



Universiteit Leiden

Human Rights in the Void - The UN Guiding Principles on Business and Human Rights in the Context of Instability, Conflict and Repression

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List of Abbreviations

BHRRC = Business and Human Rights Resource Centre

CSO = Civil society organisation

Framework = UN Protect, Respect, and Remedy Framework for Business and Human Rights

FWF = Fair Wear Foundation

GSP = generalised system of preferences

HRC = Human Rights Council

ILO = International Labour Organisation

Interpretive Guide = Interpretive Guide to the Corporate Responsibility to Respect

NAP = National Action Plan on Business and Human Rights

NGO = Non-governmental organisation

RCA = Root Cause Analysis

SRSG = Special Representative of the Secretary General

TNC = Transnational cooperation

UNGPs = United Nations Guiding Principles on Business and Human Rights

UN Working Group = UN Working Group on human rights and transnational corporations and other business enterprises

1. Introduction

The economic globalization that has come to characterize the 21st century poses significant challenges to the “Westphalian paradigm of human rights protection under national-constitutional and international law”, which allocates human rights obligations within the locus of sovereign states (Augenstein and Kinley 2013, 271). Patterns of production, cooperation, and competition across national borders are creating governance gaps between “the increased scope and impact of economic forces and the capacities of societies and governments to manage their adverse consequences” (HRC 2008, 3). Accordingly, the traditional emphasis of the human rights discourse on protecting individuals from the oppressive power of the state is increasingly shifting to large economic actors, specifically transnational corporations (TNCs). Indeed, violations of human rights by economic actors operating abroad have become more frequent and increasing documentation of the negative effects of global business operations on human rights has triggered ‘business and human rights debates’ in major international fora. Many of these debates revolve around a central question: who is to be held responsible for human rights violations in global business operations?

Transnational production processes are characterized by the involvement of a myriad of actors including states, TNCs and local production facilities, making it difficult to assign responsibility for human rights harm. Recognizing this accountability gap, the UN has undertaken several attempts since the 1970s to draft effective legislation to address it. After rejecting many proposals, the Human Rights Council (HRC) accepted the ‘UN Protect, Respect, and Remedy Framework for Business and Human Rights’ (Framework) in 2008. The framework constitutes the UNs first formal response on the issues of corporate-related human rights harm and aims to clarify the responsibilities of relevant actors by addressing the “governance gaps created by globalization” to promote a more effective “protection of individuals and communities against corporate-related human rights harm” (HRC 2008, 3). It does so by proposing three complementary pillars: 1) “the state duty to protect against human rights abuses by third parties, including business”; 2) “the corporate responsibility to respect human rights”; and 3) the accessibility of effective remedies for victims (Ibid.). The Framework was further operationalized in the following years, resulting in the publication of the ‘UN Guiding Principles

on Business and Human Rights' (UNGPs) in 2011 and several interpretive guides for businesses and states.

Both the Framework and UNGPs indicate the host state¹ as the sole actor to which legal duties are assigned. Businesses are assigned responsibilities without any necessary legal repercussions, which they can discharge through due diligence. Considering the state's duty to protect, adequate state capacity appears to be crucial for the effectiveness of the UNGPs. However, businesses also operate in states where the government is either unwilling or unable to fulfil its protective duties, such as in the context of conflict, repression or limited state control and/or capacity. This thesis is concerned with determining the effectiveness of the UNGPs in these contexts by asking the following question: when the host state is either unwilling or unable to fulfil its duty to protect against human rights abuses, do the UNGPs offer sufficient alternative mechanisms to ensure that violations corporate actors do not occur?

Since the introduction of the UNGPs, the question of whether home states and corporations can be ascribed legal obligations has been subject to much research and debate by scholars.² What has received less consideration, however, is whether they have sufficient incentives to act and what their conduct is in practice. Whilst there has been a multitude of studies into the legal and normative foundations of the UNGPs, case studies of their actual effects on the conduct of states and businesses remain few.³ This thesis addresses both of these gaps by inquiring into the obligations and/or incentives home states and corporations have to prevent and redress corporate-related abuses in circumstances where the host country of transnational production is unable or unwilling to comply with its duty to protect, and how these are applied in practice. Through analyses of the ways TNCs in the garment sector and their home states do or do not incorporate the UNGPs recommendations that aim to compensate for a lack of host state action, this thesis aims to gain more insight into whether the UNGPs sufficiently incentivise these actors to take additional action in those contexts where human rights are arguably most at risk.

¹ Within the context of the UNGPs, the term 'host state' is used to indicate the country in which production by a TNC takes place. 'Home state' refers to the country in which that TNC is domiciled.

² See, for example, Augenstein and Kinley 2013, Artacho and Del Mar 2013, Davitti 2016, Bernaz 2013, and Methven O'Brien 2018.

³ With the notable exception of Halversson and Buhman 2013, who include four case studies in their discussion on extraterritorial regulation of companies under the UNGPs.

1.1. Garment sector in Myanmar

To facilitate comparison between TNCs, this thesis focuses on garment sector companies that operate in Myanmar. Myanmar has suffered decades of authoritarian rule, self-isolation, and one of the world's longest protracted civil wars. Since 2010, a military-led transition to a quasi-democratic rule has seemingly put the country on the path towards a 'modern' democratic state. Following this transition, most economic sanctions on Myanmar were lifted in 2012, leading to an influx of foreign investment. The low wages and relaxed regulatory environment made Myanmar very attractive for businesses in labour-intensive, low-skilled sectors, most notably the garment sector. The ASEAN Post has reported that Myanmar's garment exports rose from US\$349 million in 2010 to US\$4.6 billion in 2018, constituting around 10 percent of the country's total export revenues (The ASEAN post 2018).

While there are many reasons to be optimistic about Myanmar's future as a growing market, the country also faces serious challenges. The country remains plagued by armed struggles between the army and ethnic minorities, the military still holds considerable power, and, resulting from decades of authoritarian and colonial rule, many institutions and the government itself are weak or ineffective. Myanmar struggles with rampant corruption, limited institutional capacity to carry out policy, and lack of rule of law. The government and judicial system lack accountability for human rights violations and fail to provide access to remedy for victims of human rights abuses (ITUC 2015, 13). Although the government has established a Myanmar National Human Rights Commission and a number of parliamentary bodies to handle human rights complaints, "these bodies lack real powers to solve disputes and have proven ineffective", the International Trade Union Confederation concludes (Ibid.). Human rights defenders and CSOs are still being arrested and charged for peaceful activities as the freedoms of expression and assembly are heavily repressed (World Justice Project 2020).

Myanmar's transitional juncture poses risks for TNCs, as liberalising a complex political economy that is shaped by a legacy of repression, ethnic conflict, and colonialism can create a volatile, politically complex context in which human rights violations might more frequently occur. TNCs operating there may risk contributing or being directly linked through their operations or relations to violations of human rights. Myanmar's garment sector specifically has been internationally criticized for numerous human rights violations, including forced unpaid overtime, child labour, hazardous working conditions, and denial of breaks (Thews and Overeem

2017; Fair Wear Foundation 2016). NGOs and CSOs have warned that human rights violations in the sector are exacerbated by the fluctuating legitimacy and effectiveness of state power, immature legal system and widespread corruption in the country.⁴

Myanmar offers a unique case study by which to examine the efficaciousness of the Framework and UNGPs in reducing corporate-related human rights harm in the context of limited host state willingness and/or capacity to fulfil its duty to protect. As it has only become possible for garment TNCs to source from Myanmar after 2012, hence after the implementation of the UNGPs, all current transnational activities in the Myanmar garment industry have been set up whilst the UNGPs were in place. This allows for an assessment of how the guidelines have impacted home state and business conduct at various stages.

1.2. Outline

This thesis is structured as follows. The next section introduces the contents of the Framework and UNGP and reviews the scholarly literature regarding duties and incentives for home states and corporations in conflict contexts. Section three sets out the methodology for this thesis, which is centred on analysing home state commitments, as expressed in a state's National Action Plan on Business and Human Rights (NAP), and company commitments, as expressed in their human rights policies and reports. Section four presents a summary of state commitment trends regarding business and human rights in conflict-affected areas and severe abuses, identified through researching state NAPs. Section five presents a similar analysis for TNC commitments, identified through researching their human rights policies and reports. The sixth and final section offers concluding remarks and recommendations for further research.

Through an analysis of home state and TNC commitments in Myanmar, this thesis concludes that the UNGPs do not sufficiently incentivise either to fully incorporate the UNGPs recommendations aimed at compensating for insufficient host state action. Home states remain reluctant to regulate their companies abroad and often refrain from making commitments to which they can be held accountable. TNCs are insufficiently transparent about their human rights conduct, thereby restricting the ability of consumers and CSOs to hold them accountable.

⁴ For a thorough analysis of the political climate in Myanmar and the effectiveness and legitimacy of the state, see Egreteau and Mangan 2018.

2. Content of the Framework and UNGPs

The Framework and its operationalisation in the UNGPs aim to provide more effective protection to individuals and communities against corporate-related human rights harm by addressing the governance gaps created by globalization (HRC 2008, 3). Globalization and the increasingly transnational nature of production processes have, it is argued, made it increasingly difficult to assign responsibility for human rights harm. The Framework and UNGPs are not presented as a new set of international laws but as practical recommendations that elaborate on the implications of existing international obligation for governments and businesses involved in transnational production processes. The Framework and UNGPs clarify the duties and responsibilities of states and corporations in preventing human rights harm and providing remedies by specifying three pillars: the state duty to protect, the corporate responsibility to respect, and access to remedies.

2.1. Pillar 1: The State Duty to Protect

The state duty to protect lies at the core of the international human rights regime and underscores the overall role of the state as a duty bearer. Drawing on international human rights law, the UNGPs reinforce the state's duty to "respect, protect, and fulfil the human rights of individuals within their territory and/or jurisdiction" and remind states that "this includes the duty to protect against human rights abuse by third parties, including business enterprises" (UN 2011, 3). With respect to protecting citizens from corporate-related human rights abuses, the UNGPs require states to fulfil their duty to respect through enforcing and, where needed, updating or introducing effective legislation and providing guidance to business enterprises on how to respect human rights throughout their operations (UN 2011, 4).

While the UNGPs encourage governments to provide effective guidance to companies on ensuring human rights compliance throughout their operations, states are not automatically held responsible for the corporate-related human rights abuses within their territory. Nevertheless, states may be in breach of their international human rights obligations where such abuse can be attributed to them or when they have failed to take the appropriate steps to prevent, investigate, punish, and redress corporate related human rights harm through effective policies, legislation, and regulations (UN 2011, 4-12).

Whereas businesses are merely required to ‘respect’ human rights, governments have an obligation to protect human rights within their territory. However, there may be circumstances in which the host state is either unable or unwilling to fulfil its duty to protect. Principle 7 recognizes this and supporting business respect for human rights in “conflict-affected areas” in detail. Before we consider the contents of principle 7 in more depth, it is necessary we first examine the central concept on which it is built: conflict-affected areas.

While the term ‘conflict-affected areas’ is the central focus of principle 7, the UNGPs do not offer a definition or further clarification of what this would and would not include. The term might be kept deliberately vague, Rudu Mares (2014) argues, because it allows for an expansion of the coverage of principle 7 beyond its traditional definition as active armed conflict in international humanitarian law (Mares 2014). Rather than focussing on defining conflict, both the UNGPs and the additional report on their implementation in conflict-affected areas focus predominantly on the heightened risk of abuse, the increased probable severity and the inability of the host state to interfere effectively. Consider the following:

“Some of the worst human rights involving business occur amid conflict over the control over territory, resources or a Government itself - where the human rights regime cannot be expected to function as intended” (UN 2011, principle 7).

Further,

“The risks of involvement in gross human rights abuse tend to be most prevalent in contexts where there are no effective government institutions and legal protection or where there are entrenched patterns of severe discrimination. Perhaps the greatest risks arise in conflict-affected areas, though they are not limited to such regions”. (Interpretative Guide, 80)

The guidance of principle 7 can thus not be limited to regions with active conflict as its emphasis is predominantly on increased risks of more severe abuses and improper functioning of the human rights regime. Although it cannot be refuted that areas with active armed conflict are at heightened risk for more severe abuses, Mares compellingly argues that the UNGPs offer no satisfactory justification for focussing on such areas only as gross violations of human rights also regularly occur in absence of active armed conflict, such as in repressive states and dictatorships (Mares 2014, 299).

By keeping the term ‘conflict-affected areas’ undefined and emphasizing the severity of violations and lack of effective government intervention, the UNGPs offer no justification for limiting the guidance of principle 7 to situations with active armed conflict only. For the interpretation of principle 7, I therefore follow Mares’ argument that its guidance is applicable to heightened risk of severe abuses in all settings irrespectively of the types of conflict, or even in the absence of conflict altogether, as the emphasis is mainly on the heightened risk of severe abuses and lack of effective intervention by the host state (Mares 2014, 315).

Returning to the contents of principle 7, which recognizes the particularly important challenges to ensuring respect for human rights by businesses in conflict-affected areas and asks states to take enhanced, context-specific measures to address the heightened risk of adverse human rights impacts (UN Working Group 2016, 26). It also recognizes that the host state may be “unable to protect human rights adequately due to a lack of effective control” (Ibid.). As the UNGPs rely heavily on the host state as the main duty bearer, an inability of the host state to fulfil its duties would significantly limit its application in unstable environments, where human rights are arguably most at risk. To fill this governance gap, the UNGPs call on home states to “assist both corporations and the host state to ensure that businesses are not involved with human rights abuse” (UN 2011, principle 7).

Principle 7 thus shines a spotlight on the role of home states in ensuring that the corporate responsibility to respect is fulfilled in conflict zones. To this end, it makes four concrete recommendations. It is specified that both host and home states should:

- a) Engage at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
- b) Provide adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
- c) Deny access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
- d) Ensure that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses. (UN 2011, principle 7)

The UNGPs further stress that home state’s governmental bodies, such as embassies, trade agencies, and other state agencies that link directly to businesses in the field play a key role in fulfilling the responsibilities of home states in conflict-affected areas. If corporate violations of human rights do occur, home states “*may explore civil, administrative or criminal liability for enterprises domiciled in their territory and/or jurisdiction*” (UN 2011, principle 7, emphasis added).

It is important to note here that, whereas host states have explicit duties to ensure human rights protection within their territories, home states are not assigned extraterritorial obligations.⁵ While the topic of whether home states can be assigned extraterritorial obligations to protect human rights has received considerable attention from scholars⁶, this will not be the focus of this study. It suffices to say that the UNGPs recognize that experts disagree on whether states have obligations under international law to help prevent human rights abuses by companies domiciled within their territory, but note that there is a greater consensus that those states are neither prohibited nor required to do so. The UNGPs thus explicitly do not include extraterritorial obligations for home states but rather state that home states are, under international human rights law, generally permitted to take more extensive action to regulate overseas activities by companies based in their territories but cannot be required to do so (UN 2011, 4).

The non-obligatory nature of principle 7 for home states generates the question whether it effectively prompts home states into action in areas where there is a heightened risk of gross abuse by ‘their’ companies?

2.1.1. Obligations and incentives for home states

Previously, I demonstrated that home states do not have legal duties within the UNGPs but are strongly encouraged to support host states in ensuring businesses respect human rights throughout their operations, especially in conditions where severe abuses are more likely and host states have limited willingness or capacity to fulfil their duty to protect. The lack of explicit

⁵ The extraterritorial dimension of the duty to protect imposes an obligation to protect individuals abroad from human rights violations that can be attributed to third parties over which the state has jurisdiction. This implies, for example, the duty of a home state to regulate national companies to ensure that they do not infringe on human rights in the countries where they operate.

⁶ Scholars are divided on whether home states do or do not have extraterritorial obligations under international law. For a discussion on why states do have extraterritorial obligations, see: Davitti 2016, Augenstein and Kinley 2013 and Artache and Del Mar 2013. For a discussion on why states cannot be ascribed extraterritorial obligations, see: Bernaz 2013 and Methven O’Brien 2018

obligations for home states has received widespread criticism from scholars, as it arguably leaves to the home states' discretion whether or not to regulate their TNCs conduct abroad. Augenstein and Kinley (2013) have argued that by marginalizing extraterritorial prescription in favour of permission, the UNGPs have "detrimental consequences" for the extraterritorial protection of human rights obligations (Augenstein and Kinley 2013, 279). Although legally permitted, Augenstein and Kinley have argued, home states remain reluctant to regulate and control national corporations abroad for two reasons: to the need to maintain a 'level playing field' for national corporations and to avoid conflicting with the legal sovereignty principle and political and economic interests of host states (Ibid.). Such an argument is supported by Halversson and Buhman (2013), Backer (2012) and Knox (2012) and highlights a potential key weakness of the UNGPs: home states face a variety of disincentives to act extraterritorially, even in contexts with heightened risks of severe abuse. To assess whether the constraints of home states are addressed appropriately in the UNGPs, both aforementioned constraints are considered in more detail below.

Although several scholars (Augenstein and Kinley 2013; Halversson and Buhman 2013) explicitly mention that the economic interest of the home state can disincentive states to regulate their corporations extraterritorially, the topic receives little in-depth scholarly consideration. Nevertheless, it is an important point to consider here. States that regulate their TNCs abroad extensively may undercut their competitiveness compared to those domiciled in states that do not. The result is a prisoner's dilemma in which the choices made individually by each state may be less optimal than if states were to cooperate in controlling transnational corporations. The UN Human Rights Council (HRC) has recognized that states are more inclined to adopt policies that do not put their own businesses at an unfair disadvantage and, to resolve this, recommends states to engage in multilateral standard-setting (HRC 2011, 7). Although this could potentially resolve this dilemma, this has proven difficult to realise in practice.

Regarding the sovereignty and interference issue, exercising extraterritorial jurisdiction is indeed necessarily paired with some degree of incursion into the domestic affairs of the home state. Olivier de Schutter (2006), one of the most well-known advocates for extraterritorial human rights duties, also recognized potential state objections, explaining that "in general, it may be anticipated that control by home states of the activities of transnational corporations will be resented as a limitation to the sovereign right of the territorial states concerned to regulate

activities occurring in their territory, as portraying a distrust of the ability of those states to effectively protect their own populations from the activities of foreign corporations” (De Schutter 2006, 21). Rachel Chambers (2018) too highlights that exercising extraterritorial jurisdiction is potentially problematic as it can be viewed as an impermissible infringement of host state exclusive jurisdiction or as imperialist and/or neo-colonialist (Chambers 2018, 2). Indeed, home state interference may conflict with the interests of the host state government and cause tension in the relationship. For instance, extraterritorial labour protection policies implemented by the home state may conflict with host state strategies when it employs cheap labour as an incentive for foreign investment. In this case, home state policies can have a direct influence on business activity and economic prosperity in the host country. In the context of conflict or repressive politics, host states may be particularly likely to object to extraterritorial incursions due to political considerations or to avoid attention being focussed on the government’s role in, and possible benefit from, corporate-related abuses.

When the host state objects to extraterritorial actions, Chambers argues, this may present home states a moral dilemma: limiting their regulations and adjudications to events and actors wholly within their territorial state creates governance gaps where corporate misconduct is transnational, spanning both home and host state, or where the host state is unwilling or unable to regulate the locally incorporated subsidiary or other affiliate company, while acting extraterritorially can have detrimental political consequences (Chambers 2018, 2). Chambers’ ‘dilemma’ draws attention to how home states aim to balance the political gains and losses of drafting and enforcing extraterritorial jurisdiction. However, Chambers fails to take into account how other factors, such as loss of revenue for their national companies, may also disincentive host states from interfering in their businesses’ operations abroad and overemphasizes the objections of host states.

In sum, the Framework and UNGPs do not generate extraterritorial obligations for states. Home states are not held liable for failing to act extraterritorial in the case of gross violations or high-risk contexts, but are encouraged to take additional actions and the UNGPs provide ample guidance for this. Nevertheless, states face multiple disincentives for regulating their TNCs conduct abroad, which are not adequately addressed. If the UNGPs aim to address the governance gaps created by globalization, the omission of clear obligations or incentives for

home states constitutes a weakness, leaving many governance gaps unresolved when host states do not fulfil their duties.

2.2. Pillar 2: The Corporate Responsibility to Respect

There are few, if any, internationally recognized rights that corporations cannot impact through their operations. While the Framework and UNGPs assert that companies should “consider” all those rights, they do not impose direct legal obligations on business enterprises (HRC 2009, 15). The responsibility to respect, as articulated in the Framework and UNGPs, can be considered a universal voluntary commitment towards promoting more effective protection of individuals and communities against corporate-related human rights harm. Corporations should respect human rights by avoiding infringement on the human rights of others and should address adverse impacts in which they are involved (UN 2011, 13). Despite its voluntary nature, the UNGPs lay down a basis for social corporate responsibility to prevent human rights abuses in the corporate sphere.

The UNGPs and the *Interpretive Guide to the Corporate Responsibility to Respect* (Interpretive Guide) indicate that a company can be involved in human rights harm by 1) *causing* the impact through its activities; 2) *contributing* to the impact through its own activities or through another entity; or 3) *neither causing or contributing* to the impact, but appear as its direct perpetrator, the accomplice or beneficiary (UN 2012, 15). This implies that corporations can also be held responsible for adverse human rights impacts through, for example, their suppliers or business partners.

The UNGPs stipulate both preventive and remediation human rights measures through due diligence, referring to the “steps a company must take to become aware of, prevent and address adverse human rights impacts” (UN 2011, principle 17). Putting due diligence into practice requires the adoption of a human rights policy and its integration in all layers of the corporation, as well as assessment of these policies’ impact and the tracking of overall human rights performance. Remediation is expected in response to harm and includes ceasing all harmful activities, terminating all contributions to or trading relationships with irresponsible (sub)contractors and exercising “leverage” over affiliates who infringe on rights (UN 2011, principle 19).

For businesses operating in “conflict-affected areas” the UNGPs make a number of additional recommendations which can be categorized into those relating to 1) assessing impacts; 2) integrating findings and taking action; 3) remediation; and 4) formal reporting and transparency. Firstly, businesses operating in volatile contexts should become aware of any heightened human rights risks the operating environment might pose and ensure their processes are “proportionate to the human rights risks of its operations” (UN 2012, 19; UN 2011, principles 14, 17 and 18). Principle 17 emphasizes that the risk assessment will “vary in complexity with the size of business enterprise, the risk of severe human rights impacts, and the nature and context of its operations” and that businesses should prioritize those areas where risks are most significant (UN 2011, principle 17). The Interpretative Guide specifies that businesses can identify heightened risks by conducting country-specific human rights assessments prior to starting operations and conducting repeat assessments if the context changes (UN 2012, 34).

Secondly, the UNGPs recommend companies to integrate findings from these assessments across relevant internal functions and processes, and take appropriate action to mitigate risks (UN 2011, principle 19). Companies can use leverage to mitigate human rights issues and should take into account the possible severity of violations. The more severe (possible) violations, “the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship” (Ibid.).

Thirdly, in the event that a violation does occur companies should provide effective and legitimate remedies. When violations occur in conflict-affected areas, companies are advised to engage stakeholders and independent experts to ensure their response does not exacerbate the situation and, where necessary, prioritize actions according to severity as a delayed response may affect remediability (UN 2011, principles 23 and 24).

Lastly, businesses who face heightened human rights risks in their operating contexts are advised to formally report on how they address these (UN 2011, principle 21). Formal reports may be self-standing reports on the enterprise’s human rights performance, or be part of wider reports on non-financial performance. For retail companies, who often source through long and complex supply chains, the interpretative guide recommends they should “communicate on how they address potential and actual human rights abuses in the supply chain” (UN 2012, 58).

All recommendations for businesses in the Framework and the UN 2011, including those for conflict-affected areas, are non-binding and voluntary in nature. Rather than threatening legal

enforcement, the UNGPs place business responsibility, driven by social expectations, at the centre of the policy and practice of corporate-related human rights harm. By demonstrating compliance with international human rights norms businesses can gain a ‘social license to operate’ while failing to fulfil responsibilities can have negative legal, financial and reputational consequences (UN 2012, 13-14). The proposed due diligence assessments for human rights risks are intended to provide businesses with the empirical information necessary to reconcile the market-driven demands of doing business with the social expectations driving the demands for respecting human rights. Although the term ‘due diligence’ evokes a legal standard, within the UNGPs it is fundamentally a term that refers to a series of good practices without necessary legal implications.

Generally speaking, businesses are not ascribed legal obligations under the UNGPs. Nevertheless, as Nicola Jägers (2013) argues, by itself the non-legal nature of the responsibility to respect does not justify dismissing it as merely aspirational and consequently of little use in the quest for corporate accountability (Jägers 2013, 299). Jägers argues that although the adoption of measures to discharge the responsibility to respect are (initially) voluntary in nature, they are “not without teeth” as compliance with these measures is increasingly mandatory. Through domestic legislation and private law stakeholders could, arguably, harden voluntary commitment (Ibid.). This is echoed in the Interpretive Guide, which states that domestic laws or regulations corresponding to international human rights standards reflect “at least in part” the responsibility to respect (UN 2012, 13).

Although governments can indeed harden responsibilities through domestic legislation, the final responsibility to enforce compliance remains with states who might be unwilling or unable to fulfil their duties or, in the case of home states, are not under an obligation to act at all. This is likely to be particularly problematic in the context of state repression, conflict, limited state capacity or instances where the state itself benefits from human rights abuse. Neither Jägers nor the UNGPs and Interpretative Guide sufficiently acknowledge how an incapable or non-compliant host state may fail to provide the regulatory framework to prevent abuses and may, on the contrary, even enable, encourage or force businesses to commit human rights abuses. To assess the effectiveness of the UNGPs in such situations, we must consider the ways businesses can be involved in abuses in conflict-affected areas and the incentives they have to prevent and redress these.

2.2.1. Incentives and obligations for corporations

The Interpretive Guide states that businesses should be extra vigilant in contexts where there are no effective government institutions and legal protection, which may or may not be conflict-affected areas. Such contexts should “automatically raise red flags within enterprises and trigger human rights due diligence processes that are finely tuned and sensitive to this higher level of risk” (Interpretive Guide, question 85). It is important to note here that, even in high-risk contexts, the corporate responsibility to respect does not expand to include ‘protect’ or ‘fulfil’ elements. The UN working group chose this stance because broadening the responsibility to respect, even in exceptional cases, would logically lead to a breaking point: corporations staying away from conflict zones altogether. As corporations also make positive contributions, this was considered an unwanted consequence.

Although businesses cannot be held liable in most circumstances, committing or complicity in the most severe human rights violations that amount to crimes against humanity or war crimes, such as genocide, slavery, torture, and human trafficking may generate legal liability as international standards and national law have increasingly evolved to sanction these most heinous of crimes. This is emphasized in the commentary of principle 23 of the UNGPs:

Some operating environments, such as conflict-affected areas, may increase the risk of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the *expanding web of potential corporate legal liability* arising from extraterritorial civil claims, and the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. (UN 2011, principle 23, emphasis added)

There must be some nuance to the applicability of such provisions to corporations, however, as John Knox (2012) points out. The sources of international law that the UNGPs cite for the existence of prohibitions on international crimes do not explicitly refer to corporations, and some even explicitly limit their coverage to individuals (Knox 2012, 70). Although a growing number of cases contributes to an emerging norm that corporations can and should be held liable for violations of international criminal law, research has indicated that very few companies actually end up in court or with a verdict (Enneking et al 2015). Therefore the UNGPs’ description of the trend towards greater potential liability for corporations seems more

likely to, Knox argues, “have the aim and effect of raising awareness of the *practical consequences* of this trend” (Knox 2012, 74, emphasis added). Indeed, the UNGPs’ overarching point should be interpreted as a warning for corporations that the potential legal costs of behaviour resulting in accusations of violations of these standards are high.

This is emblematic of the UNGPs’ stance towards business responsibility in general. Because the responsibility to protect generally cannot be enforced at the international level, the UNGPs mainly emphasize the potential reputational and legal costs of noncompliance with human rights norms. They emphasize that the public, consumers especially, can hold businesses accountable for their actions. Failing to respect human rights may damage their reputation, thereby reducing incomes from sales and hampering their ability to recruit and retain staff and to gain permits, investments and new project opportunities. As such, the UNGPs argue, it is in the business’ best interest to comply with the guidelines. The success or failure of the UNGPs in persuading corporations to respect human rights is therefore essentially tied to whether the courts of public opinion can use their naming and shaming power effectively.

Sally Wheeler (2015) addresses some critical issues with this emphasis on public scrutiny and reputation. Firstly, not all corporations will react in the same way to pressure from the public. Reputation has a different value to different corporations and a corporation’s internal operational culture highly determines how external pressure affects its actions (Wheeler 2015, 766). Moreover, it is not guaranteed that news of corporate-related human rights harm will always reach consumers or civil society organisations, especially in repressive environments. When transnational supply chains are long and largely invisible to consumers, as is the case in the global garment industry for example, this introduces additional problems. How can we expect consumers and civil society to hold companies accountable for human rights abuses if these production processes are not transparent? Although the public debate on human rights violations in the fashion industry has been gaining traction the last few years, it remains questionable up to what extent consumers are actually informed about the circumstances in which their clothing was produced and up to what extent they alter their purchasing decisions accordingly.

2.3. Pillar 3: Access to Remedies

The state duty to protect and corporate responsibility to respect are supplemented by the need to provide effective remedies for adverse human rights impacts by corporations. Both states and corporations are assigned roles under the third pillar. Corporations should ensure access to remedies by providing effective claim mechanisms at an operational level, install due diligence mechanisms that identify and address grievances early and “provide for or cooperate in their remediation through legitimate processes” (UN 2011, principle 22).

States are expected to investigate and punish business-related human rights abuses and offer remedies to those affected within their territory and/or jurisdiction. Judicial and non-judicial instruments must ensure that redress actions contemplate all or some of the following: “compensation, restitution, guarantees of non-repetition, changes in relevant law, or public apologies” (HRC 2008, 22). States are advised to strengthen their judicial mechanisms to overcome barriers that could result in denial of access to remedy. These barriers include the corporate misuse of separate legal personalities, high litigation costs, and lack of legal representation (UN 2011, principle 26).

Principle 25 and 26 further underscore the importance of ensuring access to remedies in conflict-affected areas. Principle 25 stipulates that states must ensure access to effective remedy through “judicial, administrative, legislative or other appropriate means” while principle 26 specifies that home states should ensure access to judicial mechanisms when there is a “denial of justice in the host state” (UN 2011, principle 25 and 26). In the context of conflict, citizens in many fragile or repressive countries experience difficulties in accessing justice and remedy mechanisms, which underscores, CSO CIDSE argues, “the need for effective extraterritorial action by States where multinational companies are based” (CIDSE 2014, 1)

In addition to its obvious qualities of holding companies accountable for actions committed and redressing adverse impacts for victims, remedial action provides an option for what may be referred to as “ex post” regulation. Judicial and non-judicial remediation mechanisms can be “a source of continuous learning” as both companies and states can learn and draw lessons from how cases are handled to “improve the mechanisms and prevent future grievances and harms” (UN 2011, p.31).

2.4. Conclusions

The three pillars of the Framework and UNGPs are presented as mutually supportive and reinforcing. Arguably, as states exercise their duty to protect they would ensure, through regulation or otherwise, that businesses respect human rights as defined in the second pillar. In the Framework this is explained as follows:

In addition to compliance with national laws, the baseline responsibility of companies is to respect human rights (...). Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectation - as part of what is sometimes called a company's license to operate. (HRC 2008, 16-17)

The duties and responsibilities of the states and businesses thus intersect in the realm of domestic legislature where states can define the scope of legal compliance and enforce adherence to human rights norms. As such, the state in which production takes place, as the only actor to which clear duties are prescribed, carries the main responsibility to protect individuals from corporate-related human rights abuses.

The Framework and UNGPs provide insufficient guidance on what the implications are for other actors in the system when the host state is either unwilling or unable to fulfil these duties and, therefore, leaves many of the governance gaps created by globalization unresolved. Although it encourages home states and corporations to take extra actions in such contexts, the previous discussion has illustrated that neither the home state nor the corporation have any obligations and that there are serious limitations to their incentives to do so. It therefore remains questionable whether the UNGPs are effective in ensuring alternative mechanisms for the protection of human rights when the host state is unwilling or unable to perform its duty to protect.

Scholarly debate up to this moment has predominantly focussed on the theoretical, legal aspects of the Framework and UNGPs. Although this has provided valuable insights and guidance for states and businesses, there has been little research on how home states and TNCs who operate in conflict-affected areas implement the recommendation that the UNGPs make. This thesis addresses that gap through an analysis of the ways TNCs in Myanmar's garment sector and their home states do or do not incorporate the UNGPs recommendations regarding lack of home state action and heightened risk, and aims to gain more insight into whether the

UNGPs sufficiently incentivise TNCs and home states to take additional action in these contexts where human rights are particularly vulnerable.

3. Methodology

3.1 Case selection and sources

This thesis considers the human rights commitments of garment TNCs and their home states in Myanmar. Following concerns over corporate-related human rights abuses in Myanmar, the Business & Human Rights Resource Centre's (BHRRC) set up a project to track foreign investment in Myanmar in 2014. This project aims to create a public database on foreign companies investing in Myanmar and their human rights commitments. BHRRC asked 10 garment TNCs investing in Myanmar to disclose information on the nature of their investment in Myanmar, whether they have policies and procedures in place to prevent contributing to human rights abuse through their operations, and whether they have consulted with workers and unions in carrying out due diligence. Company responses and non-responses to this questionnaire were published publicly. Since the questionnaire, the BHRRC has continued to follow up with these companies about developments in Myanmar such as the introduction of a new minimum wage or allegations of human rights violations.⁷

While this project provides a good starting point for analysing corporate human rights commitments in Myanmar and provides valuable information on country-specific actions and policies, its scope and depth remained quite limited since the BHRRC did not include analyses of other company resources. Moreover, as the business and human rights dilemma exist on the state-business nexus, an inclusion of the state perspective is critical for a full comprehension of the effects the UNGPs implementation has had on business activity in crisis-affected areas. The project by the BHRRC does not include such a state perspective.

This thesis builds on the work by the BHRRC by analysing companies' public disclosures on human rights and home states NAPs. The research in this thesis is exclusively desk-based, using information publicly reported by the companies and states in the sample. Resources include CSR reports, codes of conduct, supplier policies and other information disclosed on the company websites referring to human rights commitments (e.g. policies, internal

⁷ For more information on the project see <https://www.business-humanrights.org/en/myanmar-foreign-investment-tracking-project-launch>

documents, special human rights reports, etc.). As this research is based purely on information publicly disclosed by the companies and states in the sample group, findings are focused on disclosure practices and should not be taken as a judgement to actual practices, which may include a range of policies, processes and outcomes that are not reflected in disclosure. Equally, it is recognized that third parties may in some cases contest information disclosed about corporate practices.

To facilitate comparison and include state commitment in my analysis, I have selected those companies of which the home state has published a NAP. NAPs are policy documents in which a government articulates the priorities and actions it will adopt to support the implementation of the UNGPs at a national level and with regards to companies that are domiciled within its territory. As such, a NAP communicates a state's baseline commitment to business and human rights. The UN Working Group, mandated by the HRC to promote the effective and comprehensive implementation of the UNGPs, noted in its 2016 report *Guidance on Business and Human Rights NAPs* that NAPs can be an important means to promote the implementation of the UNGPs and recommended all states to develop a NAP (UN Working Group 2016, 1). From the 10 garment sector companies in the BHRRC survey, 9 are based in countries that have published a NAP. These companies are domiciled in 6 countries. The research sample in this thesis thus consists of 9 company and 6 state cases.

Companies	States
Jack Wolfskin	Germany
Adidas	
Mango	Spain
Hennes & Mauritz (H&M)	Sweden
MC Group	Thailand
Primark	United Kingdom
Marks & Spencer	
Calvin Klein	United States
GAP	

Table 1: companies and states selected for this study

3.2 Analysis

As previously discussed, the UNGPs recommend policies for both companies and home states to offset negative consequences of inadequate home state action for the prevention of business-related human rights harm. For home states, principle 7 of the UNGPs makes clear recommendations for conflict-affected areas. They advise home states to take into account to following:

1. Engagement: home states should “engage at the earliest stage possible with business enterprises to help them identify, prevent, and mitigate the human rights-related risks of their operations” (UN 2011, principle 7).
2. Assistance: home states advised to “provide adequate assistance to businesses in assessing and addressing heightened risks of abuse” (Ibid.).

3. Deny public support: home state governments should “deny access to public support and services for business enterprises that are involved with gross human rights abuses and refuse to cooperate in addressing the situation” (Ibid.).
4. Effective regulation: home states are expected to “ensure that their policies, legislations, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses”. This includes both implementing provisions for human rights due diligence and ensuring civil, administrative or criminal liability for businesses that violate human rights abroad (Ibid.).

For companies, the UNGPs recommend they pay specific attention to:

1. Assessing impacts: a company is required to ensure awareness of any heightened human rights risks the operating context might pose. This can be achieved by conducting a country-specific human rights risk assessment prior to starting operations, and conducting repeat assessments, especially if the context changes (UN 2011, principle 14, 17 and 18).
2. Integrating findings and taking action: businesses should integrate the findings from impact assessments across relevant internal functions and processes, and take appropriate action to mitigate risks. Businesses should take into account that (risks of) severe abuses need a more immediate response (UN 2011, principle 19).
3. Remediation: in the event that a violation does occur in a company’s supply chain, businesses should have in place legitimate remediation processes. In conflict contexts, the company is advised to engage stakeholders and independent experts to ensure their response does not exacerbate the situation (UN 2011, principle 23).
4. Formal reporting and transparency: Businesses whose operations or operating contexts pose heightened risks of more severe human rights impacts should report formally on how they address those (UN 2011, principle 21). “A retail company should be able to communicate on how it addresses potential and actual human rights abuses in the supply chain” (UN 2012, 58).

The following analysis considers the ways in which both TNCs and their home states have incorporated the aforementioned recommendations on mitigating additional human rights risks that may occur in conflict-affected areas where the host state has limited capacity or willingness

to fulfil its duty to protect. I use both the company's public information on its human rights commitments and its response (or non-response) to the BHRRCs survey as a source.⁸ The BHRRC questionnaire offers valuable insight into measures that companies have taken for Myanmar specifically, as not all publish separate reports on country-specific policies. Home state commitments to the UNGPs conflict recommendations are assessed through analysing NAPs.

⁸ 4 out of 9 companies in my sample have not provided a response to the BHRRC survey. I have reached out to these companies (Mango, Jack Wolfskin, Calvin Klein and MC Group) via email on 24 April 2020, asking them to provide a response. At the moment of submission of this thesis, none of these companies had replied.

4. Home state commitments

The following section presents a summary of home state commitments trends regarding business and human rights in conflict-affected areas and severe abuses. Each section begins by restating the recommendation in the UNGPs and then discusses the scope and robustness of state commitments. The final section discusses trends that can be distinguished from this analysis and highlights overarching strengths and weaknesses for the NAPs considered. For a full overview of state commitments, please refer to appendix 1.

4.1. Engagement

Home states should “engage at the earliest stage possible with business enterprises to help them identify, prevent, and mitigate the human rights-related risks of their operations” (UN 2011, principle 7).

Scope

All states in the research sample commit, in one way or another, to engage with businesses to help them become aware of and address the human rights-related risks of their operations abroad. However, none of the states in the sample specify engagement policies that go beyond awareness-raising activities. Therefore, the overall state commitment on engagement is rather shallow.

Robustness

While all of the countries in the sample engage with businesses through awareness-raising activities on the UNGPs, none of them make hard commitments on proactively detecting and engaging with companies that operate in conflict-affected areas and are at risk of involvement in severe human rights abuse. Some states do have engagement policies for conflict-affected areas, but apply a very narrow focus on extractive companies that is insufficiently substantiated. Germany, for example, has committed itself to establishing binding due diligence rules for extractive companies operating in conflict-affected areas (Germany 2016, 22). While these policies effectively ensure continued engagement and allow the government to stay updated on possible risks as they develop, the narrow focus on extractive companies excludes

other types of businesses operating in conflict-areas that might be at an equally high risk of abusing human rights. The German NAP does not provide a satisfactory justification for limiting the scope of these policies.

Other countries have aspirations for preventive engagement, but make no concrete commitments or plans for implementation. Sweden's NAP, for example, states "it should be mandatory for importers from particularly problematic countries to obtain certification" (Sweden 2015, 21). Although mandatory certification would certainly provide a good avenue for government engagement with corporations operating in high-risk contexts, the NAP does not actually commit to implementing this and offers no plan or timeline. At this moment, I was not able to find proof that such a policy has been implemented. Similarly, the U.K. "considers" extra awareness-raising activities on business and human rights through diplomatic missions where there are "concerns", but offers no clear indication of what steps will be or have been taken to realise this (United Kingdom 2016, 11).

Overall, the states in this sample demonstrate an awareness of the heightened risk of serious human rights impacts in conflict-affected areas but lack the policies to actively engage with companies who operate therein. All states have committed to carrying out awareness-raising activities on the UNGPs in general which can be considered a positive trend, but none of them have policies in place to engage proactively with those businesses that might be at a higher risk of committing more serious human rights abuses. The majority of states leave the responsibilities with companies themselves by "encouraging corporate due diligence and reporting under such [conflict-affected] circumstances" (U.S.) without proactively engaging with those who may be at a high risk for abusing human rights (US Fed. Gov. 2016, 17).

4.2. Assistance

Home states are advised to "provide adequate assistance to businesses in assessing and addressing heightened risks of abuse" (UN 2011, principle 7).

Scope

83% of states in the sample make strong or moderate commitments for providing assistance to businesses in assessing and addressing a heightened risk of abuse. This is the best scoring indicators of the four considered here.

Robustness

83% of states (Germany, Spain, Sweden, U.K. and U.S.) show a strong commitment to assisting businesses in assessing and addressing heightened risks of abuse and have a variety of policies in place. The U.S. in particular demonstrates a great awareness of the heightened risk of serious human rights impacts in conflict-affected areas and recognizes that “the tools and resources available to effectively conduct detailed and appropriate risk assessment can be sparse (...) in the complex environments where this is most needed” (US Fed. Gov. 2016, 17). In the NAP, the U.S. government envisions for itself a clear role in helping businesses “address those gaps” by producing and disseminating various resources that help businesses understand and respond to human rights and investment conditions around the world (Ibid.). Through the provision of country- and subject-level profiles, the U.S. provides effective guidance and advice. Moreover, the NAP describes a variety of projects in conflict-affected or high-risk areas, one of which focuses on Myanmar. The U.K., Spain, Sweden, and Germany also demonstrate a strong commitment by providing a wide range of country- and sector-specific information (Germany and Sweden) and employing diplomatic missions to inform companies on contextual risks (U.K, Spain, Sweden, and Germany) and help resolve issues with local authorities (U.K.).

Thailand is the only country whose NAP does not specify sufficiently how it will assist businesses operating in conflict-affected areas. Judging from the information provided in the NAP, Thailand does not provide adequate guidelines for foreign investments in conflict-affected areas, does not offer third country information services to alert companies to potential risks, and only “considers the establishment of rights protection centres” in areas of conflict without making any commitments or specifying what services such centres would offer (Thailand 2019, 98).

4.3. Denial of public support

Home state governments should “deny access to public support and services for business enterprises that are involved with gross human rights abuses and refuse to cooperate in addressing the situation” (UN 2011, principle 7).

Scope

Only one state in the sample (17%) makes a strong commitment to denying public support, in the form of subsidies or other state benefits such as export credits, to companies that are involved in gross human rights abuse. One more state (17%) makes a moderate commitment, specifying limitations on only a few state benefits. The remaining 67% of states fail to incorporate this recommendation into their NAP altogether. Out of the four considered here, states score most poorly on this indicator.

Robustness

Both Germany and Sweden stand out due to their commitment to denying public support to companies that are involved in human rights violations. Germany makes the strongest commitment as its NAP states “subsidisation must not conflict with (...) the protection of human rights”. Although Germany’s policies for subsidisation and awarding other state benefits already take corporate respect for human rights into account, the country has committed to examining whether their policies are consistent with the requirements set out in the UNGPs and how enterprises receiving “significant subsidies” can be subjected to a future obligation to apply the elements of due diligence (Germany 2016, 17).

In comparison to Germany, the Swedish commitment is less robust. The Swedish NAP does not refer to subsidies but does require the Swedish Export Credit Corporation to “take account of conditions such as the environment, corruption, human rights and working conditions in its credit assessments” (Sweden 2015, 24). While export credits are a key form of government support for businesses, the Swedish NAP leaves unaddressed the many other forms of support available. The remaining countries (Thailand, UK, US, and Spain) do not refer to denial of state benefits at all in their NAP. As such, they do not attach appropriate consequences to failure by business enterprises to respect human rights in conflict-affected areas and/or cooperate to reduce risks of violations.

4.4. Effective regulations

Home states are expected to “ensure that their policies, legislations, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses”. This includes both implementing provisions for human rights due

diligence and ensuring civil, administrative or criminal liability for businesses that violate human rights abroad (UN 2011, principle 7).

Scope

50% of states in this sample make explicit reference to judicial mechanisms that can be accessed by victims of human rights abuses committed by national businesses abroad. Out of these, one state (17%) makes a strong commitment while two states (33%) make a moderate commitment. The remaining three states (50%) do not sufficiently specify under what legal mechanisms victims can find remedies, with the exception of very grave violations like war crimes and genocide that are liable under international treaties.

Robustness

Out of the six states considered, Germany communicates the most robust commitment to ensuring effective regulation of business conduct abroad through legal instruments. Germany provides clear information on how foreign victims of human rights abuse can press charges and allows for the German prosecutors offices to start trials. Consider the following section in the German NAP:

Anyone who considers that his or her rights have been infringed abroad by the actions of a German enterprise, can bring an action in Germany, normally at the court with local jurisdiction for the registered office of the enterprise. (...) Germany's international civil procedure law also contains additional provision whereby the German courts may be seized of matters relating to certain offences committed abroad, provided that a sufficient connection can be demonstrated. (Germany 2016, 24)

Moreover, to ensure that foreign victims face no restrictions in prosecuting German businesses in Germany, Germany offers "litigants of limited means" legal aid for their court proceedings (Germany 2016, 24). These provisions are already implemented in German civil courts but the German government recognizes that those who are affected by human rights violations might not know these remedy mechanisms. To this end, the Federal Government of Germany is tasked with producing a multilingual information brochure on access to justice and the courts, giving potentially affected individuals and groups an "easy-to-follow summary of the remedies available to them under German civil procedural law" (Germany 2016, 25). Although no

implementation period or deadline is specified, this commitment is specific and allows for follow-up and monitoring by stakeholders.

While Germany makes a strong commitment to effectively regulating business conduct in conflict-affected areas by ensuring liability under civil law, other states in the sample lag behind significantly. The U.K and Sweden make a moderate commitment as they do specify which judicial mechanisms offer remedies for victims of human rights abuses overseas, but fail to indicate whether domestic prosecutors can start trials. Moreover, these states do not have policies in place to ensure that foreign victims of human rights abuse are well informed about the remedy mechanisms available, making it questionable that these remedies are accessible to foreign victims in practice (Sweden 2015, 10-11; United Kingdom 2016, 20).

The remaining three states (Spain, Thailand and the U.S.) demonstrate a weak commitment to regulating foreign human rights abuse through domestic legal instruments. The NAPs of Spain and the U.S. do not specify that domestic judicial mechanisms allow liability for businesses that violate human rights abroad, nor indicate that this will be developed. Thailand's NAP specifically states that its judicial mechanisms can only be used for Thai who have been victims of corporate-related human rights abuse abroad, thereby decisively excluding foreign nationals who have had their rights violated by Thai companies operating overseas.

4.5. Discussion

Overall, it can be concluded that none of the states considered here fully incorporates all recommendations for conflict-affected areas and that there is a great variety between different indicators and states. Table 2 summarizes the findings discussed in the previous sections. There are three trends that can be distilled from the preceding analysis: 1) preference for assistance over regulation; 2) lack of commitment and accountability; and 3) discrepancies between EU member-states.

	Engagement	Assistance	Denial of public support	Effective regulation
Germany	Moderate	Strong	Strong	Strong
Spain	Moderate	Moderate	Weak	Weak
Sweden	Moderate	Strong	Moderate	Moderate
Thailand	Moderate	Weak	Weak	Weak
UK	Moderate	Strong	Weak	Moderate
US	Moderate	Strong	Weak	Weak

Table 2: Commitments state NAPs per indicator.

4.5.1. Assistance over regulation

Compared to the indicators on engagement and assistance, the NAPs considered in this sample display a weaker commitment to the denial of public support and effective regulation indicators. Whilst the first two relate to supporting businesses to respect human rights and reflect a predominantly collaborative relationship between the state and enterprise, the latter two directly relate to regulating business activity, both ex ante and ex post. The results presented here indicate that states are more reluctant to regulate the conduct of their businesses abroad, even in conflict-affected areas, and prefer to take a ‘softer’ approach, focussing on engagement and assistance. The discussion below further illustrates this point.

As previously discussed, the states considered here have scored most poorly on the denial of public support indicator, reflecting a reluctance to directly regulate business activity abroad through hard measures. It is interesting to draw a comparison here with the generalised system of preferences (GSP), a programme implemented by the US and EU that allows exporters from developing countries to pay lower or no duties on exports. As such, it offers, the Office of the US Trade Representative states, “opportunities for many of the world’s poorest countries to use trade to grow their economies and climb out of poverty” (US Trade Representative 2019). The GSP can thus be interpreted as a form of public support, not dissimilar to export credits or

subsidies offered to domestic companies. By contrast, however, the benefits under the GSP are conditional and can be withdrawn when recipient states do not comply with human rights principles in general (EU) and labour rights in particular (US and EU). The fact that GSP is conditional and public support for TNCs is not highlights hypocrisy in the business and human rights policies of the US, the UK and Spain. While these states do deny access to public support under the GSP scheme to developing states that lack respect for human rights, they do not apply this same rhetoric to their domestic companies abusing human rights abroad.

The preceding analysis has also highlighted the failure of all but one state (Germany) to sufficiently explore regulatory options to ensure access to remedies for victims of human rights abuse abroad. Only three of the six considered NAPs explicitly allow foreign victims of human rights abuses that can be attributed to ‘their’ national companies to seek judicial remedies within their states. Out of these three, only Germany’s NAP commits to the implementation of additional policies to ensure that foreign victims are aware of and have access to remedial options in the home state. With the exception of Germany, the NAPs of all states considered here contain very few action points on the development of additional regulatory actions and remedies, especially when compared to other topics such as awareness-raising and information provision.

A failure to effectively regulate corporations through denying public support and judicial accountability is problematic because it does not attach the appropriate consequences to businesses violating human rights abroad. Instead, it may foster a situation in which businesses can ‘pick and choose’ whether they would like to engage with and receive assistance from the state on business and human rights related topics.

4.5.2. Lack of commitment and accountability

All states considered in this sample provide commitments to future action in the NAPs in addition to evaluating past actions the state had taken. However, in the vast majority of cases, the future action points that are included in the NAP are overly vague and lack explanations of the concrete steps the state will take and in what timeframe. This makes it difficult for stakeholders to adequately monitor whether a state has implemented the actions it committed to in its NAP and hold the state accountable for failure to do so.

4.5.3. Discrepancies between EU member-states

Out of the 6 states considered here, 4 are EU member-states.⁹ As EU member-states closely collaborate on issues relating to human rights through various EU institutions, such as the EU parliament and European Court of Human Rights, one should expect the NAPs of the EU countries considered here to be quite similar. This is, however, not the case as there are many discrepancies.

When comparing the NAPs of EU member-states, the German NAP stands out as it displays the overall strongest commitment to regulating the activities of domestic corporations in conflict-affected areas, communicating clear and effective policies on assistance, denial of public support and effective regulation. Comparably, the other EU member-states fall behind significantly. How can we explain these discrepancies between states that closely collaborate on human rights issues?

	Engagement	Assistance	Denial of public support	Effective regulation
Germany	Moderate	Strong	Strong	Strong
Spain	Moderate	Moderate	Weak	Weak
Sweden	Moderate	Strong	Moderate	Moderate
UK	Moderate	Strong	Weak	Moderate

Table 3: Commitments EU member-state NAPs per indicator.

One possible explanation is the fact that the EU did not provide any guidelines or support to member-states whilst developing their NAPs. On the topic of NAPs, the 2015-2019 EU action plan on human rights states that the development and implementation of NAPs is the sole responsibility of member-states and no EU body was assigned any responsibility in this aspect (Council of the EU 2015, 29). As previously discussed, states face economic disincentives to

⁹ The UK left the EU in January 2020. However, as the UK's NAP was written while the state was still part of the EU, it still makes sense to consider its contents in relation to those of other EU member-states and EU regulations and policies.

including more harsh policies in their NAPs as this may undercut their competitiveness when other states do not pursue similar policies, resulting in a prisoner's dilemma. By providing guidelines and support for the development of NAPs, the EU could have significantly reduced these disincentives and may have reduced the discrepancies between member states.

5. Company commitments

The following section presents a summary of company commitments regarding human rights in conflict-affected areas. Each section begins by restating the recommendation as stated in the UNGPs and then discusses the scope and robustness of company commitments. The final section discusses trends that can be discerned and highlights the weaknesses and strengths of company commitments. For an overview of company commitments, please refer to appendix 2.

5.1. Assessing impacts

A company is required to ensure awareness of any heightened human rights risks the operating context might pose. This can be achieved by conducting a country-specific human rights risk assessment prior to starting operations, and conducting repeat assessments, especially if the context changes (UN 2011, principles 14, 17 and 18).

Scope

This indicator can be subdivided into two: 1) whether the company has in place processes for enhanced risk assessments for high-risk operating contexts; and 2) whether the company has conducted a country-specific assessment prior to starting operations in Myanmar. Compliance with the first indicator demonstrates that the company has a baseline awareness of the importance of becoming aware of additional contextual risks and has policies in place to do so. As Myanmar is generally indicated as a high-risk production location, conducting a country-specific analysis communicates a deeper commitment on behalf of the enterprise to become aware of any additional risks the operating context poses.

33% of companies in this sample specify in their policies under what circumstances an enhanced risk assessment would be necessary and how this should be executed. The human rights policies of the remaining 77% of companies do not specify either.

45% of companies in the sample have conducted a country-specific risk assessment prior to sourcing from Myanmar. 55% of companies did not conduct such an assessment or failed to communicate about this.

Robustness

Three out of the nine reviewed companies indicate, in their policies, that certain contexts demand additional risk assessments and specify how these are to take place. Adidas and Marks & Spencer have policies in place that profile both geographical locations and individual factories based on the level of risk and subject those to additional risk assessment measures. Both companies involve civil society organisations and/or external experts to map context specific risks. The third company, Jack Wolfskin, is a member of the Fair Wear Foundation (FWF), an organisation that works with over 130 companies in the garment industry to improve human rights throughout their supply chains. FWF has categorized the countries in which its members operate on the basis of risk and requires enhanced monitoring programs for some, including Myanmar. The six remaining companies do not specify when an enhanced risk assessment would be necessary and how this should be carried out. While H&M does take a step in the right direction by requiring risk assessments for all new markets and suppliers, the company fails to specify how heightened risk may require enhanced assessment practices.

Four companies undertook a country-specific risk assessment prior to starting to source from Myanmar, all of which included consultations with stakeholders. Gap, as the first U.S. based retailer to start sourcing from Myanmar, undertook a particularly thorough risk assessment. To become aware of how human rights issues and the local operating environment impact and may be affected by their business conduct, Gap's risk assessment included consultations with "key stakeholders across sectors" such as civil society and workers organizations in Myanmar, U.S government agencies, the ILO and international NGOs with specialized expertise in Myanmar (Gap 2014, 2). Adidas, H&M and Primark also indicate that their risk analysis included consultations with external stakeholders.

The remaining five companies did provide enough evidence that they undertook a country-specific risk assessment for Myanmar. These are the same companies that failed to respond to the BHRRC survey (Jack Wolfskin, MC Group, Mango and Calvin Klein) or only provided a short statement referring to their policies, without answering any questions (Marks & Spencer).¹⁰ Although Marks & Spencer's policies state that they consider it "important to understand where their operations and sourcing impacts adversely on individuals", there is no

¹⁰ I have contacted these four companies (Jack Wolfskin, Mango, MC Group and Calvin Klein) to request more information on the nature of their investment in Myanmar and gave them the opportunity to provide answers to the BHRRC survey. None of these companies have responded despite my reminders.

evidence that indicates that the company conducted a proper assessment before sourcing from Myanmar (Marks & Spencer “Human Rights”).

5.2. Integrating findings and taking action

Businesses should integrate the findings from impact assessments across relevant internal functions and processes, and take appropriate action to mitigate risks. Businesses should take into account that (risks of) severe abuses need a more immediate response (UN 2011, principle 19).

Scope

This indicator can be subdivided into three implications: 1) whether the enterprise integrates findings from their risk assessment and identifies context-specific human rights risks; 2) whether the enterprise has in place policies to prevent or mitigate these key human rights risks; and 3) whether the enterprise prioritizes actions according to severity.

78% of companies in the sample identify human rights risks that are particularly salient in their supply chains. However, only 33% of companies communicate about context-specific salient human rights risks, displaying a strong commitment to this indicator. The remaining 44% of companies identify global human rights priorities that do not appear to be context-specific, displaying a moderate commitment. 22% of companies in this sample did not identify which specific human rights are at risks in their supply chain.

33% of companies in the sample demonstrate a strong commitment to prevention and mitigation by having in place additional policies that are tailored to context-specific risks and supplemental policies to help suppliers comply. A further 44% demonstrates a moderate commitment, as they do not have in place policies to mitigate context-specific key risks, but do specify how they support suppliers in complying with their other prevention and mitigation policies. Lastly, 22% of companies demonstrate a weak commitment by specifying few or no policies to mitigate context-specific key human rights risks and do not offer support to suppliers in helping them comply with their policies.

67% of companies indicate, in their policies, some kind of prioritization for more severe human rights abuses. Although all of these companies specify which violations would be considered severe, only 22% specify what kinds of actions these would necessitate and in what

timeframe these should be resolved. Therefore, 22% of companies in the sample display a strong commitment to prioritizing action according to severity, 44% display moderate commitment, and 33% display a weak commitment, failing to provide sufficient information on if and how they prioritize according to severity.

Robustness

While the majority of companies in the sample integrate findings from risk assessments to identify which human rights are particularly at risk in their supply chains, only a small minority does so on a localized scale. Although identifying global priorities is important because it allows for the development of effective, large-scale project and procedures to tackle human rights issues that occur frequently in a variety of locations, such as workplace safety (which has been identified as a salient human rights issue by all but one of the companies in this sample), it does not demonstrate an awareness of heightened human rights risks in conflict-affected areas in general or Myanmar in particular. Only three countries in this sample (Adidas, Gap and Jack Wolfskin) demonstrate awareness of context specific risks for Myanmar.¹¹ These risks include child and forced labour, working hours and wages, freedom of association and collective bargaining, corruption and governance, land right and property acquisition, discrimination and ethnic conflict, and building and fire safety.

Companies that demonstrate a strong commitment to prevention and mitigation have put in place additional policies tailored to context-specific risks. Adidas demonstrates a best-practice as, following their country-specific risk assessment, the company has put in place supplementary procedures for suppliers from Myanmar and is assisting its suppliers in achieving compliance, if necessary. Firstly, Adidas requires suppliers who propose any land acquisition to commission an independent party for review and to consider community impacts, including displacement and livelihood issues. This demonstrates that Adidas is aware of issues regarding land grabbing in Myanmar and has taken appropriate steps to prevent violations relating to this. Secondly, Adidas has made independent structural engineering assessment mandatory for all production facilities in Myanmar following concerns over the weak permitting system, demonstrating that Adidas has

¹¹ H&M has stated, in its response to the BHRRC survey, that it produced two documents for Myanmar specifically: the “BSR Responsible Sourcing Principles” and “H&M’s Sustainability Strategy for Myanmar”. However, neither of these documents can be found online and H&M has not replied to my question on where one could find these documents.

taken on additional responsibilities to compensate for the weak regulatory context in Myanmar and the state's proven incapability to ensure building safety. GAP and Marks & Spencer also demonstrate a strong commitment to this indicator by having in place policies that effectively address Myanmar-specific risks, as well as additional policies to help suppliers comply.

Companies that demonstrate a moderate commitment to prevention and mitigation do not have in place policies that mitigate context-specific human rights risks, but do have in place policies that support suppliers in complying with their other human rights policies, such as capacity building services (Calvin Klein and H&M) and training for staff (Jack Wolfskin and Mango). They may also have in place policies that mitigate non context-specific key human rights concerns. Companies that demonstrate a weak commitment (MC Group and Primark) do not have in place policies to mitigate context-specific key human rights risks nor do they support suppliers in improving their human rights performance. Interestingly, Primark did undertake a country-specific assessment prior to sourcing from Myanmar, but the limited information Primark provides does not demonstrate that the company adopted policies that effectively target the challenges of operating in Myanmar.

The companies that display the most robust commitment to prioritizing according to severity clearly state which violations are counted as more or most severe and link these to well-defined actions and timeframes. Calvin Klein, for example, expects suppliers to prioritize most severe issues and provides a list of "critical immediate action issues", which are to be corrected within 7 business days after assessment. These include payment below minimum wage, discrimination and building safety issues. For all other non-compliance issues, Calvin Klein requires suppliers to present a corrective action plan within 14 calendar days. Adidas and Marks & Spencer similarly instruct suppliers to prioritize according to severity and list issues that require immediate engagement.

Companies that display a less robust commitment to prioritization do categorize non-compliance issues according to severity, but do not specify the kinds of actions this necessitates nor the timeframe in which these must be resolved (Gap and H&M). Gap, for example, categorises violations by level of severity into "critical", "severe", "key" and "noncompliant", but does not specify which actions each of these trigger and within what timeframe violations are to be resolved (Gap "Improving Supply Chain"). GAP merely states that they "outline a timeline within which we expect the facility to fully remediate" depending on the "severity of the issue"

(Ibid.). Whilst this is a step in the right direction, the lack of commitment to specific timeframes and/or actions makes it difficult for victims and CSOs to hold the company accountable.

Companies demonstrating a weak commitment to prioritizing according to severity either do not indicate that they prioritize the remediation of more severe issues at all (Jack Wolfskin and Primark) or only provide high-level statements on the importance of prioritization, but fail to specify what non-compliance issues would be regarded as severe and how and in what timeframe these should be addressed (Mango, Marks & Spencer, MC Group). The latter cannot be considered a substantial commitment to prioritization but merely a ceremonial commitment, as they do not include any policies that victims, consumers, and CSOs can hold companies accountable to.

5.3. Remediation

In the event that a violation does occur in a company's supply chain, businesses should have in place legitimate processes to provide for or cooperate in the remediation of affected stakeholders. In conflict contexts, the company is advised to engage stakeholders and independent experts to ensure their response does not exacerbate the situation (UN 2011, principle 23).

Scope

Remediation can be subdivided into two indicators: 1) whether the company discloses substantive information on the process they have in place to provide remedies to affected stakeholder and 2) whether the company engages with stakeholders and independent experts to ensure that their response does not exacerbate the situation.

Regarding the first indicator, 44% of companies in this sample provide strong information on the remedies they have in place for affected stakeholders, often supported with case examples. 22% of companies make a moderate commitment and 33% make a weak commitment.

44% of companies in the sample indicate, in their human rights policies, that they engage third parties for the remediation of more complex human rights issues to ensure that they do not exacerbate the situation. The remaining 56% of companies do not make such commitments at all.

Robustness

Companies in the research sample that display a strong commitment to remediation do so by disclosing specific details about their process to provide remedies to affected stakeholders and/or by disclosing illustrative examples of instances in which the company has provided effective remediation. PVH, the parent company of Calvin Klein exemplifies a strong commitment for the provision of and communication about remedies as it states, in its supply chain guidelines, that “any discovered non-compliances will result in the creation of a corrective action plan (...) with detailed root cause evaluation, timelines for completion, and [specification of] responsible parties”, which should be provided to PVH within 14 calendar days (PVH 2020, 31). In addition, PVH states it works with suppliers to suggest remedial actions, tools, or other resources to effectively address the issues and, when feasible, will support suppliers in developing and executing the corrective action plan. A key strength of PVHs approach is its emphasis on Root Cause Analysis (RCA), which considers physical, human and organisational causes and focuses on “investigating the patterns of negative effects, finding hidden flaws in the system, and discovering specific actions that contributed to the problem” (Ibid., 161). This strategy can help PVH to provide more effective remedies to stakeholders and reduce systemic issues in the long run.

Companies that display a weak commitment to disclosing information on their remediation policies (Mango, MC Group and Primark) generally only provide high-level statements on the importance of effective remedies but fail to specify what appropriate remediation procedures should look like throughout their supply chain and how these are implemented. These cannot be considered a substantial commitment to remediation, as they offer no opportunities for victims, consumers and CSOs to hold the company accountable.

Within a conflict-affected environment, human rights issues are often complex or systemic. Remediation efforts should therefore be tailored to the context as some responses may exacerbate the situation or create new issues. 44% of companies explicitly state that they engage third parties for more complex non-compliance issues to ensure that their response does not exacerbate the situation. This is achieved through participating in collaborative initiatives such as the ILO Better Work Program and the Sustainable Apparel Coalition (GAP) or through engaging directly with government, CSOs and other stakeholders (H&M, Adidas and Marks & Spencer).

The remaining five companies do not specify if and how they engage third parties for the remediation of more complex human rights issues.

5.4. Formal reporting and transparency

Businesses whose operations or operating contexts pose heightened risks of more severe human rights impacts should report formally on how they address those (UN 2011, principle 21). “A retail company should be able to communicate on how it addresses potential and actual human rights abuses in the supply chain” (UN 2012, 58).

Scope

This section can be subdivided into two indicators: 1) communication of formal reports and 2) transparency about how the company addresses actual and potential violations.

89% of companies communicate about their human rights efforts through formal periodic reports. Only one company in the sample does not adequately address human rights in its formal reporting.

One company (11%) can be considered fully transparent about the potential and actual human rights impacts throughout their supply chain and how these issues have been addressed, demonstrating a strong commitment. 45% of companies demonstrate a moderate commitment, as they fail to specify either the types of violations that occurred, where violations occurred, or how violations were addressed. The remaining 45% of companies in the sample cannot be considered transparent about the potential and actual violations in their supply chains.

Robustness

The vast majority of companies (8 out of 9) report formally on how they address human rights risks throughout their supply chain through periodic sustainability reports. Most companies report yearly through either a separate human rights report or by dedicating a chapter to human rights in their sustainability report. Only MC Group does not adequately report on its human rights efforts as the company only produces yearly financial reports, which do not address human rights.

While producing formal reports can be considered a base-line commitment, providing information about the number and types of human rights violations the enterprise identifies

throughout its supply chain, as well as where these occur and how these have been addressed, communicates a more substantial commitment to transparency. Adidas is the only company in the sample to demonstrate such a strong commitment. Adidas produces a detailed, yearly summary of the human rights complaints it handled, which includes detailed information about the type of violation, where it occurred, how the complaint was filed to Adidas, and what Adidas has done to remediate the adverse impact (Adidas 2018).

The companies that display a moderate commitment to transparency do not provide information on *where* a non-compliance issue occurred and/or *how* these were resolved. H&M, for example, does specify the number of human rights related non-compliance issues that occurred throughout its supply chain, but does not specify where these occurred and how, if at all, these issues were resolved. Similarly, Calvin Klein is transparent about the overall performance of individual suppliers, but does not disclose the number or types of non-compliance issues and how these were resolved. Gap, on the other hand, is transparent about both the number and types of non-compliance issues it detects in its supply chain, the country in which these occurred and the timeframe in which these are resolved, but is not transparent about in which factory it occurred and how it was remedied.

The remaining four companies (Mango, Marks & Spencer, MC Group and Primark) do not provide information on the kinds of non-compliance issues that occurred within their supply chains and how these were resolved. Some companies (Mango and MC Group) also do not disclose their suppliers publicly, making it extremely difficult for stakeholders to hold brands accountable for human rights violations that occur throughout their supply chains.

5.5. Discussion

Overall, the preceding analysis has demonstrated that there are great disparities in the ways garment TNCs operating in Myanmar incorporate the UNGPs recommendations for conflict-affected areas. While Adidas scores very well on the indicators considered here, other TNCs lag behind significantly. Companies score particularly poorly on transparency, the significance of which will be discussed in more detail below. Additionally, we can identify a correlation between the commitments made by TNCs and those of their home states.

	Assessing impacts		Integrating findings and taking action			Remediation		Formal reporting and transparency	
	Processes	Country-specific assessment	Identifying key risks	Prevention and mitigation	Prioritizing	Processes	Engaging with third parties	Formal reports	Transparency
Adidas	Strong	Strong	Strong	Strong	Strong	Strong	Strong	Strong	Strong
Calvin Klein	Weak	Weak	Moderate	Moderate	Strong	Strong	Weak	Strong	Moderate
Gap	Weak	Strong	Strong	Strong	Moderate	Moderate	Strong	Strong	Moderate
H&M	Weak	Strong	Moderate	Moderate	Moderate	Moderate	Strong	Strong	Moderate
Jack Wolfskin	Strong	Weak	Strong	Moderate	Weak	Strong	Weak	Strong	Moderate
Mango	Weak	Weak	Moderate	Moderate	Weak	Weak	Weak	Strong	Weak
Marks & Spencer	Strong	Weak	Moderate	Strong	Strong	Strong	Strong	Strong	Weak
MC Group	Weak	Weak	Weak	Weak	Weak	Weak	Weak	Weak	Weak
Primark	Weak	Strong	Weak	Weak	Weak	Weak	Weak	Strong	Weak

Table 4: company commitments per indicator

5.5.1. Lack of transparency

While the businesses considered here score well on the formal reporting indicator, they score very poorly on transparency. Only Adidas can be considered sufficiently transparent about their supply chains, the violations that occur therein and how these are resolved. Others provide limited (45%) or virtually no information (45%). As such, consumers and other stakeholders cannot be fully aware of manufacturing conditions, restricting their ability to hold businesses accountable.

This is problematic because the UNGPs rest on the premise that businesses will act in accordance with the guidelines to prevent reputational damage. However, as has become apparent from my analysis, businesses do not implement the transparency advised in the UNGPs and can thereby reduce such reputational risks. The reluctance of businesses to be transparent about the violations that occur in their supply chain is especially problematic in conflict-affected contexts such as Myanmar. In Myanmar, as in many other conflict-affected contexts, there are restrictions on freedom of expression and association, which restricts labor protests, union gatherings and the ability of workers to voice their concerns collectively (World Justice Project 2020). This exacerbates the lack of transparency because it hides violations that occur in Myanmar's factories from the eyes of consumers and other stakeholders who, the UNGPs state, should hold companies accountable for their actions.

While the UNGPs emphasize that not adhering to the recommendations can negatively affect a business' reputation, it fails to account for the fact that in conflict-affected contexts the business itself has a large influence over what information is and is not available to consumers and CSOs. Information, in this context, is not a neutral factor between actors and cannot be said to have the 'sword of Damocles' function that the UNGPs ascribe to it.

5.5.2. TNCs and their home states

When comparing the conduct of TNCs and their home states there does appear to be a correlation, although the small sample size of this study does not provide enough data to make any conclusive statements. By awarding 100% to strong, 50% to moderate, and 0% to weak commitments, we can roughly compare the scores of companies and their home states by plotting them on a scatter chart (see Figure 1). The sample correlation coefficient (R) in this case is 0.712, indicating significance.¹² More research would be needed to confirm this correlation with more certainty. However, from my analysis there is a clear indication that commitments of states influence those of the companies domiciled in their territory.

¹² For a sample of 9, the 95% critical value of the sample correlation coefficient is 0.707.

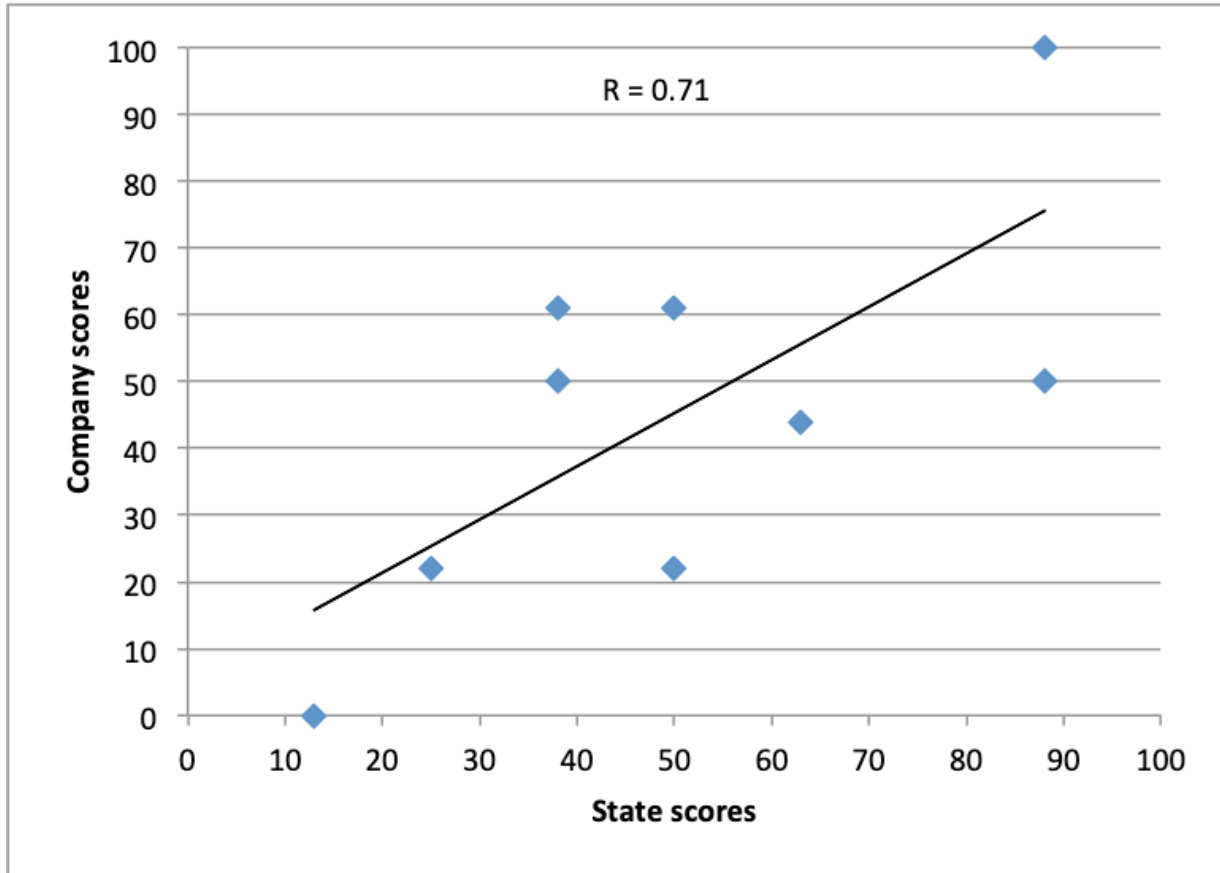


Figure 1: correlation between company and state scores

6. Conclusions

At the root of the business and human rights debate lays “the governance gaps created by globalization – between the scope and impact of economic forces and capacities of societies to manage their adverse consequences” (HRC 2008, 3). This is especially evident in states that lack the institutional capacity to legislate and enforce national laws to protect citizens against corporate-related human rights harm, or in the context of conflict, and human rights are arguably most at risk here. Although the UNGPs indicate the host state as the only bearer of duties, they aim to resolve governance gaps in contexts where the host state is incapable or unwilling to fulfil this duty by making additional recommendations for home states and corporations.

From the above analysis, it is clear that the UNGPs do not resolve all the governance gaps the documents sets out to do. Home states remain reluctant to regulate the conduct of national businesses abroad through denial of public support and judicial mechanisms and, instead, tend to focus on providing assistance to companies in avoiding human rights violations. Whilst assistance is an important aspect of supporting corporate respect for human rights, not attaching appropriate consequences to corporations failing to respect human rights may not have the effect of changing the corporate behaviour. Instead, it may create a situation in which corporations can ‘pick and choose’ whether they engage with their home state on business and human rights related topics. The foregoing analysis of NAPs has also highlighted that in the vast majority of cases, the future action points of states are overly vague and lack explanations of the concrete steps the state will take and in what timeframe, which significantly restricts the ability of society to hold the government accountable.

TNCs, on the other hand, remain non-transparent about their supply chains and the violations therein. This is problematic because the UNGPs rest on the premise that businesses will act in accordance with its recommendations to avoid reputational damage. Conflict-affected contexts likely further exacerbate this because restrictions on the freedoms of assembly and expression prohibit stories of corporate-related human rights violations reaching consumers and CSOs.

The limitations of this thesis should also be highlighted however. A major one of which is the small size of the sample. The results presented here should be read as preliminary. Future inquiries would be strengthened by including more states and TNCs in the sample as this may give rise to additional insight and can further our understanding on the correlation between the commitments of TNCs and their home states. Having said that, the results presented here do highlight some key weaknesses of the UNGPs in the context of limited host state interference and may serve as a starting point for more research into how we can reduce corporate-related human rights harm in these contexts.

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Appendix 1: overview of state commitments per recommendation

	Engagement	Assistance	Deny public support	Effective regulation
Germany	Only engagement policies for higher-risk areas and businesses focus on the extractive industry.	Provides a wide range of country and sector-specific information and can provide tailored advice through foreign missions.	Human rights are considered in subsidization and awarding other benefits such as export credits	Allows for foreign victims to press charges and for prosecutors to start trial. Ensures access for foreign victims.
Spain	General UNGPs awareness-raising activities with a focus on companies that may affect vulnerable groups. No coherent outreach policies for companies operating in conflict.	Aims to inform businesses in conflict-affected areas through foreign missions, but does not specify how and what kind of information will be disseminated.	Not specified	The remedy mechanisms that are planned to be developed do not opt decisively for extraterritorial judicial mechanisms
Sweden	Communicates aspirations for engagement but has no policies in place. Is carrying out general UNGPs awareness-raising activities.	Embassies should gather information, especially in conflict-affected areas. Reports on human rights around the world, but these are not tailored to business.	Export credit agency is required to take account of conditions such as the environment, corruption, human rights and working conditions in its credit assessments. No mention of subsidies	Explicitly refers to extraterritorial jurisdiction, only when companies commit actions that are criminalized in the country of occurrence. No extra provisions to ensure access to justice.
Thailand	Limited engagement efforts on UNGPs in general	Insufficient	Not specified	NAP does not specify that Thailand's judicial mechanisms allow liability for businesses that violate human rights abroad, or that this will be developed.
UK	Limited outreach. Only some awareness-raising projects on the UNGPs and a project which is being 'considered' for high-risk areas. No further information provided.	Diplomatic missions both inform on risks and help to resolve issues with local authorities	Not specified	Identifies judicial mechanisms that offer remedies for victims of human rights abuses in the UK and overseas. Does not specify whether prosecutors can start a trial or ensure access to justice.
US	Aims to encourage	Produces a variety of	Not specified	Does not specify under

	due diligence in conflict-affected areas, but lists no policies to do so. Outreach on UNGPs in general.	resources. Examples of effective projects in conflict-areas		what legal mechanisms victims can find remedies, with the exception of war crimes. No mention of extraterritorial jurisdiction
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Appendix 2: overview of company commitments per recommendation

	Enhanced risk assessment		Integrating findings and taking action			Remediation		Formal reporting and transparency	
	Processes	Country-specific assessment	Identifying key risks	Prevention and mitigation	Prioritization	Remediation processes	Engaging with third parties	Formal reports	Transparency
Adidas	Additional monitoring requirements determined by risk of both country and factory. Risk mapping includes engagement with civil society.	Conducted a two year review and stakeholder engagement prior to start in Myanmar.	Has listed specific risks for Myanmar and links these to its own actions	Extra policies tailored to context-specific risks (land grabbing and additional structural engineering monitoring)	Yes. "Zero tolerance points" and "threshold issues". Severe violations require immediate and urgent engagement.	All non-compliance issues reviewed and investigated. Examples provided. Options include termination and warning letters.	Yes	Yes, yearly formal report.	Transparent about number and types of non-compliance issues, where these occur and how these are resolved.
Calvin Klein	Does not specify when enhanced risk assessment is necessary and how this should be carried out	No country specific assessment for Myanmar	Sets global human rights priorities / key issues but these are not tailored to specific contexts	Policies to mitigate key, non context-specific risks. Assist suppliers in compliance.	Requires suppliers to prioritize according to severity and provides a list of critical issues which should be resolved within 7 working days.	Remediation specified. Includes assisting supplier in developing corrective action plan with RCA	Not specified	Yes, yearly formal report.	Is transparent about the overall performance of individual suppliers, but does not disclose number or types of non-compliance issues.
GAP	Does not specify when	Yes, conducted a	Lists specific risks,	Extra policies in place	Does categorize	Sets out framework for	Partners with "peers in	Yes, yearly formal	Information about

	enhanced risk assessment is necessary and how this should be carried out	country-specific assessment prior to sourcing from Myanmar. Includes consultations with stakeholders.	following country-specific assessment	for context-specific issues. "Unique programs to address local economic, political, business and cultural context where needed"	according to severity, but does not specify the kinds of actions this necessitates or the timeframe in which these must be resolved.	corrective action plans, but these remain vague and do not indicate how stakeholders can receive remedies from Gap	collaborative initiatives" for the most complex and pressing human rights challenges.	report	the number and types of non-compliance issues and the timeframe in which these are resolved. No information about where these occur and how they are resolved.
H&M	Requires risk assessments for new markets and suppliers. Does not specify how heightened risk may require enhanced assessment practices.	Risk analysis prior to sourcing from Myanmar. Incl. consultations with external stakeholders.	Identifies global 'salient issues' yearly, not context-specific. H&M's strategy on Myanmar is not available online and H&M did not respond to my request.	Mitigation policies focus on enabling dialogue and negotiation. Addresses context-specific key human rights issues on project basis.	Categorizes according to severity, but does not specify the kinds of actions this necessitates or the timeframe in which these must be resolved.	Does not specify remediation policies. Provides some examples of remediation in the past.	H&M states it tackles systemic issues with other actors in the market, as well as through public affairs work	Yes, yearly formal report	Specifying number and types of issues, but not where these took place and whether and how they were resolved.
Jack Wolfskin	FWF requires an enhanced monitoring	No country-specific analysis performed before sourcing	Integrates Myanmar recommendations from	Mitigation efforts focus primarily on training.	Does not categorize non-compliance issues nor	Implements FWF remediation process, which included	Does not specify, FWF also does not index this.	Year, three yearly sustainability report and	FWF publishes auditing results and non-compliance

	program for Myanmar. As a member, this applies to Jack Wolfskin.	. FWF completed a country study in 2016, well after Jack Wolfskin started sourcing in Myanmar in 2013.	FWF, these require additional concern for Myanmar-specific issues.	Does not specify how it aims to mitigate context-specific risks or support suppliers.	specify how it prioritizes actions according to severity.	RCA. Case examples provided.		yearly brand performance check through FWF.	nce issues. Has recently failed on some of its reporting requirements, failing to report on 2 out of 5 factories.
Mango	Does not specify when enhanced risk assessment is needed or how this should be executed.	No country specific assessment for Myanmar.	Global priorities only. These do not demonstrate an awareness of heightened risks for conflict-affected areas.	Mentions training and 'drawing up an action plan'. Does not specify how it aims to mitigate context-specific risks or support suppliers.	No. Only mentions 'serious issues' but does not specify.	Remediation measures only focus on ensuring compliance. No RCA.	Not specified.	Yes, yearly formal sustainability reports.	Does not publicly disclose its suppliers, auditing results, or violations and how these were resolved.
Marks & Spencer	Prioritizes risk assessment in high-risk areas. Work with external experts to map business operations and supply chain to scope.	No country specific assessment performed.	Identified global key issues following from risk assessment. No country specific risks communicated.	Assessment methods that focus on underlying issues; specific policies for context-specific risks;	Considers both likelihood and severity in determining actions needed and the timeframe in which these are to be implemented.	Provides overview over remedy framework, examples of how remedies were implemented and how it aims to improve remedies.	Engages with government and stakeholders to resolve complex issues.	Yearly sustainability report. Includes limited information on human rights. Last Human Rights Report from May 2016.	Does not publicly disclose non-compliance issues, how these were resolved, or audit results.

	and assess risks.				nted.				
MC Group	Does not specify when enhanced risk assessment is necessary and how this should be carried out	No country specific assessment for Myanmar	Does not identify specific human rights risks	No clear policies. Only states the company must ensure adequate planning and measures.	Indicates prioritization, but not what issues qualify and what actions would follow.	Insufficient	Not specified	No sustainability reports	Does not disclose any non-compliance issues or auditing results. Claims that there were no violations in 2019
Primark	Does not specify when enhanced risk assessment is necessary and how this should be carried out	Undertook a due diligence process prior to entering the Myanmar market to assess potential and actual risk within the proposed supply chain.	Global priorities only. These do not demonstrate an awareness of heightened risks for conflict-affected areas.	Few additional policies, mainly on structural integrity. Does not specify how it aims to mitigate context-specific risks or support suppliers.	Does not categorize according to severity and prioritize accordingly	Only states offer training and support. Working on a new remedy procedure, no information disclosed.	Not specified	Yes, yearly report	Discloses overall performance of all suppliers but no information on kinds of violations, where these occur, and how they are resolved.