Master Thesis

Business Responsibilities for Human Rights

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Abstract

In light of numerous allegations of business human rights violations, the business and human rights agenda has entered the spotlight of international regulation at UN forum. The goal of the regulatory process was to open the door for consent-based, multi-stakeholder consultations that would lead to a common definition on business responsibilities for human rights (BRHR). Discussions have more than often centered on binding regulation on BRHR versus soft recommendations for corporate actors. Given the difference in outcome concerning two multi-stakeholder intergovernmental initiatives in the area of BRHR, this paper has set to inquire on the dynamics at play concerning UN’s latest definition of BRHR. Therefore, the following research question has been formulated: How do current corporate governance models and theories of international law influence the way corporations perceive their human rights responsibilities?

Answering the question above requires an interdisciplinary approach: given the demarcation between corporate actors as private legal actors and human rights as principles of international law which are non-binding on corporations, the research method employs theories of corporate governance, informed by finance-economics and business ethics/strategic management and theoretical legal models outlined in the field of international law, such as CSR beyond voluntary action and legal critical studies; to a lesser extent the paper approaches the political concept of governmentality.

Making use of two UN initiatives on BRHR regulation, which led to different outcomes, the paper argues that corporate governance models do contribute to some extent to shaping corporate perceptions and behavior in relation to binding regulation under human rights law. Human rights normativity becomes influential on corporate self-regulation on BRHR through hybrid -formal and informal, public and private- channels of dissemination regarding social normativity, such as standards or soft law guiding corporate human rights policies and their codes of conduct. The paper answers to the research question by making recommendations for regulation on BRHR: in light of the theoretical assessment on the topic and of UN’s rendition of BRHR, this study tentatively concludes BRHR need to be approached by employing a balanced calibration between soft normativity and hard regulation.
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1 INTRODUCTION

“...We have to choose between a global market driven only by calculations of short-term profit, and one which has a human face.”

(Kofi Annan, 1999)

1.1 Context

Allegations of business violations of human rights have been documented for years by human rights non-governmental organizations (NGOs) and the development of media communication channels has helped the corporate social responsibility movement to disseminate information and acquire public support in voicing demands for increased corporate accountability. According to the Business and Human Rights Resource Centre¹, allegations of human rights violations with direct or indirect participation of corporations range from human trafficking, discrimination, denial of labor rights, oil pollution and toxic waste dumping to unlawful killings to name a few. The advocacy efforts of human rights NGOs such as Human Rights Watch² and Amnesty International³ have proved influential in bringing these issues under public attention and in triggering debate on ways to ensure corporate accountability for human rights.

Corporations have proved responsive to these concerns by engaging in voluntary, self-regulatory initiatives in the area of corporate human rights responsibilities. Despite their efforts, corporate human rights policies have been criticized as declaratory and the mounting evidence built against corporate behavior towards human rights has caught the attention of the United Nations (UN), which has sought to mediate. The UN initiatives on business and human rights regulation were meant to provide a common set of standards that would facilitate a level playing field for corporations engaging in voluntary human rights policies and codes of conduct, against which to hold accountable by their stakeholders.

1.2 Corporations and human rights law

Business responsibilities for human rights (BRHR) discourse has emerged from the wider CSR movement and consequentially has been perceived as corporate voluntary action; radicalized discussions on business and human rights issues have centered on methods to converge human rights normativity with the private legal status of corporate entities in order to ensure corporate accountability through binding regulation. Several issues have emerged though as impediments.

International law has been designed for state actors bearing the obligations to enforce international principles and carrying the task of remedy in case of human rights abuse. Businesses are categorized

¹http://www.business-humanrights.org/LegalPortal/Home/Completelistofcases
as private legal parties under international law and therefore it is assumed they cannot incur human rights obligations, hence the antagonism on this topic.

Moreover, finance literature tells us that corporations are “legal fictions which serve as a nexus for a set of contracting relationships among individuals” (Jensen & Meckling, 1976), that have been designed to lower the costs of market transactions (Coase, 1937 cited in Jensen & Meckling, 1976) rather than upholding human rights obligations. The ownership structure theory of the firm developed by Jensen and Meckling’s seminal article has led to a belief which seems to be persistent in the business community that corporations are complex contracting systems which cannot be assigned social responsibilities as in the case of private individuals.

Milton Friedman went further and explained that maximizing profits is the way businesses contribute to society, by providing economic benefits to be enjoyed by all actors and by engaging in economic activities within the boundaries of law and fair competition; in light of his beliefs, he basically defined corporate (social) responsibility movement as irresponsible, in as much as it served for a subversive managerial tactic to indulge in activities depriving shareholders of their profits (1971).

The rapid pace of globalization, however, has not only opened the door for new markets through business expansion beyond national borders, but it has also exposed corporations to increased risks, such as violating, knowing or unknowingly, human rights as consequence of engaging in business activities in poorly regulated environments. Critics have pointed to the supposedly overly influential profit-maximizing agenda of corporations as source for ignoring negative impacts on the social communities and consequentially demands of corporate regulation with respect to human rights issues have risen. Others have pointed instead to governance gaps in relation to states not being able or refusing to fulfill their international obligations in relation to the human rights sphere.

1.3 Towards a definition for business responsibilities for human rights (BRHR)

In delivering his speech at the World Economic Forum in Davos, the former United Nations Secretary-General Kofi Annan reminded the international business community of the significant challenges posed by global markets, characterized by “an imbalance between the economic, social and political realms (which) can never be sustained for very long”⁴. In order to address that imbalance the Secretary-General proposed to seal a global contract with businesses that would comprise, among others, principles of human rights, meant to address the potential negative and positive impact corporations can exert in this area. As the UN Global Compact (2000) went on to become a global standard for corporate social responsibility/sustainability, to be adhered to on a voluntary basis, the

business and human rights agenda entered the spotlight triggering other intergovernmental initiatives aimed at translating human rights responsibilities for the business sector.

The former UN Special Representative of the Secretary-General (SRSG), Prof. John Ruggie, has made a consistent contribution to this area by providing a forum for multi-stakeholder, consent-based discussions on the topic, crystallized in the *UN Protect, respect, remedy: a Framework for Business and Human Rights* (2008), defining corporate responsibilities and state duties regarding human rights issues and access to remedies by victims of the alleged violations. The Framework is complemented by the *Guiding Principles* (2011), comprising recommendations on how to implement the standards laid down in the Framework.

The SRSG’s work has been unanimously endorsed by the UN Human Rights Council, which led Prof. Ruggie to assess these initiatives as the “*authoritative global reference point for business and human rights*”\(^5\). They have been welcomed by the European Commission Vice-President as “*an important reference for the renewed policy on corporate social responsibility*”\(^6\) the European Union seeks to address in the future and by other intergovernmental initiatives in the area such as the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, recently revised in 2011 according to Prof. Ruggie’s definition. Moreover, international private standard-setting organizations have followed Prof. Ruggie’s approach as well i.e. ISO 26000 on CSR has been reformulated in accordance with the BRHR definition under the UN Framework.

### 1.4 Problem formulation

The SRSG and his team have essentially altered the debate on corporate accountability for human rights, shifting the focus towards state duty to protect against corporate human rights violations through domestic regulation, based on the belief that “*corporate and securities law directly shapes what companies do and how they do it*”(UNSRSG, 2011a). However, in spite of the fact that corporate law neither prohibits nor allows human rights responsibilities, as revealed in his interregional study on corporate law, businesses have gotten involved in the UN initiatives aimed to regulate BRHR, by lobbying forcibly against binding regulation under human rights law, as was the case with the UN Norms (UN, 2003) or by adhering voluntarily to the set of standards and guidelines established in the SRSG’s work.

Another interesting fact has been the constant disagreement between businesses and NGOs on both of these UN initiatives, which could be suggestive of conflicting perceptions on what corporate human rights responsibilities should look like. Corporate law and securities do not provide a clarification of

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\(^6\)http://ec.europa.eu/enterprise/newsroom/cf/itemlongdetail.cfm?item_id=5220&lang=en&tpa=0&displayType=news
how these perceptions are shaped; hence, a useful area of research could be corporate governance theory, which defines the goal of the corporation and means to achieve that goal.

Moreover, despite the fact that they enjoy a private legal status under international law, corporations have been referencing in their CSR policies and codes of conduct (UNSRSG, 2008a) the Universal Declaration of Human Rights (UDHR) that serves the basis for two binding instruments on human rights norms, namely the International Covenant on Civil and Political Rights Convention (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, in doing so, corporations claim their policies and codes of conduct are non-binding. Given the mixed signals enunciated above it is worth inquiring what do BRHR mean and what are the implications of BRHR at policy level, by asking the following question:

1.4.1 Research question

_How do current corporate governance models and theories of international law influence the way corporations perceive BRHR?_

In order to respond to the research question above, the present paper will address the following sub-questions: _What are the normative sources of corporate governance models and how do they influence the scope of corporate (social) responsibility? How do these models shape corporate perceptions on BRHR and how does corporate regulation interact with these perceptions? Why and how do corporations seemingly comply with human rights norms and how does international law influence this? Finally, how should corporations understand UN’s definition on BRHR and how can state policy-making contribute to this?_

1.5 Research delimitations

Few clarifications need to be made in order to avoid misinterpretation of the goal of this research question. The present paper enters the category of theoretical studies. The formulation of the research question is not aimed at establishing a causal relationship between the way corporations consider BRHR and theoretical models of corporate governance and international law; rather, it is aimed at going beyond taken-for-granted conceptions and conceptualizations of what BRHR should look like, as argued by various parties to the debate on BRHR. The formulation _corporate governance models_ refers to theoretical framings embodying large scale representations/assumptions of how corporations understand to govern themselves by defining their goals and methods towards achieving those goals. In lack of specific empirical data on corporate governance topic, two distinct theoretical models are being used to presumably understand businesses’ actions in light of roughly defined patterns of corporate behavior. The term _corporation_ is meant to cover business entities beyond and within
national boundaries, therefore it is used interchangeably with others such as firm, company, business, business/corporate entity/and multinational enterprise. The use of the acronym BRHR has been found in Buhmann, Roseberry, Morsing (2011) and its usage is not meant to be limited to a specific concept, as defined for example by the former SRSG in the UN Framework; nor is this usage meant to imply a delimitation between what actors assumed corporate human rights responsibilities are before and after the issuance of the UN Framework in 2008. The usage of the acronym merely intends to make the distinction between the corporate human rights responsibilities discourse and the larger, more encompassing discourse on Corporate Social Responsibility (CSR), which also embodies a dimension of human rights responsibilities. However, the present study will not make use of the CSR literature per se, rather this will be touched upon in connection to the legal dimension of CSR, i.e. human rights.

1.6 Theoretical framing and method
Due to the various disciplines informing the research question, the theory choice is eclectic. The dual focus of the research question necessitates multiple angles of analysis in order to convey an overall vision of the situation and be able to sketch connections between the two different disciplines enunciated in the main research question. It is not the intention of this paper to either support or infirm the adequacy of the theories in use, but rather to obtain an overall understanding of the status quo, based on which to build an argument on possible future developments in the area of BRHR. The paper will make use of two corporate governance paradigms, namely shareholder value and stakeholder theory (Jensen, Friedman, Freeman), and of international legal theory (Buhmann, Koskenniemi) i.e. CSR beyond voluntary action, critical legal studies. To a lesser extent the paper will rely on political theory (Higgins and Hallström) i.e. governmentality.

Corporate governance theory and international legal theory will be approached primarily as two different silos in order to follow their apparently parallel development, as assumed in the literature; to the author’s knowledge, there are no research studies assessing possible points of convergence. The method aims at uncovering drivers for change and possible points of interaction between the two disciplines, which will be elaborated on when analyzing briefly a previous failed attempt to regulate BRHR at UN level. Text analysis will be made in case of legal provisions i.e. sections 172 and 417 under UK Companies Act and amendment 99 to Danish Financial Statement Act.

Although it is a theoretical study, the present paper will make use of qualitative data to inform on theory gaps or support argumentation; however, it will not serve as point of departure for analysis. The methods of collecting and employing the qualitative data will be displayed in the following section.

1.7 Thesis structure
The thesis is structured as follows: after the present introductory section serving as delimitation for research question and justification for methodology, the second section will briefly present the underlying philosophical perspective guiding the data collection and the research approach employed.
Section 3 reviews corporate governance models in an attempt to assess the scope of corporate responsibility with a reference to human rights normativity. Section 4 reviews discussions of international law and private legal parties while addressing the political and persuasive drivers underlying BRHR development towards its articulation in the UN Framework. The succeeding section 5 builds on the shift in discourse concerning BRHR as defined by the SRSG to discuss policy-making alternatives. The conclusion section will attempt to provide an answer for the research question and discuss research limitations as well as perspectives for future research.
2 METHODOLOGY
This section is aimed at outlining the qualitative data collection process by discussing the philosophical stance serving as point of departure in gathering data and the research approach employed. In addition, this section will present the limitations of qualitative data in relation to the research question of the paper, which is largely theoretical, and will explain the relevance of utilizing data to inform the context of BRHR.

2.1 Research philosophical stance
The research philosophy employed in this paper is an interpretivist one. The goal of the research process concerning data collection was guided by a need to search for common meaning, due to multiple interpretations on the topic of human rights responsibilities for businesses. The interpretivist approach leans towards viewing the world through multiple-view lenses, as a social construct where people’s different assumptions on things are influential on the way they understand the world around them (Saunders, Lewis, & Thornhill, 2007). According to Remenyi (1998 cited in Saunders et al., 2007) it is necessary to study „the details of the situation to understand the reality or perhaps the reality working behind them”. According to Saunders et al. (2007) this subjective view is justified by the need to „explore subjective meanings motivating the actions of social actors”.

2.2 Research approach
The research approach utilized in this paper is aimed at providing a basis for understanding corporate human rights responsibilities, by taking in various interpretations which may form an encompassing view on the topic. The approach is characterized by a descriptive aspect- in outlining the common assumptions on the topic in both the academic forum and from a practitioner’s point of view; the approach in relation to data is mainly deductive, constructed through a series of personal postulations, based on relevant literature in the field. In addition, the approach is both explanatory and exploratory when the data collection technique employed for the purpose of this paper allowed for more unstructured, informal frame which determined interviewees to build a context by establishing causal relationships and reflecting on novel situations.

2.3 Qualitative data
The paper made use of one collection technique, namely the semi-structured interview. This specific technique permitted the interviewer to ask open-ended questions (Saunders et al., 2007) on a topic characterized by biased interpretations. The interviews were conducted in English, since the interviewer did not share the mother tongue of the respondents, all of them having a Danish background. For this reason, the interview script was approached flexibly in relation to each respondent in order to make sure any discrepancies rising from both actors speaking a foreign language would not impede a proper understanding on both sides, of the issues to be covered. All five
interviews lasted approximately 40-45 minutes and discussions were audio-recorded for the sake of proper quotation and proper contextualization of any of the interviewees’ remarks.

Given the lack of existing literature to cover the research question of this project, an informal stance was encouraged so as to allow the respondents to feed in the gaps regarding context of the research topic by employing informant interviews, where the interviewees’ perceptions on the issues in discussions were guiding the conduct of the interview (Saunders et al., 2007).

2.3.1 Informants
The respondents were selected with a view to their expertise in the field of BRHR, although neither was knowledgeable to cover both corporate governance and international law aspects of the research question. Therefore the research approach combined a descriptive aspect with explanatory and exploratory aspects in order to determine reflection on the topic. The following Table 1 offers information on respondents’ professional background, suggestive of their relevant expertise for the purpose of the present paper.

<table>
<thead>
<tr>
<th>Interviews</th>
<th>Information on institutional background of the respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>2x Novo Nordisk A/S</td>
<td>Danish transnational company, their social sustainability/CSR policy is informed both by stakeholder engagement and human rights compliance</td>
</tr>
<tr>
<td></td>
<td>• Susanne Stormer, Vice President Global TBL (Triple Bottom Line) Management</td>
</tr>
<tr>
<td>1x Global CSR</td>
<td>Consultancy company in Copenhagen with expertise in the human rights approach to Corporate Social Responsibility</td>
</tr>
<tr>
<td></td>
<td>• Sune Skadegård Thorsen, CEO and Senior Partner at Global CSR</td>
</tr>
<tr>
<td>1x DHRI</td>
<td>Danish Human Rights Institute, Copenhagen</td>
</tr>
<tr>
<td></td>
<td>• Dylan Thomas, Business Consultant</td>
</tr>
<tr>
<td>1x Global Compact Chairman</td>
<td>UN Global Compact Board Member&amp; former CEO at Novo Nordisk A/S</td>
</tr>
<tr>
<td></td>
<td>• Mads Øvlisen, Corporate Social Responsibility Professor at Copenhagen Business School</td>
</tr>
</tbody>
</table>

Table 1. Informants on qualitative data.

2.3.2 Secondary data
This thesis mainly relies on secondary data due to the theoretical nature of the research questions. The primary data gathered in interviews serves to inform discussions on BRHR in the context of current corporate governance models. The secondary data encompasses academic articles within the various disciplines approached in this paper- finance and legal theory, as well as United Nations reports and research projects undertaken by the UN Special Representative to the Secretary-General prior to drafting the Protect, Respect, Remedy Framework (2008) and the Guiding Principles (2011).
2.4 Reliability
Reliability of data refers to the extent to which “data collection techniques or analysis procedures will yield consistent findings” (Saunders et al., 2007). According to Easterby-Smith et al. (2002, cited in Saunders et al., 2007), assessing the reliability of data implies that research methods would yield the same results when replicated by other researchers, ensuring similarity of observations and transparency while processing the data. The interview scripts designed for each respondent followed common themes that all interviewees were supposed to deliver an answer to, in order to ensure a common understanding of the basic concepts to be pursued in the research question and in order to capture the essential behind the various assumptions made by respondents. In addition, the theory analysis makes use of quotations from interviews, where the information is relevant for inquiry and interpretation.

Data triangulation, as combination of various research methods beyond the usage of semi-structured interviews is useful in ensuring data reliability. In this paper, data triangulation is employed by making use of company reports, academic case studies, in the case of data provided by Susanne Stormer and Mads Øvlisen, and of Prof. Ruggie’s research studies in the case of the information provided by the two business consultants on human rights, Sune Skadegård Thorsen and Dylan Thomas.

2.5 Validity and limitations
Validity “is concerned with whether the findings are really about what they appear to be about” (Saunders et al., 2007). The interview scripts were aimed at ensuring a multiple angle towards the issues in discussion, and by utilizing the informant interview technique, the respondents were encouraged to present an in-depth contextualization of the topic in discussion, which ensured a proper identification of the issues at stake when approaching the concepts present in the research question. The scripts of the five interviews are copied on the CD-ROM accompanying the printed thesis.

Given the interdisciplinary nature of the present theoretical study and lack of secondary data on the topic i.e. academic literature, some of the data provided by the informants is assumption-based and not easily verifiable, as they themselves admit. In light of these limitations, the information provided by interviewees is quoted so as to avoid the author’s bias in relation to data interpretation.
3 CORPORATE GOVERNANCE MODELS

“We used to say that Western missionaries came to do good, and ended up doing well. (Technology) firms could find themselves forced to do good, even if it sometimes means doing badly”.


The goal of this section is twofold: first, by looking at the shareholder - stakeholder dichotomy in corporate governance theory, this section seeks to unveil few fundamental assumptions considered influential on the way corporate management understands and responds to the concept of corporate responsibility and human rights normativity. In doing so, this section will approach some of the main principles underlying the conceptual design of these models in sequence, with a view to their critical assessments as presented in the corporate governance literature. Second, this section will discuss instances of corporate law which reflect the dynamics of discordant conceptions in corporate governance literature, in order to understand the way regulation alters corporate management’s behavior in relation to social responsibility.

3.1 What is corporate governance?

The commonly accepted definition of corporate governance (CG), according to Thomsen (2006) is to be found in the Cadbury Committee Report on Financial Aspects of Corporate Governance, where CG is defined as “the system by which companies are directed and controlled” (1992, para 2.5). The Cadbury Report is the first internationally recognized standard on CG recommendations for best practices and it addresses, among others, issues of transparency in financial reporting and enhancement of Boards’ accountability towards investors, or shareholders. The issuance of the Report followed two major corporate financial scandals on the London Stock Exchange and it is viewed as the standard approach in ensuring that corporate management acts responsibly, meaning their behavior is not detrimental to shareholders’ interests.

As a discipline, CG draws on various fields of expertise, from economics, politics to legal science, hence the multiple definitions available in the CG literature. Thomsen (2006) concedes this multiplicity reflects the numerous interests in the life of the company; accordingly, a focus on the role and composition of Boards is due to management and business individuals, while an investor’s interest would draw on the relationship between the company and its shareholders, and stakeholders i.e. employees, customers, communities, would focus on management’s social responsible behaviour. The multiple dimensions addressing the CG discipline are indicative of its complexity in approach, as mirrored in the following examples.

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8The collapse of Maxwell Communications and Polly Peck, which raised concerns that accountants had failed to oversee potential losses incurred by shareholders (Williams & Conley, 2005a).
3.1.1 Corporate governance conceptualizations

Colley et al.’s seem to build on the Cadbury definition in describing CG as a “system of authoritative direction”, (Colley, Doyle, Logan, & Stettinius, 2005, Ch.1) which in their view illustrates a feature of representative government. A basic model of the formal relationships between corporate constituencies is as follows: the shareholders elect non-executive (supervisory) directors through democratic vote during the yearly shareholder general meeting, to represent their interests in managing the business. Directors (or Board) delegate the responsibility of running the business processes to the executive directors, or managers, whom they hire and oversee. Corporate management becomes accountable to the Board, which in turn is accountable to shareholders.

Other scholars focus more on balancing the plurality of interests inside the company rather than on controlling and monitoring systems. Blair (1995) emphasizes the mode in which constituencies are incentivized by claims against assets and revenues and opinionates that CG “is about setting up rules that determine these things in business corporations” (M. M. Blair, 1995). Consequentially, she dismisses shareholder primacy as normative and argues for a larger pool of non-shareholder constituencies to compete for these claims on a reward-upon-effort basis i.e. team production model.

3.1.2 Blurring lines on corporate responsibility: guiding regulation and statutory provisions

Non-binding or soft regulation on corporate governance supplements statutory provisions by providing managers, Directors and other key stakeholders with guidelines on good corporate governance, meant to facilitate an environment of trust for investors, and with recommendations regarding the structure of accountability reflected in the control mechanisms i.e. enhance Boards’ accountability towards shareholders. Issues of social responsibilities are viewed as separate from core CG issues, marking two different areas of regulation i.e. the 2011 edition of OECD Guidelines for Multinational Enterprises allows a whole chapter on business responsibilities towards human rights, reflecting Prof. Ruggie’s definitions.

The 2004 revised edition of OECD Principles of Corporate Governance defines CG as “a set of relationships between company's management, its board, its shareholders and other stakeholders” (e.g. employees, creditors, suppliers). Consistent with the Cadbury Report, the OECD Principles make usage of the term owners with reference to shareholders and elaborate on Directors’ accountability/responsibility towards the company and shareholders, as the monitoring and controlling mechanism within the business enterprise. Issues pertaining to social responsibilities are not however considered incompatible with this structure of accountability according to OECD guidelines, in as much as they can have a negative impact on the organization through reputational risks i.e. social and environmental concerns.
Statutory law enforces to some extent the principles underlying these guidelines in CG: the *Council Regulation (EC) No 2157/2001 on the Statute for a European Company* requires a company to comprise a general meeting of shareholders, a supervisory and management organ, consistent with a two-tier system or an administrative organ, utilized in one-tier systems (art.38(a)-(b)). According to its provisions, Directors are required to be appointed by the general meeting of shareholders (art. 40(2)) and to supervise the work of the management organ (art. 40(2)), while management is required to report to the Supervisory organ (art. 41(1)), but there is no provision stating that Directors and management are specifically required to report to shareholders or any other requirements suggestive of legally enforceable accountability towards them. Art. 51 states that managers and Directors are liable for damages incurred by the company due to their breach of legal duties, but the Statute does not specify what is meant by the *company* or whether the *company* belongs to or is comprised of shareholders only.

Soft law standards are intended to be aspirational as they are easier to amend should circumstances require it. In addition, due to their dynamic nature, non-binding standards can be road-tested by the subjects it regulates on a comply-or-explain basis and thus potentially serve as instrumental to public policy-making. Denmark’s regulation on CG illustrates the dynamic relation between soft law and hard regulation: 2010 amendments to Danish CG Recommendations (s.2.1.2) are meant to encourage companies to adopt a policy on corporate social responsibility (CSR) given the fact that one year prior to this entered into force amendment 99 to the Financial Statements Act requiring all large Danish businesses to report on their CSR policies.

### 3.2 What is the corporation?

Colley *et al.* (2005) identify three main characteristics that essentially contribute to a definition of the corporate entity: unlimited life, limited liability for its owners and divisibility of ownership, permitting shares to be sold without disrupting the organizational structure. Based on this, one could argue social responsibility and human rights normativity are viewed fundamentally as external to the life of the company.

Understanding the way social normativity is perceived by corporate management requires an additional look at the way the role of the corporation is conceptualized in the economic and management science and how it can justify management behavior in relation to expectations of a non-legal nature, in the sense that they are not required in the legal provisions specifically addressing the corporate entity.

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10. [http://www.corporategovernance.dk/graphics/Corporategovernance/20110816_Recommendations_on_CorporateGovernance.pdf](http://www.corporategovernance.dk/graphics/Corporategovernance/20110816_Recommendations_on_CorporateGovernance.pdf)
3.2.1 Shareholder view of the firm
The shareholder model or finance view in CG clearly makes the distinction between issues pertaining to business interests shaping its purpose and matters of a social nature, viewed as extrinsic to corporate activities. Based on this argument, corporate responsibility for human rights seems inherently a normative behavior, given the fact that the business and human rights normativity are perceived as two tracks unlikely to converge.

3.2.1.1 Finance theory premises
Coase’s 1937 seminal article (Sison, 2010, p.2) has laid the foundation for an instrumental view of the firm, whose raison d’être was to lower transactions costs incurred on the market by investors, who turned to contracting as means to provide for labor, suppliers and creditors. Coase’s theory of the firm has influenced generations of economists who set off to refine the conceptualization of what business is and how does it work.

Berle and Means’ (1944) seminal work has laid the basis for a conception of divided interests inside the business enterprise, which remains to this day fundamental for the basic CG structure. In their view, the corporate form was characterized by a potentially conflicting separation between owners (shareholders) and the controlling actors (managers): “In its new aspect the corporation is a means whereby the wealth of innumerable individuals has been concentrated into huge aggregates and whereby control over this wealth has been surrendered to a unified direction” (1944, p.2). Their work has contributed to a great degree to laying focus on managers’ presumably discretionary powers in relation to shareholders’ money.

The emergence of contractarianism as the leading business paradigm attempted a solution to Berle and Means’ findings; Jensen and Meckling’s article (1976) defined the corporation as “a nexus for contracting relationships(...)characterized by the existence of divisible residual claims on the assets and cashflows of the organization which can generally be sold without permission of the other contracting individuals” (1976, p.9). Their article put forward the agency model as a frame for the manager-shareholder relationship, where managers are expected to act as agents, conducting the business in the interests of their principals, the shareholders.

Jensen and Meckling’s representation of the business entity implied an amoral character, which in their view excluded consideration of social responsibility as this would fit naturally with a person rather than with a legal fiction. They made the argument that the focus should be on designing a contract-based framework to deal with the “conflicting objectives of individuals” inside the company, namely between the shareholder and the manager, both considered to be utilitarian individuals (1976, p.9).

Their view was consistent with Milton Friedman’s (1971), whose seminal article in the New York Times Magazine continues to feed in the debate on corporate social responsibility. First, because
Friedman bluntly asserted that the only social responsibility of business is to make a profit, and second, because his essay has long been considered influential on the way businesses understand their role in society.

Leaving aside the aggravating nature of his manifesto title, a closer look at his argument reveals the rationale behind the corporate view of social responsibility as external to the business’ interests. Friedman argued that by making a profit, within legal and ethical boundaries, businesses contributed to the economic well being of society by providing wages for employees, product supply for customers and income for suppliers. In his argumentation, issues of a social nature are best to be dealt with outside the corporate sphere.

3.2.2 Stakeholder view of the corporation
Stakeholder model seems compatible with the idea of corporate responsibility for human rights. Corporations such as Novo Nordisk use a mix between stakeholder engagement strategies and a human rights policy as part of their social sustainability approach (Øvlisen, May 2011; Stormer, May 2011), although their example is merely exceptional rather than representative for the business community. Additionally, scholars supporting the stakeholder model sustain the rhetoric of the compatibility thesis as well, based on the argument that, similarly to the stakeholder idea, human rights have become a “matter of morality of what business does”\(^{11}\).

Stakeholder theory has emerged in the field of strategic management and later on has been assimilated in the field of business ethics. The stakeholder model of the corporation challenged an entrenched business model characterized by shareholder primacy, or profit maximization.

The model aims at converting those sharing an interest in the firm into stakeholders, thus reflecting a plurality of interests to be balanced by the management to ensure the success of the corporation; this targets both classic constituents such as shareholders and non-shareholders, such as customers, suppliers, employees and the larger community (R. E. Freeman & Reed, 1983). A generic definition of stakeholders mentions “groups and individuals who benefit from or are harmed by, and whose rights are violated or respected by, corporate actions” (R. E. Freeman & Reed, 1983, p.163).

3.2.2.1 Stakeholder theory delimitation
The Oxford Handbook of Corporate Social Responsibility (2008) frames the stakeholder concept under CSR theory (Mele, 2008), or as an “alternative theme” to CSR (Carroll, 2008, p.36), due to its normative postulate of business responsibilities towards non-shareholder. Freeman himself delineates his business ethics approach from CSR by arguing that the former supports a view wherein social issues are ought to be embedded in the business model, and not interpreted as something that managers do besides their business operations (E. R. Freeman, 2011).

\(^{11}\) Lecture held by Prof. Ed. Freeman at Nordic Symposium for CSR, June 17\(^{th}\) 2011, Copenhagen Business School.
The present paper will discuss few conceptual bases in stakeholder theory which are relevant to the dynamics of CG development and subsequently to its understanding of human rights normativity. CSR will be conceptually addressed in this section as a notion going beyond shareholder or profit focus (McBarnet, 2009 (2007)).

3.3 Shareholder value maximization
Literature perceives the finance view of the corporation as the prevailing CG model in practice (Mitchell & Mitchell, 2010). Discussing convergence issues between CG systems varying from country to country, academia identifies shareholder value maximization as representative for the Anglo-Saxon business model, which encompasses the US and to some degree, the British corporate governance models while the stakeholder model is seen as representative for European business environment (M. M. Blair, 2003; Lazonick & O'Sullivan, 2002; Mitchell & Mitchell, 2010; Williams & Conley, 2005a).

The financial discipline view of the corporation has been endorsed by the neo-classical school of economics (Friedman, 1971; Jensen & Meckling, 1976), supporting profit maximization as the corporate purpose. This view is thought to be informed by individualism and utilitarianism (Sison, 2010). The former supports the fact that individuals act independently of their social relations, be they group or civic society, which rules out the social function of the individual, while the latter implies that utility serves as an end in individual’s actions and the value of any action is balanced against its expected outcome.

The following section is meant to uncover the main principles and ideas contributing to the conceptualization of and justification for the share value maximization model. Due to limited space, this paper will focus on few themes found to be recurrent in discussions concerning the scope of corporate responsibility towards issues of a social nature.

3.3.1 Agency paradigm
Agency theory was developed in the 1960s and the 1970s to be applied by various types of organizations, as a response to the problem of risk sharing in cooperative efforts, where interests of principals and agents are conflicting and attitudes toward risk are divergent (Eisenhardt, 1989).

Taking as point of departure the utilitarian view of individual behaviour in an organization, Jensen and Meckling (1976) investigated ways in which maximizing behavior can be addressed in order to balance conflicting interests in the organization. Essentially, agency theory emphasizes issues rising from the contractual nature of relationships between the constituents of a corporation, namely between shareholders (principals), who delegate management (agents) the authority (residual control rights) to
run the business in their interests. Residual control rights are assigned to professional management since a multitude of principals will find it costly to engage in decision-making processes.

Fama and Jensen (1983) further reiterated on the agency costs incurred by stockholders while setting monitoring procedures pertinent to agency model, and punctuated the importance of the market for corporate control as a check and balance mechanism to tame the allegedly discretionary powers of managers, whose interests are not always aligned with those of stockholders. The issue signaled in their article is the fact that investors cannot address all possible risks emerging from managerial opportunistic behavior, therefore the principals incur residual rights, meaning, they should be entitled to all residual gains after all other contracts have been paid, in light of the risks they incur by investing their money in the business. The argument was later developed by Hart and Moore (1988, cited in Joo, 2010), who coined the concept of incomplete contracting, meant to address the fact that, in reality, contracts cannot cover all contingencies due to transaction and information costs.

One way to align both the principal’s and the agent’s interests has been through incentive pay, seen as a bonding cost (Fama & Jensen, 1983), which comprised stock-based compensation and was aimed at motivating management to increase share value (profits) and thus minimize agency risks.

3.3.2 Ownership and residual claims
CG discourse, including soft regulatory tools i.e. OECD Principles of Corporate Governance (2004), is pervaded by the use of the term owners with reference to the investors in a corporation. This terminology is reminiscent of the property rights view approached in CG as Blair (1995) suggests. Although Berle and Means (1944) made the observation that corporate ownership represented a paradigm shift from the classical notion of property rights due to the rise of the control group- the management- use of the term seems to be made at face value given there is little argumentation to justify that use.

Engelen (2002) makes the observation that the principle underlying the ownership status of shareholders is related to John Locke’s theory of private property. In Locke’s view, owning property is morally justified due to one’s labor or contribution invested in that property, labor that is rightfully his or her as a natural right (Locke, 2005). Similarly, shareholders are viewed as legitimate owners of the net residual gains in light of their financial contributions to the life of the corporation.

Another articulation to inform the argument for the primacy of shareholders’ interests consists of shareholders’ residual capacity. After all other constituencies have received their payments under contractual terms shareholders receive the residual revenue, which implies they bear the highest risk in case of losses and consequentially the strongest incentive to set up supervisory mechanisms for agents, similarly to owners of proprietorship12 (M. M. Blair, 1995; M. Blair & Stout, 2011). Fama and Jensen

(1983) define residual claimants or residual risk-takers those constituents “who contract for the rights to net cash flow” (Fama & Jensen, 1983, p.64). Those provisions are, according to Fama and Jensen, enclosed implicitly or explicitly in the agent’s contract, who agrees to perform the business function in the interests of these residual claimants (bonding agency costs).

3.3.3 Critical assessments of finance model

According to Joo (2010) the finance model is built on two fundamental assumptions: the consensual nature of this model (contracting), conferring moral legitimacy to private interaction, and the economic theory of market efficiency, transposed in the efficiency of stock market as main criteria for assessing management performance in relation to its agency responsibilities. Critical views on the finance model point to both of these assumptions, supported by an increased awareness of corporate potential for social impact, both positive and negative, and by latest corporate financial scandals leading to systemic economic failures i.e. short-termism of profit maximization has been identified as one of the culprits in the financial crisis of 2008.

3.3.3.1 Contracting nexus, a conceptual critique

Blair (2003) traces the conceptualization of corporate ownership to the residual claim issue and residual control rights, as the fundamentals for the agency paradigm in CG, and notices the limitation of the nexus of contracts concept - since one cannot own an abstraction - to inform the assumption that shareholders automatically own the corporation because they have residual rights. Similarly, Joo (2010) argues that contractarianism or the nexus of contracts, as put forward by Jensen and his collaborators, defies the notion of ownership, since the principal-agent relationship is governed by rules set in one of the multitude of contracts allegedly defining the corporate entity.

Which leads to a recurrent debate in CG on what do equity rights imply for shareholders: are they owners in their full right or mere participants (one class of stakeholders among others), bearing a claim against net earnings?

Engelen (2002) is straightforward in criticizing what he calls the Lockean conception of ownership applied in the share value model, which entails the immutable character of ownership rights. He makes the argument that liberal doctrine of property rights can no longer stand true to shareholders’ primacy status, given the complex realities surrounding the concept of property rights, such as the social dimension of ownership sprung out of relational rights it prescribes, or the rise of the welfare state, where property is far from absolute. He makes the argument that ownership normativity implies not only formal rights, but also informal rights and responsibilities as in the example of the German system co-determination, where employees have seats in the Board of Directors.

He proposes increased regulation in the form of “institutionalized constraints upon the short-termed maximization of shareholder value, ensuring a higher quality of corporate decision making and preventing negative externalities” (2002), that would substitute the share value model with the
pluralist view (stakeholder approach) which would confer multiple ownership rights, expanding the pool of interests to be balanced within the corporation. Externalities are generically defined as “social costs that (companies) do not have to bear” (M. Porter & Kramer, 2011, p.5).

3.3.3.2 Stock market efficiency, fact based critique
Theorists have argued that a focus on shareholder interests would benefit the larger community with labor income and market supply which accompanies the return on investment pertaining to stockholders (Friedman, 1971). Stock market efficiency has long been assimilated with managerial performance in maximizing profit, a view termed as short-termism.

Extrapolating the efficiency argument of shareholder value to macroeconomic data, literature finds that statistical data of employment security in the 1990s opposes the social wealth principle proposed by the finance theorists. Empirical data interpretation (Lazonick & O’Sullivan, 2002) is suggestive of the fact that share value maximization in the US corporate governance has led to “declining employment security, falling job tenures and (…) significant costs of job loss” in the ‘90s, which, in their view, represents a direct consequence of the share value model prevalent in the US financial system (p.300).

Reviewing its Corporate Governance Principles in the aftermath of the 2008 financial crisis, the OECD (2009) reckons that there is no clear link between management’s stock-based compensation and company performance while stock price as performance metric is not relevant to corporate performance in relation to industry or market average. Boards’ low performance and absence of shareholder supervision - institutional shareholders in particular - concerning management practices have been identified, among others, as two culprits in facilitating the financial systemic failures leading to the global financial and economic crisis in 2008.

Scholars (Jones, 2010) and OECD experts (2009) have assessed CG standards and recommendations in light of the financial crisis in order to determine the efficiency of the CG regime. Results pointed to the fact that, all rules in place, stemming from both hard law sources and soft regulatory regimes are sound in their requirements and that problems lie in the enforcement of such rules. Jones (2010) suggests that problems arise because of irresponsible management, thus resumed to a question of ethics, while the OECD assessments (2009; 2010) put an emphasis on active ownership, where shareowners are expected to act on their responsibility to supervise boards, and on board’s legally prescribed function to ensure management’s accountability.

3.3.4 Shareholder model and US case law
Law, in the sense of enforceable rules, is often sought at in conflicting situations to test the validity of models in use. In the case of CG conceptualizations, it seems that law is perceived as having a functional quality to it, meaning, its prescriptions ought to reflect general consent on what should be done concerning that issue at stake. Descriptive study of the legal component of CG in the form of
statutes or CG recommendations so far does not reveal any clearly articulated impediment towards a social responsibility approach to the business model. By looking at US case law this section seeks to trace the development of the social responsibility conception of corporations as rendered by judicial interpretations.

Scholars share different views in relation to the way share value model is being reflected in the US regulatory framework. Some scholars see the share value model manifesting as predominant in US corporate law (A. Keay, 2010b), while other scholars view corporate law simply as responsive to succeeding financial requirements in time (Mitchell & Mitchell, 2010) or merely reflective of the shifting pattern of business financial models (Joo, 2010). Finally, others explicitly disagree with a share value model endorsed by US litigation; rather, they make the claim that the principal-agent model in corporate law has been prescriptive, despite scholarly efforts to make it functional (M. M. Blair, 1995; M. M. Blair, 2003; M. Blair & Stout, 2011).

### 3.3.4.1 Property conception of the corporation
The *Dodge vs. Ford Motor Co.* case held before the Michigan Supreme Court in 1919 reiterated what scholars have called the inherent or property conception of the corporation (Allen, 1992 cited in M. M. Blair, 1995), in which the sole purpose of the company is to serve the interests of its owners - the stockholders - by focusing on profit maximization. The Court seemed to adhere to the property conception of the corporation - framed by Blair (1995) as precursor to share value model - by ruling in favor of the Dodge party, which asked that Ford paid dividends owed to shareholders instead of reinvesting them in lowering product price: “A business corporation is organized and carried on primarily for the profit of stakeholders. The powers of the directors are to be employed for that end”.

### 3.3.4.2 Social entity conception of the corporation
The social entity conception or “constellation of interests” that managers need to balance, in which no constituency’s interest is more important than the others’ (Votaw, 1965 cited in M. M. Blair, 1995) resembles somewhat the managerial stakeholder view. Although not explicitly endorsing the social conception view of the corporation, law allowed directors to consider other interests than shareholders’ by invoking the long-term interest of the owners for activities viewed as outside the scope of shareholders’ interests i.e. philanthropy acts on the part of directors were upheld without specific charter provisions (M. M. Blair, 1995). Blair concedes the long-term discourse employed in courts was meant to accommodate both the property conception of the corporation, and the social entity one.

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3.3.4.3 Breaking point
The nascent development of the agency paradigm in economics brought the principal-agent discourse into spotlight, conceptualized as the law and economics movement started by legal scholars adherent to shareholder primacy model (Easterbrook and Fischel, 1983 cited in M. Blair & Stout, 2011).

It is then that the independent - defined as not in control - monitoring boards emerge, with the distinct duty of supervising managerial activities (Eisenberg, 1976 cited in Joo, 2010). Originally, scholars conceptualized the monitoring function so as to render directors as agents of shareholders. This view has been accommodated in other law jurisdictions by recognizing the supervisory function of directors in relation to management i.e. EU Council Regulation on the Statute for a European Company (2001). US case law, however, has come up with a clever device to balance Directors’ duties towards shareholders - the business judgment rule - as a way to shield these from consolidated law suits i.e. shareholders suing against directors.

3.3.4.4 Business judgment rule
With the rise of shareholder discontent in relation to managerial decisions, the courts have designed the business judgment rule, a legal doctrine which Delaware Supreme Court declared to be a presumption that “in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company” (Aronson v. Lewis, 1984 cited in Mitchell & Mitchell, 2010). In a nutshell, the rule stands for deference to directors’ expert opinion.

A long-term consequence of the use of the business judgment rule has been the dilution of directors’ duties towards shareholders - now limited at guaranteeing the shareholder meeting and the democratic vote - which also limited shareholders’ ability to challenge their decision in Courts. Based on this argument, Blair and Stout (M. Blair & Stout, 2011) denounce the lack of strict specification in corporate law demanding directors to actively pursue the interests of shareholders and maximize profits. Consequentially, they argue that US corporate law does not reflect the agency model promoted in economic theory of the firm. Moreover, literature observes that, despite the widespread use of fiduciary discourse towards shareholders, the legal support for the business judgment rule, where directors’ decision-making is indisputable, renders the fiduciary duty unenforceable (Jones, 2010; Joo, 2010).

Case law seems to be supportive of their affirmation: in the case of Paramount Communications vs. Time Inc. (1989), the Delaware Supreme Court ruled in favor of Time’s managers to proceed on a tender offer for Warner Communications, which prohibited shareholders from cashing considerable gains from Paramount’s takeover bid: “Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the

\[\text{Shareholders may not sue directors for negligence or poor performance (Joo, 2010).}\]
corporate strategy” (excerpt from Court’s decision, Blair, 1995, p.220). Academia has interpreted the Court’s decision as favoring a broader constituency than shareholders of the corporation (Allen, 1992, cited in Blair, 1995), acknowledged today as stakeholders, while others see it as an attempt to reject the shareholder wealth maximization claim (A. Keay, 2010b).

Illustrations of US litigation above do neither confirm nor infirm the primacy of shareholder model in law or in practice. Similarly, they do not endorse or reject the view of corporate social responsibility. As seen in the beginning of this section, it seems that the line between formal regulation altering corporate conduct and standards-based behavior tends to blur when discussing the principles underlying corporate behavior.

3.4 Stakeholder model

3.4.1 Integration thesis

Literature identifies stakeholder approach as the most prominent view resistant to the shareholder value maximization model (Williams & Conley, 2005a) and identifies the corporate social responsibility movement as one of the elements contributing to its development.

Stakeholder theory first emerged in the field of strategic management, featured in Edward Freeman’s seminal book “Strategic management: a stakeholder approach” (1984) shortly after the CG agency model, pioneered by Jensen and Meckling’s article (1976) in the field of corporate finance, ultimately enshrined the contractarianism view of the corporation - perceived as a nexus of contracts supposed to govern all claims against the corporation. Some authors (Carroll, 2008) believe the instant popularity of Freeman’s stakeholder managerial model was linked to major corporate scandals shaking the corporate world and stirring public distrust and demands for corporate accountability. One example is the Union Carbide/Bhopal scandal in 1984, when poisonous gas was released outside the plant killing and injuring tens of thousands of people in Bhopal community. Against this backdrop, social expectations were being raised given the legal vacuum in handling corporate externalities i.e. social costs incurred through corporate negative impacts.

While the agency paradigm constructed a control mechanism in the form of agency framework aimed at protecting residual claimants’ interests in the business organization, stakeholder theory rejected the single constituency emphasis, and instead proposed a multiple-constituency framework that would deal with all key stakes against the corporate entity in order to assess business performance.

The postulate in stakeholder theory consists of integration of ethics, prescribed as values, and economics in pursuing the wellbeing of the corporate entity (E. Freeman, Wicks, & Parmar, 2011; R.

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http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnionCarbideDowlawsuitreBhopal
E. Freeman, Wicks, & Parmar, 2004), which builds Freeman and his collaborators’ argument against being assimilated to CSR theory, perceived as something done besides the core business processes.\(^{16}\) In a similar manner, corporations engaging in stakeholder approach denounce the CSR terminology as a parallel track (Øvlisen, May 2011; Stormer, March 2011; Stormer, May 2011) to the business itself. It is for this reason that they recourse to the sustainability or triple bottom line discourse promoted through UN Global Compact as international principles of CSR. Triple bottom line model implies embedding social issues, through stakeholder engagement strategies, in their operational business models along with environmental concerns (Elkington, 1997).

### 3.4.2 Stakeholder, a definition

Stakeholders have been defined as “groups and individuals who benefit from or are harmed by, and whose rights are violated and respected by, corporate actions” (R. E. Freeman, 2001). A corporation’s primary stakeholders include, according to Freeman (2001), owners and employees, customers and suppliers and not least the local community, while management, itself a stakeholder, should act as the agent in relation to all these stakeholders, viewed as principals.

Another broad definition pictures stakeholders as “those persons and groups who either voluntarily or involuntarily become exposed to risk from the activities of a firm” (Clarkson, 1995 cited in Asher et al., 2005).\(^{17}\) This definition points to the contractarian view of the corporation, where externalities or negative impacts inflicted by corporate activities in the communities they operate, subscribe to implicit, incomplete contracting, as opposed to complete, explicit contracting proposed by Jensen and Meckling’s 1976 article, which puts forward the shareholder primacy view.

### 3.4.3 Economic foundation for stakeholder theory

Incomplete contracting stands for a later development in economic theory (Hart and Moore, 1998 cited in Joo, 2010) which posits that transaction and information costs cannot prevent all possible contingencies, therefore explicit agreements are not feasible. Recent developments in economic theory are pointing to a bundle of rights theory of the firm, where inconsistencies in the real world rising from contingent and non-enforceable issues (incomplete, implicit contracting) are suggestive of a need to admit suppliers, customers and employees, among possibly others, as residual claimants (Agle et al., 2008; M. M. Blair, 2003; M. Blair & Stout, 2011).

Asher et al. (2005) propose that incomplete, implicit contracting develop as the foundation for a stakeholder theory of property rights. This theory would admit the reality of other parties than shareholders being inadequately protected, and would open the possibility of multiple residual claims.

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\(^{16}\) Lecture held by Prof. Ed. Freeman at Nordic Symposium for CSR, June 17\(^{th}\) 2011, Copenhagen Business School.

\(^{17}\) Literature refers to stakeholders as shareholders, holders of options issued by firm, employees, local communities, the government, customers and suppliers (Asher, Mahoney, & Mahoney, 2005).
against the corporation as opposed to the shareholder model, where only shareholders have the residual claimants status.

3.4.4 Potential development for stakeholder theory
Nascent attempts at developing a new theory of property rights in industrial organizational economics and corporate finance have signaled a need to re-discuss Jensen and Meckling’s (1976) contracting model in terms of its validity, in the context of an increasingly complex business environment where the corporations are faced with pressures coming from institutional actors, investors and civil society to be more responsive on corporate responsibility regarding social issues (Williams & Conley, 2005a).

The conceptualization of the firm as a *nexus of contracts* bears the presumption that all claims against the business organizations have been resumed through a set of *explicit* (formal) contracts, from a *complete contracting* perspective. Ultimately the principal-agent contract rendered shareholders to be the residual claimants, thus elevating their status to that comparable to owners in an organization. The residual claim also implied that, because of the risk incurred, shareholders would also be entitled to residual control rights over the corporation, assigned to directors and managers on their behalf (congruent to Berle and Means’ (1944) problem formulation), by applying the agency model. Thus, shareholders, as the owners of the business, expect to receive the residual gains (profits) since all other constituencies have contracted to be paid first, and directors and managers are expected to exercise their function on behalf of the owners, namely, to maximize profits, or shareholder value. Shareholder value proponents further assessed that, by increasing share value all actors stand to gain due to the contracting model, because it covers all other claims.

The reconceptualization of the property rights theory of the firm takes into account both *explicit and implicit contracting, from an incomplete perspective*, which would determine a change in the distribution of value i.e. surplus could be distributed among all stakeholders of a corporation. Implicit contracts refer to agreements between firms and employees in which the former will reward the latter in a fair fashion, depending on the employees’ contribution to the firm, which some theorists formulated as *non-tradeable reputation* (Dierickx and Cool, 1989 cited in Asher et al., 2005). The formulation implies that reputation acts as a non-tradeable asset for corporations, because it can attract or divert another essential asset, the human capital, and therefore could contribute to the economic value of the corporation.

3.4.4.1 A pragmatic approach to non-financial performance
Practice (Øvlisen, May 2011; Stormer, May 2011) seems supportive of the reality of incomplete contracting, since reputation and brand image are often subjected to public approval or disapproval. According to Stormer (May 2011) and documented by scholars (Morsing & Oswald, 2006) bottom

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18http://www.businessdictionary.com/definition/implicit-contract.html
lines are affected negatively as a consequence of press releases in relation to poor non-financial performance but causation cannot be yet assessed.

An empirical study undertaken by Accenture and Global Compact experts displays an enhanced focus among CEOs in relation to reputation vis-à-vis sustainability/CSR issues (2010). This is a strong indicator that corporations are increasingly becoming more concerned with the social perceptions of their activity and ultimately with their social impact. Social perceptions thus become an important driver towards acting with a view to non-shareholder stakeholders, despite the absence or because of absence of formal rules. Management science (M. Porter & Kramer, 2011) has recently reiterated on this apparent shift in managerial thinking by praising the efficiency virtues of employing strategies to align core business processes with social concerns. This idea is not entirely new in the literature (M. E. Porter & Kramer, 2006), but the novelty it brings is that academic perceptions have shifted towards a view in which business and society is exchanged to business in society.

3.4.5 Critique of stakeholder theory
Long time contributor to the share value model, Michael Jensen (2010) criticizes the stakeholder model’s precept of balancing multiple interests in the life of the company by arguing that it lacks a single focus, which he believes it renders the notion of management accountability as susceptible of discretionary behavior. Stakeholder theorists’ (Phillips, Freeman, & Wicks, 2003) counterargument is enhanced accountability due to having to attend to multiple stakes within the business organization.

Jensen (2010) proposes long term value maximization theory which recognizes the importance of attending to a company’s stakeholders but preserves the precept of managerial single focus, aimed at maximizing, among others, equity value. In his view, value maximization comprises “values of all financial claims on the firm-debt, warrants, and preferred stock as well as equity”. He claims his theory departs from the limited focus of share value model and shares the same principle of creating value for both business and society that underlies the stakeholder theoretical thesis. However, he advances value maximization as a joint theoretical framework which subjects the stakeholder vision of multiple corporate interests to a unique corporate objective, a model identified in the literature as enlightened shareholder value (Williams & Conley, 2005a).

3.4.5.1 Value maximization thesis
Jensen admits the stakeholder model is valuable in as much as it serves the purpose of the business, to generate value. Hence, he sees it instrumentally. This view is consistent with what companies seek in practice in light of the fact that they are economic entities. Novo Nordisk understands to attend to stakeholder interests in pursuing “the interests of the company for the long term and generate sustainable, profitable growth” (Stormer, March 2011). The scholar shareholder-stakeholder dichotomy is interpreted in an integrated way by Susanne Stormer, the Vice President of Global Triple
Bottom Line Management at Novo Nordisk: “(...) we have to be a profitable business and a responsible business, so we do not see the distinction between the two”.

Stormer argues for profit maximization as adjacent to providing a service, responding to society’s need of medicine; this duality in purpose is conceptualized as a stakeholder approach to their business. Similarly, Mads Øvlisen, former CEO at Novo Nordisk and currently member of the UN Global Compact Board (May 2011), argues that share value model “is not suitable as a guide of how to run your business”. He reckons a strong driver for corporate engagement in social sustainability is “the influence it has on (...) recruitment” due to reputational risks and sees stakeholder engagement as critical in aligning social concerns with business practice. Reputational risk is a recurrent theme other practitioners (Skadegård Thorsen, May 2011; Thomas, March 2011) argue for when explaining business acceptance of social responsibility, and of human rights normativity in particular.

3.5 Convergence of CG models

According to Williams and Conley (2005a) the emergence of a hybrid model of corporate governance in the United Kingdom stands proof to the convergence movement in the field of corporate governance models. In their view, the UK corporate governance model seems to diverge from its North-American counterpart, shareholder primacy, and develop the prospect of a model that bears a stakeholder-based influence, considered to be predominant in continental Europe.

The UK model is perceived as a third alternative to the two predominant models presented above, bearing the potential for a permutation from the finance/shareholder value model prevailing in the Anglo-Saxon corporate governance towards the concept of enlightened shareholder value, built on a long-term view of the company.

3.5.1 Section 172, UK Companies Act 2006

A most debated addition in UK Companies Act concerning General Duties of Directors is Section 172 (1) Duty to promote the success of the company: “A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole” (see Annex 1), which requires Directors to “give proper consideration to” (UK, 2007) stakeholders’ interests that may be affected through corporate actions.

Enforcement measure to support s. 172 is s. 417 regarding the contents of a director’s report, which requires a Business Review to report on, among other matters, “social and community issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies” (417.5.III). However, the Act contains no provisions suggestive of sanctions in the event companies fail to deliver the Business Review.
Section 172 is viewed to codify pre-existent common law rules, where Directors were required to act “bona fide in the best interests of the company” (A. Keay, 2010a). In terms of evolution to a different philosophy, as one accommodating demands for proper consideration of a broader constituency, scholars (Davies & Rickford, 2008) notice that Directors were allowed to give regard to stakeholders if it was in the long-term interest of the company/shareholders in common law as well. The development brought about in the Act is the fact that Directors now have a duty to act with regard to stakeholders’ interests, in pursuing the shareholders’ interests.

3.5.1.1 Regulation approach
The enlightened shareholder value appears to be the middle way the Company Law Review (CLR), tasked with the formulation of the Act’s provisions, chose when deliberating between shareholder primacy principles and the pluralist (stakeholder) approach proposed by NGOs. The latter approach entailed a duty for Directors to balance the interests of stakeholders, who could demand a right to remedy in case of negative impact stemming from corporate activities (Ellis & Hodgson, 2011). The CLR’s reluctance towards the pluralist (stakeholder) approach was justified as avoiding “unpoliced discretion to directors” (Alcock, 2009).

According to Ministerial Statements (2007), applying the philosophy of enlightened shareholder value was meant to determine directors to articulate the purpose of the corporation when taking decisions that might have an impact on stakeholders, while pursuing the interests of shareholders. Additionally, it was intended to encourage Directors to promote a culture of financial sustainability, as opposed to short-termism, or focus on short-term gains. Hence, the success of the company “means what the members collectively want the company to achieve. For a commercial company success will usually mean long-term increase in value” (UK, 2007, p.7).

3.5.1.2 A paradigm shift?
Both academia and practitioners (Davies & Rickford, 2008; Ellis & Hodgson, 2011) have signaled the limitations embodied in Section 172 in relation to giving stakeholders a proper consideration when pursuing the success of the company. Davies and Rickford (2008) observe that the formulation in Section 172 is not intended to suggest Directors have a duty to balance the interests of shareholders or members with those of stakeholders, and NGOs’ assessment reports (Ellis & Hodgson, 2011) argue that stakeholders’ interests’ could be overlooked if the “success of the company” dictates so. Moreover, literature asserts that, in light of the terminology used throughout the Act, the company should be identified with the members or shareholders (Davies & Rickford, 2008, p.53).

Academia (Alcock, 2009; Davies & Rickford, 2008) asserts that the UK company law maintains the shareholder primacy principle, indicative of the Anglo-Saxon CG system, where shareholders’ interests are given the highest consideration. Alcock (2009) essentially resumes the discussion by
asserting that the shareholder primacy principles are enshrined in statutory law, since *the success of the company* is perceived as equating the success of shareholders. Keay (2010a) is doubtful of the success of the UK Government’s intent of the Act, when analyzing s. 172. In his opinion, the section fails to reach the goal of ensuring sustainable business by changing the short-term, profit-oriented only business behavior of companies and lacks a clear provision aimed at enhancing Directors’ accountability.

Statutory law seems to put forward minimal requirements so as to support a debate on best practices concerning good corporate governance, enunciated in soft regulation on CG i.e. Cadbury Report. As emphasized by the UK Financial Reporting Council report (2010), business regulation and matters of corporate responsibility implicitly, are “principles rather than rules based” (p.1), hence subjected to soft regulation.

### 3.6 Concluding remarks

*Sub-research questions: What are the normative sources of corporate governance models and how do they influence the scope of corporate (social) responsibility? How do these models shape corporate perceptions on BRHR and how does corporate regulation interact with these perceptions?*

Corporate governance models represent both descriptive and prescriptive corporate patterns of behavior that draw on principles for economic efficiency, managerial/business ethics and on legal regulation. Development under these disciplines seems to affect positively the development of corporate governance models towards maintaining profitability while admitting to non-economic responsibilities. Thus, the share value model has undergone extensive criticism due to its conception of social responsibility as extrinsic, backing its argument on lack of specific legal requirements in the area of corporate social responsibility. Stakeholder precepts seem to be consistent with corporate responsibilities of a social nature, including issues of human rights, but it is unclear whether the model accepts human rights legal normativity. Enlightened share value might be an evolutionary step in corporate governance thinking models and it appears to be corporations’ response towards external pressure to change; a pragmatic view of these external pressures relies on their impact on bottom lines.

Hard regulation in the form of statutory provisions sets a minimum of requirements so as to stimulate a debate on CG best practices, at soft regulation level; similarly to CSR, corporate governance seems to be viewed by regulators as something that corporations do on a voluntary basis, hence the distinction under soft law between CG and human rights norms, also perceived as prescriptive. There are no sanctions on corporate behavior related to social issues. It seems that hard regulation is needed to nudge at least corporate interest on social matters, and regulators intervene because they link issues of social responsibility to long-term economic stability, as opposed to short-termism. However, human
rights are not perceived as meeting the threshold for managerial risk, which could explain why national regulators seem to avoid or ignore this topic. Given the example of s.172 in UK Companies Act, it appears that binding regulation is appropriate to motivate the business community to consider at least, if not act on social responsibilities.
4 BUSINESS AND HUMAN RIGHTS LAW

“For many companies, human rights are something new on their radar screen (...) until human rights standards become part of their DNA, they may need advice and guidance on how to understand human rights in practice.”

(UN SRSG Prof. John Ruggie)

As the previous section of this paper argues, looking at corporate governance models could forward our understanding of what are the principles stemming from economics, business ethics and regulation policies that build the assumptions underlying corporate conceptualization vis-à-vis business responsibility for social matters, human rights included. A descriptive, holistic view of these principles reveals a propensity to address corporate accountability for their impact on human rights in what appears to be a non-binding legal forum, perceived as closer to ethics or to a standard of best practice. As Prof. Ruggie’s research (2011a) pointed to, human rights and corporate law are viewed by regulators as two distinct policy areas. Moreover, human rights have international legal implications whereas businesses and multinational enterprises (MNEs) alike are considered private entities subjected to domestic regulation.

Notwithstanding the politics shaping the apprehension of business and human rights debate, stimulated by the CSR movement, it seems though that principles of international law do exert an influence on the corporate perception of their responsibility towards human rights as well i.e. some business codes of conduct are informed by principles of human rights, referencing the UDHR. What started as a sub-set discussion of the CSR movement, understood as voluntary action by corporations and regulators, business responsibilities for human rights (BRHR) have gained a discourse license of their own, granted through UN’s non-binding approach (UNSRSG, 2008b) to regulating corporate behavior in accordance with principles of human rights responsibility.

In order to understand this transit from CSR discourse to soft regulation at international level, this section will approach Prof. Ruggie’s Framework as an outcome of international private politics leading the discussion on principles of international human rights law in relation to private party status. In doing so, the present section will address the UN project of “Norms on the responsibilities of transnational corporations and other business enterprises” (2003) as a different approach to BRHR.
4.1 International legal theory
Legal scholars (Kinley & Nolan, 2010; Muchlinski, 2009a) and UN activists (Sidoti, 2011) have argued that, in light of their considerable bargaining influence on the international economic and policy arena, MNEs and businesses in general should be assigned corresponding responsibilities, if not duties, under human rights law. Business allegations of human rights violations have been documented for years by NGOs and human rights lawyers have gradually constructed their argumentation in support of BRHR in the legal sphere by looking at ways to support business legal subjectivity under the current model in use of international human rights law.

4.1.1 The positivist model in international law
The prevailing model of international law encompasses a statist view, where nation-states’ consent creates valid international legal norms and thus become binding on those very states, as subjects of international law; thus international law is understood as both rules and procedures. In international legal theory, this view is framed as legal positivism and is most commonly referred to as the black letter of the law.

Attempts to conceptualize private obligations under human rights law are framed as normative in light of the fact that human rights treaties and other relevant binding instruments address state parties, as the SRSG (2007c) made sure to emphasize in building his argument against direct obligations for corporations under human rights law. Disagreement on international legal subjectivity addresses a fundamental concern, that of ensuring corporate accountability through rules and regulation - the mandatory argument, which stands in opposition with the concept of responsibility as articulated by regulators and corporations, perceived to entail a moral obligation and thus detached from the legal sphere - the voluntary argument.

4.2 The mandatory versus voluntary debate
The mandatory versus voluntary debate is constructed on a binding versus non-binding dichotomy, wherein non-binding is often misleadingly categorized as moral, according to Zerk (2006). Legal literature makes the argument that this divide is not absolute, since law is not only binding regulation, and regulatory schemes can address CSR without depriving it of its volunteer character.

Two observations emerge while reflecting on this construct, which will be approached in more detail within this section. First, the multiple nuances implied in the legal dimension of corporate responsibility mirror the dynamics of a multilevel structure of persuasion, ranging from formal drivers such as governmental and intergovernmental soft regulation initiatives to informal drivers, broadly identified as social expectations in shaping business response towards human rights responsibilities.

22http://www.business-humanrights.org/LegalPortal/Home/Completerlistofcases
Second, the voluntary vs. mandatory debate on BRHR essentially reflects heterogeneous political interests framed as divergent; this marks a shift on the international arena from a statist anthology towards a reality wherein international politics and international regulatory forums are increasingly privatized in the area of BRHR, as international human rights NGOs and transnational corporations or international business organizations share the table of discussions, moderated and mediated at UN forum. Comprehending how political drivers stir discussions on business responsibility for human rights could tentatively explain why corporations, bearing a private legal status, comply with international principles in the manner that they do.

Before delving into the discussion on what drives private compliance to international principles and how do these principles of human rights law influence corporate behavior, this section will make use of international legal theory to provide an overall understanding of the voluntary versus mandatory debate through legal lenses.

4.3 Indeterminacy of international law

4.3.1 In search of the legal argument

The BRHR as a concept has been internationally acknowledged through the SRSG’s UN Framework as “corporate responsibility to respect human rights because it is the basic expectation society has of business” (2008b, para.9). However, interpretation of this pillar through legal lenses implies a traditionally non-enforceable duty under human rights law, as suggested by academia (K. Buhmann et al., 2011; F. Wettstein, 2010b) and practitioners: “Ruggie’s Framework is a classic human rights approach to the problem: the state is a duty bearer, the company is a duty bearer, so it comes down to deciding what are the different duties they have” (Thomas, March 2011).

This is reminiscent of the voluntary vs. mandatory debate on BRHR triggered by the UN Norms project (2003), debate that contributed to the actual articulation of BRHR under the UN Framework (2008), considered to have migrated towards a discourse of state duty to protect which “may decrease legal pressure or societal expectations on companies” (K. Buhmann et al., 2011, p.5). As translated by Dylan Thomas, consultant at DIHR, “these duties (defined by Prof. Ruggie) are still not legal”.

It seems that Prof. Ruggie’s approach, taken in the context of voluntary and mandatory discussions, has sought to ensure compliance with the principles laid down in the UN Framework by looking at the positivist model of international law, where binding law is made by states’ consent, for states to abide it. In order to understand the recurrence of voluntary, aspirational principles versus formal, binding regulation in the area of BRHR, critical legal studies offer a useful account of how law operates in the actual when actors debate on the value of shifting paradigm: how to best apply human rights law i.e. through direct obligations on non-state parties that break human rights – normative argument, or
applying indirect obligations through domestic regulation – concrete argument, more appropriate to the accepted model of international law.

4.3.2 Critical legal studies
Martti Koskenniemi (2007(2005)) essentially argues that there cannot be a definitive resolution to conceptual disputes in international law, at least not one free from counter-argumentation. Koskenniemi describes international law in the actual as a continuous oscillation between two types of argumentation that seek to ensure law’s delimitation from international politics. Under criticism of justifying politics, law seeks to ensure normativity, to be binding on states regardless of their behavior - descending argumentative pattern. However, law cannot be independent of state interests, therefore it seeks in turn to be concrete and not mistaken for natural morality - ascending argumentative pattern.

Koskenniemi argues that international law is unable to provide a coherent justification in normative disputes due to the fact that it cannot simultaneously seek to be normative and concrete. In distancing itself from international politics, under criticism of justifying state interests, law risks turning into utopianism; departing from natural morality, law seeks concreteness and thus falls into apologism. Thus, international law is ascertained as indeterminate in as much, unable to provide a consistent argument.

Koskenniemi’s thesis in relation to the dynamics of the structure of international legal argument provides a useful viewpoint to frame the recurrent argumentation on both sides of the debate on BRHR, reflecting contradictory interests. The voluntary adepts of the debate around BRHR favor concreteness over normativity i.e. by making reference to lack of formal provisions binding non-state actors under human rights law, while the mandatory proponents favor normativity over concreteness i.e. arguing for a shift in international legal theory to accommodate the view that human rights norms can be binding on private legal persons. A reiteration of his thesis is summarized in the following quote: “this indeterminacy exists because legal rules derive from structures of thought, the collective constructs of many minds that are fundamentally contradictory” (Gordon, 1984 quoted in Koskenniemi, 2007(2005)).

4.4 BRHR, a conception
Business responsibilities for human rights (BRHR) seem to be an oxymoron from a legal positivist point of view. BRHR are promoted at UN level as a non-binding standard for corporate conduct in relation to human rights issues, a standard defined as respect for human rights, which means that corporations are expected “not to infringe on the rights of others” (UNSRSG, 2008b, para.24). Nevertheless, the term is endowed with a legal quality to it. Critics point to the fact that it reflects merely a negative duty to respect, conceptualized as a third dimension complementing the positive duties to protect and promote (Sidoti, 2011; F. Wettstein, 2010a). Practitioners concur that Prof. Ruggie’s approach to BRHR entails a legally unenforceable duty under human rights law that is
different from state duties (Thomas, March 2011) and that has a proto law feature to it (Skadegård Thorsen, May 2011). Being neither legally binding, nor completely voluntary, BRHR detaches itself as an independent discourse from the more encompassing CSR.

However, for the purpose of this paper, BRHR will be used to depict both the definition presented in the UN Framework and the set of issues surrounding the emergence and conceptualization of corporate human rights responsibilities enabled by the CSR movement, as argued by legal scholars (K. Buhmann, 2007; Zerk, 2006). For the sake of clarity, legal obligations and duties entail a legally binding character, while the term responsibility will be utilized to convey a non-binding character, in accordance with the UN Framework (2008b). This section will make use of the CSR and law literature as source for depicting some of the main drivers - legal and non-legal - leading to the BRHR rhetoric employed in the *UN Protect, respect and remedy Framework* (UNSRSG, 2008b).

### 4.5 Complex structure of persuasion

#### 4.5.1 CSR, a conception

Due to lack of consensus concerning a definition of corporate responsibility, an array of terms and concepts are approached by practitioners (Øvlisen, May 2011; Stormer, May 2011) and literature (Aras & Crowther, 2008; Tencati & Perrini, 2006) instead, perhaps in order to distance themselves from a conception often perceived as a public relation tool used to polish the corporate image. Literature concurs that the variety of terms related to corporate responsibility are not essentially different (Zerk, 2006) and in as much as these concepts attempt to bring an argument to support the shift from profit maximization to alignment of business core processes and social issues, they share a common goal and other conceptualizations i.e. sustainability, corporate citizenship, triple bottom line etc. serve as interchangeable terms. Given that BRHR has emerged as a sub-set discussion of the wider CSR, this sub-section will make reference to literature discussing the legal nature of CSR drivers.

#### 4.5.2 Critique of CSR, looking for substance

Business literature suggest that CSR reporting and codes of conduct resemble more a discourse on good corporate governance rather than acting on good governance principles. Numerous critics of CSR point to what The Economist has termed “lipstick-on-a-pig image”\(^\text{23}\), symbolic of the fact that “governments, corporations, and their stakeholder critics take it seriously at rhetorical

\(^{23}\)http://www.economist.com/node/21017720
level” (Williams & Conley, 2005b, p.36) and “empirical investigation is casting doubt (...) on the conclusion that the CSR movement is actually succeeding” (p.37).

4.5.3 CSR legal and non-legal drivers

Notwithstanding, evaluating the interdisciplinary nature of CSR’s drivers, empirical studies (Shum & Yam, 2011) on corporate understanding of corporate social responsibility suggest that the tendency towards “stronger economic responsibility” or the shareholder model does not inherently dismiss the idea of going beyond the profit-making goal, which makes it relevant to look at some of the CSR drivers. As their research shows, acting on CSR basis is dependent on the interplay between ethical responsibility (i.e. compliance with the law) and law. Shum and Yam’s results (2011) are consistent in one aspect with the body of literature revealing a skeptical attitude towards CSR, and that is the fact that economic agents favoring the share value model “do not automatically exercise voluntary CSR activities that benefit the wider community” (p.560), and law seems to step in to drive reflection on the benefits of voluntary self-regulation. Moreover, their results point to a functional relationship between mandatory regulation and ethical behavior, which reinforce each other and both endorse CSR activities. Conceptualizing this relationship is important towards one’s understanding of the forces at play when it comes to corporate management’s decision-making process on corporate human rights responsibility.

4.5.4 Blurring lines: bottom-up development

CSR literature is abundant of various terms depicting collective assumptions of what is good and what is wrong behavior in society, and there is little or blurred dissociation in the literature between these various terms i.e. social values/norms, moral norms, ethical behaviour, societal expectations etc. There is however an accord among scholars and practitioners (Carroll, 2008; Shum & Yam, 2011; UNSRSG, 2008b) that the array of terms listed above act as drivers for corporate responsibility and BRHR, alongside the law. The question that arises then is what role does the law play in the orientation of these drivers.

4.5.4.1 Ethics, a definition

The online Merriam Webster Dictionary defines ethics as “dealing with what is good and bad and with moral duty and obligation”24. Literature draws from the social psychology definition of social norms as “rules for accepted and expected behavior” (Shum & Yam, 2011, p.555). Thus it seems reasonable to argue that ethical beliefs serve to join individuals sharing these norms into social groups, thus informing social normativity. A subsequent argument would be the fact that social norms are

24http://www.merriam-webster.com/dictionary/ethic
inherently subjective outside the supporting group, therefore not universally authoritative. This raises
the question of how does social normativity migrates from its medium into that of legal normativity.

**4.5.4.2 Delimitation between ethical and legal norms**
A classical, prescriptive delimitation between moral/ethical and legal norms resides in defining the
legal norm as “a right to claim the fulfillment of the norm”, whereas morality consists of “norms
which command without authorizing anybody to claim the deed commanded” (Ossowska, 1960,
p.251). In assessing this demarcation, Ossowska (1960) makes the argument that, due to the subjective
nature of the *claim*, dependent on one’s attitude or state of mind, it becomes increasingly difficult to
sustain an operational distinction between law and morals based on the definition above i.e. “*if the
existence of widely experienced claims is decisive for including the given norm in the class of legal
norms, among the really binding norms, practically nothing is left to morality*”(p.256).

One could concur with the observation that it is difficult to make a sharp distinction between the ways
moral and legal norms command behavior and shape perception of things. Nevertheless, observing the
interplay between the two can be equally valuable, as it facilitates understanding of the layers - in -
between that influence corporate behaviour i.e. international principles of CSR defined by UN Global
Compact act as soft law, exercising authority without coercion, as illustrated in corporate codes of
conduct or CSR policies.

Attempting to map a predictive behavior of compliance by distinguishing between ethics - as
imperative by choice or social group affiliation - and legal norms - as generally imperative - could be
one argument to support the validity of this task. However, as literature suggests (Michael, 2006),
legal norms do not necessarily lead to compliance i.e. corporate scandals did occur in a tightly
regulated environment, such as the astounding collapse of Lehman Brothers during the global financial
crisis in 2008. Additionally, corporations cannot refuse to face responsibility for externalities arguing
that specific regulation on the matter is lacking.

Some scholars suggest the validity of legal normativity lies in close connection with ethics, seen as
compliance with law, as Carroll’s oft-cited definition of CSR suggests (Carroll, 2008), and
management empirical research seems to endorse a similar conception (Shum & Yam, 2011). The
cognitive assessment of this relation is one element in the equation, and formal articulation into
international law is yet another element. The following will attempt to understand the process of
gradual accession from the realm of ethics and social normativity to that of international legal
normativity.
4.5.5 Social expectations and soft law
Social expectations are often cited in the work of the SRSG as both driver and assessor for corporate responsibilities towards human rights i.e. “the broader scope of the responsibility to respect is defined by social expectations”, where corporate performance is subjected to “the courts of public opinion comprising employees, communities, consumers, civil society as well as investors” (2008b, para.54) and yet there is no clear definition of the concept itself. Instead of a definition, Prof. Ruggie frames social expectations as relevant for soft law i.e. UN Global Compact, OECD Guidelines for Multinationals, where soft law “derives its normative force through recognition of social expectations by states and other key actors” (UNSRSG, 2007c, par.45). Arguably, one could assume social expectations from business enterprises are derivative from social normativity and presuppose a non-legal character. However, as seen earlier in this section, distinction seems to blur between what is required and what is expected due to social pressures that trigger a responsive behavior from corporations. In that sense, the interplay between social normativity and international legal normativity leads to various gradations between the legal and non-legal dichotomy.

Legal literature (Zerk, 2006) essentially defines soft law as bearing a voluntary feature, comprised of principles agreed between states or promulgated by other intergovernmental institutions, which are not mandated by law and therefore not binding, although still relevant i.e. Universal Declaration of Human Rights (1948) is one example of soft law, its provisions have entered hard law through International Covenant on Civil and Political Rights (1976) and International Covenant on Economic, Social and Cultural Rights (1976). In the area of corporate responsibility towards human rights, Buhmann (K. Buhmann, 2007, p.345) cites the UN Global Compact as a new form of soft law, outcome of the “privatization of law and legal regulation”.

4.5.5.1 Dynamics between formal and informal drivers for change
Framing social expectations as driver for BRHR in the context of soft regulation is not a new idea among legal scholars. Zerk (2006) and Buhmann (2006; 2007) discuss the merits of soft law in regulating issues pertaining to the CSR and BRHR concerns under the national or international policy agenda. There is agreement (K. Buhmann, 2007; UNSRSG, 2007c; Zerk, 2006) on the fact that soft law has proven highly useful for regulatory bodies - states and intergovernmental institutions - to give recognition to matters of concern for the social collective and regulators alike, that could however not have been appropriately addressed through hard law codification. Reasons range from lack of state will to implement necessary measures for change due to political disagreement, or simply the need to gain enough political support from the parties to be subjected to that regulation, prior to hardening into legal rules. In this sense, soft law can be proto law as well, defined by Buhmann (2007) as a previous stage in the process of becoming hard law i.e. UDHR.

BRHR is an eloquent example of an area where soft law has been used on several occasions i.e. long considered and referenced as the most widely used CSR instruments in the field of business and
human rights, OECD Guidelines for Multinationals have briefly referenced corporate responsibility to respect human rights (OECD, 2000, para. 2) until recently, and the International Labor Organization (ILO) Tripartite Declaration has long been accredited as the international bar for business behavior in relation to labor rights.

Despite the non-binding character of human rights norms in relation to corporations, social expectations draw on these internationally agreed principles to both hold corporations responsible for their negative impact on society and ask that corporations contribute to the fulfillment of human rights; corporations use these international instruments to gain inspiration in their self-regulative processes. In this sense, Buhmann defines CSR as informal law, arguing that “law that is not formally binding on corporations has an effect as if it were” (2007, p.349). CSR practices such as corporate codes and policies inform international soft law as well and the work of the SRSG stands as a perfect example; the UN Framework defining BRHR is an outcome of extensive research on, among other areas of interest, existing corporate human rights policies and codes of conduct. Literature exemplifies as well with other UN initiatives in the field of CSR and BRHR, such as the UN Global Compact, which have relied on existing corporate practices to elaborate the non-binding principles, informed by human rights normativity, such as the UDHR, that most corporations make reference to in their codes and policies related to human rights issues.

This reciprocal reflection is observed by business and human rights consultants as well. According to Thomas (March 2011), corporate “codes directly incorporate (international) norms, but there is always a process of translating those norms for companies”. Additionally, “codes also inform international norms”, exemplified in Prof. Ruggie’s Framework where business codes of conduct have been used as normative source for drafting BRHR standards. According to Thomas, it is not unlikely for the UN Framework to turn into binding regulation, provided there is political agreement, which illustrates more clearly the dynamics between the public legal sphere of human rights normativity and the private sphere endorsing and sometimes informing that normativity.

The present sub-section has attempted an understanding of the way international principles of human rights law contribute or bear the potential to contribute to influencing business behavior and perceptions- defined as unstructured set of assumptions- towards human rights. It seems that articulation on BRHR at international level constitutes a bottom-up development due to civil society pressure or social expectations, a development that continues to grow out of the interactions and exchanges between private and international actors.

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25 The 2011 edited version of the Guidelines includes a whole chapter on BRHR, derived from the principles laid out in the UN Framework (2008) and the Guiding Principles (2011) to the Framework, both approved unanimously by the UN Human Rights Council.
The following sub-section will look more closely to the political process behind the emergence of BRHR as defined in the latest regulatory initiative on business and human rights, the UN Framework (UNSRSG, 2008b) by discussing the outcome of a prior initiative proved to be influential on the SRSG’s regulatory approach.

4.6 Corporations and human rights law
There have been several initiatives taken by intergovernmental organizations aimed at addressing both the allegations of corporate human rights violations, stemming from increasing governance gaps in a globalized world (Ruggie, 2007), and the potential born by the business sector in assisting states on their efforts to support and promote enjoyment of human rights, in light of their economic resources and scope of influence. Those initiatives have been perceived as a transition from the private sphere of CSR to the international legal forum (Muchlinski, 2009a; Zerk, 2006), where principles of human rights law serve as normative source, albeit guiding, for corporate policies on CSR.

Welcomed as a necessary articulation of CSR principles, these initiatives have been and continue to be criticized in light of their volunteer character, regarded as inappropriate in tackling externalities in the area of human rights i.e. despite their declaratory commitments to human rights responsibilities following allegations of complicity to human rights violation (1995) and settled in courts (2009), Shell Nigeria continues to be reported on in light of its presupposed continued complicity in unlawful killing and torture of residents in the Nigerian Delta. Due to space limitations, this section will focus on UN based initiatives in the area of BRHR.

4.6.1 UN Global Compact and private self-regulation on CSR
Prior to the UN Framework (2008b), corporate responsibilities in the area of human rights have been articulated within the UN Global Compact initiative started in 2000, praised as “the largest corporate citizenship and sustainability initiative in the world” by the General Secretary Ban Ki-moon (UN, 2010, p.33). The framework comprises three soft law instruments and one that is binding on states (see Annex 2), and despite the UN’s reluctance towards CSR based discourse, the initiative has been indeed considered as such by legal scholars (K. Buhmann, 2007), who frame it as a soft law instrument.

26 http://businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/Sh elllawsuitreNigeria
29 The United Nations Convention Against Corruption.
It is perceived as an international endorsement of the triple bottom line concept often associated with the sustainability model in business (Elkington, 1997). The triple bottom line model has a three-dimensional postulate, namely, it supplements the economic sustainability principles with social and environmental sustainability principles. Human rights and stakeholder relations are often framed as the social sustainability dimension in corporate rhetoric (Stormer, May 2011). Global Compact claims to be a platform for knowledge sharing between corporations and other stakeholders and some scholars opinionate that it acts as a supplement to formal, binding regulation, while critics denounce its lack of focus on corporate accountability mechanisms (Nolan, 2010).

Nevertheless, the Global Compact principles act as soft law despite their voluntary, much criticized character in the sense that they regulate without necessarily exercising a regulative force. The case of the Danish head-quartered pharmaceutical company Novo Nordisk provides an argument in this sense; their Articles of Association, an expression of corporate purposes and modus operandi concerning business internal organization, reflects the triple bottom line paradigm: “The Company strives to conduct its activities in a financially, environmentally, and socially responsible way” (pg.3, par.2.1). One might interpret this inclusion of the sustainability model as embedding the social issue into core processes, an issue signaled as a necessary action in effectively implementing CSR (Williams & Conley, 2005b). As explained by the company’s representative, this contributes to removing investor pressures towards short-term profits (Stormer, March 2011).

4.6.2 The UN Norms project or the politics behind international law

The draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Draft UN Norms), proposed by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003, has been the most controversial regulatory initiative taken at the UN level and at the same time the main point of departure for the unanimously adopted UN Framework (2008) proposed by the former SRSG Prof. Ruggie (Kinley, Nolan, & Zerial, 2009).

Referencing the oft-cited preamble of the Universal Declaration of Human Rights which allegedly implies human rights responsibilities for “every organ of the society”, the UN Norms were viewed as a formal instrument of business regulation through principles of human rights law, normally incumbent on states (Ruggie, 2011). The draft UN Norms document did not clarify the formulation

30 http://www.unglobalcompact.org/AboutTheGC/index.html
33 The binding character of the Norms were justified by the use of internationally ratified norms (UDHR norms ratified in ICESC and ICCPR) (Muchlinski, 2003 citing Weissbrodt).
chosen\textsuperscript{34}, which led to various speculations in the literature. The SRSG (2007; 2006a; 2006b) commented that it could not be distinguished between corporate obligations and state duties towards human rights, which was interpreted as an unfounded claim for corporate duties under international law. The treaty like language used in the draft and the title itself were suggestive of that, as stressed by Prof. Ruggie.

Legal scholars in favor of the draft Norms viewed the proposal as an attempt to supplement state duties in the area of human rights (Kinley & Tadaki, 2004; Kinley et al., 2009; Kinley & Chambers, 2009; Muchlinski, 2009a; Muchlinski, 2009b). They defended the draft by arguing that the Norms were giving proper recognition to state prerogatives under human rights law, therefore they were not trivializing the legal institution formally acknowledged in the area of human rights norms, namely human rights treaty signatories. However, their argumentation is not clear concerning their support towards the draft Norms as a document instilling corporate human rights duties, similar to states’ human rights obligations.

A probable explanation could be that international law is understood as both a set of rules and procedures for enforcement; according to Zerk (2006), law is not dependent on its enforcement to be acknowledged as such. Rising demands for corporate accountability within the CSR movement for alleged corporate negative impacts on human rights have been mirrored in the legal sphere as an attempt to argue that businesses have duties under human rights law, despite the lack of enforcement procedures (Clapham, 2006; Dickerson, 2009). Hence, they argue businesses could incur human rights duties in a different manner than national governments do, pursuant to the current international legal model.

\textbf{4.6.3 The debate}

The confusion stemming from the Norms’ formulation spurred a public exchange of opinions between international business representatives, opposing what they perceived to be an attempt to privatize human rights norms by creating international obligations for businesses, and human rights activists supporting the draft document as a formal recognition of corporate accountability.

\textsuperscript{34}“States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.” (emphasis added)(UN, 2003, para.1).
International Chamber of Commerce (ICC) and International Organization of Employers (IOE) argued forcibly against the Norms by denouncing their attempt to impose international obligations “that do not exist at the national level and do not apply to domestic companies”\(^{35}\), a conception that is compatible with the current model of international law described earlier in this section. ICC and IOE’s joint argumentation against the Norms as well as the Confederation of British Industry’s opinion focused on states’ obligations to uphold human rights norms by employing a “more effective enforcement (...) of existing international human rights obligations through domestic legislation”\(^{36}\). States rallied in support of non-binding regulation for businesses, which the USA representative coined as an “anti-business agenda” (Kinley & Chambers, 2009). Amnesty International defended the draft Norms by asserting they do not incur binding obligations on businesses. In their view the Norms were “more than voluntary”\(^{37}\) compared to other intergovernmental initiatives, such as the OECD Guidelines for MNEs and the ILO Tripartite Declaration, which in their view did not “diminish the prevailing public distrust of companies or that profit is put before principles”\(^{38}\). Activists found the Norms to be valid in as much as these reflected social expectations concerning what it means to “operate responsibly and profitably”\(^{39}\).

The UN Commission of Human Rights opinionated in its Resolution 2004/116 that the Norms have no legal standing and many interpreted this as the demise of the project. Legal scholars (Kinley et al., 2009; Kinley & Chambers, 2009) attributed the demise to the open conflict between increasingly influential actors on the international stage, namely MNEs and NGOs. Building on this argument, the SRSG (Ruggie, 2007; UNSRSG, 2006b) denounced the utility of the UN Norms in shaping his focus on conceptualizing standards for corporate human rights responsibilities. However, the Norms had far reaching influence, as it kept the discussion of corporate responsibilities for human rights, informed by international principles, ongoing.

The lack of success in reaching consensus among the stakeholders debating on the issue of corporations and human rights led to the creation of the SRSG’s mandate in 2005, appointed, among others, “to move beyond the stalemate” (UNSRSG, 2006b, para. 55) created by the Norms project and gain approval from all major parties involved in the process of setting human rights standards.


\(^{37}\)Idem

\(^{38}\)Idem

\(^{39}\)Idem
applicable to corporations worldwide\textsuperscript{40}, which later crystallized into the UN Framework as guidelines to instill corporate respect for human rights.

The novelty brought by the UN Norms was twofold: on one hand, compared to previous intergovernmental initiatives in the field of business and human rights, the UN Norms specifically addressed all business enterprises and not just MNEs, indicating a shift in discourse from corporate responsibilities under the voluntary paradigm towards corporate accountability under the instrumental view of international normativity. On the other hand, the draft Norms ignited a debate on effective ways to address the business and human rights agenda, by either employing regulation i.e. direct or indirect, through domestic regulation, or endorsing the voluntary, perceived as not mandated by law discourse on corporate responsibility, compatible with the current model of international law.

4.6.3.1 Businesses’ paradigm on responsibility for human rights

Corporate world’s answer to UN Norms project has been somewhat uniform due to the stark, joint intervention of the international business representatives, as discussed earlier in this section. This could be suggestive of the fact that their strong lobbying against a shift in international law reflects the compatibility between the statist model of international law and the shareholder value model in corporate governance, usually less prone to formal regulation.

Business Leaders Initiative on Human Rights (BLIHR) on the other hand, comprising few multinational enterprises from around the world\textsuperscript{41} and present at the talks alongside ICC and IOE, set to road test the principles enunciated in the draft UN Norms on a voluntary basis. BLIHR’s recognition of the project’s value has been perceived by scholars (Kinley et al., 2009) as a business minority stakeholder during the consultative process, whose opinion on the matter diverged from that of the major business representatives. Their stance on the UN Norms project could be explained through their explicit commitment to human rights normativity, articulated in their official endorsements of the UN Global Compact principles informed by human rights, labor rights, environmental principles and anti-corruption standards.

Novo Nordisk, one of the members of the BLIHR, has been articulating for years a social sustainability model based on a joint stakeholder-human rights approach, consistent with its stakeholder focused corporate culture (Øvlisen, May 2011; Stormer, May 2011) and with its commitment to Global Compact’s human rights principles since 2001. Moreover, Novo Nordisk

\textsuperscript{40}“(...) in the SRSG’s view the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights”\textsuperscript{(UNSRSG, 2006b, par. 69).}

\textsuperscript{41}http://www.blihr.org/
claims its initiatives in the field of CSR “have long been informed and guided by international human rights standards”\textsuperscript{42}, such as those in the UDHR.

One could argue, based on the assumptions above, that international legal normativity serves to inform corporations’ rhetoric on their commitment to CSR that becomes a standard bar against which their stakeholders hold them accountable, and by voluntarily acting on their commitment, corporations seem to both endorse and inform international principles of CSR through codes of conduct, an empirical instance both scholars (K. Buhmann, 2007) and practitioners (Thomas, March 2011) have noticed. In this sense, there seems to be a reciprocal feedback between the private and international legal sphere, duly noted by Dickerson (2009), but which is also determined by the dynamics between the political and legal spheres and not only by a development within the human rights medium towards empowering the weak collectives. By willingly adopting the Global Reporting Initiative (GRI) standards of non-financial reporting, which are publicly endorsed by the UN Global Compact and by the Danish government\textsuperscript{43}, Novo Nordisk seems to be responsive to demands of accountability, demands that are not legally enforceable on them but are nevertheless expected. Thus, sequenced volitional action leads to a publicly mandated behavior that is no longer purely voluntary.

Buhmann (2006; 2007) assesses this dynamic - originated as bottom-up - between the political crystallization of social expectations as CSR behaviour and international principles of law by arguing that CSR acts as informal law, defined as “normative ideas and patterns of behavior and action that are not based on a sharp distinction between law and morals, or between law and fact”\textsuperscript{(2007, p.348)} but which nevertheless determine corporations and stakeholders to act as if it were binding. Novo Nordisk’s social sustainability model is not representative for the business community. It is illustrative however of the fact that managerial perceptions in the area of corporate responsibility do not always converge, which could explain the need to act in the area of BRHR based on a commonly agreed set of principles. SRSG’s approach on BRHR is indicative in this matter.

4.6.3.2 UN’s approach on corporate responsibility for human rights

Theory (K. Buhmann, 2007; K. Buhmann, 2009) suggests UN’s recognized authority in the field of BRHR regulation resides in its duty to promote and encourage respect of human rights, in accordance with articles 1(3) and 55\textsuperscript{44} of the UN Charter. There are various arguments supporting UN’s authority in this field, ranging from being pertinent to the inherent character of BRHR, informed by international principles of law, to substituting or complementing states’ efforts in providing guidance in an unregulated area. In commenting on UN’s response towards the draft Norms project, this sub-

\textsuperscript{42}http://www.novonordisk.com/sustainability/positions/human_rights.asp

\textsuperscript{43}http://www.eogs.dk/graphics/Samfundsansvar.dk/Dokumenter/Proposal_Report_On_Social_Resp.pdf

\textsuperscript{44}http://www.un.org/en/documents/charter/
section will make use of legal theory of institutional law-making processes and of social science investigating drivers of institutional behavior.

Legal theory (K. Buhmann, 2009; 2011) suggests UN’s initiatives in the area of CSR i.e. Global Compact, UN Framework, are consistent with the reflexive law model, a paradigm which she opinionates it challenges the view of law as a repository of rules only and brings into discussion law as “a theory and a method of institutionalization of norms of conduct” (2011, p.8). Buhmann defines the law-making process at UN level as “a participative approach to the creating of norms for businesses on human rights, drawing on public-private cooperation” (K. Buhmann, 2009, p.17), which stands as a prevailing feature of the reflexive law model. The SRSG seems to concur with this view, by referencing a legal perspective incurring a participatory status for non-state actors under international law, wherein private legal persons such as corporations are able to carry some rights and duties, consistent with a voluntary approach to BRHR (Higgins, 1993 cited in Ruggie, 2007). The argument of political conflict (Kinley et al., 2009) as source for the demise of the project stands relevant for investigation of power disparities within the multi-stakeholder, consultative discussions at UN level. This is illustrated in light of the opposite reactions both business representatives and NGOs incurred with the UN Framework project, where the former welcomed Prof. Ruggie’s emphasis on state duty to protect and the latter manifested public dissatisfaction with lack of clearer specifications on the operationalization of the state duty to protect, criticized for not being “a statement of law”.

Buhmann (K. Buhmann, 2009) argues for the applicability of reflexive law-making methods in the area of BRHR as providing, on one hand, the medium needed to facilitate actors’ participation and thus their consent on the norms agreed at the round table, which is assumed to be more effective in ensuring democratic participation and commitment to the new norms. On the other hand, reflexive law-making methods render the subjects to regulation to a self-reflective assessment on the issues imputed to them, which is supposed to be followed by the internalization of those issues through self-regulation rather than through domestic regulation i.e. corporate codes of conduct reflect international principles of CSR and BRHR.

Reflexive law method seems to be an appropriate answer to BRHR given the incongruities surrounding the issue of private legal obligations under human rights law. Social science theory, however, poses some challenges to this law-making model. Empirical studies on global governance organizations (Koppell, 2008) challenge the simultaneous maintenance of authority (acceptance of

46http://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf;
http://www.ft.com/intl/cms/s/0/36f72370-2226-11e0-b91a-00144feab49a.html#axzz1c5RMhJrk
power) and legitimacy (submission to rules) within global governance organization (GGOs). The supportive argument is that, in lack of coercive tools and having to respond to heterogeneous demands coming from multiple, different communities, global organizations such as UN need to juggle with authority and legitimacy independently, sacrificing one in the interest of the other and vice versa.

In this sense, voiced opinions on the UN Norms stand illustrative of the argument above: the former Commission for Human Rights practically dismissed the project in light of the highly politicized debate determined by conflicting opinions, where the louder voices came from governmental and business representative official statements, lobbying against “anti-business agenda” (Kinley & Chambers, 2009, p.448). In this sense, literature (Koppell, 2008) comments on the fragile balance global organizations need to ensure given their lack of enforcement powers, which would require sacrificing legitimacy in the interest of authority, given the stark manifestation of various agendas they need to be responsive too i.e. “GGOs also serve a community of interests groups (including profit-seeking companies) that are deeply affected by the rules, standards, and regulations generated”, groups that “have owners and/or members with political influence scattered around the globe”(p.201).

Power disparities within the heterogeneous community of global organizations do not necessarily imply that they lack their own agenda. Barnett and Finnemore (1999) apply a constructivist approach to international organizations in order to explain their unpredictable behavior. According to institutional theory, the principal-agent model employed by the economic school, wherein organizations are conveyed as agents fulfilling their functions dependent of states’ interests, cannot explain these patterns of behaviour. Building on the argument that international organizations integrate features of their cultural environment reflecting contradictory behavior, they propose that international organizations (IOs) be viewed as endowed with power independently of their agency towards state i.e. promoting BRHR. Additionally, it seems that IOs follow their own agenda, which they need to balance against serving multiple agencies, exemplified in Koppell’s (2008) argument of heterogeneous communities of interests.

4.6.3.3 Civil society's approach on corporate responsibilities for human rights
The draft UN Norms project has received open displayed support from international human rights NGOs due to their “more than voluntary” character, as the Amnesty International representative argued. It is obvious from this argument that the rhetoric of business and human rights employed by the civil society has gradually moved from the realm of corporate responsibility to the area of corporate accountability under human rights law, where the latter spurred a heated debate on ways to crystallize that accountability by reference to international legal obligations. Due to the statist view

model of international law, it is difficult to make the argument of corporate human rights obligations or duties without facing criticism mounting to attempt to disrupt the model of the international legal system, as was the case with the businesses’ critique of the project.

The move in civil society’s discourse from corporate responsibility, understood as voluntary, towards corporate accountability, comprising forceful human rights normativity seems to be mirrored in lawyers’ discourse as well. The legal community seeks to accommodate private subjectivity to human rights law by arguing for a shift in the paradigm of human rights “from the realms of rhetoric and ideology into the sphere of daily reality and social progress” (Clapham, 2006, p.35), wherein BRHR would surpass the boundary of mere volitional action by transcending the private sphere into that of international norms. This transcendence is translated as a radical shift towards corporate direct obligations under human rights law or conversion to corporate indirect duties, applicable through domestic regulation. The latter is less controversial, in as much as it admits the traditional statist view in international law; however, it poses some challenges as not all governments are signatories of the International Bill of Human Rights, comprising the UDHR, ICCPR and ICSEC i.e. China has not signed the ICCPR and USA is not signatory to the ICSEC. Moreover, the issue of extraterritoriality - governing at home and abroad - has not yet been resolved.

4.6.3.4 The functional argument
Legal theorists suggest that there are no clearly stated provisions under international law that would impede articulation of corporate accountability for human rights, rather, there are political barriers raised by states’ refusal to enforce these liabilities. Building on this argument, academia (Clapham, 2006; Stephens, 2009) argues that lack of enforcement mechanisms does not preclude the existence of legal duties in cases of corporate violation of human rights normativity.

Clapham (2006) makes a notable contribution to this literature, questioning face-value assumptions about the validity of private normativity under human right law. Based on his argumentation, non-state actors enjoy sufficient legal personality so as to bear some rights and obligations, as reflected in the International Court of Justice’s commentaries on international rights and duties: “the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community” (ICJ Reports, 1949 cited in ICHRP, 2002, p.75). Clapham emphasizes the difference between state duties and corporate duties under human rights law and argues pragmatically for a development in human rights law where “human rights are entitlements enjoyed by anyone to be respected by everyone” (2006, p.58).
4.7 Concluding remarks

Sub-research question: Why and how do corporations seemingly comply with human rights norms and how does international legal theory influence this?

Although the business and human rights spheres continue to be perceived as separate and incompatible, civil society’s lobbying for increased business accountability for their alleged negative impacts for human rights, coupled with a shift in the legal literature towards private international normativity contribute to blurring this demarcation. Interests within the business and human rights agenda are diverging however, and the legal argument is utilized to defend a political position on the matter of BRHR, since international legal theory emphasizes the fact that international law is essentially about making an argument and not resuming a conflicting discussion. There are multiple actors involved in defining corporate human rights responsibilities and these definitions are conflicting, depending on each actor’s agenda. There are external pressures manifested at UN level to harden regulation on BRHR; thus, this conception no longer is framed under the voluntary paradigm of CSR from which it originated, rather, it bears a dual legal and non-legal pedigree, being however neither voluntary nor binding on corporations.

To some extent this section has argued that corporate governance models outlined in the previous section seem to have an influential role on corporate perceptions of their human rights responsibilities and on their behaviour, as observed in relation to the process of multi-stakeholder assessment of the UN Norms. Given the fact that the UN forum does not dispose of coercive methods, one could arguably conclude that power disparities during the multi-stakeholder consultations process on BRHR could offer an advantage to corporate lobbying against binding regulation. However, it does not preclude the intergovernmental organization from shifting the business and human rights agenda towards a conception no longer submitted to the will of corporations alone. Which leads to the more cautious conclusion that, despite or in spite of absence of binding regulation on BRHR, corporations need to be responsive to a hybrid coalition i.e. UN soft law initiatives and NGOs’ scrutiny, that render BRHR less voluntary as businesses would presume.
5 BRHR AND POLICY-MAKING

“For many companies, human rights are something new on their radar screen (...) until human rights standards become part of their DNA, they may need advice and guidance on how to understand human rights in practice.”

(UN SRSG Prof. John Ruggie)

As shown in the previous section, the polarization on the legal nature of BRHR at UN level has reflected conflicting demands of heterogeneous private actors rising on the international stage of politics i.e. corporations representatives and international human rights NGOs, to be mediated at UN forum through consensus based methods i.e. reflexive law-making. In light of the latest developments in international guidelines on BRHR - the UN Framework (UNSRSG, 2008b) complemented by the Guiding Principles (UNSRSG, 2011c) - the balance was tipped towards a BRHR approach that seems to evade the strict dichotomy of the voluntary vs. mandatory debate, by embracing lesser responsibilities for corporations, as evaluated by legal theorists (K. Buhmann et al., 2011).

Prof. Ruggie has thus managed to shift the discourse on BRHR from focusing on corporate responsibilities bearing a legal pedigree under human rights law to one embracing the state duty to protect against corporate human rights violations. UN’s internationally agreed principle on BRHR has thus spurred emphasis on corporate regulation under domestic jurisdiction.

The present section attempts to punctuate some issues found relevant for reflection on the possible implications of this approach to BRHR. Additionally, examples of corporate law on social and human rights normativity will be approached as departure for a brief analysis of the applicability of Prof. Ruggie’s international guidelines on state duty to protect with respect to non-financial reporting.

5.1 International political agreement on BRHR

The latest intergovernmental soft regulatory initiative in the area of corporate responsibility has been the Protect, respect and remedy: a Framework for Business and Human Rights (2008b). This guiding framework was proposed by Prof. Ruggie at the earlier recommendation of the UN High Commissioner for Human Rights to come up with “best practices of States and transnational corporations and other business enterprises” (OHCHR, 2005, para.1) in relation to human rights, subsequent to the conflicting discussions on UN Norms.

Standing on three pillars - state duty to protect against human rights abuse from third parties, corporate responsibility to respect human rights and access to remedies - the Framework entails “differentiated but complementary responsibilities” (UNSRSG, 2008b, para.9) in the area of human rights. The Guiding Principles (UNSRSG, 2011c) have been issued in the second half of the SRSG’ mandate in

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48http://www.ohchr.org/EN/NewsEvents/Pages/10thNHRIConference.aspx
order to operationalize the pillars described in the Framework. The unanimous endorsement by the UN Human Rights Council in June 2011\(^\text{49}\) of the Guiding Principles, “on which further progress can be made”\(^\text{50}\) (para.4), has been unprecedented, which led the SRSG Ruggie to assess it as “the authoritative global reference point for business and human rights”\(^\text{51}\). However, both the Framework and the Guiding Principles are non-binding, including for states. Due to space limitations, this section will focus on the first two pillars in the Framework and few corresponding principles for operationalization of the state duty to protect human rights.

5.1.1 Pillar 1- state duty to protect
Justification for emphasis on states’ duty to protect against human rights abuses committed by private actors seems to be one aligning international regulation on BRHR to the positivist model of international law, wherein “the human rights regime rests upon the bedrock role of States”, as argued in the Framework (UNSRSG, 2008b, para.50). This view has been reinforced by UN Resolution 17/4 endorsing the SRSG’s work, whose preamble reflects to a great degree the positivist model of international law: “the obligation and primary responsibility to promote and protect human rights and fundamental freedoms lies with the State”.

It is worth noting, in light of discussions in Section 4 of this paper, that Prof. Ruggie’s stance on the project has been a realist one. His approach has been mandated under UN Resolution 2005/69 (see Annex 3) as one to identify international standards for responsibility and accountability for corporate acts (UN, 2005). Thus, his “evidence –based” mandate (UNSRSG, 2006b, para.81) has been influential on his research approach as well, conceptualized as one of principled pragmatism.

Defined as a “commitment to the principle of strengthening the promotion and protection of human rights as it relates with business, coupled with a pragmatic attachment to what works best in creating change” (UNSRSG, 2006, para.81), the principled pragmatism approach could tentatively be identified under international law theory with the Koskenniemian ascending pattern of justification, in his search to rely on the status quo of international law in order to reach multi-stakeholder consensus on new regulation on BRHR.

5.1.2 Pillar 2- corporate responsibility to respect
It seems emergent from Prof. Ruggie’s definition on BRHR that there is international political agreement on dividing the business and human rights agenda between pressing issues that need to be submitted to domestic regulation - documented corporate violations of human rights, reflected in the


SRSG’s work (UNSRSG, 2008c) - and issues that continue to be viewed as voluntary, wherein businesses are expected to contribute to the enjoyment of human rights “because that’s the benefit that comes out for society”, according to Skadegård Thorsen, consultant on BRHR.

According to the UN Framework, the baseline corporate responsibility is “not to infringe on the rights of others- put simply, to do no harm” (UNSRSG, 2008b, para.24). Legal compliance with this “minimum criteria” (Skadegård Thorsen, May 2011) on BRHR is passed to state regulation while a broader conception of CSR “is defined by social expectations” (UNSRSG, 2008bpara.54) and is subjected to the “courts of public opinion” (para.54). Thus it falls on national governments to ensure compliance through domestic regulation in the area of BRHR criteria. Consequently, the discourse on BRHR has shifted to one centered on the operationalization of states’ duty to protect human rights against corporate infringements on human rights (K. Buhmann et al., 2011).

5.2 Readjusting the polarization on BRHR

5.2.1 The political conflict

The UN Framework and the GPs promote a set of non-binding standards for defining and applying corporate responsibility to respect and corporate duty to protect human rights. The voluntary vs. mandatory dichotomy in conceptualizing BRHR seems to have persisted however, given the open conflict between the SRSG and the human rights NGOs.

In regards to the emergence of the Guiding Principles (GPs), it has been expected among NGO activists that it would be the next step forward in the process of accommodating formal regulation on BRHR at domestic level i.e. corporate law. The draft GPs allegedly failed their expectation to formally endorse state duty to protect human rights on several grounds.

According to a joint civil society statement, the draft GPs submitted for public consultation was not “a statement of the law”, in fact it seemed to be “more regressive (...) than authoritative interpretations of international human rights law and current practices”. With reference to the formulation of the GPs, criticism pointed to insufficient guidance provided for states to exercise “the legal obligation (...) to take action to prevent abuses by their companies overseas”. The SRSG’s defense utilized the pragmatic argument reflected in his approach towards political consent, arguing that, compared to UN Norms project, his proposal “enjoys broad support from governments, business associations, individual companies, as well as a wide array of civil society and workers’ organizations”. It seems that the legal argument on BRHR - lack of specific human rights provisions for non-state actors - is supported politically, due to the fact key players such as states agree on the SRSG’s proposal as compatible with the current statist based model in international law.

52 http://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf (Jan.2011);
http://www.ft.com/intl/cms/s/0/36f72370-2226-11e0-b91a-00144feab49a.html#axzz1c5RMhJrk
5.2.2 Perspectives on the readjustment process
As discussed in the previous section, the process of transit form the realm of social normativity to that of international legal normativity is highly dynamic and complex, influenced by international politics that no longer seem restricted to private actors, who now qualify as participants in the law-making process, as theory observes (K. Buhmann, 2007). Categorizations blur as qualities change, and so appears to be the case of BRHR defined by UN.

The unanimous endorsement of the Framework and of the GPs by the Human Rights Council, comprising state representatives, where pillar one is grounded in international law, and the lack of enforcement mechanisms specified in the guidelines seem to be suggestive of a soft law status for Prof. Ruggie’s work on BRHR. This quality endows the work of the SRSG with a non-strict character that allows for new interpretations on issues not yet accommodated under international law, such as the issue of extraterritoriality attached to the state duty to protect. Moreover, the Framework and the GPs appear to migrate to other fora of soft regulation, such as the OECD Guidelines on MNEs that have revised their CSR standards by endorsing UN’s definition and guidance on corporate responsibility to respect. International Standard Organization (ISO) is another forum that has embraced Prof. Ruggie’s perspective by redefining ISO 26000 on CSR according to UN’s definition.

This migration towards both public and private international standard institutions, pertinent to international corporate world, indicate a propensity for readjustment the BRHR discourse outside the voluntary v. mandatory dichotomy towards a hybrid medium of regulation; literature observes that the UN Global Compact can be a form of hybrid law, being informed by human rights norms and promoting private self-regulation on BRHR and CSR (Buhmann, 2011). The present thesis extrapolates on the concept of hybrid regulation arguing that international coalitions of both public and private international organizations sharing the goal to define and supervise BRHR for corporations.

BRHR consultants refer to this process in relation to the proto-law quality the Framework and the GPs seem to demonstrate. Sune Skadegård Thorsen (May 2011) asserts that the Framework “will evolve over the coming of two or three decades to international binding law” due to civil society pressures. In his view, the actual form of UN’s approach on BRHR is part of a gradual transition towards binding regulation on BRHR through domestic legislation, a process entailing “various jurisdictions that will take these guidelines and transform them into corporate governance requirements and then binding law for any corporation that works in their jurisdiction”. Thomas (March 2011) reiterates on this proto-law quality by arguing that the newly appointed Working Group was meant to “continue
exploring the legal issues, which could mean there is room for drafting a convention”. Moreover, the UN Resolution 17/4 endorsing the SRSG’s work seems not to dismiss this quality.

5.3 Modes of regulation on BRHR

Prof. Ruggie’s (2007) justification in going beyond compliance in his approach to BRHR, as opposed to NGOs’ view on the matter, resides in the recognition of non-legal factors influencing corporate behavior. In his article, Ruggie (2007) argues that there are various modalities to alter corporate behavior and a balanced interplay between international legal normativity and “moral, social and economic rationale” could better address the business and human rights agenda by strengthening “governance capacity in the face of enormously complex and ever-changing forces of globalization” (Ruggie, 2007, p.840). His view is congruent with the enforcement mechanisms suggested in the Framework and Guiding Principles, namely a concerted supervision of both stakeholders and policy-makers.

The SRSG’s approach could be suggestive towards an international recognition of and reliance on modes of regulation that do not necessarily exert formal authority but nevertheless contribute to regulating corporate behavior in the area of CSR i.e. international standard setting bodies such as the newly-revised OECD Guidelines for MNEs (2011) dedicating an entire chapter on corporate human rights responsibilities consistent with the SRSG’s Framework and GPs, the redefinition of ISO26000 standard on CSR and of International Finance Corporation’s sustainability policies in accordance with the Framework’s second pillar are few examples. Increasingly, the international community of businesses, policy-makers and civil society are relying on informal international standards, such as the UN endorsed Principles for Responsible Investment linking the bottom lines to social and environmental concerns, the Global Reporting Initiative promoting integrated reporting (combining financial and non-financial reporting) and the UN Global Compact principles promoting sustainable development by employing the triple bottom line paradigm for businesses.

The informal modes of regulation in the area of business and human rights listed above can become hybrid modes of regulation when linked to either international legal norms as is the case of UN Global Compact principles that are inspired from international hard and soft law instruments, or national

54 “[The Human Rights Council] recognizes the role of the Guiding Principles for the implementation of the Framework, on which further progress can be made (...) without foreclosing any long-term development, including further enhancement of standards.” (UN, 2011, para.4)
55 http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1_1_00.html
56 http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_disc overing_iso26000.htm
57 http://www.ifc.org/ifcext/sustainability.nsf/Content/Publications_Handbook_HRIA
58 http://www.unpri.org/principles/
regulation as is the case of those jurisdictions imposing a legal obligation on businesses to report on non-financial matters that could affect the well-being of the enterprise. The amendment of the Danish Financial Statements Act is a case in point.

5.3.1 BRHR reporting and corporate law
Building on the argument that “governments can support and strengthen market pressures on companies to respect rights” by employing human rights reporting policies (UNSRSG, 2008b, para.30), the Guiding Principles further develop the idea of state regulation on the issue of business and human rights. Foundational principle 2 and commentary list state regulation on corporate human rights reporting as one alternative with extraterritorial implications - expectation that the parent company would account for its subsidiaries - available to governments in order to discharge of their duty to protect (see Annex4).

The issue of extraterritoriality - regulation extended outside one’s jurisdiction - is particularly relevant to the conceptual design of state duty to protect in light of the governance gaps identified by the SRSG as main source for human rights violations through business activities. Not all states have endorsed the human right conventions, which could pose a significant problem for a company’s subsidiaries working in a legal environment void of specific requirements or lacking political will to enforce human rights principles under their jurisdiction. Operational principle 3(a-d) and commentary reinforces this view by addressing states’ prerogative in issuing laws and policies conducive to a behavior consistent with the corporate responsibility to respect human rights throughout their operations (see Annex 5).

Corporate non-financial reporting has long been considered to be voluntary in nature and only recently has the practice of integrated reporting been embraced by some companies as evidence of their commitment to CSR/sustainability issues (Morsing & Oswald, 2006). The UN Global Compact principles, reflecting internationally human rights recognized norms such as UDHR, have been referenced by most companies reporting on CSR and human rights. However, the practice of CSR and human rights reporting has been scarce i.e. only 291 corporations are known at this moment to employ self-regulation procedures with regard to human rights issues⁶⁰, and criticized by civil society as lacking a clearly articulated assessment of corporate actions aimed at minimizing their negative impact on human rights. Moreover, NGOs have criticized lack of specific requirements under corporate law to ensure corporations report on concrete actions to discharge of their social responsibility.

5.3.1.1 Provision 417 UK Companies Act
Such is the case of provision 417 (see Annex 6) under UK Companies Act, meant at forcing businesses to report on implementation of s.172 (duty to promote the success of the company by

⁶⁰http://business-humanrights.org/Documents/Policies
having regard to stakeholders’ interests). CSR focused NGOs have drawn attention on the lax formulation of the provision as defying its own purpose: thus, the UK based companies are required to report on, among other, social issues “to the extent necessary for an understanding of the development, performance or position of the company’s business” (s.417 (5)). One could argue then that Directors are being given the task to decide the materiality of this threshold, which can only trigger mistrust regarding the quality of information contained in these reports. This illustration is consistent with an inter-regional study mandated by the SRSG on corporate law which contends that generally there lacks a clear guidance for corporations on how to establish that materiality as it is in the case of financial reporting (UNSRSG, 2011a). In other words, corporate law could become the instrument for change given the will of states to do so.

5.3.2 Governmentality and state duty to protect
As seen in section 3 of this paper, states seem reluctant to use hard regulation on issues pertaining to non-financial matters and not only; in cases where corporate law touches upon such issues, requirements are minimal and seem to reflect a propensity towards allowing for corporate management’s discretion on decision-making i.e. section 172 in UK Companies Act discussed in section 3. Relying on states’ will to reform corporate non-financial reporting on human rights, as the GPs seem to suggest, could become problematic since it leaves room for state discretion, as observed by human rights NGOs who criticized the non-legal language of the GPs.

5.3.2.1 Neo-liberal practices of governance
International relations theory (Higgins & Hallström, 2007) frames this voluntary vs. mandatory debate, or lack of state will towards hard regulation as a neo-liberal political rationality model currently in use, that defines government as practice rather than as institution tasked to govern. Development in political theory and government practice softens the traditional distinction between the governor and the governed, allowing dissemination of modes of self-regulation throughout the private sphere. According to theory, dispersion of standards of international private origins, i.e. ISO 26000, or soft regulation is integral part of the governance practice in modern society and it often complements hard regulation.

Under the neo-liberal paradigm, states’ retreat from hard regulation to soft regulation or standards translates as participatory practices of government - termed as governmentality - wherein the free-decision of the governed is utilized as a governance technology to be converted to modes of self-regulation i.e. corporate codes of conduct on human rights responsibilities reference UDHR and the Global Compact principles of human rights, considered soft law. In Higgins and Hallstrom’s (2007) example, the rise of epistemic communities such as businesses influences governance patterns; this allows for public-private partnership wherein the latter engage in self-regulatory practices on a

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voluntary basis. Thus, under the neo-liberal political model, governments rule without actually governing, a practice which seems to depart from the command-and-control mode of regulation. In other words, hard regulation is not viewed as the only governance technology in use; rather it coexists in a finely tuned balance with non-binding regulation, through private actors’ acceptance which leads to internalization of non-formal standards.

Building on this argument, theorists further enunciate on the implications of these governance practices; given the lesser focus on binding regulation, governments become dependent on incorporating private international standards, reflecting knowledge and expertise which governments lack i.e. UN-backed PRI are issued by a private international standards-setting organization and are endorsed by Denmark’s government as one option for companies to discharge of their duty to report on non-financial performance.

The shadings between standards as voluntary and rules as mandatory become more apparent in the case of formal endorsement of these standards, which become “grey letter law” (Higgins & Hallström, 2007, p.693). The process becomes more interesting when criticizing lack of formal regulation sometimes leads to both private i.e. civil society, and public endorsement of soft law instead.

The analogy used in Higgins and Hallström’s (2007) article on private international standards as hybrid mode of regulation will be transposed to our discussion on how to discharge of the state duty to protect and the value of existing intergovernmental initiatives on BRHR such as the UN Global Compact. Denmark’s corporate law reform on non-financial reporting will be approached to discuss some of the implications of the soft character of GPs in light of the neo-liberal political model considered to be descriptive of state practice.

5.3.3 Application of the state duty to protect

5.3.3.1 Denmark’s Amendment 99 to Financial Statements Act

Denmark’s reform of corporate law reporting stands as an illustrative option on what governments can do to discharge of their duty to protect in accordance with the GPs. Amendment 99 to Danish Financial Statements Act (2008), effective from 2009, is part of Denmark’s Action Plan on Social Responsibility. The Amendment requires all large Danish businesses to report on social responsibility, roughly defined as corporate voluntary actions with a view to human rights, social, environmental and climate issues as well as anti-corruption, on a comply or explain basis (see Annex 7). The requirement is three-dimensional, asking businesses to provide information on CSR, state how those policies could translate into action and report on CSR achievements. The amendment has an extraterritorial quality to it (see Annex 8), in as much as it requires parent companies to report on behalf of the entire group in its consolidated financial statements, as emphasized in the Explanatory Notes. The innovative character of section 99 lies in the fact that is does not regulate CSR/human rights issues per se -
viewed as a voluntary management strategy - rather it imposes an obligation on businesses to consider these concerns.

5.3.3.2 Potential of reporting provision 99
Justification for this mixed approach lies in its “reflective influence” on management decision-making, as explained by the Danish Commerce and Companies Agency representative (K. Buhmann et al., 2011), which is supposed to motivate companies to adhere to a CSR policy in order to avoid negative publicity, and to reconsider their current CSR policies in light of recommended reporting criteria. Danish corporations are exempted from complying with section 99 if they endorse UN Global Compact or UN-backed Principles for Responsible Investments and deliver a Communication on Progress report (Danish Commerce and Companies Agency, 2009), which means that Danish businesses are expected to report in accordance with internationally agreed standards for social sustainability comprising human rights principles. Based on this, scholars (K. Buhmann, 2011) opine that the amendment 99 constitutes an expression of support from the Danish government towards evolving social expectations as crystallized in, among others, human rights law. This could imply that those companies choosing to get inspiration from the UN Global Compact’s reporting criteria will also embrace its human rights principles as part of their CSR policies or self-regulation. In this sense, internationally legal normativity permeates the conduct of private parties, possibly leading to self regulatory technology of governance, induced through domestic regulation.

5.3.3.3 Assessment of reporting provision 99
The actual impact of s.99, as documented by a study conducted by Danish authorities (2010) one year after its endorsement, has overall been a positive one in terms of the number of companies providing information on CSR, reaching a percentage of 89% compared to only 26% as documented by the Danish Commerce and Companies Agency (2009) prior to the amendment. Out of the total reporting companies, however, only 28% have made use of UN Global Compact’s principles and Global Reporting Initiative reporting standards as sources for inspiration, a tendency common among listed companies. The same group of listed companies has presented a higher tendency to provide information on CSR related to all three dimensions specified under s.99 than the others. Specifically on human rights though, it is difficult to make an assessment of their progress as main themes evoked in the quantitative study have been “environment and climate” and “social conditions aimed at Danish workplaces”.

5.3.3.4 Obscuring the public-private boundary in regulation
Based on these results, one could make several assumptions in relation to businesses’ response to regulation on human rights reporting, albeit human rights are addressed as part of a collective of issues pertinent to corporate responsibility. First, given the rising numbers, Danish corporations’ reaction to the amendment has been a prompt one, which could suggest that not reporting on social responsibility and human rights is likely to have a significant non-legal impact, i.e. reputational risks. Bad publicity
can affect profitability, according to Novo Nordisk’s experience; therefore, human rights issues can constitute a factor to be covered by risk management.

Second, given the fact that the majority of companies embracing international CSR principles have been listed companies, one could assume that international stock markets rely to some degree on this international structure of non-binding, public-private standards to ensure transparency demanded by investors. It appears that human rights can pose a concrete risk for the bottom lines and non-financial reporting in accordance with public-private standards could ensure markets of a low risk for investment i.e. UN Global Compact principles, Principles for Responsible Investments (PRI) standards.

On a third note, implementing human rights policies is a timely process; it remains to be seen if s. 99 is sufficient to tackle the business and human rights agenda or whether businesses would need more specific guidance to fulfill their responsibility to respect through corporate regulation.

Reflecting on the governmentality model, it seems that discharging of state duty to protect implies relying on hybrid standards (K. Buhmann, 2011), endorsed through domestic regulation. The normative source of these standards is mixed: they are linked to both international legal normativity as is the case of UN Global Compact principles referencing UDHR and to private standardization, as is the case of PRI and GRI social sustainability criteria. Additionally, soft law-making processes comprise public-private participation i.e. UN utilizes reflexive law-making methods, while international private setting institutions rely on private-multi-stakeholder consensus of epistemic communities. In this sense, soft human rights normativity does influence corporate behavior as part of a complex hybrid structure of persuasion, comprising both formal and public/private informal mediums of regulation.

5.4 Concluding remarks

Sub-research question: How should corporations understand UN’s definition on BRHR and how can state policy-making contribute to this?

There is a widespread assumption that binding regulation on BRHR would fundamentally alter corporate perceptions towards human rights and improve their non-financial performance, to respect and possibly contribute to the enjoyment of human rights, hence the corporate lobbying against binding regulations and the restless NGOs’ demands towards binding norms to ensure corporate human rights accountability, a discussion that is recurrent. Arguably, critics of the SRSG’s work have suggested a compromise approach to BRHR in the form of the Guiding Principles, perceived as non-binding on state duty to protect human rights. Political theory however has provided a more refined picture of how regulation works in the modern society; borrowing from their analogy on private

international standards as informing corporate self-governance practices, this section has tentatively argued that due to the development of hybrid coalitions of persuasion in the area of BRHR - which are endorsed by national regulators in one form or another - creating binding regulation seems to be the other driver instead of the driver for BRHR. Due to the peculiar nature of BRHR as presented in the previous section - neither completely voluntary nor binding on corporations - it appears that a carefully calibrated balance between soft and hard regulation could be an answer to provide the business sector with an understanding of what do BRHR mean.
6 CONCLUSIONS

The goal of this paper has been to assess to some degree the influence of corporate governance models and international law theory on corporate perceptions towards their human rights responsibilities. In doing so, the paper has analyzed a prior, unsuccessful attempt to regulate business human rights responsibilities at UN forum in order to understand the extent to which economic drivers affect corporate behavior in relation to human rights normativity, given the fact that businesses are participants in soft law-making processes. Due to space limitations, the focus of this paper has leaned towards analyzing patterns of corporate behavior in the context of international regulation on human rights, by looking at theoretical models, both descriptive and prescriptive.

Making use of international law theories, this study has revealed that corporations both influence and are influenced by international norms in a medium no longer defined by a clear distinction between voluntary and mandatory norms. Concern for profitability remains a key impediment to binding regulation, under domestic jurisdiction and at international forum. The other side of the coin indicates, however, that non-binding regulation on BRHR such as the SRSG’s work does not preclude corporations from acting on their declaratory commitments, due to a recalibration of expectations from corporate behavior that comes not only from civil society but also from hybrid coalitions of persuasion - comprising international public-private partnerships facilitated by the emergence of BRHR at UN level as the common set of principles everyone agreed upon.

BRHR remains a sensitive topic in terms of binding regulation, under both domestic and international jurisdiction. Theory supports the argument that governance is no longer limited to state fiat, and that self-regulatory processes making use of standards or soft law are a widespread practice; however, the question remains: how does this impact corporate and state actions on BRHR? It this sufficient to prevent human rights violations if we assume corporations will self-regulate on how to respond to these challenges, or is binding regulation the method to be desired? By looking at theoretical academic studies, UN documents, national legal provisions and documented testimonies, this paper has argued, albeit lacking empirical verification, that binding rules should not preclude other means of persuasion. Lack of punitive measures does not impede corporate competitiveness on what appears to look like a standard on human rights where business actors can make a difference, and thus differentiate from competitors. This is particularly important in light of the discussion on economic drivers; if maximizing profits is the engine that drives corporate actions, why not capitalize on BRHR as the next competitive advantage? Additionally, corporate governance theory, comprising what seem to be the main principles guiding corporate actions has revealed a dynamic dimension; it has shown it is not a static discipline, but rather an evolutionary one, guided by soft law.

In this climate, it seems unlikely that states would enact legal requirements addressing specifically the recommendations laid down in the UN Framework. More likely, Denmark’s corporate law reform
stands for an innovative example of what governments could do to act on Prof. Ruggie’s Guiding Principles, relying on complex modes of regulation wherein human rights issues can become a matter of managerial risk. Moreover, surveillance mechanisms of corporate behavior towards human rights seem to expand from civil society activists to private international epistemic communities, such as legal scholars in favor of increased corporate accountability. Notwithstanding, there is a fine thread between corporate baseline responsibility to respect and the broader responsibility towards facilitating enjoyment of human rights; corporations are economic agents that thrive in competitive markets, therefore regulation should be carefully calibrated so as not to menace the rising market for social sustainability/human rights corporate performance.

6.1 Critical reflections
The present study has not by far exhausted discussions on drivers towards and implications of BRHR. This paper is largely theoretical and the qualitative data obtained on the topic serves to inform in an argumentative manner the gaps inherent to this study; BRHR has only recently been crystallized as a matter of concern to be taken seriously under the international soft law framework. Additionally, the empirical data on the impact of the SRSG’s work on corporations and states alike is missing or insufficient to serve a type of project such as this study which renders the argumentation in this paper. The theory and method used throughout this paper do not preclude other research approaches on the BRHR topic, but rather serve to provide a different angle for discussions and to tentatively deepen understanding of the dynamics of heterogeneous factors underlying both perceptions (informal) and conceptualization (formal) on BRHR.

6.2 Future research
The present paper has built on various occasions on assumptions, or perceptions not verified empirically, to draw conclusions on why and how corporate actors react on BRHR, such as the conception of reputational risk as one driver oft-mentioned in both literature and empirical studies. It seems that academia has shown an interest in developing a theoretical frame around reputation effects that usually follow negative press disclosures of non-financial performance. The importance of this factor seems to be high since corporations and stock markets alike react to the risks it poses for the business sector, supposedly reflected in declining bottom lines. Another aspect to be further researched on concerning BRHR informal drivers is what this paper has termed as the hybrid coalition of persuasion towards BRHR, comprising formal and informal, public and private international organizations focused on constructing a framework to support, scrutinize and measure BRHR performance. Adjacently, it would be useful to observe its potential for development in light of providing recommendations for policy-making in the area of BRHR.
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http://www.unpri.org
**ANNEXES**

**Annex 1**

*Key provision in the UK Companies Act 2006*

*Section 172 Duty to promote the success of the company*

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to:

(a) the likely consequences of any decision in the long term,

(b) the interests of the company’s employees,

(c) the need to foster the company’s business relationships with suppliers, customers and others,

(d) the impact of the company’s operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

**Annex 2**

*UN Global Compact*

Human rights principles:

1. Businesses should support and respect the protection of internationally proclaimed human rights; and

2. make sure that they are not complicit in human rights abuses.

Labor principles:

3. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

4. the elimination of all forms of forced and compulsory labour;

5. the effective abolition of child labour; and

6. the elimination of discrimination in respect of employment and occupation.
Environment principles:

7. Businesses should support a precautionary approach to environmental challenges;
8. undertake initiatives to promote greater environmental responsibility; and
9. encourage the development and diffusion of environmentally friendly technologies.

Anti-corruption (added in 2004):

10. Businesses should work against corruption in all its forms, including extortion and bribery.

Annex 3

Excerpts from Resolution 2005/69 on human rights and transnational corporations and other business enterprises:

1. Requests the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises, for an initial period of two years, who shall submit an interim report to the Commission on Human Rights at its sixty-second session and a final report at its sixty-third session, with views and recommendations for the consideration of the Commission, with the following mandate:

   (a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

   (b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;

   (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”;

   (d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

   (e) To compile a compendium of best practices of States and transnational corporations and other business enterprises;
Annex 4

Excerpts from Guiding Principles on Business and Human Rights

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

Commentary
At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction. (…)
States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on “parent” companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development; and performance standards required by institutions that support overseas investments.

Annex 5

Excerpts from Guiding Principles on Business and Human Rights

Operational Principles
In meeting their duty to protect, States should:
(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.
Annex 6

Key provisions of the Companies Act 2006 relating to environment and social reporting

417 Contents of Directors’ report: business review

(1) Unless the company is subject to the small companies’ regime, the directors’ report must contain a business review.

(2) The purpose of the business review is to inform members of the company and help them assess how the directors have performed their duty under section 172 (duty to promote the success of the company).

(3) The business review must contain -

(a) a fair review of the company’s business, and
(b) a description of the principal risks and uncertainties facing the company.

(4) The review required is a balanced and comprehensive analysis of -

(a) the development and performance of the company’s business during the financial year, and
(b) the position of the company’s business at the end of that year, consistent with the size and complexity of the business.

(5) In the case of a quoted company the business review must, to the extent necessary for an understanding of the development, performance or position of the company’s business (emphasis added), include -

(a) the main trends and factors likely to affect the future development, performance and position of the company’s business; and (b) information about -

(i) environmental matters (including the impact of the company’s business on the environment),
(ii) the company’s employees, and
(iii) social and community issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies; and
(c) subject to subsection (11), information about persons with whom the company has contractual or other arrangements which are essential to the business of the company.

If the review does not contain information of each kind mentioned in paragraphs (b)(i), (ii) and (iii) and (c), it must state which of those kinds of information it does not contain.
Annex 7

Key provisions in the Danish Financial Statements Act
Amendment 99

1. After section 99 the following shall be inserted:

"99a-(1) Large businesses shall supplement their management's review with a report on social responsibility, cf. subsections (2)-(7). Corporate social responsibility shall mean that businesses voluntarily include considerations for human rights, societal, environmental and climate conditions as well as combating corruption in their business strategy and corporate activities. Businesses without policies on social responsibility shall disclose this information in their management's review.

(2) The report shall contain information about

1) the policies of the business on social responsibility, including any standards, guidelines or principles for social responsibility that the business is using;

2) how the business realizes its policies on social responsibility, including any systems or procedures in this respect;

3) assessment of the business on achievements resulting from its work on social responsibility in the financial year, and any future expectations to the work of the business.

Annex 8

Key provisions in the Danish Financial Statements Act
Amendment 99

(5) For businesses that prepare consolidated financial statements, it shall be considered sufficient to submit information for the group as a whole pursuant to subsections (1) and (2).

(6) A subsidiary which is part of a group may refrain from including this information in its management's review, if

1) the parent company complies with the disclosure requirements according to subsections (1) and (2) for the whole group; or

2) the parent company has prepared a progress report in connection with accession to the UN Global Compact or the UN principles for responsible investments.
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<th>Acronym</th>
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<tr>
<td>BLIHR</td>
<td>Business Leaders Initiative on Human Rights</td>
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<td>BRHR</td>
<td>Business Responsibility for Human Rights</td>
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<td>CG</td>
<td>Corporate Governance</td>
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<td>CLR</td>
<td>Company Law Review</td>
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<td>GGO</td>
<td>Global Governance Organization</td>
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<td>GP</td>
<td>Guiding Principles</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>Principles for Responsible Investment</td>
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<td>Special Representative of the Secretary General</td>
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