to the consequent request of dismissal of the case by the company’s lawyers due to its legal inconsistency. However, the claimants’ lawyers filed an appeal to the London High Court for a worldwide freezing of about £5 million of the company’s assets, avoiding the deny of justice and compensation for victims caused by the sale and relocation of the leading firm.

In this case, the legal barriers have arisen especially at local level in Peru, where the victims, assisted by the local NGO Fundación Ecuménica para el Desarrollo y la Paz (Fedepaz)\(^{58}\), have tried for many times to file suits before the local Courts that have always been rejected and, at the same time, they have received several death threats. For these reasons, the Peruvian protesters and activists decided to file the lawsuit in the United Kingdom, in order to have more possibilities to access an effective remedy. This case demonstrates how sometimes although the access to a grievance mechanism is assured, the solution of the case does not satisfied the victims or it even results in wider conflicts between the people involved. In fact, apart from the disclosure of some personal and private information and the conflict arisen between the claimants for the amount of the compensation, some NGOs that have analysed the Monterrico case stated that the abuses committed have not been solved yet and that, due to the alleged collusion between the mining companies and the governmental security forces, the mining operations are still ongoing and the victims have not been received an adequate compensation.

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\(^{58}\) Fundación Ecuménica para el Desarrollo y la Paz: http://www.fedepaz.org
3.1 The origins of the international debate on Corporate Social Responsibility

The emergence of the international doctrinal discussion on how to regulate business activities worldwide through a normative action has begun in the 1960s, as demonstrated by the creation of the World Bank dispute settlement mechanism (Washington Convention, 1965) and by the adoption of the OECD Draft Convention on the Protection of Foreign Property (1967). Only in the 1970s, it has been perceived as compelling the need to introduce a regulation for multinational enterprises, due to the increasing number of instances coming from Developing Countries; in the wide context of the “new international economic order”, the establishment of a more balanced relationship among States has overcome the liberalistic doctrine, promoting a more equal distribution of the resources available. Given the growth of HR violations’ cases involving enterprises, some International Organizations have decided to focus on this issue and to adopt the first legal measures in order to limit the negative impact of business activities on people and environment. To this purpose, the already analysed OECD Guidelines for Multinational Enterprises (1976) recalled in the introduction the need to consider the possible harmful effects of business activities over the host-State, in particular on its economic development, in order to ensure the companies’ compliance with the host-State national policies. Although multinational enterprises are not recognized as subjects of International Law and the responsibility of their alleged HR violations has to be attributed to the home-State, since the 1970s’ the debate was concentrated on the arising of company responsibility in legal terms related to the prevention, control and mitigation of HR abuses.
Notwithstanding these concerns, the debate has been developed during the following decades also about other theoretical and practical issues, such as the role played by the civil society in particular about the concept of sustainable development, that has arisen in the last twenty years regarding the relevance of a responsible approach of business sector to the surrounding environment and local communities. In this sense, the enhancing of a free and fair business, compliant with environmental and social standards of the States where the company operates, has been demonstrated by the tentative inclusion of the so-called social clause in a number of investment agreements and treaties, in order to guarantee both the liberalization of business exchanges and the respect of HR, in particular of labour rights. To this regard, it has to be remarked that the Final Declaration of the World Summit on Social Development, that has been held in Copenhagen in 1995, has recognized the universal effectiveness of labour rights, thanks to the existence of international binding sources - such as the ILO Declaration on Fundamental Principles and Rights at Work (1998) - and the idea that they should be respect independently of State economic development level. On the other side, the emergence of an ethical interest concerning business activities has helped the actors involved to implement new mechanisms and policies, such as the adoption of Codes of Conduct or ethical management models.

Nevertheless the continuous interest of the International Community regarding the issue of Corporate Social Responsibility (CSR), in the last years the debate has focused on the elaboration and adoption of regulations aiming at improving the standard of control over company activities and to minimize their negative impact. In fact, the new definition of CSR given by the international doctrine as the reaction of multinational enterprises to the lack of business accountability, as defined by Muchlinski, was inspired by the philosophical concept of ‘social contract’ and by the necessity to preserve human dignity. However, some scholars have criticised this approach, in particular for the

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59 The United States proposed to include a social clause during the closing session of the Uruguay Round (Marrakesh, 1994) that has led to the creation of the World Trade Organization. The American proposal was related to a clause providing the respect of the minimal labour standards and a negative conduct in reprisal to the failing State. The proposal has not been adopted due to the opposition of the developing States.

difficulties in defining the range of HR to be respected and promoted by companies and in involving in this process all the relevant stakeholders, such as NGOs, CSOs and local communities.

In the following paragraphs will be analysed the European Union approach to CSR since the 1990s’, thus focusing on the related legal instruments adopted during the last twenty years up to the recent legislative proposal presented in 2014.

3.2 The ground of the EU CSR Strategy

Officially, the debate on the adoption of a EU regulation on CSR started in 2001, when the EU Commission published the Green Paper ‘Promoting a European framework for Corporate Social Responsibility’. Actually, just in the 1990s’ some legal instruments were adopted by the EU institutions, as the following paragraphs will describe.

3.2.1 The EU action on CSR in the last decade of the XIX century

Since 1993 the European Commission focused its attention on this issue, for instance through the publication of the White Paper ‘Growth, Competitiveness and Employment’, promoting a new economic order based on competitiveness and fair regulation, in order to face the employment crisis of that period. Following this trend, the then President of the Commission Jacques Delors made an appeal to the enterprises, inviting them to address Europe’s structural problems related to unemployment and social exclusion through the elaboration of a European Declaration on this matter. Two years later, in May 1995, it was announced the adoption of the European Business Declaration on Social Exclusion, signed in London by 20 business leaders and aimed at enhancing joint efforts for the promotion of social responsibility in business sector. In the same years, the European Commission has launched the initiative named ‘Action for Employment in Europe’
(1996) in order to improve the provisions contained in the 1993 White Paper, through the commitment of all the economic and social operators involved for a responsible business conduct. However, until the adoption of the Amsterdam Treaty, the concept of CSR could not be considered as integrated in the European institutional system, due to the lack of an overall involvement of citizens in all the issues concerning free movement in labour market, professional training and unemployment. Since 1997, the EU institutions began a more comprehensive action related to CSR, as demonstrated by the Lisbon European Council (2000), promoting a new economic strategy based on business responsible conduct and defining a first European CSR framework.

In this context, the endorsement by the EU Commission of the Green Paper in 2001 could be defined as the final step of an exogenous process started in the 1990s’. On the one hand, indeed, the analysis of the Green Paper’s content should be done considering the previous developments in this field. On the other hand, it should be remarked that the dimension of business extraterritorial responsibility had been already taken into consideration through the elaboration of some soft law sources - such as the Codes of Conduct for enterprises operating in South Africa and the one for avoiding the negative conduct of business activity in the arms sector61 - demonstrating the limited action of the European institutions in adopting legal binding instruments on BHR. Both these examples have not led to a Member States common position for their inclusion in binding sources: for instance, the Code of Conduct for enterprises operating in South Africa has been criticised several times for the lack of a control mechanism over business conduct,

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61 The EU Code of Conduct for Companies operating in South Africa was adopted on 22 September 1997 by the Ministries of Foreign Affairs of the European Community in the framework of the European Political Cooperation (thus defined as Common Foreign and Security Policy - CFSP) to avoid the complicity of the European companies in breaching HR of the South African population, already oppressed by the apartheid policy acted by the South African Government. Instead, the EU Code of Conduct on Arms Export was signed by the Member States of the Council of Europe in 1991; it contained 8 criteria related to the export of weapons and implied the respect of fundamental rights, the political and social stability of the country. Following this initiative, the French Government promoted the adoption of a Code of Conduct related to the same issue, endorsed in June 1998, introducing an information mechanism between States to monitor the respect of the selected criteria.
especially in relation to the more operative initiatives introduced by the OECD Guidelines for Multinational Enterprises or the ILO Tripartite Declaration. Furthermore, the European Council had not reached an agreement on the adoption of a binding instrument for enterprises exporting weapons, in spite of the 1999 EU Parliament Resolution (the Howitt Resolution). This resolution, proposed by the MEP Mr. Richard Howitt and related to the European enterprises operating in Developing Countries, established legally binding requirements on European enterprises’ compliance with International HR Law provisions and a European Monitoring Mechanism, in order to control both the proposed Code’s implementation and the compliance with other international existing standards. Due to the lack of agreement among the European institutions on both the Code of Conduct and the Monitoring Mechanism, the EU Parliament decided to establish a Temporary Monitoring Platform, held by the EU Parliament Committee on Development and Cooperation, that organized once a year a public hearing of victims of corporate-related HR violations. For instance, the 2001 hearing concerned the alleged complicity of the French oil company Total and the British MNE Premier Oil for HR abuses in Burma, in breaching both company provisions and international principles, such as the UN Universal Declaration on HR, also recalled by the Total’s and Premier’s Code of Conduct.

Such a system, realized for improving the European companies’ attitude toward their involvement in HR abuses, has demonstrated not only some limits, but also some merits: on one side, being a semi-judicial mechanism, its decisions have a limited impact on the parties, whilst, on the other side, it envisaged the possible regulation needed by European enterprises operating outside the European territory. Due to the encompass faced by the Platform in the EU Parliament, as demonstrated by its 2008 Resolution on the failure of the Code of Conduct.

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Conduct’s adoption, the EU Commission has preferred to promote the compliance with the existing international sources, such as the OECD Guidelines, and the provided grievance mechanisms (namely the OECD NCPs). However, the EU Commission has stressed its intention to include in all the EU External Relations Agreements the wording «the Parties (...) remind their multinational enterprises of their recommendations to observe the OECD Guidelines for Multinational Enterprises, wherever they operate.»\(^{63}\) In conclusion, also this EU initiative proved that the current constraints of the international voluntary measures about the lack of implementation have not been overtaken once again, neither solving the inefficiency of the monitoring system, nor providing a reliable option.

3.2.2 The EU action on CSR in the first decade of the XX century

In order to better understand the reasons on which was grounded the EU Commission action for the elaboration of a European CSR policy, it is necessary to analyse the political European framework at the beginning of the XXI century.

Together with the first definition of CSR, contained in the Presidency Conclusions of the Lisbon European Council (23-24 March 2000)\(^{64}\), has been set out a new ten-years strategy based on an innovative economic trend for better addressing the new challenges posed by the globalization phenomenon, including an environment and sustainable development dimension, recalled in the Gothenburg European Council (2001). In fact, the so-called ‘Lisbon strategy’ was aimed at defining the basis for the future economic and technological growth of the European States, through the promotion of labour policies and the improvement of production. In these terms, it was presented a global strategy composed of three main actions: (i) the elaboration of the


\(^{64}\) Presidency Conclusions, 24/3/2000 - Nr: 100/1/00, point No. 5.
transitional way to a competitive, dynamic and knowledge-based economy, including structural reforms for competitiveness and innovation; (ii) the update of the European social model, fighting social exclusion and investing in human capital; and, (iii) the promotion of a healthy economic outlook thanks to the application of macro-economic policies. Given the analysis conducted on the Presidency Conclusions, it has emerged the relevance of the Member States and public Authorities’ commitment for outlining the transition process to the strategic goal\(^\text{65}\) posed by the European Council. Moreover, it could be attributed to the enterprises a relevant role in implementing the second action, namely to update the European social model. In the following points (No. 24-34) of the Conclusions have been pointed out the requirements for a more digital and knowledge-based economy, in order to improve the citizens’ quality of life, goods and services available and their work opportunities. To this end, the EU Council together with the EU Commission have been required to draft an e-Europe Action Plan: the Plan is based on a benchmarking of each Member State’s initiative in this field and the exchange of best practices, it aimed at adjusting the educational and training systems to the technological innovations and at facilitating the access to labour market. For the present work is thus essential to consider the challenges faced by the implementation of the Lisbon strategy, that have led to a major involvement of the business sector in reaching the posed objectives. Within the realization of the new open coordination method, proposed by the EU Council and then developed in the following years, an important role is played by the multinational enterprises, as recalled by the Presidency Conclusions:

The European Council makes a special appeal to companies' corporate sense of social responsibility regarding best practices on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development\(^\text{66}\).

\(^{65}\) The strategic goal, already mentioned in the previous paragraph, is, to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion. (supra, point No. 5)

\(^{66}\) supra, point No. 39.
In this sense, companies are required to cooperate for the achievement of the strategic goal, recognizing their role together with the European institutions and the Member States for implementing the EU objectives concerned. Furthermore, beside the companies’ involvement, the EU Council recognized also the role of private sector and public-private partnerships in acting as privileged tools for the realization of the final aim.

In December 2000 at the European Council in Nice\textsuperscript{67}, it has been affirmed again the will to implement the Lisbon Strategy, through the adoption of the ‘European Social Agenda’, based on six strategic actions in all the sectors of social policy and considered as the main tool for the enhancement of the new social model through the co-existence of both the economic and social development. The Presidency Conclusions of the Nice Council contain the methodological approach for the Social Agenda implementation, including the subjects to be involved (European institutions and Member States, CSOs, local Authorities and firms) and the legal framework concerned (the open coordination method, structural funds, regulations and laws, research and analysis), in respect to the principle of subsidiarity and the existing different approaches at national level. The endorsement in the same Council of the EU Charter of Fundamental Rights has acquired a central role in the development of the EU Strategy, especially regarding the insertion of the principle of solidarity as basis for this new European phase. In this context, the reaffirmed relevance of the business sector could be intended as its active participation to the promotion of the principle of solidarity.

If the Lisbon and Nice Councils had been focused on the social aspects of the economic change required within the European Union, the emerging interest of the civil society for the safeguard of the environment and natural resources has been demonstrated by the inclusion in the Presidency Conclusions of the Gothenburg Council of

\footnote{During the Nice Council it was also endorsed the EU Charter on Fundamental Rights.}
the ‘Sustainable Development Strategy’. Although the concept of sustainable development has been introduced for the first time in the Amsterdam Treaty (1997 - article 2) and recalled in Article 6 (article 11 TFEU), it also contained in article 37 of the European Charter on Fundamental Rights. The European Strategy for a sustainable development clearly grounded the Gothenburg Conclusions on the principle of a coordinated examination of the economic, social and environmental effects of the EU policies. To this end, there should also be considered the external dimension of the effects and the bilateral cooperation tools, such as the membership of International Organizations. Within the framework of the EU Strategy for sustainable development, the EU Council has underlined the importance of consultation among the relevant stakeholders, in particular of the enterprises’ role for a more responsible management of natural resources and for facilitating the adoption of an integrated policy related to waste management. This strategy has been recalled both in the Green Paper on CSR 2001 and in the 2002 EU Commission Communication.

Simultaneously to the launch of a European debate on CSR, also due to the increasing access to a wider number of financial markets, the EU Commission released the Communication ‘Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation’, aimed at better defining the European Strategy on Social Governance and Labour Standards. In the Communication, it recalled the content of the European Social Agenda and of both the Nice and Gothenburg Councils on the tight relation between economic growth and social policy. Moreover, it could be considered the ground of the provisions contained in the Green Paper on CSR, especially regarding the obstacles posed by the difficult inclusion of all actors’ interests in the social governance process. Finally, the Communication

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68 Art. 37 of the European Charter on Fundamental Rights states: «A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.»


also analysed the private initiatives adopted by the enterprises, such as the Codes of Conduct, especially regarding their effectiveness and the available tools for guarantying disclosure of information. On this regard, the Commission stressed the importance of the monitoring measures, including certification and publication of the Codes. Furthermore, the European Union should promote private initiatives aimed at spreading and respecting labour standards, contained in the ILO Conventions. In conclusion, it is evident that the business sector plays a central role for the effective realization of its own objectives related to CSR policy, both at internal and external level, as will be clarified in the next legal instruments adopted by the EU since 2001.

3.2.3 The way forward the CSR European Framework

The already mentioned Green Paper ‘Promoting a European Framework for CSR’\textsuperscript{71}, published in July 2001, aims, as stressed in the Executive Summary, at launching a debate at national, European and international level on CSR, for promoting this concept, improving transparency and enhancing the validation and certification systems, both based on the existing experiences and on innovative practices. The Green Paper introduced a new definition of CSR, namely «a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis»,\textsuperscript{72}, intended as the business commitment to comply with legal obligations and to give attention to human capital, environment and relations with other stakeholders. In fact, CSR is a twofold concept, grounded on the voluntary nature of the related practice and the recognition of the possible negative impact of business activities. Given the number of large debates for establishing the CSR content and nature among the different stakeholders, the Green Paper could be considered as the first attempt to introduce a basic definition

\textsuperscript{71} COM (2001) 366.
\textsuperscript{72} Ibidem, Chapter 2, point 20.
of CSR, on which was based the following debate. It has to be remarked that in the Executive Summary the EU Commission has strictly linked the final aims of the Green Paper to the Lisbon Strategy, intending CSR as a tool for reaching the Lisbon objectives and widening the European Union CSR dimension to all the enterprises, independently to their size and sector. To this end, the Green Paper is aimed at defining an added value to the EU CSR Strategy, such as the implementation of a European framework finalized at improving the existing procedures and the support to the good practices regarding an effective and reliable evaluation. In the EU Commission’s view, the Green Paper represented the EU will to introduce in the existing international legal framework referred to CSR, some EU regulations to be considered jointly with the UN Global Compact, the ILO Tripartite Declaration and the OECD Guidelines. In this context, the EU and national institutions played a central role in promoting adequate legislative provisions, even in the countries where the related legislation is missing.

The Green Paper also helps to define the internal and external dimension of CSR, as in the meaning of the prevalent European doctrine. The identification of the internal dimension of CSR could be intended as an innovative element in respect to the international sources, because it poses beside the protection given by the national legislation, the need of minimum standards to be complied with. This dimension should be developed through two kinds of action: (i) the adoption of standards related to human capital, health and security, such as the one provided by quality certification programmes; (ii) the implementation of management systems for reducing negative effects for environment and natural resources.

The external dimension of CSR regards the involvement of relevant actors, such as NGOs, local communities, customers, suppliers, apart from employees and shareholders. In addition, the social responsible approach of enterprises should comply with international obligations, deriving from the membership of International Organizations and EU
policies, especially the ones related to development cooperation and business. As far as concerns the respect of HR, being considered in the Green Paper as essential principles of the rule of law and the promotion of democracy, represent also one of the major constraint faced by businesses in their relationship with States and other business actors.

Having defined the external and internal CSR content, the second part of the Green Paper focused on the way for implementing this sustainable approach to business activity. First of all, should be improved and guaranteed the dialogue with workers representatives’ associations, in order to increase the level of involvement of workers in business management. Secondly, the document provides more attention for the promotion of quality systems, such as the spreading of information about the principles contained in the Codes of Conduct, the respect of international social and environmental standards through the publication of ‘Social Reports’ and of the results of social audit. In the Commission’s view, the Code of Conduct does not represent a valid option to the national, European and international binding regulation, due to its non-binding nature. In conclusion, given that the Green Paper has been the first EU document providing a clear definition of CSR, it has been deeply criticised, especially because it has not provided empirical evidence of the strict relationship between a social responsible conduct and the increasing business performance. Furthermore, it has to be remarked the lack of an explicit description of the EU institutions’ role, in particular regarding the outline of concrete and effective policies.

The following documents and initiatives, set out at European level, have facilitated the implementation of the EU CSR Strategy, leading to the CSR policy a renovation, presented in 2011.

The first initiative to be analysed is the ‘European Multistakeholders Forum on CSR’, established in 2002, led by the EU Commission and composed of about 40 European organizations, representing employers, workers, customers, CSOs and business trade unions. The Forum,
basing on the EU Commission’s Communication\(^73\), has the overall objective to foster CSR, promoting transparency and convergence of CSR instruments, through three main actions: (i) facilitating the exchange of experiences and good practices; (ii) bringing together the existing CSR initiatives, particularly related to SMEs; and, (iii) exploring the possibility to establish common principles for CSR practices. As part of the process, the following four Round Tables were created with the aim of: 1) spreading knowledge about CSR and facilitating the exchange of good practices; 2) fostering CSR in the SMEs’ sector; 3) promoting transparency and convergence of CSR tools; 4) improving development aspects of CSR. Each Round Table had the possibility to hear from companies their direct experience, as well as from the different members of the Table, such as NGOs and employer’s organizations. The summary reports produced by each Round Table have been integrated in the Final Report of the Forum, published in 2004\(^74\). The content of this Report reveals essential especially for the definition of a business voluntary approach to self-regulation in this field, together with the inclusion of all the already mentioned international legal sources as reference points for business conduct in respect to environmental and social aspects. in this sense, the Forum has not updated the existing policies in the CSR field, reiterating both the role played by national Authorities in providing legal regulations and the companies’ commitment in self-regulating themselves through the adoption of Codes of Conduct.

Two years later the release of the Final Report of the Multistakeholders Forum, the Commission adopted the Communication ‘Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility’\(^75\), following the intermediary update in 2005 of the Lisbon process, the Strategy for

\(^{73}\) COM (2002) 347.
\(^{74}\) The latest plenary session of the Forum was held in November 2010. The Forum Coordination Committee, composed of the representatives of all the relevant stakeholders, is currently involved in the elaboration of new initiatives related to business and HR disclosure and information.
Sustainable Development and the Social Agenda. In particular, the Lisbon process has been reviewed for promoting growth and employment, together with sustainable development, as one of the main objective of the European Union. In order to strengthen the cooperation among the Member States in the CSR field and to promote the Partnership, the EU Commission launched the proposal of a ‘European Alliance for Corporate Social Responsibility’, involving the European enterprises of all dimensions and sectors. This Alliance, described in the document attached to the Communication, redefined the central role of enterprises in collaboration with local, national and European authorities. The overall aims of the Alliance are: (i) increasing public awareness of CSR activities; (ii) exchanging ideas and views on CSR; (iii) guarantying an environment favourable to CSR.

Finally, the European Parliament adopted a Resolution in 2007, confirming the Commission’s approach to CSR, but revamping the necessity to strengthen the implementation of the existing European legislation and policies related to this field. In the Parliament’s view, the CSR policy could be better carried out through the application of the legal instruments in force; in fact, the Parliament has welcomed the last business initiatives of non-financial reporting, although it has underlined that only few reports recalled international applicable standards, are referred to the entire supply chain and included monitoring and information systems. Among the most relevant changes, the Resolution called upon the Commission for the implementation of a grievance mechanism for guarantying the access to remedy for all victims, including from third Countries, even if it has not provided any information about the implementation’s procedures.

3.3 The CSR Strategy 2011-2014

The international debate on CSR has been accelerated thanks to the UN and European initiatives at the beginning of the XXI century, as already analysed. Nevertheless, the large number of theoretical aspects of the debate and their difficult application in practice, the EU Commission has tried to reach a final definition of CSR, especially regarding the procedures and modalities through which the results could be achieved. In particular, it has to be recalled the Compendium published in April 2011 on ‘Corporate Social Responsibility: national public policies in European Union’, that qualifies the concept of CSR as «an inherently complex concept. (...) dynamic, context-dependent and holistic.»\(^7\) The Compendium represents an innovative approach to the issue, in respect to the previous instruments regarding CSR adopted in 2006 and 2007; in fact, it is organized by different thematic areas and not by Countries, facilitating the individuation of relevant tools and initiatives of public institutions related to CSR promotion. It appears more complex to understand the legal content and value of the related instruments, starting from the assumption of the voluntary nature of CSR concept. Basing on the European definition of CSR, three basic elements have been pointed out: (i) the business voluntary commitment; (ii) the application of social and environmental sustainability criteria for determining the productive strategy; and, (iii) customer satisfaction and advanced employment policies. Focusing on the first element, it offers the possibility to better define the legal content of CSR, especially regarding the non-binding legal value of all the concerned business initiatives, such as due diligence policy, Code of Conduct, etc. The final objective of the CSR strategy at European level is not to provide a legal binding framework obliging all Member States and private actors to be compliant with, but only to increase the stakeholders’ involvement in respecting fundamental rights in the business activities. For this reason, the Compendium introduces five instruments through which public policies could promote CSR values: (i) legal sources, regulations and case-law; (ii) economic and financial instruments, such as tax and fiscal policies, incentives, etc.; (iii)

\(^7\) EU Commission, Compendium on ‘Corporate Social Responsibility: national public policies in European Union’, cit., p.9.
training courses, information campaigns, websites; (iv) partnership involving companies, States and other private actors; and, (v) CSR research centres or action plans\textsuperscript{78}.

On 25 October 2011, the European Commission has released a package of measures, titled ‘More responsible business can foster more growth in Europe’, aimed at encouraging the development of business social initiatives, such as the ones related to economic equity and based on environmental and social attention. The legal basis of the initiative of the EU Commission could be found out in article 2 of the Treaty establishing the European Union (after the Lisbon Treaty, article 3, \textsection\textsection3 TEU\textsuperscript{79}), that provides the development of a ‘competitive social market economy’, namely an economic model integrating both free market principles and social justice. This article should be considered together with the so-called horizontal social clause, included in article 9 TFEU\textsuperscript{80}, that requests to take into consideration the social impact of each political and economic measure applied. Given the previous legal instruments adopted by the European institutions between March 2010 and April 2011, demonstrating the need of initiatives aimed at promoting the growth of a single market for citizens and consumers\textsuperscript{81}, among the proposals contained in the package of measures have been introduced: on one hand, the so-called Social Business Initiative, already proposed in the Communication ‘Towards a Single Market Act. For a highly competitive social market economy’\textsuperscript{82}; and, on the other hand, a renewed Strategy on CSR, that will be analysed in the following part of this paragraph. These two initiatives demonstrate the intrinsic meaning of the provisions of article 3, \textsection\textsection3 TEU as a general principle of the multilevel

\textsuperscript{78} For similar cataloguing, please refer to R. Steuer, “The role of governments in the corporate social responsibility: characterizing the public policies on CSR in Europe”, in Policy Sciences, 43 (2010), p. 49.

\textsuperscript{79} Article 3, \textsection\textsection3 of the Treaty on European Union states: «The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.»

\textsuperscript{80} Article 9 TFEU states: «In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.»

\textsuperscript{81} Among the initiatives taken by the European institutions that have led to the adoption of this package, should be recalled: Communication of the EU Commission ‘Europe 2020. A strategy for smart, sustainable and inclusive growth’ (March 2010); the Monti’s ‘Report on the Future of the Single Market’ (May 2010).

\textsuperscript{82} Proposal No. 36, COM(2010) 608 final/2.
European system, to be applied in order to reach the final objective of defining an economic and financial Union grounded on social shared values.

The new European Strategy on CSR is contained in the Communication from the EU Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, titled ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’83, as called upon the Parliament and the European Council. Given the wide number of cases involving HR violations committed by companies located within the European territory and the limited number of EU Member States having already applied a CSR national policy, the European Commission has tried to outline a new definition of CSR and a renewed agenda of actions, in order to promote its development within the process of the European economic integration.

The most relevant innovation introduced by the 2011 Communication, is the new definition of CSR as «the responsibility of enterprises for their impacts on society»84, giving to CSR a wider and more general meaning. This concept has been deepened by the Commission through a twofold approach: on one side, the compliance with the core set of internationally recognized principles and guidelines on CSR; and, on the other side, the application of a multidimensional CSR action, including at least HR, labour and environmental issues and employment practices. Although the development of CSR is led by the company, other stakeholders should cooperate with the business sector, in order to maximise a shared value with the shareholders and other stakeholders and to identify and mitigate possible negative impacts. Among the observations made by the Commission, it has been remarked that: (i) the CSR promotion should be consistent with the relevant binding and non-binding international legal sources, in order to consider all the aspects constituting CSR policy (environment, labour, corruption, etc.); (ii) the multidimensional nature of CSR should facilitate the inclusion of disclosure initiatives, non-financial reporting and the promotion of environmental and social responsibility in the supply chain; (iii) public authorities and other stakeholders should work together with

84 Ibidem, p.3.1.
companies for developing CSR and promoting the adoption of self-regulations or complementary regulations: in particular, trade unions and CSOs could identify the constraints and propose shared solutions; investors and consumers could recognize the business commitment in complying with CSR provisions; and, finally, mass media could spread the knowledge and information about negative and positive impact of business activities; and, (iv) the EU Commission will promote the creation of sectoral committees, that in the last years have enabled the adoption of guidelines and good practices.

The second part of the Communication regards the ‘Agenda for Action 2011-2014’, containing commitments for the EU Commission and suggestions for all the other actors involved and listing the following eight areas of intervention:

the enhancement of CSR visibility and the dissemination of good practices through the establishment in 2013 of CSR platforms and the launch in 2012 of a European Award for business CSR partnerships. Among the programmes launched by the European Union for optimizing the joint work of European institutions, enterprises and other stakeholders on critical social and environmental issues, within the framework of the Europe 2020 Strategy, the CSR Europe’s Enterprise Initiative85 is a good example to be considered.

The improvement of CSR role in tracking levels of citizens’ trust in business, in particular in relation to the misleading marketing regarding the negative environmental impact of products (the so-called green washing). To this regard, the Commission intends to open a debate with citizens, enterprises and other stakeholders to encourage the sharing of expectations and to call for periodic survey among citizens about their trust in business compliance.

The promotion of a Code of good practice for self and co-regulation processes, carried out through the following procedure: (i) an initial phase analysis involving all the relevant stakeholders (including public authorities and EU institutions); (ii) the collection of results through performance indicators, shared with the concerned stakeholders; (iii) the provision of monitoring

85 http://www.csreurope.org/our-strategy
mechanisms and performance review; and, (iv) the inclusion of accountability mechanisms for dealing with non-compliance complaints.

The increase of CSR role in competitiveness through the EU leverage in some fields, like consumption, public procurement and investment. The objective is the inclusion of social and environmental considerations especially in the European public procurement system, without prejudicing the principle of awarding contracts to the most advantageous tender and adding further administrative burdens for enterprises.

The company disclosure of social and environmental information, in order to facilitate stakeholders engagement and sustainability risk identification. In relation to the disclosure of non-financial information, some Member States have updated the existing EU regulation in this matter, introducing different requirements on national basis that could lead to additional costs for enterprises operating within the EU territory (excluding SMEs). As will be analysed in the last paragraph of this chapter, the European Union has worked during the last two years for drafting a regulation on non-financial reporting, conducting an impact assessment of the proposed options and also involving CSOs and public authorities. Moreover, the EU Commission has encouraged all the international initiatives in this field, such as the Global Reporting Initiative86, an organization for the promotion of sustainability reporting.

The provision of further financial funding for training and education projects, aimed at raising awareness of educational officers and enterprises on the relevance of cooperation for CSR. The European Union should encourage the inclusion in academic curricula of CSR and sustainable development matters at high school and university level, should promote the organization of concerned training courses and support further research projects under the 7th Framework Programme, as well as under its successor, Horizon 2020.

The support of local, national and regional CSR policies that sometimes are better organized and could easily achieve the expected results, in particular for SMEs. Furthermore, to this end the Commission invited the Member States to

86 https://www.globalreporting.org
prepare national list of priority actions related to Europe 2020 strategy, considering the international CSR principles and guidelines.

The last point is the most relevant for the present work, because it regards a better alignment of European and international approach to CSR. By promoting the European interests in this field, the European Union should also ensure the integration of the internationally recognized principles into European policies, such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact and the ISO 26000 Guidance Standard on Social Responsibility for large enterprises, and the ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy for all the European-based companies. Also the countries that are candidate as future EU Member States should embrace the mentioned CSR principles and guidelines, in order to continue their accession process. Regarding the spread of information and awareness about CSR principles, the EU Commission reaffirmed its commitment in doing so, especially through the establishment of direct dialogue with partner countries and regions. Finally, in order to contribute to the achievement of the most critical objectives related to business and HR, the EU Commission «invites EU Member States to develop by the end of 2012 national plans for the implementation of the UN Guiding Principles.»

The Communication does not establish a single and common procedure, but it requests that EU delegations, HR defenders and organizations, enterprises and local CSOs will be involved in the process of NAP’s elaboration, in order to better understand the consequences of State’s failure in meeting its duty to protect HR.

In the Communication’s conclusions, the Commission committed to publish, together with the European Multistakeholder Forum on CSR and the High Level Group of CSR representatives of Member States, a report on the implementation on the ‘Agenda for Action 2011-2014’, contained in the Communication. In following-up this Agenda, the Commission has released in

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87 Ibidem, p.4.8.2.
88 The High Level Group of CSR representatives of Member States meets every six months to share different approaches to CSR and encourage peer learning. Among its objectives, the high-level group operates as a mechanism for the Commission to sound out Member States on its own initiatives and to focus on major dissemination events.
March 2013 a Report titled ‘An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles’, as part of its monitoring exercise over more than 200 European enterprises with more than 1000 employees. The results of the survey conducted on CSR/sustainability report, codes of conduct and business principles publicly available demonstrate that 68 per cent of the enterprises refer to ‘corporate social responsibility’ in their policies or external activities and 40 per cent at least to one of the internationally recognized CSR instruments listed by the EU Commission. Furthermore, during the 10th meeting of the High Level Group of CSR representatives of Member States, held on 20 December 2013 together with the EU CSR Multistakeholders Forum Coordination Committee and International Organizations, have been presented by the Commission the results of the Eurobarometer data survey, published in April 2013, on the follow-ups of the 2011 Communication. The findings demonstrate the increasing interest of EU citizens in CSR-related issues and the evident gap between the citizens’ feeling of their level of information and the effective company’s disclosure of information. Regarding the implementation of the eight points of policy measures included in the 2011 Commission’s Agenda for Action, about the 80 per cent has been carried out, especially through regulatory and complementary policy actions, as will be explained in the last paragraph.

In July 2012 the European Economic and Social Committee issued an Opinion Paper on the 2011 Communication on CSR, listing some unanswered questions left by the Commission. Among the most relevant ones, there should be pointed out: (i) the unclarified definition of ‘enterprise’, that should include private, public and civil society stakeholders; moreover, the Communication does not provide an assessment of the results of the last ten years of CSR.

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89 32 per cent refer to UN Global Compact; 31 per cent to Global Reporting Initiative, 23 per cent to UN Universal Declaration of HR; 20 per cent to ILO sources; 2 per cent specifically to ILO MNE Declaration; 3 per cent to UNGPs. About the latter, the EU Commission expected all the enterprises to implement them with regard to CSR.

90 The survey, commissioned by the European Commission, Directorate-General Enterprise and Industry, questioned over 32,000 European, American citizens and other selected nationalities about the influence that companies have on their societies. Interestingly, the majority of European citizens (71 per cent) believe SMEs make more effort to behave responsibly than larger companies. Finally, 79 per cent of European respondents indicated they were interested in business social and environmental impacts, but only 36 per cent said they felt informed on this issue.
strategy on companies’ behaviour. (ii) Although it is essential that enterprises should be accountable for their activity, CSR should consider how to deal with the inherent connection between business and the community, through transparency actions and social dialogue. (iii) Finally, in its strategy, the EU Commission has not included SMEs’ approach, missing the opportunity to create a comprehensive policy. In fact, although the Commission does not specify what it intends for ‘business’, there is a clear reference to large companies. In this sense, the ‘one size fits all’ approach of CSR for different kinds of enterprises is not applicable.

More recently, in June 2012 the EU, for the first time in its history, adopted the Strategic Framework and an Action Plan on Human Rights, setting out the HR policy for the years ahead and establishing the list of actions to be implemented for achieving these goals. The Framework reaffirmed the EU commitment in promoting HR compliance and protection in all the sectors of its external sections, such as trade, investment, energy, environment, etc., outlining the main objectives and priorities of EU HR policy over the next ten years. The Action Plan listed ninety-seven actions to be implemented by the end of 2014, including business and HR, and provided the publication of the ‘Annual Report on Human Rights and Democracy in the World’.

Moreover, in June 2012 the EU Council adopted the mandate of a EU Special Representative (EUSR) on Human Rights, Mr Stavros Lambrinidis, former Greek Minister of Foreign Affairs, in order to ensure the internal implementation of the Framework and the Action Plan, to enhance the dialogue on HR with third-parties and to represent EU in the international fora on HR. The EU’s Annual Report on Human Rights and Democracy in the World for 2012 (May 2013) contains, among the others, a section dedicated to the implementation of the UNGPs, listing all the relevant initiatives where the EU Special Representative took part during the first year of his mandate, including the UN Forum on BHR. Furthermore, it contained the legislative proposals to be presented or that have already been presented to the EU institutions related to CSR and BHR, such as the non-financial reporting by companies included in the ‘Single Market Act II:

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91 Council of the EU, 9431/13, May 2013.
Together for new growth' adopted in April 2013. In addition, it recalled the EU commitment in developing sector-specific guidance, in collaboration with some partners - such as the Shift Project and the Institute for Human Rights and Business\(^{92}\) - such as the already published guidance for oil and gas sector, the ICT sector, and the employment and recruitment agencies, that will be analysed in the last paragraph of this chapter. Finally, the EU Action Plan on HR and Democracy contains the EU Member States’ commitment in adopting NAPs on UNGPs implementation, as requested by the EU Commission in 2011. The last chapter of the thesis will be completely focused on this issue.

In conclusion, basing on the analysis conducted it is possible to affirm the different value and contribution of State’s legislation and CSR instruments in ensuring the respect of fundamental rights and in safeguarding the interests of all the economic actors. The evolution in the last years of the XX century toward the voluntary nature of CSR initiatives has been due to the increasing of multinational enterprises’ economic influence and to the more limited role of public institutions as goods and services’ providers. Basing on the CSR definition given by the EU Commission in the 2011 Communication, it could be recalled the voluntary approach of CSR, complemented by the internationally recognized binding norms related to the protection of HR. The codes of conduct, the quality certification systems, the best practices and standards - deriving both from State’s regulation or company self-regulation - play a role of demanding the inclusions of stakeholders’ interests in the business priorities and of fostering the consideration of these interests beyond the related binding provisions. Sometimes, in some contexts where the rule of law is not guaranteed, the CSR instruments could be invoked for protecting fundamental rights, replacing the ineffective binding provision. Given the lack of international binding sources related on CSR and the inability of some Countries worldwide to provide national legislation in this field and to guarantee its enforcement, all the voluntary initiatives should be promoted and respected, especially when it is impossible to apply national judicial

\(^{92}\) ‘Shift Project - Putting Principles Into Practice’ is a team of ten committed individuals in addressing business and human rights and coming from all the sectors, from Governments to NGOs. The ‘Institute for HR and Business’ is a global centre of excellence and expertise on the relationship between business and HR.
mechanisms and sources. For instance, following some OECD and UN conventions, such as the ones against corruption, it could be useful to implement the so-called home country control\textsuperscript{93} in order to support the elaboration of an international regulation. However, it has to be considered the relevance of these soft law instruments, in particular when they come together with national legal framework (e.g. information and monitoring systems, external control, quality certification, etc.) and contribute to the respect of HR and the awareness of the negative impacts of business activities.

3.4 The soft law instruments on CSR and BHR endorsed by the European Union

As expressed by the Conclusions of the EU Foreign Affairs Council held in February 2014, setting out the European priorities for the UN HR Fora, the EU has reaffirmed its commitment in several areas affecting HR, including the business sector. In particular, it has recalled the importance to encourage and contribute to the dissemination of the UNGPs, through the organization of international debates and conferences, the promotion of multistakeholders initiatives and of dialogue with third Countries, and the support to NAPs’ implementation.

To this regard, this paragraph focuses on the soft law instruments adopted by the European Union since the endorsement of the UNGPs. In particular, will be analysed: a) the EU Sector Guides on Implementing the UNGPs on Business and Human Rights; b) the EU Regulation on transparency of company non-financial reporting; c) the EU proposed Regulation on conflict-minerals.

\textsuperscript{93} The \textit{home country control} is a principle of EU single market Law and it determines which law applies to good and services that cross the border of EU Member States.
3.4.1 The EU Sector Guides on Implementing the UNGPs on Business and Human Rights

As already mentioned in the EU's Annual Report on Human Rights and Democracy in the World for 2012, the European Union – in collaboration with the Shift Project and the Institute for Business and Human Rights - has issued three specific-sector guides, in order to ‘translate’ the provisions contained in the UNGPs for the selected sectors. In particular, the three documents are related to the ICT (information and communication technologies) and oil and gas sectors and to the employment and recruitment agencies. Not intended to be legally binding, the Guides provide a range of options to put in practice the UNGPs’ provisions, leaving the firms the management for the implementation phase, based on their sector, size and location. The internal structure of the Guides follows the Interpretative Guide developed by the Office of the UN High Commissioner for Human Rights, together with Prof. Ruggie. For this reason, it focuses on the following matters: (i) the corporate responsibility to respect HR, namely the second pillar of GPs; (ii) the key steps required to a company for the GPs’ implementation, from the business commitment and identification of the HR risk to the provision of effective remedies to harmful acts; (iii) the role of States in promoting laws and regulations for addressing and punishing HR abuses⁹⁴; (iv) the development of local-focused policies related to the territory where the company operates (‘no one size fits all’ approach); and, (v) the need of an on-going process for the UNGPs’ implementation, due to the continuous changes of contexts and circumstances. In general, the Guides regard the whole industrial sector they refer to, cover all the internationally recognized HR, apply to all the supply chain and company’s subsidiaries and to companies of all size - including the smallest ones - and, although they take into consideration especially the

⁹⁴ Although States and companies play independent role in HR protection and respect, the Guide points out the potential difficulties faced by companies in complying with HR provisions when they operate in States unable to meet their HR obligations.
experiences of EU companies, they aim to be applicable at global level, both for EU companies operating inside and outside the EU borders. Furthermore, being the result of a field-based research period, two multistakeholder consultation roundtables and more than seventy-five interviews per sector with individual experts, the Guides’ audience is not limited to the specific-sectors’ companies, but also to practitioners, trade unions, NGOs, industry and business associations, representatives of vulnerable or affected groups and all the other involved actors.

3.4.2 The proposal for enhancing business non-financial reporting

On April 2013 the European Commission proposed to amend the existing accounting legislation on transparency of enterprises on social and environmental issues. This initiative was already announced in the Single Market Act Communication\(^\text{95}\) (April 2011), the already mentioned above 2011 Communication on CSR Strategy and in the Action Plan for Company Law and Corporate Governance adopted in December 2012\(^\text{96}\). The proposal is the result of a series of consultation with Member States, companies and stakeholders and an extensive impact assessment concluded in 2012. The EU Commission has considered the current EU legislation in this field\(^\text{97}\) as unclear and ineffective, due to the adoption by Member States of legislation that go beyond the EU law, such as the British, Spanish, Swedish and French updated legislation. For this reason, after the adoption by the EU Parliament in February 2013 of two Resolutions on ‘CSR: accountable, transparent and responsible business’ and on ‘CSR: promoting society’s interests and a route to sustainable and inclusive recovery behaviour and sustainable growth’\(^\text{98}\), the EU Commission released its proposal.

\(^{95}\) COM (2011) 0206.

\(^{96}\) COM (2012) 740.

\(^{97}\) Namely the Fourth Company Law Directive (78/660/EEC) and all the emending acts.

\(^{98}\) Respectively: (2012/2098(INI)) and (2012/2097(INI)).
According to this regulation, large companies are due to disclose information regarding their activities related to HR, labour conditions, anti-bribery and corruption and environmental standards. As underlined by the Internal Market and Services Commissioner, Michel Barnier\textsuperscript{99}, this proposal could introduce more financial and economic benefits for companies, as demonstrated by the business performance of companies that are already experiencing non-financial reporting. Moreover, the legislation will apply to all the enterprises with more than 500 employees and not to SMEs, due to the higher level of costs than benefits for small firms. The proposed measures identify some important aspects to be fulfilled by the businesses:

- the ‘sustainability’ report - published at group level and not only by one of the companies of the group - should be addressed through the disclosure of relevant environmental and social information on business activity in all the concerned sectors;
- the regulation does not provide a prescriptive set of steps that should be followed for elaborating the report, giving to the company more flexibility; however, the company could use the international guidelines and standards that considered more reliable, such as the UN Global Compact, ISO 26000, etc.;
- following the EU general corporate governance framework, the company should provide information on its internal organization and management, the respect of gender equality, educational and professional background and geographical diversity.

At the end of February 2014, the Committee of Permanent Representatives (COREPER) endorsed the agreement reached by the EU Parliament and the Council on the amendment proposed in April 2013. The Draft Directive addresses mainly large companies, but also financial institutions, banks and insurance companies are included. Furthermore, the Directive could be considered as the first step for the

\textsuperscript{99} European Commission, Press Release ‘Commission moves to enhance business transparency on social and environmental matters’, 16 April 2013.
implementation of the provisions contained in the EU Council Conclusions of May 2013, that required to companies more transparency on tax and fiscal matters and large companies and groups’ reporting initiative. The EU Parliament has adopted the Commission’s proposal on 16 April 2014.

3.4.3 The proposed Responsible Trading Strategy on Conflict Minerals

The most recent EU legislative initiative concerning in some way the CSR and BHR matters is the proposed EU legislation on responsible trading strategy for minerals from conflict zones. The proposal, jointly presented by the High Representative of the EU for Foreign Affairs and Security Policy and EU Trade Commissioner, has been presented on 5 March 2014. In particular, the joint proposal is aimed at limiting the financing to armed groups activities in conflict affected areas, in particular the Great Lakes Region in Africa and in Latin America, through the mining and trade in minerals. The package of measures contains a European self-certification system for responsible importers into EU territory of tin, tantalum, tungsten and gold, and the provision of a due diligence process, based on the OECD Due Diligence Guidance. In this way, the importers will have the opportunity to trade more easily and in a responsible way with operators in conflict zones, facilitating the monitoring by EU concerned systems over all the supply chain transparency. According to the draft proposal, some incentives should be established for supporting the Regulation’s provisions: (i) public procurement incentives for some business sectors; (ii) financial support for SMEs; (iii) diplomatic dialogue with Governments of minerals’ extracting and producing Countries; (iv) raw materials diplomacy in multistakeholders due diligence initiatives; and, (v) promotion of cooperation among Countries involved and support to Member States policies concerned. Also this legislative initiative is the result of a public consultation process, an impact assessment and
extensive consultations with the OECD, business, CSOs, as well as with institutions and stakeholders in producer Countries.

The proposal has been immediately followed by the Joint Communication from the EU Commission to the Parliament and the Council on ‘Responsible sourcing of minerals originating in conflict-affected and high-risk areas. Towards an integrated EU approach’\textsuperscript{100}. This document contains the overall foreign policy regarding the European action to struggle the link between minerals’ trade and armed conflicts, confirming the EU commitment on conflict minerals, as demonstrated by the inclusion of this matter in the EU External Action Agenda. The integrated approach set out in the Communication is mainly related to three issues: (i) reducing the armed groups trading activity in conflict affected zones; (ii) improving due diligence frameworks compliance by EU operators; and, (iii) reducing minerals-related distortions in high-risk areas.

Some international NGOs, committed in the area of ‘conflict minerals’ have already presented some concerned remarks, especially regarding the non-binding nature of these proposed measures and the limited kinds of companies on which the regulation applies. As far as concerns the first point, the NGOs have observed that at European level already exists a voluntary system of due diligence, issued by the OECD and endorsed by Governments. Furthermore, the possibility for companies to choose to be or not responsible could undermine the State duty to respect HR and limit the companies’ commitment to comply with voluntary supply chain due diligence, as provided by the Commission’s proposal. Regarding the second point, instead, the NGOs’ representatives have remarked the lack of provisions extended to other minerals and not only to the four mentioned and the inclusion of the opt-in scheme limited to importers of raw materials and not including the operators of finished products. The European institutions are considering all these suggested measures for improving the proposed

\textsuperscript{100} JOIN(2014) 8.
legislation, that will be probably released in its final version later this year.
CHAPTER 4
THE THREE CASE STUDIES:
UNITED KINGDOM, ITALY AND SPAIN

4.1 The NAPs’ drafting: States and NGOs’ engagement

Since the endorsement of the UNGPs some UN Member States have begun to focus their attention on the needed implementation of the Guiding Principles and the updating of their national CSR policies. In particular, together with the increasing engagement of States and public institutions in this matter, some concerned NGOs have developed tools and projects in order to help Governments to address this problem: the second part of this paragraph will regard this topic.

To this regard, last February it has been held in Geneva the first Open Consultation organized by the UN Working Group on the UNGPs’ implementation at national and local level, involving States, CSOs and enterprises’ representatives. During this event, have been presented the results of the first two years of Governments’ commitment in implementing the GPs provisions, the faced constraints and the future engagement in this field. Furthermore, Mr. Michael Addo, a Working Group’s member, has pointed out the WG’s position in relation to States’ duty to protect HR by corporate-related abuses. He has remarked that States are requested: (i) to draft at least a baseline assessment on CSR and BHR situation in the country, before the NAP’s elaboration; (ii) to follow best practices of other Countries that have already published their NAP; (iii) although it does not exist a common model for the drafting procedure.

The WG preferred a process based on consultation with all the relevant stakeholders or a NAP’s model. As far as concerns the essential elements of the
NAPs, the WG has recalled the need to create a monitoring structure for controlling the status of the UNGPs’ implementation by States and the existing grievance mechanisms, in order to ensure access to remedy for victims. In fact, a specific department will be appointed to evaluate States’ action and avoid their impunity. Finally, Mr. Addo underlined the necessity to send the NAP to external bodies for a check and to involve external consultants for managing the relationship with all the stakeholders.

Apart from the WG’s position, during the Open Consultation the representatives of some Countries from all over the world have reported on their Governments’ commitment in addressing corporate-related HR violations\textsuperscript{101}.

Among the interventions, it could be remembered the speech of the Ambassador Yvette Stevens, Permanent Mission of the Republic of Sierra Leone in Switzerland. She has provided the Sierra Leone’s experience in NAP’s drafting. In particular, she reaffirmed the necessity to consider each country’s social and political situation, together with the most relevant local requests. For instance, in the Sierra Leone’s NAP will be included some provisions on agricultural sector in general and biofuel. An inter-ministerial Working Group, indeed, is working on agricultural Guidelines, analysing the relevant institutional framework, the governmental, corporate and NGOs’ role, elaborating a six stages’ document based on consultation, land agreement, environmental and health impact assessment, monitoring and enforcement action. For promoting the elaboration of this draft, the Sierra Leone’s Government has organized consultations with local communities, that were not aware on legal consequences of this initiative, providing legal advices to them. In conclusion, the Guidelines included a ranking (\textit{silver, gold and platinum level}) concerning the minimum requirements that should be ensured by corporations to local communities.

Furthermore, other relevant interventions could be mentioned, such as the ones of national NGOs and multinational enterprises’ representatives. On one side,

\textsuperscript{101} To this regard, please refer to paragraph 4.1.1
NGOs’ have recalled that the NAPs may reflect national regulations on access to judicial mechanisms, may be embedded in International Law HR standards and may provide consultations with local and vulnerable communities. On the other side, the business representative has pointed out the lack of coherence between the already released NAPs and the necessity of avoiding the creation of legal barriers at national and international level. Moreover, on one hand, according to the business point of view the Working Group should play a leading role in aligning NAPs to UNGPs and in promoting the industrial countries support to NAPs’ implementation in the southern regions of the world. On the other hand, enterprises should support the NAPs application for levelling playing field, whilst companies of all size and sector should be able to implement HR impact assessment and non-financial reporting activities. Finally, according to a NHRI’s representative NAPs should: (i) reflect all the range of HR impacted; (ii) be based, as recalled by the UN WG, on a baseline assessment and on consultation with external experts (e.g. academicians, HNRIs’ members, etc.); (iii) be independent and clear, involving also all the vulnerable groups, not only NHRI’s as independent experts; and, (iv) include monitoring evaluation, through the selection of achievable and timing targets and the provision of review mechanisms.

The most relevant follow-up of this Open Consultation is the roadmap presented by the UN Working Group to develop a guidance for States engaged in implementing their NAPs. The main milestones of the roadmap include: (i) the online repository launched after the Open Consultation for collecting all the NAPs released by States; (ii) the establishment of an annual review process; (iii) the online consultation on NAP’s baseline; and, (iv) publication of a draft guidance on NAPs by the end of 2014. Given this commitment demonstrated by the UN WG in assisting the States action in this field, it could be useful to understand the individual initiatives implemented by a number of European or extra-European States, aiming at aligning their internal policies to the internationally recognized BHR standards and principles.
4.1.1 A global overview on NAPs

In order to give a global overview of States’ engagement in this field, it is possible to distinguish two groups of States, basing on the current status of NAP’s implementation. The first group - that could be defined as the *front-runners group* - is composed of those countries that have already published or are in the process to release their NAP, such as United Kingdom, Spain, Italy, the Netherlands and Denmark. To the second one belongs Belgium, Norway, Switzerland, Germany, Finland and France, those States that are approaching in the last period the NAP’s implementation issue. Finally, outside the European boundaries, in the American continent could be mentioned the U.S. Toolkit for businesses and the commitment of the Colombian Government in this field, whilst in the Asian and African continents some States (e.g. Uganda, Mozambique, etc.) are in the process to consider the problem of the corporate-related HR violations.

As introduced above, during the UN Open Consultation last February also some States’ representatives have given a speech on the status of UNGPs implementation within the national legal system. In particular, the Dutch and Spanish Governments have disclosed some information, especially regarding the NAP’s consultation and drafting processes.

For instance, in the Netherlands since mid-2012 the Government has created an interdepartmental Working Group on business and HR, with the aim to introduce the UNGPs in the Dutch legislation, having compared the existing Dutch policies in this field. The consultation process has regarded both the CSR and BHR policies, including 27 interviews conducted by external experts, consultation meetings with enterprises, NGOs and implementing organizations and a final roundtable with all the involved stakeholders, in order to analyse and promote State and business accountability. The Dutch NAP, presented to the Parliament in December 2013, is thus the result of this process and it has pointed out some important concerns, such as: (i) the need to clarify the due diligence policy through a better access to information.
for business, industrial sector analyses and training workshops for companies; (ii) the promotion of a more active role of Government, namely a pro-active State’s involvement in next years; (iii) the improvement of policy coherence, transparency and reporting initiatives through CSR agreement; and, (iv) the guarantee of access to remedy, promoting and encouraging dialogue between community and business and enhancing sector investigation conducted by the OECD NCPs.

Another European Country deeply committed in elaborating a NAP on this matter is Denmark, that has released its NAP in April 2014. Previously, the Danish Government published its CSR NAP 2012-2015, entitled ‘Responsible Growth’, also containing actions for UNGPs implementation. The NAP on Business and HR has been developed by the Ministry for Business and Growth and the Ministry of Foreign Affairs. The Ministry of Employment, the Ministry of Justice, the Export Credit Agency and the Danish National Institute for Human Rights have contributed to the content of the national action plan. Actually, the Plan is the results of the recommendations presented mainly by the Danish Council on Corporate Social Responsibility (The Danish Council for CSR), the advices of the Danish Government and of the most relevant business and financial organizations, NGOs, local municipalities and trade unions represented by the CSR Danish Council. Furthermore, the first draft of the NAP has been sent to the Danish Working Group that has elaborated some recommendations on non-judicial mediation and grievance mechanisms for monitoring business conduct, it has been created by the Danish government in December 2012. The ‘Danish National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights’, published in March 2014, is structured in three parties, based on the three pillars of the UNGPs. Each part is composed of four paragraphs:

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103 The Danish Working Group is composed of key stakeholders from the CSR Danish Council, including the Confederation of Danish Industry, the Danish Confederation of Trade Unions, the Danish 92 Group, the Danish Shipowners’ Association and the chair of the Council.
a) a summary of the UNGPs of the pillar concerned; b) the recommendations from the CSR Danish Council; c) the initiatives already implemented by the Danish Government in this matter; and, d) planned initiatives. In particular, the Plan focused on business activities of Danish enterprises operating abroad, because the economic and reputational risk for Danish companies is perceived as higher when they operate outside the Danish territory. The long Danish political tradition in supporting and promoting HR activities - especially related to freedom of expression, freedom of religion, racism, indigenous peoples, children’s rights, the rights of persons with disabilities, HR defenders, torture, and most recently, Corporate Social Responsibility (CSR) - is demonstrated by the information contained in the introduction of the NAP on UNGPs.

Among the European States that have started just in the last months to focus on the GPs’ implementation could be mentioned Belgium, that, as well as the Irish Government, is monitoring and mapping the related activity of the European States involved. In particular, the concerned institutional Body, the Steering Group on HR within the Belgian Ministry of Foreign Affairs, that is collecting information about the existing best practices at European level regarding the content of the NAP, also through the involvement of CSOs. Indeed, on 10 April 2014104 the Belgian Ministry of Foreign Affairs has organized a close roundtable for sharing the experiences with other European countries, such as the Netherlands and Spain. At the event have participated some representatives of both these Governments, of Belgian CSOs and of UN High Commissioner for Human Rights, in order to have a complete overview of the drafting and consultation processes implemented by the States regarding the NAP. Thanks to this event, the Belgian Government will be able to follow the best samples of the already concluded processes on NAPs, grounded on the main phases, such as the baseline assessment, the individuation of a leading body, the open

consultation with other public institutions, CSOs and business representatives and the presentation of a draft version of NAP to the Parliament.

As far as concerns Switzerland, in response to the request formulated by a member of the Swiss National Council, the Federal Government is developing a NAP for implementing the UNGPs. Both the Federal Department of Foreign Affairs (FDFA) and the State Secretariat for Economic Affairs (SECO) have commissioned to the Swiss NGO ‘Swisspeace’ a document containing the results of a consultation process involving businesses, NGOs and academicians for mapping the current Swiss situation on BHR. The study has revealed a number of options available for a governmental action in this field and a lot of expectations coming from different stakeholders. The two hundred recommendations in forty-two different areas pointed out during the study, can be divided in five categories: (1) providing information and support for companies; (2) requirements for SOEs; (3) legally binding measures for reporting on or demanding due diligence; (4) the implementation of corporate responsibility in SOEs, and, finally, and, (5) measures for ensuring the access to judicial or non-judicial remedy.

The Swiss NAP is expected to be approved by the Federal Council in December 2014. The Swiss sample could be considered as an unicum in the European scenario: firstly, although Switzerland is not a member of the European Union, it is following the UNGPs implementation process through the elaboration of a NAP; secondly, due to the location of all the UN Offices on Human Rights in Geneva, the Swiss Government has been very often involved in HR issues, especially during the Ruggie mandate. Furthermore, HR has always been a sensitive issue of the Swiss political agenda and, at the same time, a lot of voluntary initiatives, organized by CSOs and NGOs, have taken place in recent years regarding BHR.

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On the other hand, Germany is just approaching the BHR issue, also due to the assignment of the new left-wing Government. According to the position of the German leading authority in this field - the Ministry of Foreign Affairs - the German Government will promote a study on BHR as a starting point for implementing the Ruggie Framework, although the document does not mention the intention of the German State to develop a NAP.

Finally, among the European Countries, the French, Norwegian and Finnish Governments have established institutional bodies or commissioned studies for facilitating the NAP’s drafting. In particular, in France the National Human Rights Institution (Commission Nationale Consultative des Droits de l’Homme - CNCDH) has developed some recommendations on the NAP’s implementation on BHR, contained in the Advisory Opinion published in October 2013106. In the same period, also the Norwegian Government has started to pay its attention to the UNGPs implementation, commissioning to an external expert a mapping study107 for analysing the existing gaps in the Norwegian legal system. The study is divided in three main parts: the first two parts regard the Norwegian commitment within the State duty to protect HR - as result of the interviews’ campaign conducted by external experts and the work of the multistakeholder group composed of Ministries and NGOs representatives, trade unions and associations of employers - and the analysis of the legislation in force. The last part contains the gap analysis of the existing State policies in respect to the content of the UNGPs, such as the ones regarding general context, extraterritoriality, private and public procurement, conflict areas and grievance and judicial mechanisms. As recalled in the introduction of the mapping analysis and according to the Author’s opinion, due to the lack of resources and time the results of the study are not complete and

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exhaustive. However, it could be utilized as basis for looking forward by identifying risks for States and thus the related actions to be adopted by the Norwegian Government, in order to solve the existing gap between the risk related to HR violations committed by businesses and the corresponding HR protection measures within the Norwegian public authorities. Finally, the Finnish Government has established a Working Group for the drafting of its NAP on Business and HR and, according with the last available Peer Review Report on CSR\(^\text{108}\), resulting from the consultations between the Finnish Ministry of Employment and the Economy and Ministry officials of the Czech, Portuguese and Greek Governments. As stated in the Report, the Finnish Government is strongly committed in promoting a CSR policy (the last NAP on CSR has been released in 2012) and in drafting a proposal for a NAP on the implementation of the UNGPs by March 2014\(^\text{109}\). To this end, the traditional Finnish HR policy, focused especially on labour rights rather than business and HR, should be realigned in order to include among the Finnish priorities the promotion of socially responsible public procurement and social responsibility among state owned companies.

Outside the European territory, the United States of America have not really elaborated a NAP on business and HR, but State Department has published on its website a Toolkit\(^\text{110}\) summarizing the U.S. approach on this matter. In particular, the document is based on the U.S. Government’s commitment in providing support and training for the respect of HR of all people, especially in the business sector, as demonstrated by the Secretary of State John Kerry speech in April 2013\(^\text{111}\) reported in the introduction of the Toolkit. The scope of the

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\(^{108}\) Peer Review Report, “Peer Review on Corporate Social Responsibility”, Helsinki (Finland), 7 November 2013.

\(^{109}\) Until the end of April 2014, the NAP’s proposal is not available online yet.


\(^{111}\) “Anywhere that human rights are under threat, the United States will proudly stand up, unabashedly, and continue to promote greater freedom, greater openness, and greater opportunity for all people. And that means speaking up when those rights are imperiled. It means providing support and training to those who are risking their lives every day so that their children can enjoy more freedom. It means engaging governments at the highest levels and pushing them to live up to their obligations to do right by their people. It means encouraging businesses to respect human rights wherever they operate.”
The document is to support the interests of U.S. companies operating abroad and enhance the effectiveness of the U.S. actions in the International Institutions concerned. Furthermore, it explains how the U.S. government addresses business and HR, by providing examples of relevant regulations and policies, and what U.S. companies should know for respecting HR throughout their global operations. According to the Obama Administration, business activities have an impact on all the four main areas of interest of the U.S. foreign policy, namely the national and international security, an open international economic system, the respect of fundamental values and the promotion of peace through a stronger global cooperation. For this reason, the State Department has decided to adopt a common policy with business representatives, in order to pursue these foreign policy objectives in three ways: (i) supporting companies that globally improve the standard of living; (ii) concluding a partnership with US-based enterprises for projects that could give advantages to both the Government and the business sector; and, (iii) encouraging a social responsible business conduct and the respect of HR. The document thus includes some examples of the already implemented initiatives of the U.S. Government in cooperating with enterprises on projects of mutual importance, as support, partner and promoter. Then, the document lists the new and emerging legal tools at national level and some best practices for companies. Finally, in the conclusion, it has been recalled the intention of U.S. Government to continue its promotion and support of responsible business conduct through the implementation of innovative tools related to HR protection by the business sector.

Among the Latin American Countries, Colombia is the unique one that has already published a document related to the UNGPs implementation. The so-called ‘Cuaderno-Guía of the UN Guiding Principles on Business and Human rights: Gateway’ has been drawn up by the NGO Social Innovation Sustentia within the Project ‘Training and Dialogue on the Framework Business and Human Rights in
Colombia. This document is aimed to achieve the effective implementation and easier understanding of GPs, through the elaboration of documents and materials referred to States, companies and also to rights-holders. This initiative has contributed to increase the national awareness on this issue, as demonstrated by the adoption of a national policies related to some international sources for BHR, such as Global Compact, OECD Guidelines, ISO 26000 and UNGPs.

To sum up, the roadmap drawn by the front-runners Countries, especially at European level, is helping the latecomer ones in identifying the best practices, especially for stakeholders’ involvement, and in organizing the drafting process. Furthermore, thanks to the UN Working Group commitment in this matter, by the end of 2014 will be probably available a draft guidance for NAP’s implementation, including all the results of the WG NAPs project launched in February 2014.

4.1.2 NGOs’ role: the ICAR and Danish Institute initiative

Nevertheless the relevant States involvement in this field, also the NGOs and CSOs action should be considered, in order to more easily understand the entire NAP implementation’s process and the role played by these actors in cooperating with public authorities.

Since 2012, the International Corporate Accountability Roundtable - ICAR - and the Danish Institute for Human Rights, as stated in the ICAR Statement to the U.S. State Department on UNGPs implementation, have been engaged into the promotion of this process at global level. To this end, they have decided to create a common platform for improving States’ involvement in addressing the
NAP’s drafting process. Indeed, in August 2013 they launched the Project “NAPs: State strategies for Implementation of the UNGPs”, in order to release a useful NAP’s toolkit, containing the advised State measure for the UNGPs implementation. The NAPs Toolkit should be composed of three main parts: the NBA, the NAP and the reporting and reviewing mechanisms on State actions. The first point - thus requested by the UN Working Group as mentioned in paragraph 4.1 – contains all the required State activities for each GPs, bottom-up (community-based) and top-down (desk-based) methodologies for identifying the right way for UNGPs implementation and a framework for assessing States progress. The second part includes a model of NAP, all the information to build it, the minimum content required, the consultation process, the territorial and extraterritorial issues and all the State regulations and law regarding procurement, investigation, monitoring, auditing and reporting. The last part is about the proposals for reviewing and reporting States implementation process conducting at sub-regional, regional and global levels, on a periodic basis and using alternative modalities.

The ICAR Project combines together a consultation process with regional and global stakeholders and the research activity conducted by the ICAR’s experts. Given this double dimension, the Project should easily lead to the formulation of a tool for supporting States progress toward the effective compliance of their duties to protect under the UNGPs. Furthermore, the Project will be aimed at complement the initiatives of all the relevant actors, including the UN Working Group - according to its mission of promoting a comprehensive dissemination of the UNGPs at global level - NGOs and obviously States.

The main steps of the Project could be summarized as follows:

- project launch in August 2013;
- first round of informal consultations with stakeholders groups;
- second round of consultations/interviews with Governments, CSOs, business, investment community, academia and NHRIs;
✓ organization of the first Dialogue on National Implementation of BHR Framework at European level in Brussels (October 2013), followed by the one involving African actors in Accra, Ghana (November 2013);
✓ participation at the 2nd UN Forum on BHR in Geneva (December 2013);
✓ launch of the Latin American Dialogue on National Implementation of BHR Framework in Bogotá, Colombia (17-18 March 2014), followed by the Asia-Pacific one in Delhi, India (11-12 April 2014).

According to the last updates on the ICAR website, jointly with the Dialogues initiated at regional level, in April 2014 a consultation with business practitioners has taken place in London, involving more than 40 participants from business and investor community, governments, CSOs and other stakeholders groups, in order to promote their role in defining the objectives, content and development of the NAPs.

The results of both the Latin American and the Asia-Pacific Dialogues, contained in a summary published online by ICAR, clarify the most relevant issues related to the UNGPs’ implementation in these regions. On one side, during the meeting in Bogotá, the participants have reaffirmed the importance of NAPs as a mean and not an end of the ongoing State commitment related to BHR and the need to cross-learning or partnering initiatives between States, especially outside the Latin American territory. On the other side, the event in Delhi has recalled the major challenges of the regions, such as State-business nexus on BHR and political corruption, and the existing lacking of State engagement in BHR across all the Asia-Pacific countries. Finally, the participants of both events have considered the indigenous peoples rights as a high risk factor related to business activities.

Furthermore, the outcomes of the African and European Dialogues are already available. Regarding the event held in Accra in November 2013, twenty-one CSOs leaders coming from thirteen African Countries
have participated, together with 50 NHRI representatives that have taken part some days later in the 9th Biennial Conference on the theme of “Business and Human Rights: Challenges, Opportunities, and the Role of National Human Rights Institutions (NHRIs)”. The most relevant concerns pointed out during these events regarding the African region’s situation are the following: (i) the lack of awareness amongst all the stakeholders groups about BHR Frameworks; (ii) the commitments taken by African Governments for the endorsement and an implementation of a number of HR legal instruments at sub-national, regional and international level that have not been carried out in an effective manner; (iii) the so-called State-business nexus as a priority in the African context, where States very often participate in business projects; (iv) the role of both international stakeholders and NHRI in collaborating for the development of NAPs, due to the scarcity of experience and resources of African institutions; (v) the necessity of conducting a baseline assessment for reporting on the current local situation and for monitoring the efficiency of judicial and non-judicial mechanisms and the laws and regulations in force; and, (vi) the foundation of a new regional network called the ‘African Coalition on Corporate Accountability’ (ACCA), in order to promote a deeper engagement of the African CSOs in the BRH matters. Quite different are the observations presented by the European representatives of CSOs during the Dialogue held in October 2013. During the discussion, the participants have noted the following issues: (i) the need to widen the States engagement on NAPs implementation, not limited to voluntary mechanisms; (ii) the involvement of more States departments and Ministries (such as the ones of business, trade and justice) in the NAP’s drafting and throughout all the process; (iii) the inclusion of both the internal and external dimensions in the NAPs, in order to address corporate activities’ impacts at home and outside the national territory; (iv) a more effective analysis and development of the Third Pillar provisions in the NAPs, since the access to remedy for victims becomes crucial when the harm is occurred; (v) the relevance of a baseline
assessment as a prerequisite for the development of the NAP, that should include concrete targets and timelines; (vi) Governments should conduct regular and transparent consultations with different stakeholders groups, including CSOs, rights-holders and public institutions.

In conclusion, the ICAR-Danish Institute Project should be considered as one of the most effective and reliable tool for helping States and public authorities to approach NAPs drafting and implementation. Although the NAPs Project Toolkit and Final Report are scheduled to be released in June 2014 and thus not available yet, it is worth remarking the role played by these initiatives in the global context, giving the opportunity to all the subjects involved to share information and experiences and to highlight the most significant concerns felt by them.

4.2 The British case: a best practice?

The UK National Action Plan is the result of an in depth consultation process with all the relevant actors, preferred by the UK Government to a gap analysis that some States have set out. The consultation has taken place within the cross-government Steering Group, including all the players involved, that have had the opportunity to discuss and share information also during some workshops, attended by 50 companies and 25 NGOs representatives located in the UK. Following to this series of workshops, in June 2013 the UK Government organized a conference in order to give the opportunity to business and CSO representatives to share opinions thanks to this cross-government approach.

Among the main objectives of the UK NAP, the individuation of a method to communicate NAP’s content to British businesses that plays an important role. In fact, given the need of UK companies to have coherent policy messaging from the UK Government on HR, the NAP tried to meet these needs, through different actions, such as:
✓ the implementation of Government obligations to protect HR within the UK jurisdiction, under the first pillar;
✓ the support to UK companies to meet their accountability to respect HR, under the second pillar, at home and abroad;
✓ the guarantee to access to remedy for victims, under the third pillar;
✓ the promotion of a HR impact and risk assessment to help businesses in addressing them;
✓ the promotion of international adherence to UNGPs, especially for States;
✓ the demonstration of Government policy coherence requested by companies.

The NAP is structured in three main parts, following the UNGPs structure in three pillars; a fourth part, instead, regards the possible further developments after the GPs endorsement. Each part contains an overview of the UK relevant legislation in force related to the specific sector examined, the actions already implemented and the planned future steps.

The first part, regarding the State duty to protect HR, focuses on the existing UK legal and political frameworks related to business and HR, listing the legal instruments adopted or endorsed by the UK Government, such as: the UK Bribery Act, introducing the corporate liability for acts of bribery committed everywhere in the world by UK companies; the ILO Core Conventions on Labour Standards and the ILO Declaration of Fundamental Rights at Work; the OECD Guidelines - the UK National Contact Point is one of the most effective and reliable one; Companies Act 2006 (section 172), recalling the managers’ duty to act in a way which may respect employees’ interests and considering companies activities’ impact on the society. The following section relates the action already taken in this field by the UK Government in the last years, such as: (i) the establishment within the G8 of a Resource Centre in Rangoon (Burma), after the incident of the Rana Plaza; (ii) the inclusion of HR appropriate provisions in public procurement; (iii) the reached agreement on the OECD 2012 Common Approaches, including a requirement for Export Credit Agencies (ECAs) to take into account environmental and social impacts;
(iv) a relevant role in the negotiation of the International Code of Conduct for Private Security Service Providers (ICOC)\textsuperscript{115}, signed by more than 700 companies; (v) the consideration given to companies operated in conflict-affected areas or fragile States, through the establishment of the Building Stability Overseas Strategy; (vi) the financial support to the UN Global Compact and the investments in projects promoting the UNGPs implementation through the HR and Democracy Programme. In conclusion, the last section includes the planned activities, as for instance: (i) a strong partnership with other Countries, such as the existing one with the Government of Colombia; (ii) the promotion of a monitoring compliance mechanism for Private Security Companies activity to be adopted jointly with other Governments (currently Switzerland, US and Australia); (iii) the strengthening of the Voluntary Principles on Security and HR effectiveness; (iv) a major attention to the SOEs role and activities in relation to HR; (v) the development of a guidance on the risks posed by the exports of information and communications technology; (vi) the promotion of raising awareness projects on corporate-related HR violations and of overseas investment agreements including provisions for business responsibility to respect HR; and, (vii) the support to some international and European initiatives, such as the UN Working Group activity, the EU Action Plan on Democracy and HR and the awareness of UK Embassies to support HR defenders all around the world.

The second part, related to the UK Government expectations of business compliance with HR, is based on the assumption that all the UK companies are expected to be consistent with the BHR principles, be transparent in their activities, involving the potentially affected subjects and participating or adopting grievance mechanisms. Among the actions already taken by the UK Government, apart from the NAP, it has been developed a Foreign and Commonwealth Office (FCO) - UK Trade and Investment (UKTI) Overseas Business Risk (OBR) Service, which provides information about business environments in the countries where the UKTI operates, and a ‘Business and Human Rights Toolkit’, a detailed guidance manual for officials. Moreover, the

\textsuperscript{115} The list of signatories as of September 2013 includes 708 companies, about a third from the UK.
UK Government is committed to update and develop the Government Guidance - including provisions for SMEs and encouraging trade unions and business associations to draft similar guidance for their respective sectors - to improve the level of awareness of diplomats and UK officials on BHR and to promote the dialogue between public authorities and CSOs representatives.

Finally, the third part, relating to the access to remedy, is especially focused on the activity of the existing grievance mechanisms, such as UK OECD National Contact Point, the Ombudsman, the Citizens’ Advice Bureau, the Government regulator in certain sectors, or the Advisory, Conciliation and Arbitration Service (ACAS). In particular, the UK Government will promote the access to remedy for victims of corporate-related HR abuses through: (i) the review of the existing mechanisms; (ii) the consideration of the lessons learned from the experience of the London Organising Committee of the Olympic and Paralympic Games (LOCOG); (iii) the raising awareness of the UK companies operating overseas on the establishment or participation at the available grievance mechanisms; and, (iv) the support to projects promoted by the FCO Human Rights and Democracy Programme Fund relating to work on remedy procedures in other Countries.

In the conclusions, the UK Government recalled its commitment in promoting future actions for monitoring the international momentum behind business and HR, by reporting each year the actions adopted for the NAP implementation, the reached objectives and the interesting updates in this field. Being the first NAP released at European level, a lot of remarks and commentaries are available yet. In particular, there are some aspects of the NAP’s content that have been especially analysed and discussed by NGOs representatives, academicians and HR defenders. On one side, among the negative comments: (i) the lack of penalties for companies violating HR and the lack of the recognition of business responsibility in their entire supply chain, since the remedial actions are based on voluntary initiatives taken by businesses; (ii) in relation to public procurement, it is not clear to what extent the Government
could exclude tenders «in certain circumstances»\textsuperscript{116}; (iii) the limited support to access to effective remedies for victims only within the UK jurisdiction, thus the UK Courts are obliged to judge civil cases involving UK companies under Brussels I Regulation\textsuperscript{117}, but victims will not receive support to bring their case. On the other side, some positive proposals have been identified, such as: (i) the provision of incentives, at home and abroad, for UK businesses that meet their responsibility, for instance establishing incentives in the tendering process of public procurement of goods and services; (ii) the re-assessment of business regulation to fill the gaps existing between the current legislation and the required one, although it is not clear how and which form the re-assessment will take; and, (iii) referring again to public procurement, the ensuring of State-investor contracts compatible with HR in order to not undermine the host-State ability to respect HR, even if it is unclear how it will take place.

In conclusion, nevertheless the UK NAP is based on the win-win scenario always sought by the UK Government of a successful business and the respect of HR, it is not always possible, as violating HR is sometimes more profitable for companies. However, many positive aspects are present in the UK NAP and could be correctly implemented, although at present it is still missed the sets of proposal on how all these provisions will act in practice.

4.3 Work in progress in the Mediterranean Europe: the Spanish case

The engagement of the Spanish Government in the field of CSR and BHR is particularly demonstrated by the last two years trend of its foreign policy. Indeed, the Spanish Ministries involved, namely the Ministry of Foreign Affairs and of Labour and Social Security, are developing in parallel both the National Strategy on CSR (Estrategia Nacional de Responsabilidad Social Empresarial) and the Plan on BHR (Plan de Empresas y Derechos Humanos),

\textsuperscript{116} “Good Business Implementing the UN Guiding Principles on Business and Human Rights”, Section 2, September 2013.

\textsuperscript{117} The Regulation lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in EU Countries. It has been replaced by Regulation No. 1215/2012 (Brussels I Regulation Recast), that will apply from 10 January 2015 (according to article 81).
according to the EU Communication on a CSR Strategy, already analysed in the third chapter. Currently, the second draft of both documents is available and the final versions of the plans are expected by the end of June 2014 and presented before the Spanish Parliament, the EU Commission and the UN HR Council. In order to understand the results achieved, it is useful to recall the steps through which both the drafting and consultation processes have been enhanced, starting from the analysis of the second draft of the strategy on CSR and thus the examination of the available version of the NAP on BHR.

4.3.1 The National Strategy on CSR

In October 2012, as stated in the ‘Report on CSR in Spain. A proposal for Europe’\(^{118}\), the State Council on CSR (Consejo Estatal de la RSE, hereinafter CERSE) presented a first outline, calling for the development of an individual strategy on CSR of each local Government (Comunidades Autónomas), following the EU recommendations. The drafting of a NAP on CSR, already announced before the Parliament by the Minister of Labor and Social Security, Fátima Báñez, could be considered as one of the five programmatic objectives of the General Direction for Labor, Social Economy and CSR during the current legislature, considering CSR policy as an added value to business competitiveness. The first draft of the Strategy was released on 7 October 2013 by the above mentioned General Direction of the Ministry of Labour and Social Security, jointly with the representatives of local Governments, the Spanish Federation of Provinces and Municipalities (Federación Española de Municipios y Provincias), some CSR experts and practitioners, and thus presented to the CERSE. The three main areas of intervention identified are: (i) supporting the corporate responsible conduct and the employment promotion; (ii) facilitating the adoption of sustainable model of management in order to improve business competitiveness; (iii) enhance the existing CSR programs for increasing the reliability of Spanish economy. As an overall objective, the Strategy is led to orient

\(^{118}\) “Informe sobre la Responsabilidad Social de la Empresa en España Una Propuesta para Europa”, Representation in Spain of the European Commission, June 2013.
the domestic CSR policy towards concerned initiatives, aimed at spreading CSR values in the business sector, especially SMEs, that are the 99 per cent of the Spanish industries, as in the Italian case. The Strategy is grounded on the already recalled international legal sources, such as the EU CSR Strategy 2011-2014, the ILO Tripartite Declaration, the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the ISO26000 and the UNGPs. Furthermore, it is an important part of the national Plan of Reforms (Plan Nacional de Reformas), it acted for adapting the Spanish foreign policy to the provisions contained in the EU Strategy 2020. Finally, the conclusions presented by the CSR Experts Forum and the work of the CERSE have been also considered. The Strategy is structured in five main objectives and ten lines of action based on different principles, such as competitiveness, sustainability, social cohesion, employment, disclosure and shared values. The main topics are: (1) the promotion of CSR principles in Spain in favour of companies and public organizations; (2) the expansion of CSR practice and value also to SMEs; (3) the support to CSR policies as a tool for a more competitive, sustainable and responsible business; (4) the spread of CSR values within all the public sectors; (5) the establishment of a national reference point for CSR. Finally, it includes some priorities in this matter for businesses, public and private organizations and public authorities. The ten identified lines of action are the following: (1) promoting CSR as a driving element of business competitiveness; (2) integrating CSR values in the education and research system; (3) strengthening the trust in the brand ‘Made in Spain’; (4) supporting responsible management of human capital; (5) fostering social responsible investment; (6) facilitating sustainable innovation and investment in R&D; (7) improving relationship with suppliers; (8) enhancing responsible consumption; (9) spreading environmental respect; (10) advancing development cooperation. In February 2014 the CERSE discussed four out of five objectives of the Council working plan, namely the necessity of a national CSR strategy, the previous
implemented actions and the institutional background, the structure and objectives proposed and the expected measures. The adoption of the Strategy was expected in the CERSE meeting in December 2013, after two months of public consultation and review of the document, but until April 2014 the revision process is still ongoing and will probably lead to a second draft.

4.3.2 The National Action Plan on BHR

According to the internal agreement between the Ministry of Foreign Affairs and the Ministry of Labour and Social Security, the Spanish Government should elaborate an autonomous Action Plan on BHR, distinguished from the one on CSR. To this end, the HR Office of the Ministry of Foreign Affairs has promoted the drafting of a NAP on BHR according to the EU CSR Strategy and involving in an open consultation all the relevant subjects (businesses, CSOs and NGOs, public authorities, academia). The consultation process started in December 2012 and the first phase was concluded in February 2013, involving public authorities, namely the Ministries concerned\textsuperscript{119}, CSOs and NGOs, academia and business representatives (about one hundred). During this first meeting the parties were informed of the UNGPs content and the leading authority presented the working plan for future developments. Moreover, the participants were requested to send some commentaries by the end of March 2013. Thanks to the contribution of these subjects and the cooperation with the external experts\textsuperscript{120}, the first draft of the NAP was released: this document contained the text of the GPs, jointly with the required measures for adapting the Spanish legislation to UNGPs and the possible actions that the companies should implement. Given the comments and remarks received by the


\textsuperscript{120} The external experts were members of the Spanish NGO Business & Human Rights, namely I. Roser and M. Prandi. The latter has been interviewed by the author in April 2014 on her role in the drafting process of the Spanish NAP on BHR.
leading Ministry and the individual meetings organized with each subject involved, a second round of consultations took place in June 2013 in Madrid, with the participation of public authorities, businesses and CSOs divided in three different roundtables, for discussing the GPs Pillars and the related comments to the first draft. At the same time, a meeting with the UN Working Group on BHR was organized in order to collect comments and suggestions on the draft. The second version of the Plan resulted from the joint effort of all the Ministries involved and was sent to CSOs and companies in November 2013, followed by a series of meetings with these subjects to explain them this second draft and gather comments by the end of the year. Currently, the HR Office of the Ministry of Foreign Affairs is building up the written comments already received, in order to present an agreed version to the Council of Ministers.

Some BHR experts and scholars have already expressed their comments, especially on the methodology applied for drafting the Plan and the content regarding the State and business roles related to the Three Pillars. In particular, the International Federation for Human Rights (FIDH) has released in a commentary its position regarding the temporal timeline, the monitoring mechanisms and the implementation measures and tools, whilst other Spanish NGOs have criticized the NAP approach to the limited requirements for public procurement, the lack of State control and the need of social and environmental clauses. As far as concerns the FIDH remarks, the first point developed in their commentary regards the welcome of a fixed temporal timeline of five years for the updating process and the establishment of a Monitoring Commission with the assignment to annually control the Plan follow-ups, the measures implemented and

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121 Dr. Alexandra Guáqueta, Member of the UN Working Group on Business and Human Rights, met some representatives of the Spanish Government in June 2013.


the proposals. Given the composition of the Commission by representatives of Ministries, academicians, BHR experts, trade unions and CSOs, the FIDH asked for a wider participation of NGOs - not limited only at the ones explicitly involved in BHR issues - and of members of local affected communities. Furthermore, they remarked the necessity of committing the analysis of the results achieved by the NAP to a group of external experts, being the Commission a supervising body. At the same time, they requested a great disclosure of the proposed interventions and changes in the implementation process, in order to ensure the deep participation of all the governmental and non-governmental institutions in the updating process. As far as concerns the content of the NAP regarding the First Pillars of the UNGPs, the FIDH agreed with the four levels of action identified by the Spanish Government: preventing, investigating, sanctioning and repairing the alleged violations committed by businesses (measure 1). For this reason, it also supported the elaboration of a baseline assessment of the existing Spanish laws and regulations - especially in the business and commercial law - as it has already been done by the Italian and Norwegian Governments, in order to identify the existing lack in the domestic legislation (measure 2). Concerning the non-financial reporting and the due diligence policy, the FIDH recalled the need of including information about the social and environmental impacts in the reports elaborated by businesses due to the lack of concerned provisions in the Ley de Transparencia124 (Law on Transparency), recently adopted in Spain. Regarding the State participation and involvement in business activities, the commentary welcomed the initiatives provided by the NAP, especially the ones related to the elaboration of the NAP (measure 12), the attention to HR principles in concluding service providing agreements inside and outside the Spanish territory (measure 14), the inclusion of HR clauses in the agreements with security service providers (measure 19), the

124 Law on transparency, access to public information and good governance (Ley de transparencia, acceso a la información pública y buen gobierno), L. 19/2013, 9 December 2013.
denial of State funds and incentives to Spanish companies allegedly responsible of HR violations (measure 20). Among the FIDH suggestions in this field, it is worth remembering the needed compliance with HR principles and norms of all the State Agencies, including local Governments, and the adoption of due diligence policies by Export Credit Agencies and the national development fund (Fondo de Ayuda al Desarrollo). Finally, regarding the State duty to protect, the commentary identified two last areas of intervention: (i) the role of State in preventing HR abuses committed by companies operating in conflict-affected areas, thanks to the engagement of the Embassies, Consulates and Diplomatic Offices (measure 10) through the creation of temporal indexes/alerts and specific policies; (ii) the inclusion and promotion of HR provisions in future international treaties concluded by the Spanish Government (measure 24) and in participating at International Organizations and Fora (measure 25-26). Regarding the Second Pillar, the FIDH considered the NAP provisions strongly limited to incentives, raising awareness and good practices identification. Instead, the commentary proposed the adoption of a legally binding instrument providing the obligation for companies to adopt a due diligence policy and the approval of State law providing civil and criminal responsibility (for the lack of prevention of damages or crimes) and administrative responsibility (for the lack of implementation of administrative obligations). Finally, concerning the Third Pillar, the FIDH welcomed the development of judicial mechanisms for judging alleged corporate-related HR violations committed in the Spanish territory or abroad (measure 30), suggesting to extend the extraterritorial jurisdiction, in spite of the recent change of the judicial discretion to judge on HR abuses committed outside the Spanish territory.125 On the other side, among all the provisions related to non-judicial remedies, the commentary most appreciated was the improvement of the OECD Spain NCP functioning, through the

125 Art. 23, Ley Orgánica 6/1985
establishment of a commission composed of external experts for analysing its competences and practices.

In conclusion, apart from the specific comments mentioned above, the opinion of the majority of CSOs representatives on the second draft of Spanish NAP is about the complex drafting process that has led to this temporary version, the exclusion of the proposals and suggestions coming from NGOs in the current document and the consequent delay in elaborating the final version of the Plan, after a long period of open and public consultation with all the stakeholders involved. In addition, according to the Spanish Observatory on CSR (Observatorio de Responsabilidad Social Corporativa)\(^{126}\), in spite of the relevant role played by the HR Office there was a lack of information about the corrections and the suggestions proposed by businesses and other Ministries, as well as the list of the companies which have participated at the different consultation events. In this sense, although the Spanish Government has reaffirmed several times its strong commitment in elaborating the Plan grounding on transparency and disclosure of information, and has applied the required multistakeholder approach in an effective way, the process conducted until now could not be considered as totally transparent and accessible for all the subjects involved. However, in the opinion of the Spanish Ministry of Foreign Affairs, the most relevant constraint faced during the consultation and drafting phases was to find a common language with all the subjects involved and agree on a text acceptable for everyone. For this reason, some meetings with the UK Ambassador in Spain and the Belgian and Swiss Governments have taken place, in order to share information and good practices on the challenges and difficulties faced.

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\(^{126}\) [http://www.observatoriorcs.org/](http://www.observatoriorcs.org/)
4.4 A starting point: the Italian case

The last case study analysed in the present research work is the Italian one, that could be considered as a starting point of State approach to CSR and BHR. According to the Italian political system, both the Ministry of Labour and Social Policies and the one of Economic Development are competent for applying the national policies on CSR. Since 2001, the Ministry of Labour has played a leading role in adopting a multistakeholder approach and has given an original contribution through a project grounded on the Green Paper published by the EU Commission in 2001\textsuperscript{127}. In May 2004, after the semester of European Italian Presidency, the Ministry of Labour created the Italian Multistakeholders Forum on CSR, following the one existing at European level. The main objectives of the Forum were: (i) to promote the CSR policy among companies and CSOs; (ii) to facilitate the disclosure of information and convergence between practice and CSR tools through an action of raising awareness about the relationship with sustainable development; and, (iii) to consider SMEs requirements, the exchange of good practices and partnership experiences. During its third and last meeting in December 2005, the Forum - composed of representatives of trade unions, employers, CSOs and public institutions - released a Report regarding the activities relating to CSR policies, underlining the most relevant and critical aspects. In regard to the recommendations contained in the Report, the most interesting refer to: (a) the improvement of communication methods in order to support the sharing of information, good practices and tools for managing the actions aimed at protecting environment and local communities; (b) a deeper analysis of the role played by trade unions and other subjects regarding the relationship between CSR and competitiveness; (c) the importance of education and training programs; (d) the advancement of the bottom-up approach from SMEs to larger firms, in order to contribute to the internal business stability; and, (e) the elaboration of internal documents agreed by all the relevant stakeholders and aimed at promoting synergies and competitiveness within the entire economic

\textsuperscript{127} Please refer to par. 3.2.1
system. During the Conference on CSR held in Milan in December 2002\textsuperscript{128}, the Italian Government has presented the project CSR - SC (‘Corporate Social Responsibility - Social Commitment’\textsuperscript{129}), following the EU Commission provisions. The project was grounded on the business voluntary approach to social commitment, recognizing as fundamental principles the central role played by the SMEs and the necessity of transparency and reliability of business activity. The \textit{social commitment}, instead, represents the engagement of public and private sectors in organizing partnership with business and CSOs sector. The project provided a twofold roadmap of business progressive involvement in CSR practices, in order to raise the awareness of the positive advantages coming from a more responsible business approach at medium and long period. The first phase regarded the organization of workshops and training sections for making aware managers and employees of social responsibility; thus, for companies that have decided to adhere to the second phase, it will start the drafting process of the Social Statement, through the inclusion of a series of quantitative and qualitative indicators for all the companies with more of 50 employees.

Due to the Italian political instability of the last years, the institutions in charge of the CSR policy have been modified several times, but it is worth mentioning the interest of the Italian Government in this field. In particular, since 2007 it is possible to point out the main attempts at national level to elaborate and implement a CSR policy: the first relevant document has been released in 2007 by the Ministry of Welfare\textsuperscript{130}, containing the voluntary institutional approach to CSR, the consequent uselessness of a binding regulation in this matter and the underlining of the peculiar Italian industrial system composed of individual, small and medium enterprises (50-249 employees). Moreover, the Working Paper proposed some targeted areas of interest, such as labour, environment, the relationship with customers and suppliers, with local

\textsuperscript{128} Conference on CSR organized by the Italian Government in Milan (13 December 2002) as the first meeting between Government, businesses and CSOs on this issue.

\textsuperscript{129} “Project CSR – SC, the Italian contribution to the CSR spread in Europe” (Progetto CSR-SC, Il contributo italiano alla campagna di diffusione della RSI in Europa), Ministry of Labor and Social Policies, 2004.

communities and the management strategies. For each area should be appointed an interested stakeholder, in order to facilitate the organization of CSR activities and to identify the relevant subjects, through the involvement of other public institutions, such as Ministries and Local Bodies (Regioni and Enti Locali). In December 2007 the document has been officially presented with the aim of starting the organization of the First National Conference on CSR and the creation of five thematic groups on governance, delocalization, health and security at workplace, local experiences and finance. Due to the fall of the Government led by Romano Prodi, the National Conference has been cancelled. With the following Governments, the CSR policy has been absorbed within some regulations regarding health and security at workplace\textsuperscript{131}, that provided the creation of a Permanent Consulting Commission on this matters, that, among its assignments, should take into consideration also the business voluntary initiatives and the Codes of Conduct released by the enterprises. Finally, it is worth underlining the role played by the Italian Government during the drafting process of the Guidance on Social Responsibility ISO26000, considered as a challenge for public institutions about their action as a leverage in CSR matters.

Given this brief overview of CSR initiatives at Italian level since the beginning of the XXI century, it is now important to focus on the specific efforts in this field after the publication of the EU Communication on a renewed CSR Strategy\textsuperscript{132}, such as the elaboration of both the NAPs on CSR and business and HR.

4.4.1 The Italian Action Plan on CSR

Thanks to the interviews conducted with representatives of the Ministries of Labour and of Economic Development\textsuperscript{133}, it has been

\textsuperscript{131} For instance: L. 123/2007, Misure in tema di tutela della salute e della sicurezza sul lavoro e delega al Governo per il riassetto e la riforma della normative in materia; D. Lgs. 81/2008, that includes the original definition of CSR given by the EU Commission in the 2001 Green Paper.

\textsuperscript{132} Please refer to par. 3.3

\textsuperscript{133} The interviews have been conducted between January and February 2014 with: Cons. Ugo Colombo Sacco, General Direction for Globalization, Ministry of Foreign Affairs (with reference to the NAP on BHR); Dr. Rossella De Rosa, Secretariat of the OECD NCP Italy (Ministry of Economic Development);
possible to identify the most significant phases of the consultation and drafting process of the Italian Action Plan on CSR. First of all, it is worth remarking that, after the release of the EU Communication on CSR Strategy (October 2011), the Italian Government has focused its attention on the development and updating of both its CSR and BHR policies. Indeed, in 2013 the Ministries of Labour and Social Policies and of Economic Development have jointly drafted the Italian Action Plan on CSR, that should be taken into consideration as an effective example for the following ones. The NAP contains the related information on the state-of-art on CSR policy in Italy and it refers to the 2012-2014 period\textsuperscript{134}, being the first NAP on CSR issued at European level\textsuperscript{135}. The consultation process, held by both the Ministries but led by the Ministry of Labour\textsuperscript{136}, started in November 2011, when it has been organized a roundtable composed of the representatives of all the public authorities involved, such as the Ministry of Foreign Affairs, Environment, Infrastructure, Agricultural and Environmental Policies and of the OECD Italy NCP, as well as the National Institute of Public Welfare (INPS) and the National Institute to Ensure against Labour Injuries (INAIL). In a second phase, the Ministry of Labour has involved the Conference of State and Regions (Conferenza Stato-Regioni), asking for the individual contribution of all the 20 Italian Regions in this matter. Finally, it has been established a multistakeholder group, composed of the representatives of the Italian banking association (Associazione Bancaria Italiana - ABI), the industrial association (Confindustria), some SMEs, trade unions and the Third Sector Forum (Foro del Terzo Settore). At the end of the first part of the process, the draft version of the NAP has been presented for a

\textsuperscript{134} Currently, the Italian Ministry for the Economic Development, jointly with the Ministry of Labour, is collecting the follow-ups related to the NAP on CSR and the new one, for the period 2014-2016, will be released by the end of 2014.

\textsuperscript{135} The Danish NAP on CSR 2012-2015, released in March 2012, is only an updated version of the existing one in Denmark.

\textsuperscript{136} In particular, with the aim of involving both the CSOs and NGOs representatives, the leading department of the Italian Ministry of Labour has been the General Direction for the Third Sector (DG Terzo Settore), whilst the Ministry of Economic Development has been represented by the OECD Italy NCP, in order to involve companies and trade unions.
public consultation between December 2012 and January 2013 and it will be submitted in June 2014 for a peer review to the representatives of three European Member States (Malta, Bulgaria and Germany) and an Observer (France), composing the first Pilot Peer Review Group. The main objectives of the NAP could be summarized as follows: (a) promoting the CSR culture among companies, public opinion and local communities; (b) sustaining the adoption of CSR policies by companies; (c) increasing business responsible conduct, through national incentives aimed at facilitating the emergence of best practices; (d) promoting the CSOs, social business and public opinion initiatives; (e) fostering the disclosure of financial, economic, social and environmental information; and, (f) supporting CSR through the implementation of the internationally recognized legal instruments, such as the OECD Guidelines, the ISO 26000 and the UN Global Compact.

From the Italian Government’s point of view, the CSR strategy adopted at international and European level since the beginning of the financial crisis has led to the launch and to the promotion of a number of initiatives aimed at facilitating the responsible business conduct. For this reason, Italy has decided to implement a national policy based on a stronger business role and on a responsible management of economic activities as a tool for increasing their positive effects on local communities, citizens and companies. Moreover, a correct approach to the CSR strategy could foster business competitiveness through risk assessment and prevention, reduction of costs, access to funding, relations with customers and innovation technologies. In this sense, CSR policy has been considered as an effective way for the Italian industrial sector to be present and competitive in the global market, thanks to increasing investment in human capital, environmental protection, anti-corruption policies and involvement of all the internal and external stakeholders. The role played in this context by the Government concerns the creation of a more proactive context for
business voluntary initiatives, in order to support the achievement of State objectives aimed at respecting social and environmental aspects. At the same time, the Government is requested to act through the establishment of a synergic action among public authorities at different levels, involving the relevant stakeholders for supporting the ongoing processes through the so-called *multistakeholder approach*. Although the Plan is referred to multinational enterprises, given the Italian industrial system based on small and medium ones, during the consultation process also SMEs representatives have been involved in order to contribute to the drafting, as well as some CSO representatives, due to their direct connection with public opinion and local communities.

The above mentioned objectives listed in the NAP have been developed considering the entire supply chain related to the definition of business strategy, investments and financial activities in general. More in detail, the NAP is articulated as follows:

(a) the first objective should be reached through two different actions, namely spreading the strategic approach to CSR among the business sectors and future generations and raising awareness of public opinion about the requested responsible conduct, in order to avoid some business behaviours, such as *green and social washing*\(^\text{137}\).

(b) The adoption of CSR policies should be supported through a number of incentives, for defining an economic and social added value for top managers, shareholders and relevant subjects - as requested by the European Commission - and for implementing actions finalized at preventing and mitigating negative effects of business activities on environment, workers and local communities.

\(^{137}\) The terms *green and social washing* is used to describe the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service.
(c) State should act as a leverage for facilitating the economic revenue of CSR approach through the market incentives, such as customers demand, public procurement and better access to credit.

(d) The governmental action related to this objective should lead to the improvement of a dialogue between profit and no-profit sectors, by proposing to potential investors a higher level of disclosure about their projects and activities, the obtained investments and their social audit.

(e) States should support a coherent legal framework for fostering the adoption of non-financial reporting initiatives, especially by SMEs, that take into consideration social and environmental consequences.

(f) State should take part in the promotion and spread of the internationally recognized legal instruments on CSR at national level, in order to attract foreign companies compliant with these principles and standards.

One of the most interesting aspect of the Italian Action Plan on CSR is related to the role played by local authorities, in particular by the Regions. Indeed, during the consultation process, as already stated above, also the representatives of the Italian Regions were involved, presenting the actions launched in the last five years or still in progress and contained in the Annexes to the NAP. In particular, the main fields in which the regional actions about CSR are usually undertaken are labour and businesses, education, training, international activities and social policies, as demonstrated by the regulations adopted since 2005 by Regions and Provinces, usually funded by regional financial resources or European funds. Furthermore, thanks to the interregional project launched in 2012 by the Ministries of Labour and Economic Development jointly with thirteen Italian Regions, ‘Creating a net for the spread of corporate social responsibility’, the business awareness in
this matter should increase through the implementation of a proactive dialogue between local authorities and companies about planned or already taken actions and the utilized tools. In this sense, the Action Plan will contribute to better allocate the EU Structural Funds 2014-2020 in the field of CSR.

4.4.2 The Italian Action Plan on Business and Human Rights

Given the publication in September 2013 of the Italian Action Plan on CSR and with the aim to comply with the EU Communication on CSR, the Italian Ministries involved have selected as leading authority the Ministries of Foreign Affairs for the elaboration of the Italian Action Plan on BHR. In the first period of the drafting process, the Italian Ministry of Labour and of Economic Development have realized a mapping study on the state-of-art of the Italian legislation on business and Human Rights, conducted by the Scuola Superiore Sant’Anna (Pisa, Italy) and presented to the Italian Parliament in November 2013. The study is composed of thirteen files, each one related to a different matter, identified basing on its relation with the content of the UNGPs and its relevance in the Italian legal and political system. A first group of files is related to the most sensitive economic issues for businesses, such as business and real estate law, incentives for disclosure and budget reporting, State involvement in business activities, public procurement, foreign direct investment and export credit regulations, and, finally, development cooperation. The second group analyses the HR issues usually included in the Italian political agenda, such as children rights, freedom of religion and gender discrimination. Moreover, two files concern labour rights of irregular migrant workers and the relation between HR, environmental protection and business. Finally, the last two ones regard the role played by the Italian Government in relation to the UNGPs third pillar, namely access

to judicial and non-judicial remedies. The internal structure of the document is organized to be useful for public officials and BHR experts; indeed, each file is the result of a survey conducted in relation to the existing policies, to the legal instruments, to the related ministerial documents, to the relevant academic studies and an interview campaign with experts of each field. Each file is structured in the following way: (a) the text of the relevant Guiding Principle; (b) the analysis of the international and European legislation and practices in that field; (c) the examination of the Italian norms and practices in relation to the requirements of the related Guiding Principle; and, (d) a set of recommendations for adapting the Italian legal framework to the GPs, apart from the internationally recognized relevant standards. Therefore, the last part of each file should be taken into consideration by the Italian Government for developing the NAP’s content. In the last part of the document, the results contained in the study have been summed up through an interdisciplinary approach, especially regarding the HR due diligence policy. According to the outcomes expressed in the conclusions, the baseline study and gap analysis expected by States in the field of business and HR have been already recommended by the European Group of NHRIs, as a reliable basis for the elaboration of NAPs. Furthermore, it reveals necessary especially for Italian companies, due to their limited awareness on the consequences of their activities on HR. As far as concerns the content of the Second Pillar of the GPs, although it regards the corporate responsibility to respect HR and it does not directly referred to State commitment, it should be considered by all the Governments, as stated in the concerned study. The business compliance with HR norms is part of the State duty to protect HR, through the implementation of policies and actions including financial or reputational incentives. In this sense, the Italian Government is required to cooperate with the EU and the main international research centres in order to promote the adoption of the existing legal tools, such as the EU Sector Guides (already analysed in

139 Please refer to: http://nhri.ohchr.org/EN/Themes/BusinessHR/Pages/Home.aspx/.
par. 3.4.1). Finally, the Government should promote the adoption of a *HR due diligence* by the Italian companies, especially by SMEs, through some promotional activities grounded on the involvement of the business management, the probable occurrence of HR violations, the business dimension and sector and the investment features. With the aim of facilitating the State commitment in supporting BHR actions, the study recommends the establishment of an inter-ministerial Working Group, of a *focal point* in each Ministry involved and the adoption of a multistakeholder approach for the NAP’s drafting.

The above mentioned study could have been useful for addressing BHR situation in Italy through the elaboration of a NAP grounded on the results achieved. Instead, given a careful analysis of the document published online (English version) in March 2014 by the Ministry of Foreign Affairs, the previous study has not sufficiently been taken into consideration in the draft version of the Italian Plan on BHR, titled ‘The Foundations of the Italian Action Plan on the United Nations ‘Guiding Principles on Business and Human Rights’. This document contains the state-of-art of the Italian legislation only limited to the First and the Third Pillars of the UNGPs, without providing effective provisions for the future actions to be implemented. As it is demonstrated by the great variety of sectors concerned, the drafting Italian Action Plan derives from a joint effort of a number of Ministries: regarding the State duty to protect, it recalls the already listed policies implemented in the most relevant sectors (agriculture, environment and sustainable development, labour, foreign direct investments and export credit, public procurement, freedom of religion and training initiatives for public officials), as well as for the Third

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140 Being the UNGPs directed to all the enterprises, including the small and medium ones, the *HR due diligence* has to be adopted also by the latter, having consideration for the different business dimension, activity and financial resources.

141 Available at: http://business-humanrights.org/media/documents/foundations-ungps-nap-italy.pdf

142 Namely: the Ministry of Economic Development, of Labour, of Environment, of Agriculture, of Infrastructure, of Finance and Economy, and of Justice for the third pillar. The involvement of both the Ministries of Economic Development and of Labour was due to the necessity of including also some CSOs representatives at national level and, as far as concerns the role of multinational enterprises, the members of the OECD National Contact Point.
Pillar (regulations in force referred to the access to judicial and non-judicial remedies). Since the second half of 2012, all the institutions, led by the Ministry of Foreign Affairs, have participated at the first phase of the drafting process, for collecting the contributions of all the bodies involved and for suggesting some proposals for future developments. In the introduction of the document the fundamental priorities of the Italian foreign policies in terms of HR have been recalled, such as (i) the campaign for the abolition of the death penalty; (ii) the protection of freedom of religion and belief; (iii) children (involved in armed conflicts) and women’s rights (fighting against practices such as female genital mutilations and precocious or forced marriages); (iv) the education to HR. To these aspects, it has been recently added also the implementation of the UNGPs, together with the focus on HR also in business sector, considering the respect for the environment and for the international labour standards. According to the position expressed by the Italian Government, business and HR have been included in the foreign political agenda, as demonstrated by the publication of this first draft of NAP and the implementation of a number of Action Plans in the last years related to the main aspects of HR protections: violence against women, racism, Roma and other travellers communities’ situation, and prevention and contrast to discrimination based on sexual orientation. Furthermore, the introduction contains the expected future commitment of the Government in this field, as the inclusion of BHR in the relations with international and European institutions and with third Countries, the participation and the support to multistakeholder initiatives and the monitoring of the effective functioning of remedy mechanisms. Being the available document only a first sample of the Italian Government’s engagement in BHR, the official and final version of the NAP on BHR is expected by the end of 2014.

As result of the international obligations undertaken by the Italian Government, the protection of HR is a State duty, also referring to
business activities, whilst companies are not obliged to abide by international HR principles and all CSR concerned actions are thus only voluntary. This distinction leads to the conclusion that the governmental initiatives should encourage and facilitate the corporate-related ones, through instruments such as a National Action Plan. Together with this last effort done by the Italian Government, it is worth mentioning the path towards ‘A Foreign Policy for Sustainability’ (FPS), promoted by the Ministry of Foreign Affairs with the relevant public authorities and representatives of the academic, business and CSO sectors, aimed at integrating the sustainable approach to HR-related principles in the Italian foreign policy, considering the stakeholder point of view. The concerned Multistakeholder Steering Committee created by the General Direction for Globalization of the Ministry of Foreign Affairs has already met once (February 2014) in order to draw up a preliminary roadmap containing all the expected milestones to be achieved in a temporal sequence, as for instance the launch of this initiative through an international event organized by the end of 2014, the inclusion of BHR in the agenda of Expo 2015 (that will take place in Milan) and in the coming semester of Italian EU Presidency. The strategic objectives laid down in the draft concept paper on FPS include: (1) the draft of a national framework for both the respect of HR and the promotion of sustainable entrepreneurial activities; (2) the parallel support to a number of initiatives regarding sustainability that should be integrated in a unique HR-based approach; (3) the contribution to economic and social development of emerging Countries; and, (4) a major involvement in various international agencies and HR institutions created to tackle emerging sustainability challenges. Moreover, the Foundation Global Compact Italy, in collaboration with the above mentioned General Direction, has created a Working Group on HR composed of representatives of the major Italian multinational enterprises, banks and insurance agencies, with the aim of raising awareness on UNGPs, sharing assessment tools and implementing due diligence policies. Finally, the Italian Government is
playing a relevant role in the OECD initiative for environmental protection, through the elaboration of a new version of the so-called ‘Common Approaches on Environment and Officially Supported Export Credits’, updated for the last time in 2012. The OECD HR Sub-Group, that assists the OECD Export Credit Group in developing its HR-based approach, has indicated some main areas of interest that should be included in the future OECD actions, such as the HR potentially breached by export credit activities, the IFC and WB standards in this field and the HR due diligence policies requested by the UNGPs.
CONCLUSIONS

Following the history of the last century, the challenges the world is facing are easily understandable, as well as the ones we are going to face in the coming years. Among the key lessons deriving from the Western industrialization process of the XIX and early XX centuries, the possible match between the economic opportunities and a greater responsible business conduct reveals the most relevant one. Due to the new industrialization phase we are living at global level, all the public and private institutions, jointly with individuals, should try to manage the difficulties arising from this phenomenon, at global, regional and national level. Furthermore, the dimension and extent of the tasks that have to be addressed are different and a deep shift in the economic and financial organization and management is needed, especially in the relationship among Countries. The present research work has been developed with the original objective to analyse the most recent measures that have been taken at global and national level for the protection and promotion of good practices related to Human Rights compliance, to enhance global social and environmental governance and support international cooperation in these fields, involving CSOs and private actors in all these initiatives. However, in spite of some exceptions, there is a lack of concerted international efforts oriented to address the increasing of irresponsible conduct by States - through the adoption of a Human Rights-based approach in their foreign policy - and by private subjects, such as multinational enterprises, international financial institutions and banks - in relation to their respect of internationally recognized Human Rights principles and norms. From a State point of view, the connection between Human Rights violations in the business sector and the location where these actions occurred, usually leads to the idea that their incidence is more probable in conflict-affected areas, due to the low level of social safeguard, the necessity of a higher security standard and the existence of political and social obstacles or the lack of will of local Governments to have recourse to their governmental authority. Actually, the recent experience
demonstrates the presence of legal tools for managing Human Rights disputes and designing governance systems, anti-corruption measures and mechanisms for sharing natural resources, whilst an agreed international and national action necessary to face these issues is still in development. To this regard, the endorsement by the UN Human Rights Council of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011, has been perceived as a starting point for State and business and as a greater form of engagement in protecting Human Rights and promoting these fundamental values all over the world.

To this regard, the first two chapters of this research study tried to analyse the international relevant legal framework regarding Human Rights and its tight connection with the State role in protecting fundamental rights. Given the examination of the international Human Rights binding sources, such as the Universal Declaration of Human Rights, the UN Covenants on Civil, Political, Economic, Social and Cultural Rights and the ILO Tripartite Declaration, the document of the UN ‘Protect, Respect and Remedy’ Framework, adopted in 2008, has been grounded on its strong relation with the above mentioned sources, that reveals the added value of this innovative document. Similarly, the UN Guiding Principles, being a non-binding source, have as a reference point the UN, ILO and OECD treaties that could be considered as a practical tool for States and companies, for addressing the continuous competition between business profit and social responsible behaviour in the globalized economic system. On one side, concerning the Guiding Principles content, it is worth mentioning the lack of effective monitoring mechanisms for business conduct, which are usually left under State control. On the other side, the UNGPs provisions could be defined as a collection of the previous norms and regulations in terms of business and Human Rights (BHR) and thus, basing on the concept of *progressive development* of International Law, potentially identified in future as Customary Law, having a ‘special codification value’, in spite of being *soft law*. The main limits of this kind of international sources (the *soft law sources*) derive from their wording and implementation tools, from the universal importance of Human Rights principles, and particularly
from the already mentioned reluctance of States to intervene for ensuring the access to effective remedies for victims of Human Rights abuses. Notwithstanding the legal value of the sources utilized by the International Community for addressing the increasing phenomenon of corporate-related Human Rights violations, the binding nature of the UNGPs is in progress, although some principles are becoming more relevant than others within the International legal system.

Apart from the commitment of the International Community in this field, in the third chapter has been analysed the ‘European Union concerned action’, introducing the concept of Corporate Social Responsibility (CSR), beside the business and Human Rights issue. Indeed, the most relevant actions taken by the European Union since the beginning of the XXI century, have been focused on the promotion of CSR policy among the EU Member States and their business sector. As well as the International Law sources, the EU legal instruments on CSR mainly have non-binding nature, and, being more numerous, have been considered as the reference point for all the EU activities oriented towards private actors, although they provide alternative methods to the usual legal sanctions. As far as concerns the interrelated characteristic of the European CSR norms, during the last years they became the common reference framework of the EU industrial and economic policies, including mergers and acquisitions and customers’ protection. Furthermore, it should be underlined the possible application of the EU concerned norms to companies operating outside the EU territory, thus supporting the universal value of CSR principles and allowing to monitor the European business conduct in the emerging Countries. Finally, as well as the UNGPs, all the EU documents in this field are referred to the international legal binding sources, aligning the European action to the international trends. One of the most interesting points of the analysis of the European legislation on CSR is surely related to the enforcement mechanisms adopted as alternative to the judicial ones, as it happens in other sectors of the EU action. Instead of repressive instruments, the European Union promotes the application of incentive instruments, repaying the positive and compliant behaviour instead of punishing the breach of an
obligation. For this reason, in the majority of the EU documents related to CSR are mentioned the exchange of best practices, the organization of fora and roundtables and the inclusion of examples of responsible conducts in informative documents for companies. Also in this case, it is quite difficult to predict the efficiency of such alternative methods, although even at European level the compliance with CSR norms and principles is considered as an added value for companies, especially for attracting investments and clients. All these features are contributing to encourage the establishment of a wider and innovative concept of CSR within the European Union, that could become the main supporter for spreading the BHR culture worldwide.

In the last chapter, the research focus moved to national dimension, considering the State commitment since the endorsement of the UNGPs in implementing National Action Plans on CSR and BHR and in raising the awareness about business and Human Rights principles within the domestic legal and political systems. For this reason, the three selected case studies, namely the United Kingdom, Spain and Italy, have been useful to understand the current development stage, reached by three European Union Member States, with regard to the implementation of the UNGPs and the elaboration of a CSR national policy, as requested by the EU Commission in its 2011 Communication on a renewed CSR Strategy. In order to provide an exhaustive study of the three cases analysed, the consultation and drafting process, the leading authority appointed and the establishment of a inter-ministerial working group or agency should be compared. First of all, it should be done a distinction between the instruments utilized for promoting both CSR and BHR issues. On one hand, Spain and Italy have adopted a National Action Plan on CSR (respectively the Spanish National Strategy on CSR - Estrategia Nacional de Responsabilidad Social Empresaria, and the Italian NAP on CSR - Piano d’Azione Nazionale sulla Responsabilità Sociale d’Impresa 2012-2014), whilst the UK has launched a public consultation on CSR view in June 2013 - concluded early in April 2014 and led by the Department for Business, Innovation and Skills - with the aim of publishing a Framework for Action on CSR. On the other hand, regarding the instruments adopted in relation to
business and Human Rights, the three Governments have decided to follow the indications of the EU Commission for the elaboration of a NAP on this field. According to the results of the research study and the interviews conducted, the strategy adopted for the NAP drafting is quite similar in all three cases, since they are all grounded on a **multistakeholder approach**. In particular, both the UK and Spanish Governments have structured the NAP elaboration in three main phases: (1) a first one of stakeholders consultation and mapping of related governmental activities (the so-called **baseline assessment**, thus requested by the UN Working Group on Business and Human Rights); (2) a drafting phase; and, (3) the last phase of political deliberation and re-drafting. Whilst the UK Government has already completed the three phases with the publication in September 2013 of the NAP, the Spanish Government is approaching the last phase of political deliberation and re-drafting. The release of the final version of the NAP is expected by the end of April 2014. The Italian process for the adoption of the NAP on BHR is mainly based on the same three phases, although the available document could be considered more as a first baseline assessment, than a complete NAP. For this reason, it is possible to define the current step reached by the Italian Government in this process as between the second and the third phase, lacking the political deliberation, the stakeholders consultation and the re-drafting of the current version. As far as concerns the leading authority appointed, for the CSR document the selected Ministries were the ones competent for labour and social policies - namely the UK Department for Business, Innovation and Skills, the Spanish Ministry of Labour and Social Security and the Italian Ministry of Labour and Social Policies - whilst the leading institutions for the elaboration of the NAP on business and Human Rights were, in all three cases, the Ministry of Foreign Affairs. Finally, only the UK Government had formally set up a Working Group to develop the NAP on BHR (namely the Human Rights and Democracy Department), which, jointly with the internal Steering Group and other governmental agencies, has conducted several rounds of consultation during the drafting process, also with non-governmental stakeholders. In the Spanish case, apart from the involvement of the State Council on CSR (Consejo Estatal de la RSE - CERSE), a relevant role has been played by the external experts -
member of the Spanish NGO called Business & Human Rights - in drafting the first version of the NAP on BHR, whilst in Italy no consultations have taken place with representatives of CSOs and NGOs for the elaboration of the NAP on BHR, apart from the publication of the Report by the Scuola Superiore Sant'Anna (Pisa, Italy), funded by the Italian Ministry of Economic Development. Since the content and provisions of the NAPs directly involve and affect rights-holders and businesses, in UK and Spain various non-State stakeholders have been involved, usually before the beginning of the drafting process. In the UK, for instance, a series of workshops have taken place in the first semester of 2012, separating each category of involved stakeholders, such as NGOs, multinational enterprises, SMEs and trade unions, whilst at the end of the process a common roundtable has been organized. Some academicians have participated to all the workshops and some members of the UN Working Group on BHR have met UK governmental representatives, as well as it happened in Spain. The Spanish Government has decided to not conduct separate consultations with non-governmental stakeholders, but the Human Rights Office, in collaboration with the external experts, has informed non-State stakeholders of the first draft of the NAP on BHR, sending them early 2014 the second version for eventual further comments and suggestions.

According to all these information, it is possible to point out some recommendations for the other States that are in the process of developing their NAPs on CSR and BHR and which are looking for best practices in this field. First of all, starting from the assumption that all the process should be based on a **multistakeholder approach**, as suggested by the majority of the international subjects and institutions involved, the establishment of an inter-ministerial or inter-governmental working group or agency is needed. The working group should be composed of public officials of the concerned Ministries and departments, should agree on its functions and objectives and should organize periodic consultations with the other stakeholders, such as business, CSOs, industrial associations, trade unions and academicians, as well as should provide the engagement of external experts for conducting a mapping study on the existing governmental initiatives on CSR and BHR, the so-called **baseline**.
apart the inclusion of all these parties before and throughout the process, they all have to play a significant role also after the release of the NAP and the conclusion of the process, in order to cooperate to the monitoring phase, that should take place periodically, in order to provide updates and redrafts of the final version of the NAP. In fact, the challenge that will be faced by these Governments, that have already published or are in the process to release their NAPs on CSR and BHR, is to apply some monitoring and controlling mechanisms, in order to deliver in the next years an updated version of the documents. Finally, due to the increasing number of States that are engaging in the development of a NAP on BHR, the effectiveness of the programmatic provisions contained in the Plans should be monitored in future especially regarding the protection of potential victims from corporate-related Human Rights violations, in order to contribute to State duty to protect fundamental rights as provided by the UNGPs.

Given the analysis conducted at national level, the State approach to CSR and BHR issues is easy to understand, especially from a legal point of view. In fact, the national legislations could be useful for addressing the problem of Human Rights abuses committed by businesses, it is related to corruption and bribery, environmental protection, labour rights and business management, in order to support the success of a CSR policy in particular where the majority of multinational companies is located, namely the industrial Countries. As well as in the International Law, also in the national legal systems a multidimensional approach to CSR and BHR has been developed, referring to different issues, such as the ones listed above. In this sense, the adoption at international level of legal instruments within the concerned International Organizations (UN, OECD and ILO) could help to harmonize the existing legal provisions and tools in this field.

Another interesting point to be taken into consideration in relation to the International Law attitude towards CSR and BHR, is the use of soft law sources, as already recalled. Due to the difficult achievement of a broad consensus on the adoption of a binding instrument relating to BHR - although it will provide some information about a recent evolution of the International
Community’s approach to this regard - this kind of instruments have been preferred, causing some problems to the International Law scholars for evaluating their legal force and the future implications. According to the examination conducted by some scholars of several examples of soft law instruments adopted in other spheres of the EU and international systems, the will of the International Community to adapt itself to the continuous evolution of norms and regulations in some specific sectors has led to prefer the use of soft law sources, being the features of traditional international treaties not in line with the rapid progress of such issues. In this sense, if the process to adopt a treaty could be considered as complex and cumbersome, at the same time it is difficult to assess the establishment of a customary principle, especially in a quickly ongoing process. Consequently, the International Organizations have somehow substituted for the role of States, promoting the adoption of their traditional legal instruments, such as recommendations, guidelines or communications.

To this regard, the International Community continues to face the problem of the non-binding value of these instruments, especially considering the business role in respecting and being compliant with. The global public opinion, through the involvement of NGOs and media, has acquired the capacity not only to denounce the illegal and irresponsible behaviours of multinational enterprises, but also to act against them organizing boycott campaigns and provoking reputational damages. Indeed, the required adoption of the Codes of Conduct by companies of all sectors and dimensions demonstrates that the binding value of a norm does not derive by the authority that adopts, implements or enforces it, but it is grounded on the conviction that the norm is needed (need for a rule). Beside the voluntary initiatives adopted within the business sector, such as the Codes of Conduct, the increasing commitment of companies is reaffirmed by their will to become part of some soft law instruments related to CSR and BHR, such as the Ten Principles of the UN Global Compact. In fact, to adhere to these Principles, the multinational enterprise should present a written statement to the United Nations affirming their motivation for becoming part of this soft law source. In this way, the regulatory nature of the
UN Global Compact derives from the voluntary adhesion to the Principles by the same beneficiaries, that freely decide to submit to these norms. In case of breach of that norm, although the Global Compact does not provide a grievance mechanism, the company could incur a serious reputational damage. At the same time, the United Nations have thus created a regulatory system towards companies, overtaking the traditional limit of State sovereignty and including private actors among the beneficiaries of International Organizations’ actions. This last aspect could imply the evolution of the French doctrine regarding the role of multinational enterprises within the International Community, especially as subjects of International Law. Indeed, since a long time some French scholars recognized the ‘embryonic subjectivity’ to multinational companies, arising from their emerging influence - sometimes stronger than States ones - and from their capacity to have access to dispute settlement bodies within investment treaties and agreements. The liberalization of trade in the global market and the increasing growth of business power have generated the *de facto* inclusion of these subjects - especially in International Human Rights Law - as members of International Financial Institutions and thus beneficiaries of duties and rights. The emerging idea of considering multinational enterprises as real and relevant actors of International Law could probably lead to some positive consequences for the International Community, such as the possibility to consider them as responsible or complicit in the breach of some obligations, such the ones related to Human Rights.

On 8 May 2014, the UN Working Group representatives have organized a Workshop to collect feedbacks and suggestions on substantive elements to be considered by States in implementing NAPs. Moreover, the WG has to consider the States perspectives related to the NAP’s launch or drafting process in order to provide a consultation draft for additional guidance for States, especially regarding the essential elements regarding the Third Pillar that each NAP should include. Finally, during the Workshop has been defined the roadmap for the next months: after six months of research and consultation (June - November 2014), in October 2014 it has expected the publication of a
WG Report on NAPs survey and by the end of the year the WG will release a NAP Draft Guidance.

All these remarks acquire a different value if considered in respect to the recent proposal by a group of States, led by Ecuador, to the UN Human Rights Council for the adoption of a UN Business and Human Rights Treaty. During the September 2013 session of the UN Human Rights Council, the representatives of Ecuador have stressed «the necessity of moving forward toward a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other business enterprises.» This statement, released by Ecuador on behalf of other UN Member States, such as the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru, has led to the organization of an expert workshop, which has taken place in Geneva on 11-12 March 2014, bringing the BHR agenda to a turning point. As it was properly underlined by Michael Addo, member of the UN Working Group on BHR, the expectations of Ecuador and the other States involved, in relation to the need of an international binding instrument in this field, are legitimate, especially due to the legal aspects and consequences of such an initiative. First of all, the adoption of an international treaty should imply the rise of legal obligations for States to implement adequate prevention and remedy policies and to overtake the existing obstacles to the access to remedy. Secondly, such an instrument should require the redraft of the existing multilateral and bilateral investment agreements, in particular on the arbitration courts and the limited role of States. Finally, regarding corporate liability, a more effective and proactive cooperation between host and home-States should be needed. At the same time, the UN Working Group has also expressed its opinion on this initiative proposed by Ecuador, thus underlining the possible difficulties that could be faced by the International Community to this regard. Among the most relevant comments, Mr. Addo recalled the strong legal basis of the UNGPs, grounded on the State duty to protect Human Rights against abuses committed by all
companies and its commitment in guaranteeing the access to remedy for victims. The future treaty on BHR should be able to fill the existing gaps especially related to the lacking measures for ensuring the effectiveness of judicial and non-judicial mechanisms. Furthermore, the UN Working Group is aware of the important momentum that has followed the adoption of the UN ‘Protect, Respect and Remedy’ Framework and the endorsement of the UNGPs, creating a common consensus on a <<smart mix of measures - national and international, mandatory and voluntary>>. In this sense, in order to foster the organic and programmatic nature of the UNGPs, as happened during the first day of the workshop, States and all the other relevant stakeholders, including victims, should actively participate at the monitoring phase of State and business behaviours, with the aim to build a strongest BHR regime.

According to the UN Working Group experience, it is important to not lose the positive communication trend established among different stakeholders, thanks to the existence of the UNGPs. Finally, any future action or initiative, oriented to better develop the present BHR instruments and principles, should be based on technical and legal assessment of the existing barriers, such as the ones related to the access to remedy and to the concept of corporate liability for Human Rights violations. To sum up, the position of the UN Working Group on this Ecuadorean proposal is basically positive, although it has strongly recalled its role in raising the awareness of UNGPs among States, through a continuous review of the implementation on National Action Plans, and in ensuring the development of a BHR culture among non-governmental stakeholders.

Beside the remarks presented by the UN Working Group in January 2014, and thus before the above mentioned workshop, Prof. John Ruggie has expressed his point of view regarding the adoption of a UN Treaty on BHR. Having remarked the need for an ongoing monitoring process of the role played by all the stakeholders involved in implementing the UNGPs, Ruggie presented his cautious position on the binding instrument, basing his remarks on a better definition of the points that the treaty intended to address. The two main challenges identified by Ruggie in his statement regarded: (i) on one side, the
problem to include in a single document different clusters of rights and obligations referred to Human Rights and all the other related areas of interest (such as labour law, trade law, corporate law, humanitarian law, etc.), that should be respect by States and businesses and should imply their legal responsibility; (ii) on the other side, the consequent necessity for establishing an international court for corporations or of attributing to States the assignment to enforce the treaty’s provisions. These observations made by Prof. Ruggie are not aimed at creating an obstacle for the adoption of a binding instrument, but at underlining the possible constraints and difficulties that the International Community could face to this regard. In conclusion, the Ruggie’s opinion is useful to sum up the current and future developments of the BHR regime at international and national level, being a multidimensional issue as already recalled several times.

More recently, Prof. Ruggie has reaffirmed his beliefs in an updated statement on a UN Business and Human Rights Treaty in May 2014. In particular, he has focused his comments on: (i) the problem of diversity and complexity of norms related to HR (namely human rights law, labour law, anti-discrimination law, humanitarian law, investment law, trade law, consumer protection law, corporate law and securities regulation) that some States are attempting to aggregate in an unique binding document; and, (ii) the risk of an inadequate enforcement of the new treaty, although the States have already legal obligations coming from the ratification of the main international HR instruments. Regarding the latter, Prof. Ruggie proposed to include in the new treaty enforcement provisions the extraterritorial jurisdiction issue, already provided for in many national legislations related to HR corporate-related abuses.

In conclusion, the State duty to protect Human Rights of all the individuals and during all their life, as well as the corporate responsibility to respect Human Rights principles, are certainly grounded on the legal nature of these norms, but they are also acquiring a social importance, which in the future could become an added value for their enforcement. Due to the different subjects involved and the financial and economic interests related to the implementation and
enforcement of BRH norms and principles, the roadmap for adopting a concerned international treaty is probably too complex, for this reason a more incisive State engagement in this field, through the analysed instruments (UN Framework ‘Protect, Respect and Remedy’, UNGPs), could reveal as the more effective vehicle for the support of business and Human Rights worldwide.
CONFERENCE ATTENDED BY THE CANDIDATE


UN Open Consultation on the strategic elements of national action plans in the implementation of the Guiding Principles on Business and Human Rights, Geneva (Switzerland), February 2014.

2nd UN Forum on Business and Human Rights, Geneva (Switzerland), December 2013.

University of Seville, Faculty of Law, Conference “The Implementation of the UN Guiding Principles on Business and Human Rights in Spain”; Seville (Spain), November 2013.

University of Cagliari, Conference “Natural Resources Grabbing: erosion or legitimate exercise of State sovereignty?”, Cagliari (Italy), October 2013.

Jean Monet Doctoral Seminar on European Union Law, Brussels (Belgium), August 2013.

1st UN Forum on Business and Human Rights, Geneva (Switzerland), December 2012.
INTERVIEWS CONDUCTED

- Cons. Ugo Colombo Sacco, General Direction for Globalization, Italian Ministry of Foreign Affairs;
- Dr. Rossella De Rosa, Secretariat of OECD NCP Italy, Ministry of Economic Development;
- Dr. Danilo Giovanni Festa, General Director for the Third Sector, Italian Ministry of Labour and Social Policies;
- Dr. Jaime Hermida Marina, General Direction of Foreign Affairs, Multilateral, Global and Security Affairs, HR Office, Spanish Ministry of Foreign Affairs;
- Prof Carmen Marquez Carrasco, Professor of International Public Law and International Relations, Law Faculty, University of Seville;
- Dr. Maria Prandi, Co-Founder, Business & Human Rights, Spain;
- Dr. Mauricio Lazala, Deputy Director, Business and Human Rights Resource Centre, London;
- Dr. Anna Bulzomi, IPIS Researcher, Rotterdam;
- Dr. Andreas Graf, Project Officer Business & Peace, Swisspeace, Bern.
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