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# MSc Thesis - Law and Governance

## Making businesses accountable for the realization of the right to food

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Businesses can contribute in important ways to the realization of a world free of poverty and hunger by 2030 [...]. To address the needs of the most vulnerable in communities around the world, we need a bolder approach to partnership, a dynamically engaged business community, and new forms of sustainability financing.

Amina J. Mohammed, Deputy Secretary-General Of the United Nations, 17 July 2018.<sup>1</sup>

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<sup>1</sup> Quote from the United Nations Global Compact Progress Report (2018), p.15.

# Abstract

This thesis investigated how an alignment of the CSR and BHR approaches can make businesses accountable for the realization of the right to food, using both doctrinal and interdisciplinary methods. At present, States are the only duty bearers of the obligations to respect, protect and fulfill the right to food while businesses are simply responsible for respecting the right to food. Two different approaches seek to influence or regulate businesses' impact on human rights. The corporate social responsibility (CSR) approach encourages voluntary business initiatives. The business and human rights (BHR) scholars opt for a more legal approach, seeking to make businesses accountable for infringements of human rights law. The CSR approach focuses on positive obligations – to protect and to fulfill – whereas the BHR approach addresses the negative obligation – to respect. This thesis explains that merging ideas from the two approaches will contribute to realizing the right to food. It is argued that only by becoming direct duty-bearers of human rights, will businesses become accountable – an idea from the BHR approach. Next, businesses can only make a significant contribution to the right to food when subject to positive obligations, as this requires active involvement – an idea of the CSR approach. Lastly, to realize the right to food in the most effective, efficient and sustainable manner, the private and public sector must work together. Business initiatives must match local needs and contribute to the achievement of national strategies. The example is given of businesses financing government-led school meal programs, thereby substantially contributing to the nutritional needs of children.

Key words: right to food, business and human rights, corporate social responsibility

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## List of abbreviations

BHR	Business and Human Rights (this abbreviation refers to the field of research)
CESCR	Committee on Economic Social and Cultural Rights
CRC	Convention on the Rights of the Child
CSR	Corporate Social Responsibility
ESC	Economic, Social and Cultural
FAO	Food and Agricultural Organization
FDI	Foreign Direct Investment
FFE	Food For Education
GATT	General Agreement on Tariffs and Trade
GFD	General Food Distribution
HANCI	Hunger and Nutrition Commitment Index
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labor Organization
MEAL	Monitoring Evaluation Accountability Learning
MNC	Multinational Corporation
MNE	Multinational Enterprise
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
SDG	Sustainable Development Goal
SMSG	Special Representative to the United Nations' Secretary General
SUN	Scaling Up Nutrition
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGC	United Nations Global Compact
UNGP	United Nations Guiding Principle
WFP	World Food Program
WTO	World Trade Organization

# 1 Introduction

The number of hungry people in the world is rising again after two decades of steady decline.<sup>2</sup> As a result of this hunger expansion, 821 million people were undernourished in 2017.<sup>3</sup> Children are especially at risk of suffering from undernutrition, which can affect them chronically or acutely, resulting in stunting or wasting respectively.<sup>4</sup> On the other hand, 672 million people were obese in 2017.<sup>5</sup> Indeed, on top of the widespread undernutrition problem, a growing portion of the population is now overweight or obese. Globally, over 38 million children under five were overweight in 2017.<sup>6</sup> Remarkably, high levels of overweight and obesity often occur in the same countries facing high rates of stunting among children. One speaks of the double burden of malnutrition. Besides, the majority of those suffering from overweight and obesity also lack essential micronutrients.<sup>7</sup> In fact, the Food and Agriculture Organization (FAO) approximates that 1.5 billion people worldwide suffer from one or more forms of micronutrient deficiencies.<sup>8</sup> All these nutrition-related health statuses are regrouped under the broader term: malnutrition.<sup>9</sup>

Overall, the causes of these different forms of malnutrition 'are complex, multi-sectoral and rooted in political and economic structures and ideological factors that influence control over resources.'<sup>10</sup> Still, one can identify one major underlying cause of malnutrition, which is food insecurity.<sup>11</sup> The FAO defines food insecurity as follows:

A situation that exists when people lack secure access to sufficient amounts of safe and nutritious food for normal growth and development and an active and healthy life. It may be caused by unavailability of food, insufficient purchasing power, inappropriate distribution or

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<sup>2</sup> Food and Agriculture Organization, et al., *The State of Food Security and Nutrition in the World 2017. Building Resilience for Peace and Food Security* (2017), p.2.

<sup>3</sup> Food and Agriculture Organisation, et al., *The State of Food Security and Nutrition in the World 2018. Building Climate Resilience for Food Security and Nutrition* (2018), p.2.

<sup>4</sup> Ibid., p.17 and p.19.

<sup>5</sup> Ibid., p.xii.

<sup>6</sup> Ibid., p.12 and p.24.

<sup>7</sup> Ibid., p.27.

<sup>8</sup> Ibid., p.28.

<sup>9</sup> World Health Organization, 'What is Malnutrition?', (Webpage, 2016) <<https://www.who.int/features/qa/malnutrition/en/>> accessed 11 February 2019.

<sup>10</sup> Food and Agriculture Organisation, et al., *The State of Food Security and Nutrition in the World 2018. Building Climate Resilience for Food Security and Nutrition* (2018), p.26.

<sup>11</sup> Ibid.

inadequate use of food at the household level. Food insecurity, poor conditions of health and sanitation and inappropriate care and feeding practices are the major causes of poor nutritional status. Food insecurity may be chronic, seasonal or transitory.<sup>12</sup>

Indeed, malnutrition and hunger are rarely caused by insufficient amounts of food produced; rather they are primarily due to a lack of access to food by large groups of people living in diverse regions of the world.<sup>13</sup> It is now proven that 'food insecurity can both directly (through compromised diets) and indirectly (through the impact of stress on infant feeding) cause child wasting, stunting and micronutrient deficiencies.'<sup>14</sup> A link also exists between overweight/obesity and food insecurity. It lies in the lack of access to affordable nutritious food. The occurrence of food insecurity and its negative impact on a household's diet quality have been observed in low-, middle- and high-income countries alike.<sup>15</sup>

The prevalence of food insecurity is worrisome as it has negative consequences for the health and well-being of people, extending beyond malnutrition and its negative consequences on health and proper development. Indeed, food insecurity has been shown to adversely impact the academic performance and behavior of children. Further, both children and adults may suffer from 'anxiety, stress, depression, interpersonal tensions, and the alienation that comes with social stigma,' as a result of a situation wherein access to food is unreliable.<sup>16</sup> Therefore, the international community aims for the elimination of food insecurity, replacing it by a situation of global food security, which is defined as:

A situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life. Based on this definition, four food security dimensions can be identified: food availability, economic and physical access to food, food utilization, and stability over time.<sup>17</sup>

Indeed, due to this high prevalence of malnutrition and food insecurity in the world, especially affecting people in developing countries and children, the second goal from the United Nations (UN) Sustainable Development Goals (SDGs) is to: 'end hunger, achieve food security and improved nutrition and promote sustainable agriculture.'<sup>18</sup> Target 2.1 from the SDG2 specifically takes food insecurity and lack of access to food into account. It aims to: 'by 2030, end hunger and ensure access by all people, in particular, the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round.'<sup>19</sup> The Food Insecurity Experience Scale (FIES) – which is used to monitor target 2.1 of the SDG2 – is specifically of interest here as it measures people's ability to obtain adequate food.<sup>20</sup> Use of the FIES found that 9.3 percent of the global population was affected by

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<sup>12</sup> Ibid., p.159.

<sup>13</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para. 5; Barrett, Christopher B., and Dan Maxwell, *Food Aid After Fifty Years: Recasting its Role*, London and New York: Routledge, (2007), p.110; Letnar Čeranič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.58; Clover, Jenny 'Food security in sub-Saharan Africa' 12(1) *African Security Studies* 5 (2003), p.7.

<sup>14</sup> Food and Agriculture Organisation, et al., *The State of Food Security and Nutrition in the World 2018. Building Climate Resilience for Food Security and Nutrition* (2018), pp.30-32.

<sup>15</sup> Ibid., p.32.

<sup>16</sup> Ibid., p.33.

<sup>17</sup> Ibid., p.159.

<sup>18</sup> Transforming our World: The 2030 Agenda for Sustainable Development, A/RES/70/1 (2015), Goal 2.

<sup>19</sup> Ibid., Goal 2.1.

<sup>20</sup> Food and Agriculture Organization, et al., *The State of Food Security and Nutrition in the World 2017. Building Resilience for Peace and Food Security* (2017), p.10. Note: 'People experiencing moderate levels of food insecurity will typically have lower-quality diets and may at



severe food insecurity in 2016. The largest portion of people affected by this severe food insecurity was found in Sub-Saharan Africa with a prevalence of 31.0 percent ( $\pm 0.8$ ) followed by Central Asia and Southern Asia with a prevalence of 11.1 percent ( $\pm 1.3$ ).<sup>21</sup>

In its 2018 report on 'The State of Food Security and Nutrition in the World,' the FAO declares that:

Access to safe, nutritious and sufficient food must be framed as a human right, with priority given to the most vulnerable. Policies that promote nutrition-sensitive agriculture and food systems are needed, with special attention to the food security and nutrition of children under five, school-age children, adolescent girls and women in order to halt the intergenerational cycle of malnutrition.<sup>22</sup>

The right to food is acknowledged in Article 25(1) of the Universal Declaration of Human Rights (UDHR)<sup>23</sup> and defined in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>24</sup> To clarify, this right should not be interpreted solely as the right to enough food, but as the right to adequate, nutritious, healthy foods meeting the requirements of each individual's state of health and lifestyle.<sup>25</sup> This definition is in accordance with the food security definition, given above. In 1996, the right to food and the right to freedom from hunger and malnutrition were reaffirmed during the World Food Summit in Rome. Henceforth, 'human rights have become an increasingly important rallying call in the global fight against hunger.'<sup>26</sup> In fact, Barrett and Maxwell acknowledge the many benefits of a rights-based approach to food security. Surely, it allows one to take a much broader perspective when looking at the issue of food security and allows one to question and analyze the possible negative impact of political and governance methods on food security. Correspondingly, it expands the range of interventions from only food provision to also consider advocacy at the policy level. Next, the rights-based approach gives people the possibility and the right to participate in decisions regarding their needs to reach food security. In addition, this approach permits the development of clear benchmarks for monitoring and evaluation of programs. These benchmarks can then be used to define the minimum standards for the realization of a particular human right, rather than focusing on improvements.<sup>27</sup> In this way, 'the normative element adds "teeth" to the empirical analysis of food and livelihood insecurity.'<sup>28</sup>

Historically and legally, nation-States have always been the main entities accountable for the obligations to respect, protect and fulfill the right to food.<sup>29</sup> The United Nations Guiding Principles (UNGPs) extend the obligation to respect beyond the States, to all businesses but qualify it as a responsibility, which is viewed as a societal

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times during the year have been forced to also reduce the quantity of food they would normally eat; those experiencing severe levels would have gone for entire days without eating due to lack of money or other resources.'

<sup>21</sup> Ibid., Table 2, p.9. Note: The prevalence is calculated as the number of people living in households where at least one adult has been found to be severely food insecure, as a percentage of the total population. Margins of error are in parentheses.

<sup>22</sup> Food and Agriculture Organisation, et al., *The State of Food Security and Nutrition in the World 2018. Building Climate Resilience for Food Security and Nutrition* (2018), p.26.

<sup>23</sup> Universal Declaration of Human Rights, GA Res. 217 A (III) (1948), art.25(1).

<sup>24</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.11(1).

<sup>25</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), paras.8-13.

<sup>26</sup> Barrett, Christopher B., and Dan Maxwell, *Food Aid After Fifty Years: Recasting its Role*, London and New York: Routledge, (2007), p.111.

<sup>27</sup> Ibid., pp.117-118.

<sup>28</sup> Ibid., p.118.

<sup>29</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.2(1).

expectation rather than an obligation.<sup>30</sup> Interestingly, the Committee on Economic, Social and Cultural Rights' (CESCR) General Comment No. 12 – which operationalizes Article 11 from the ICESCR – does recognize that businesses have responsibilities in the realization of the right to adequate food.<sup>31</sup> However, these are mere responsibilities, as opposed to legally binding obligations. Hence, at the moment, the requirements for businesses are limited to the negative responsibility to not ignore human rights, whereas the State is subject to all three obligations needed for the realization of human rights.<sup>32</sup>

This limit in the human rights obligations applying to businesses is unfortunate as the State is not always in command of activities impacting economic, social and cultural (ESC) rights, which include the right to food. Other powerful actors such as international institutions and multinational corporations (MNCs) also impact these ESC rights, sometimes with 'a much larger and profound impact [...] than the territorial state.'<sup>33</sup> In today's globalized world, there is no doubt that businesses, and especially MNCs are 'politically powerful.'<sup>34</sup> They have the capacity to control 'who does or does not have access to vital things like wealth, security, essential goods and services such as drugs, nutritious food, credit or education.'<sup>35</sup> Hence, Wettstein declares 'it is time that we acknowledge the changing role of powerful corporations in the global political economy, and it is time that we start thinking more thoroughly about the normative consequences deriving from it.'<sup>36</sup> Vandenhoe agrees and notes that 'economic globalization has so far not been paralleled by a "globalization of human rights law." But it should.'<sup>37</sup> This would greatly advance human rights as businesses could take on the role of promoters and fulfillers of human rights.<sup>38</sup> As Wettstein declared:

Corporations have unique capacities and capabilities to address and contribute to the solutions for pressing human rights problems. These capabilities derive from their specific purpose and the productive nature of the corporation as a social institution. Thus, if we start our reflection on human rights responsibility with the purpose of the company, its potential to contribute to the realization of human rights turns into a central parameter of such responsibility. It is increasingly and sometimes painfully obvious that a growing number of global human rights problems, related to poverty or disease, for example, cannot be solved by governments alone; they crucially

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<sup>30</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31 (2011), Principle 11.

<sup>31</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para.20.

<sup>32</sup> De Schutter, Olivier, 'The Accountability of Multinationals for Human Rights Violations in European Law,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp.230-231; Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31 (2011), Principle 1, Commentary and Principle 11.

<sup>33</sup> Vandenhoe, Wouter, 'Emerging Normative Frameworks on Transnational Human Rights Obligations', *EUI Working Papers, RSCAS 2012/17* (2012), p. 1. See also: Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, A/HRC/40/48 (2019), para. 10.

<sup>34</sup> Wettstein, Florian, 'Beyond Voluntarism, Beyond CSR: Making a Case for Human Rights and Justice,' 114(1) *Business and Society Review* 125 (2009), p.141.

<sup>35</sup> *Ibid.*, pp.141-142.

<sup>36</sup> *Ibid.*, p.143.

<sup>37</sup> Vandenhoe, Wouter, 'Emerging Normative Frameworks on Transnational Human Rights Obligations', *EUI Working Papers, RSCAS 2012/17* (2012), p. 1.

<sup>38</sup> Reinisch, August, 'The Changing International Legal Framework,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.63.

depend on the participation and contribution of a variety of institutions, among them companies.<sup>39</sup>

Thus, having businesses involved in the protection and fulfillment of the right to food – in addition to the responsibility to respect – could significantly speed up the elimination of food insecurity. The global society needs these powerful businesses to become active in the fight for the realization of all human rights.<sup>40</sup> This applies especially to ESC rights, and more specifically to the right to food, for which the only way forward would be through positive obligations, pushing businesses to take action.<sup>41</sup> Despite the existence of several legal and non-legal instruments acknowledging the right to food, realizing this right remains a challenge today, as illustrated by the high prevalence of malnutrition and food insecurity in the world as of 2017.<sup>42</sup>

Two different approaches seek to influence or regulate businesses' impact on human rights. The corporate social responsibility (CSR) approach encourages voluntary business initiatives, whereby businesses assume responsibility and act upon their social and environmental impact. It is based on the idea that businesses must voluntarily contribute to the improvement of society, for the sake of *doing good*.<sup>43</sup> On the other hand, the business and human rights (BHR) approach is a more legal approach, aiming to make businesses accountable for their infringements of human rights law.<sup>44</sup> This approach advocates business human rights obligations on the basis of law, which provides it with a strong and universal point of reference.<sup>45</sup> In general, the BHR approach has focused specifically on remedying harm already caused, rather than exploring ways for businesses to positively contribute to the realization of human rights, which is an aim of the CSR approach.<sup>46</sup> In fact, the CSR approach touches upon the positive obligations – to protect and to fulfill – whereas the BHR approach addresses the negative obligation – to respect. Scholars have argued that merging ideas from these two approaches would allow the extension of States' human rights obligations to businesses, making the latter accountable for the realization of the right to food. Consequently, this thesis addresses the following main question:

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<sup>39</sup> Wettstein, Florian, 'From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?,' in Dorothée Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.85.

<sup>40</sup> Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, A/HRC/40/48 (2019), para. 10.

<sup>41</sup> Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.436.

<sup>42</sup> Food and Agriculture Organization, et al., *The State of Food Security and Nutrition in the World 2017. Building Resilience for Peace and Food Security* (2017), Table 2 p.9; Food and Agriculture Organisation, et al., *The State of Food Security and Nutrition in the World 2018. Building Climate Resilience for Food Security and Nutrition* (2018), p.xii and p.2.

<sup>43</sup> Buhmann, Karin, 'Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case', 7(2) *International Journal of Law in Context* 139 (2011), pp.139 and p.146; Newell, Peter, and Jędrzej G. Frynas, 'Beyond CSR? Business, Poverty and Social Justice: An Introduction,' 28(4) *Third World Quarterly* 669 (2007), p.678; Hopkins, Michael, 'What is Corporate Social Responsibility all About?', 6(3-4) *Journal of Public Affairs: An International Journal* 298 (2006), p.299; Wan-Jan, Wan S., 'Defining Corporate Social Responsibility,' 6 (3-4) *Journal of Public Affairs: An International Journal* 176 (2006), p.183; Commission of the European Communities, *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, COM(2002) 347 final (2002), p.5.; European Commission, 'Corporate Social Responsibility (CSR)' (Webpage, 2018) <[https://ec.europa.eu/growth/industry/corporate-social-responsibility\\_en](https://ec.europa.eu/growth/industry/corporate-social-responsibility_en)> accessed 5 December 2018.

<sup>44</sup> Ramasastry, Anita, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,' 14(2) *Journal of Human Rights* 237 (2015), p.238.

<sup>45</sup> Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.438; Wettstein, Florian, et al., 'International Business and Human Rights: A Research Agenda,' 54(1) *Journal of World Business* 54 (2019), p.58.

<sup>46</sup> Ramasastry, Anita, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,' 14(2) *Journal of Human Rights* 237 (2015), p.238.

## How can an alignment of the CSR and BHR approaches make businesses accountable for the realization of the right to food?

In order to answer this question, three main research points have been elaborated, guiding the structure of this thesis. To begin, in chapter 2 the legal framework of international human rights law will be presented, studying the duties of businesses under those laws. Also, an overview of soft law initiatives developed within the field of business and human rights will be given. This will be followed by an analysis of ESC rights and the right to food, in particular, questioning the accountability of businesses for the right to food. Next, in chapter 3, interdisciplinary literature research will determine how ideas from the corporate social responsibility (CSR) approach and the business and human rights (BHR) approach can be used to make businesses accountable for the realization of the right to food. One will take into account the importance of being able to make businesses pro-active but also accountable for their actions. As mentioned by Wettstein, 'the integration of the [CSR and BHR] debates provides the space for the conceptualization of positive human rights obligations for corporations.'<sup>47</sup> These obligations would replace the businesses' current 'human right minimalism' modes of action by making them accountable for respecting, protecting and fulfilling human rights. The third pillar – fulfilling human rights – seems most relevant when talking about the role businesses could have, by donating food or money for example. In fact, chapter 4 will study possible business initiatives that could be set up in order for businesses to actively contribute to the realization of the right to food. Lastly, chapter 5 will offer a conclusion of the findings.

The findings presented in this thesis are the result of an extensive literature research. First, doctrinal research was conducted to interpret the international law related to the right to food and the legal obligations of businesses resulting from it. Indeed, hard and soft international human rights laws, official comments from the CESCR, as well as literature about the BHR approach were studied. Second, the CSR approach and the benefits and limits of several food and nutrition assistance programs were studied through interdisciplinary research. The results of the doctrinal and interdisciplinary research were combined to elaborate a recommended way of making businesses accountable for the right to food. In fact, this thesis aims to give more specific and practical insights regarding a possible alignment of the CSR and BHR approaches by focusing solely on the right to food, while previous studies have discussed human rights in general or specialized in ESC rights. The study delivers novel findings, on a specific topic seldom studied. On the other hand, because research focusing on the right to food is rare, this literature research is mostly based on papers covering broader themes like ESC rights. Findings from those studies were extrapolated and applied to the right to food, linking them to studies on malnutrition from other fields of research. This limitation in literature addressing the right to food specifically, illustrates the need for additional research focusing on particular types of ESC rights, as each right has different requirements for its full realization.

The thesis has referred to classic terms such as corporate obligations or corporate initiatives, as business obligations or business initiatives, respectively, in order to not exclude any type of business activities. This is in accordance with the UNGPs' scope, namely 'all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.'<sup>48</sup> Consequently, the terms businesses, multinational corporations, transnational corporations, companies, corporations, and private sector have been used interchangeably to define the same idea. Although these terms may have particular legal connotations and there

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<sup>47</sup> Wettstein, Florian, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide,' 22(4) *Business Ethics Quarterly* 739 (2012), p.752.

<sup>48</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31 (2011), General Principles, p.1.

are debates whether the focus of the discussion on human rights obligations for businesses should be restricted to certain types of businesses or include all of them, this thesis does not limit its focus on a specific type of business enterprise. Therefore, all terms mentioned above should be considered as carrying the same meaning, unless the context clearly points out that reference is made to a particular type of business entity such as transnational corporations for example.

## 2 Businesses and the right to food: a regulatory framework

### 2.1 Businesses and international human rights law

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Whether businesses are subjects of international law is a much-debated question. In the field of human rights, the main conclusion at present is that businesses have at least the responsibility to refrain from violating international human rights law.<sup>49</sup> In theory, based on the classic model of subjectivity in international law, only States are subjects of international law.<sup>50</sup> Other entities such as 'individuals and business organizations, interact with international law indirectly'<sup>51</sup> through domestic laws and are referred to as 'non-state actors.'<sup>52</sup> As a result, States are defined as 'active subjects of law', whereas all other entities, including businesses, have the lower status of 'passive objects of law.'<sup>53</sup> International lawyers tend to support this classic model, preferring to keep only States as subjects of international law.<sup>54</sup> They argue that businesses do not have to abide by international human rights treaties as a logical result of this vertical approach.<sup>55</sup> Besides they believe 'any extension beyond the State is fundamentally weakening the very concept of human rights (law).'<sup>56</sup>

On the other hand, scholars increasingly recognize that businesses should have direct human rights duties. Wettstein explains that scholars have tried to reinterpret and redesign the international human rights regime to

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<sup>49</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.89.

<sup>50</sup> Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.437.

<sup>51</sup> Charney, Jonathan L., 'Transnational Corporations and Developing Public International Law,' 1983 *Duke Law Journal* 748 (1983), p.753.

<sup>52</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.86 and p.93. See also: Charney, Jonathan L., 'Transnational Corporations and Developing Public International Law,' 1983 *Duke Law Journal* 748 (1983), p.753; Wettstein, Florian, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide,' 22(4) *Business Ethics Quarterly* 739 (2012), p.743.

<sup>53</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.86.

<sup>54</sup> Alston, Philip, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.19.

<sup>55</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.91.

<sup>56</sup> Vandenhoe, Wouter and Willem van Genugten, 'Introduction: An Emerging Multi-Duty-Bearer Human Rights Regime?' in Wouter Vandenhoe (ed.), *Challenging Territoriality in Human Rights Law*, London and New York: Routledge (2015), p.4.

include non-state actors as direct duty-bearers.<sup>57</sup> He identifies three methods scholars have used to achieve that aim:

First, it has focused on the extended reading and reinterpretation of existing international human rights legislation in order to include corporate responsibility alongside traditional state obligations. [...] Second, it has contemplated ways to extend domestic legislation in order to include corporations' human rights conduct abroad by exploring questions of extraterritorial or universal jurisdiction in general or by reference to specific statutes such as the Alien Tort Claims Act in the United States. [...] Third, beyond the option of reinterpreting existing domestic and international legislation, it has focused on the design of a "new international normative regime", that is, on the possibility of new international codes or legislation, which would directly address corporations' human rights conduct.<sup>58</sup>

Thus, Wettstein notes that scholars have tried to interpret non-state actors as direct duty-bearers of international human rights law (1) by reinterpreting existing international laws, (2) by addressing the question of extraterritoriality and (3) by developing an entirely new international legislation. A short overview of the first and second method presented by Wettstein will be given here. Section 3.3 will later address the possibility of a new international binding document addressing businesses and human rights, which is the third method identified by Wettstein.

### 2.1.1 Reinterpreting international human rights law to extend it to businesses

Wettstein defines human rights as 'moral concepts and thus as moral rights'.<sup>59</sup> Like Sen and Feinberg, he believes that human rights are essential means for the protection of people's freedom and autonomy as human beings. In other words, 'human rights, as the most important and fundamental category of moral rights, protect those freedoms that are most essential for a dignified and self-determined human life.'<sup>60</sup> To clarify, human dignity is the idea that each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth and that the State exists for the individual, not vice versa.<sup>61</sup> According to Letnar Čerňič, both human dignity and equality are fundamental aspects of the idea of corporate accountability for ESC rights.<sup>62</sup> He explains that 'to achieve [ESC] development, one is obliged to address the equality of opportunities or, as Sen argues, the "equality of basic capabilities" – it is necessary to ensure the realization of some of the basic, truly fundamental living conditions.'<sup>63</sup> In this view, rights exist independently of a government's willingness to acknowledge them.<sup>64</sup> As a consequence hereof, everyone should respect human rights, including businesses.

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<sup>57</sup> Wettstein, Florian, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide,' 22(4) *Business Ethics Quarterly* 739 (2012), p.743.

<sup>58</sup> Ibid., pp.743-744.

<sup>59</sup> Ibid., p.740.

<sup>60</sup> Ibid., p.741. See also: Feinberg, Joel, *Social philosophy*, Upper Saddle River: Prentice Hall (1973), p.84; Sen, Amartya, 'Human Rights and Capabilities,' 6(2) *Journal of Human Development* 151 (2005), p.153.

<sup>61</sup> McCrudden, Christopher, 'Human Dignity and Judicial Interpretation of Human Rights,' 19(4) *European Journal of International Law* 655 (2008), p.723.

<sup>62</sup> Letnar Čerňič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.51.

<sup>63</sup> Ibid., p.56.

<sup>64</sup> Steinhardt, Ralph G., 'The New Lex Mercatoria,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.214.

Scholars tend to agree that ‘in practice, human rights law will become less and less relevant if it fails to adapt to changing realities in which States are no longer the only leading actor.’<sup>65</sup> Indeed, States are losing their power across the globe as the influence of businesses – and specifically MNCs – in both international and national policies keeps on expanding.<sup>66</sup> Hence, in general, scholars are in favor of a broader definition of the term ‘subjects of international law’ as they believe ‘non-State actors still play a very important role.’<sup>67</sup> Reinisch explains that human rights today have already gained a much larger meaning following a broadening of the legal framework. In fact, substantive norms of behavior have acquired a wider scope of application and can now be challenged in increasingly diverse procedures and institutions.<sup>68</sup> Besides, the International Court of Justice’s (ICJ) statement of the law held in 1949 keeps all possibilities open for a shift in the definition of international law subjectivity and indicates that ‘the categories might be meaningfully reconsidered in time.’<sup>69</sup> It reads as follows: ‘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.’<sup>70</sup> Having analyzed this same quote from the ICJ’s statement of the law, Reinisch concludes:

It can be credibly asserted that a contemporary reading of human rights instruments shows that non-State actors are also addressees of human rights norms. If this interpretation is supported by the adoption of legally binding codes of conduct in the future, for instance via treaties, there remains no serious obstacle to considering non-State actors, in this context most likely TNCs [transnational corporations], to have gained, at least to some extent, international legal personality.<sup>71</sup>

In fact, there are examples where businesses benefit from international dispute-settlement mechanisms and where they are guaranteed rights under international law.<sup>72</sup> Some argue that because they have access to these rights, they must also be subject to the obligations of international law, which includes human rights.<sup>73</sup> For instance, Andrew Clapham believes the discussion about one’s subjectivity to international human rights laws should focus on how to make certain actors gain international rights and duties.<sup>74</sup> This is in line with the criteria to identify whether an entity is subject to international law, developed by the ICJ as it decided upon the UN’s legal status. The ICJ concluded that the UN was a subject of international law as it is ‘capable of possessing international rights and duties, and [...] it has capacity to maintain its rights by bringing international claims.’<sup>75</sup> Bernaz has

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<sup>65</sup> Vandenhole, Wouter and Willem van Genugten, ‘Introduction: An Emerging Multi-Duty-Bearer Human Rights Regime?’ in Wouter Vandenhole (ed.), *Challenging Territoriality in Human Rights Law*, London and New York: Routledge (2015), p.1.

<sup>66</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.86; Charney, Jonathan L., ‘Transnational Corporations and Developing Public International Law,’ 1983 *Duke Law Journal* 748 (1983), p.753; Josselin, Daphne, and William Wallace, ‘Non-State Actors in World Politics: a Framework,’ in Daphne Josselin and William Wallace *Non-State Actors in World Politics*, Berlin: Springer (2001), p.12.

<sup>67</sup> D’Aspremont, Jean, ‘Non-State Actors from the Perspective of Legal Positivism: The Communitarian Semantics for the Secondary Rules of International Law,’ in Jean D’Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, London and New York: Routledge (2011), p. 25.

<sup>68</sup> Reinisch, August, ‘The Changing International Legal Framework,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.42.

<sup>69</sup> Alston, Philip, ‘The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.19.

<sup>70</sup> International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory opinion: International Court of Justice Reports (1949), p.178.

<sup>71</sup> Reinisch, August, ‘The Changing International Legal Framework,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.72.

<sup>72</sup> *Ibid.*, p.85.

<sup>73</sup> *Ibid.*, p.85.

<sup>74</sup> Clapham, Andrew, *Human Rights Obligations of Non State Actors*, Oxford: Oxford University Press (2006), pp.70-73.

<sup>75</sup> International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory opinion: International Court of Justice Reports (1949), p.178.



applied these criteria to MNCs. She argues that to a certain extent businesses have rights under international law, however, determining whether they have duties is more controversial.<sup>76</sup> Vandenhoe and others have a straightforward opinion on this subject and argue:

In essence, human rights (law) is about correcting power, first and foremost for the protection of the most vulnerable and marginalized. Given this basic mission of human rights (law), the decisive criterion for singling out actors as human rights duty-bearers is whether they exercise power or are in a position to do so. Human rights law thus becomes applicable to all actors that hold or exercise power, regardless of the identity of the power holder.<sup>77</sup>

Hence, according to Vandenhoe et al., businesses should be human rights duty bearers. In fact, the literature already speaks about cases when businesses have been held accountable for human rights abuses (institutional sanctions found in criminal codes or administrative codes).<sup>78</sup> However, these are domestic cases, decided by domestic courts and not international jurisprudence. Besides, most of the cases are defended with the idea that businesses must abstain from certain activities infringing upon civil and political (CP) human rights. Thus, the court assumed businesses have negative obligations, mostly regarding CP rights. Here, the argument is that positive human rights obligations are essential for businesses to be accountable for the realization of the right to food – which is an ESC right– in addition to negative obligations (this will be discussed in more depth in section 2.4). Although the argument held is far from being concretized, scholars increasingly reinterpret international human rights law to defend the idea of its application to businesses.

### 2.1.2 Extending national jurisdiction to businesses' activities abroad: the question of extraterritoriality

The UN Working Group on Business and Human Rights notes that 'while business enterprises generally do not have legal obligations directly relating to human rights emanating from international instruments, they will often have legal obligations resulting from State laws that incorporate international standards, or contractual obligations with regard to respecting international standards.'<sup>79</sup> Indeed, the vast majority of countries now have constitutions that bind legal persons, which includes businesses, to ESC obligations.<sup>80</sup> These constitutional protections 'provide perhaps the strongest basis for corporate obligations under the [ESC] rights.'<sup>81</sup> In fact, the recognition of businesses as legal persons at the national level has permitted to sue these businesses in tort and contract, and occasionally hold them criminally liable.<sup>82</sup> Overall, States have the obligation to ensure that the companies operating on their territory do not violate the human rights that are recognized in their domestic legislation.

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<sup>76</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.88.

<sup>77</sup> Vandenhoe, Wouter, Gamze E. Türkelli and Rachel Hammonds 'Reconceptualizing Human Rights Duty-Bearers', in Mark Gibney and Anja Mihr (eds), *The SAGE Handbook of Human Rights*, London: SAGE (2014), p.1036.

<sup>78</sup> Wells, Celia and Juanita Elias, 'Corporate Complicity in Rights Violations,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp.151-169.

<sup>79</sup> Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/68/279 (2013), para.19.

<sup>80</sup> Letnar Černej, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), pp.91-94; Report of the Special Rapporteur on Extreme Poverty and Human Rights: Philip Alston, UN Doc. A/HRC/32/31 (2016), para.33.

<sup>81</sup> Letnar Černej, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.92.

<sup>82</sup> Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.434.

However, there is an on-going debate whether States also have the duty to ensure that businesses registered in their territory do not violate these same human rights when operating abroad.<sup>83</sup> This is referred to as extraterritorial jurisdiction. Already in 1974, the UN Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations issued a report recommending States to take actions ensuring that MNCs do not infringe upon human rights during their operations in developing countries. The report explicitly required States to put in place domestic measures with extraterritorial implications in the field of business and human rights.<sup>84</sup> Further, the CESCR has stated that: 'States parties should [also] take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.'<sup>85</sup> In fact, several UN human rights treaty bodies, monitoring the implementation of those treaties by States, have adopted texts that support the idea of extraterritorial jurisdiction.<sup>86</sup>

Also, the UNGP 2 encourages States to monitor and regulate the foreign activities of companies registered in their territory. It reads as follows: 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'<sup>87</sup> The official commentary to this Principle 2 gives examples of ways to achieve the previous, among which the adoption of 'domestic measures with extraterritorial implications.'<sup>88</sup> Vandenhoe and Genugten acknowledge that considerable work has been done on extraterritorial human rights obligations, especially concerning ESC rights.<sup>89</sup> The growing trend of extraterritoriality can be seen as a sign that governments are extending the borders of their national jurisdiction to further international laws. This is a promising development, as the traditional approach of international human rights law has allowed businesses to 'operate largely in a legal vacuum, devoid of obligations at the international level.'<sup>90</sup>

However, the question of extraterritoriality remains contested and cannot serve as a unique and encompassing solution to business and human rights challenges.<sup>91</sup> Also, it is still unclear when and how the States' obligations deriving from international human rights law are subject to extraterritoriality.<sup>92</sup> The UN's Special Representative of the UN Secretary-General (SRSG) on business and human rights, John Ruggie, recognized that although States are

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<sup>83</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.95.

<sup>84</sup> The Impact of Multinational Corporations on the Development Process and on International Relations, UN Doc. E/5500/Add.1 (Part I) (1974), pp.854–855.

<sup>85</sup> Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, E/C.12/2011/1 (2011), para.5.

<sup>86</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4 (2000), Para 39; Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003), The Right to Water (Art. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11 (2003), para. 33; UN Committee on the Rights of the Child, General Comment No. 16 (2013), State Obligations Regarding the Impact of the Business Sector on Children's Rights, CRC/C/GC/16 (2013), para. 43; Concluding Observations on the Sixth Periodic Report of Germany, adopted by the Committee at its 106th session (15 October - 2 November 2012), CCPR/C/DEU/CO/6 (2012), para. 16.

<sup>87</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31 (2011), Principle 2.

<sup>88</sup> Ibid., Principle 2, Commentary.

<sup>89</sup> Vandenhoe, Wouter and Willem van Genugten, 'Introduction: An Emerging Multi-Duty-Bearer Human Rights Regime?' in Wouter Vandenhoe (ed.), *Challenging Territoriality in Human Rights Law*, London and New York: Routledge (2015), pp.1-2.

<sup>90</sup> Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' (2) *Journal of Business Ethics* 433 (2009), p.437.

<sup>91</sup> Ruggie, John G., 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights,' 20(1) *Global Governance* 5 (2014), p.9.

<sup>92</sup> Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.437.

not legally bound to exercise extra-territorial jurisdiction over human rights abuses by corporations, they are not prohibited to do so either.<sup>93</sup> Nolan and Taylor argue that the few human rights obligations that bind corporations are 'merely domestic laws that happen to have extraterritorial [...] application.'<sup>94</sup> Thus, extraterritorial jurisdiction in the field of human rights is not a universal practice yet, and domestic laws differ greatly according to 'the type, depth and extent of the regulation of businesses.'<sup>95</sup>

To illustrate one of the difficulties met when regulating businesses operating globally, one must mention the doctrine of limited liability. In the case of MNCs, each subsidiary and its parent company are considered as independent and individual legal personalities. Companies are subject to the domestic laws of the States where they are based and operate. However, the network of subsidiary companies and the parent company, or the MNC as a whole is not subject to international law; rather each separate entity is bound to specific domestic laws. This means that a parent company cannot be held liable for the wrongdoings of its subsidiaries, which makes it challenging to ensure respect for human rights, especially by large MNCs.<sup>96</sup> Therefore, De Schutter defends the 'need for the adoption of a new international instrument, aimed at clarifying, and where necessary at extending, the obligations of States to protect human rights against any violations of these rights originating in the activities of transnational corporations.'<sup>97</sup> He explains:

Under the proposed instrument [however], the States parties would have to impose on the parent companies of transnational corporations which have their nationality that they respect internationally recognized human rights, over and above the locally applicable legislation, in all their activities, and that they monitor the behavior of their subsidiaries, affiliates and business partners, by including provisions imposing a similar obligation to respect internationally recognized human rights in the agreements they conclude with these partners. This would facilitate overcoming the 'corporate veil' problem by the imposition of due diligence obligations on the parent company, whose liability could potentially be engaged once it appears that the subsidiary, affiliate or business partner has committed human rights abuses or has been complicit in such abuses, and that the parent has not adopted all measures which could have prevented the risk from materializing.<sup>98</sup>

It appears that although the principle of extraterritoriality is far from being universally applied, there is a continuous search for ways to attribute international human rights obligations to businesses, transcending geographical barriers.

To sum up, traditionally, the only duty bearers of human rights were States, resulting from a vertical application of domestic and international human rights law. Recent developments have now validated a horizontal approach of human rights law with multiple duty bearers: 'International law already imposes in different areas indirect human rights obligations on corporations, although it is certainly correct that it suffers due to the lack of binding

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<sup>93</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc A/HRC/4/35 (2007), para.15.

<sup>94</sup> Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.437.

<sup>95</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.231.

<sup>96</sup> Ruggie, John G., 'Business and Human Rights: The Evolving International Agenda,' 101(4) *American Journal of International Law* 819 (2007), pp.823-824.

<sup>97</sup> De Schutter, Olivier, 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations,' *Report, Université Catholique de Louvain* (2006), p.51.

<sup>98</sup> *Ibid.*, p.52.

enforcement fora.’<sup>99</sup> For instance, Černič Letnar notes that corporations are indeed ‘individual human rights duty-holders.’ He explains what this means:

‘Not only States but also corporations have direct and indirect obligations under [ESC] rights. In fact, corporate obligations depend on the plurality of duty-bearer settings, where there exist a variety of holders that complement each other. Corporate obligations under [ESC] rights here refer to substantive and procedural human rights obligations of corporations deriving from national, international and unilateral commitments by corporations themselves.’<sup>100</sup>

In relation to this, Clapham shares the idea that one should ‘talk about the parties to a human rights treaty rather than use the expression States parties, which indicates that States are exclusive members of every human rights regime.’<sup>101</sup> Overall, nothing prevents the attribution of international human rights duties upon businesses; yet the question is whether business and human rights treaties will actually choose to do so.<sup>102</sup> In fact, a multitude of (successful or not) soft law initiatives at the international level have already been developed, with the aim of creating an international and encompassing instrument or framework to guide or even to regulate businesses’ operations with regards to human rights. A short overview of the different projects that have been worked on during the past fifty years (mostly focusing on UN-based initiatives) will be presented next, in section 2.2.

## 2.2 Overview of international soft law initiatives relevant for businesses and human rights

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As seen above, businesses are not (yet) directly accountable for the effects of their policies and actions on the human rights of the people in the areas where they are active. They are not direct subjects of international human rights law; hence do not have any international and universal legal obligations originating from that field. Already in 1973, a report of the UN about the impact of Multinational Corporations in World Development stated the following:<sup>103</sup>

Despite the considerable and transnational power, which multinational corporations possess, they, unlike governments, are not directly accountable for their policies and actions to a broadly based electorate. Nor, unlike purely national firms, are the multinational corporations subject to control and regulation by a single authority, which can aim at ensuring a maximum degree of harmony between their operations and the public interest. The question at issue, therefore, is whether a set of institutions and devices can be worked out which will guide the multinational

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<sup>99</sup> Letnar Černič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.96. See also: Reinisch, August, ‘The Changing International Legal Framework,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp.70-71.

<sup>100</sup> Letnar Černič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.91.

<sup>101</sup> Clapham, Andrew, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press (2006), p.91.

<sup>102</sup> De Schutter, Olivier, ‘The Accountability of Multinationals for Human Rights Violations in European Law’, in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.231; Weissbrodt, David and Muria Kruger, ‘Human Rights Responsibilities of Businesses as Non-State Actors’, in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p. 331.

<sup>103</sup> Multinational Corporations in World Development, UN Doc. ST/ECA/190 (1973), p.2.

corporations' exercise of power and introduce some form of accountability to the international community into their activities.

According to Bernaz, this report from 1973 is still relevant and applicable today, as the search for a way 'to introduce some form of accountability for multinational corporations at the international level' is still prominent in the business and human rights field.<sup>104</sup> Besides, the 1973 report suggests the elaboration of a 'broad international code of conduct', which eventually led to the development of several soft law initiatives. For instance, the UN Draft Code on Transnational Corporations (the Code) and the UN Draft Norms on Business and Human Rights (the Norms) were both ambitious in terms of obligations imposed onto corporations. Unfortunately, this ambition also partly caused their failure to be supported by the private sector and more importantly, to be accepted by governments. On the other hand, the UN Global Compact (UNGC), the UNGPs, the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD Guidelines) and the International Labor Organization's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) were successful initiatives that received support from governments. They will be presented in more detail in the following sections.

These soft law initiatives do not impose any legal obligations on businesses, but are an important development in the field of business and human rights as they 'seek to encourage businesses to at least respect human rights.'<sup>105</sup> Tomuschat insists on the importance of soft law, despite their lack of binding power. In fact, he notes the major influence of soft law initiatives on the development of the law, which he refers to as a 'process of hardening into law.'<sup>106</sup> Accordingly, this section will present international soft laws addressing businesses and touching upon human rights developed by the UN, other international organizations, and the private sector. Specific attention will be drawn on the impact of these soft laws on the right to food and lessons learned throughout the different negotiations and instruments.

### 2.2.1 UN soft law initiatives relevant for businesses and human rights

The UDHR is commonly viewed as the foundation for international human rights law. All parties to the UN General Assembly unanimously accepted it in 1948 'as a common standard of achievements for all peoples and all nations [setting out] for the first time, fundamental human rights to be universally protected.'<sup>107</sup> The UDHR is particularly interesting as it recognizes the right to food<sup>108</sup> and is addressed to all organs of society, not just States.<sup>109</sup>

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<sup>104</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.166.

<sup>105</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.203.

<sup>106</sup> Tomuschat, Christian, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press (3rd edition, 2014), p.45. See also: Blitt, Robert C., 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance,' 48 *Texas International Law Journal* 33 (2012), p.41; International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), pp.8-9 and p.160; Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.434; Sen, Amartya, 'Elements of a Theory of Human Rights,' 32(4) *Philosophy & Public Affairs* 315 (2004), p.327; Sethi, Prakash S., 'Self-Regulation through Voluntary Codes of Conduct,' in Prakash S. Sethi, *Globalization and Self-Regulation: The Crucial Role that Corporate Codes of Conduct Play in Global Business*, New York: Palgrave MacMillan (2011), p.6; Steinhardt, Ralph G., 'The New Lex Mercatoria' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp. 206-207.

<sup>107</sup> Universal Declaration of Human Rights, GA Res. 217 A (III) (1948).

<sup>108</sup> Ibid., art.25(1).

<sup>109</sup> Ibid., Preamble.

### 2.2.1.1 The UN Global Compact

On 31 January 1999, Kofi Annan, at that time UN Secretary-General declared: 'I propose that you, the business leaders gathered in Davos, and we, the United Nations, initiate a global compact of shared values and principles, which will give a human face to the global market.'<sup>110</sup> One year after, Annan inaugurated the UNGC. It was created to encourage and smoothen discussion among and with businesses, serving as 'a platform to facilitate corporate engagement with [its] principles' on human rights, labor, environment, and anti-corruption, following the failure of the Code.<sup>111</sup> In accordance with these aims, the UNGC has become *the* example of a 'bottom-up, non-hierarchical model of multilateral cooperation'<sup>112</sup> and has grown to become the largest 'voluntary global governance agency'<sup>113</sup> with over 13,500 signatories in 2019.<sup>114</sup>

The UNGC supports companies in two important ways discussed below.<sup>115</sup> First, it supports them to 'do business responsibly by aligning their strategies and operations with [the UNGC's] Ten Principles.'<sup>116</sup> These Ten Principles allowed the UNGC to play 'an important role in putting CSR on the agenda, facilitating and fostering dialogue, and establishing a consensus on global ethical standards for business.'<sup>117</sup> The principles were drawn from a series of important international agreements: the UDHR, the Fundamental Principles and Rights at Work of the ILO, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption.<sup>118</sup> However, only the UNGC's two first principles based on the UDHR, are interesting for this thesis:

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

Principle 2: make sure that they are not complicit in human rights abuse.<sup>119</sup>

Although these principles do not bind businesses to the same obligations as States towards international human rights like the Code aimed to do, it still is a success in the sense that it allowed international organizations to open the discussion about human rights with businesses.<sup>120</sup> Indeed, the principles successfully encourage businesses to respect human rights.<sup>121</sup> Second, the UNGC supports companies to 'take strategic actions to advance broader

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<sup>110</sup> Press Release, Secretary-General, 'Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos,' UN Doc. SG/SM/6881, 1 February 1999.

<sup>111</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.176.

<sup>112</sup> Thérien, Jean-Philippe, and Vincent Pouliot, 'The Global Compact: Shifting the Politics of International Development?', 12(1) *Global Governance: A Review of Multilateralism and International Organizations* 55 (2006), p.57.

<sup>113</sup> Voegtlin, Christian and Nicola M. Pless, 'Global Governance: CSR and the Role of the UN Global Compact,' 122(2) *Journal of Business Ethics* 179 (2014), p.179.

<sup>114</sup> For a complete list of all the UNGC participants, see: UN Global Compact, 'Our Participants,' (Webpage, n.d.) <<https://www.unglobalcompact.org/what-is-gc/participants>> accessed 13 February 2019.

<sup>115</sup> For a more complete and practical overview of the UNGC's activities, the reader is referred to Table 2 in: Kell, Georg, and David Levin, 'The Global Compact Network: An Historic Experiment in Learning and Action,' 108(2) *Business and Society Review* 151 (2003), p.165.

<sup>116</sup> UN Global Compact, 'The Ten Principles of the UN Global Compact,' (Webpage, n.d.) <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 13 February 2019.

<sup>117</sup> Voegtlin, Christian and Nicola M. Pless, 'Global Governance: CSR and the Role of the UN Global Compact,' 122(2) *Journal of Business Ethics* 179 (2014), p.179.

<sup>118</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.177.

<sup>119</sup> UN Global Compact, 'The Ten Principles of the UN Global Compact,' (Webpage, n.d.) <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 13 February 2019.

<sup>120</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.180.

<sup>121</sup> UN Global Compact, 'The Ten Principles of the UN Global Compact,' (Webpage, n.d.) <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 13 February 2019.

societal goals, such as the UN SDGs, with an emphasis on collaboration and innovation.’<sup>122</sup> The latter is relevant for the right to food as the SDG2 entitled ‘Zero Hunger’ has the aim to ‘end hunger, achieve food security and improved nutrition and promote sustainable agriculture.’<sup>123</sup> Hence, it is clear that the aim of the UNGC is in no way to impose obligations on businesses or measure their performance related to the ten principles. Instead, it is a platform regrouping businesses to promote and share ideas about the *ideal* way of doing business. In fact, António Guterres, UN Secretary-General stated that ‘together with its Local Networks, the UN Global Compact will continue its efforts to create a critical mass of responsible companies to help fulfill the core promise of the 2030 Agenda: to leave no one behind.’

#### 2.2.1.2 UN Guiding Principles on Business and Human Rights

Following the continued debate around business and human rights after the work on the Code, the UNGC and the Norms, Ruggie elaborated the UNGPs during his mandate as SRSR on the issue of ‘business and human rights.’ In June 2008, Ruggie first presented the ‘Protect, Respect and Remedy’ Framework (also referred to as ‘the Framework’) to the Human Rights Council. This Framework rests on three pillars: ‘the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.’<sup>124</sup> Contrary to the Norms,<sup>125</sup> the Framework allocates the international human rights obligations to States only, while businesses *simply* have to conduct due diligence to ‘discharge the responsibility to respect.’<sup>126</sup> In fact, the Framework differentiates the obligations of States and the responsibilities of businesses by using the term ‘duty’ in the expression: ‘State duty to protect’ whereas businesses *only* have the ‘responsibility’ to respect human rights. The former having a legal meaning and the latter not: ‘the corporate responsibility to respect [...] is the basic expectation society has of business’, it is not a legal obligation.<sup>127</sup> To clarify, the explanatory comments develops that:

The term “responsibility” rather than “duty” is meant to indicate that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic laws. It is a global standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself.<sup>128</sup>

As a result, the Framework allocates a ‘much narrower scope of responsibility’ to businesses in comparison to the Norms.<sup>129</sup> In general, while the UN’s ‘Protect, Respect and Remedy’ Framework does not enable the recognition of direct business human rights obligations under international law, it is a positive step moving the concept of

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<sup>122</sup> UN Global Compact, ‘Our Mission’ (Webpage, n.d.) <<https://www.unglobalcompact.org/what-is-gc/mission>> accessed 10 November 2018.

<sup>123</sup> Transforming our World: The 2030 Agenda for Sustainable Development, A/RES/70/1 (2015), Goal 2.

<sup>124</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5 (2008), para.9.

<sup>125</sup> Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), art.1.

<sup>126</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5 (2008), para.56.

<sup>127</sup> *Ibid.*, para.9.

<sup>128</sup> UN, ‘The UN “Protect, Respect and Remedy” Framework for Business and Human Rights,’ (Explanatory Comments, 2010) <<https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>> accessed 15 November 2018.

<sup>129</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), pp.191-192.

corporate responsibility closer towards the legal sphere.<sup>130</sup> The Human Rights Council who unanimously approved the Framework in 2008, decided to prolong Ruggie's mandate for him to develop the UNGPs.

The UNGPs were issued in March 2011 and endorsed by the Human Rights Council in June of the same year. They consist of the recommended implementation of the UN Framework, as well as a report defining options on how the Human Rights Council can progress on the business and human rights agenda after the end of Ruggie's mandate. The UNGPs' three distinct but complementary pillars address (1) States on their legal obligation to protect human rights, (2) businesses on their responsibility to act with due diligence and avoid infringing on human rights, and (3) affected individuals or groups on how they can gain access to remedy when their rights were violated.<sup>131</sup> Overall, the UNGPs aim to bring society one-step further towards the full respect, protection, and fulfillment of all human rights.<sup>132</sup> As described by John G. Ruggie:

The Guiding Principles represent two unprecedented steps for the United Nations: they are the only authoritative guidance the Human Rights Council and its predecessor, the Commission on Human Rights, have ever adopted on the subject of business and human rights; and this is the only time that either has "endorsed" a normative text *on any subject* that governments did not negotiate themselves. Of course, I would wish to see more and faster progress in implementation. But in comparison with normative and policy developments in other difficult domains, the [UN] GPs uptake since the Council's endorsement in June 2011—by other international standard setting bodies, governments, businesses, workers organizations, and civil society actors—has been relatively swift and widespread.<sup>133</sup>

Turning to the specific content of the UNGPs, UNGP 1 mentions the obligations of States to ensure the respect, protection, and fulfillment of all human rights.<sup>134</sup> UNGP 11 explains that businesses 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved' in order to 'respect human rights.' Then UNGP 12 clarifies that businesses should respect virtually all internationally recognized human rights, which is a promising step forward.<sup>135</sup> The official commentary develops on this by specifying that this includes all rights stated in the UDHR and the ICESCR, among others. It explains that 'because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights.'<sup>136</sup> Hence, all types of businesses are responsible for the respect of the right to food, as this right is acknowledged in the UDHR and the ICESCR.<sup>137</sup> Similarly to the UN Framework, the UNGPs view the corporate responsibility to respect human rights as a social rather than a legal

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<sup>130</sup> Ruggie, John G., *Just Business*, New York and London: W. W. Norton & Company Inc. (2013), p.125.

<sup>131</sup> Ruggie, John G., 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights,' 20(1) *Global Governance* 5 (2014), p.9.

<sup>132</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.190.

<sup>133</sup> Ruggie, John G., 'Comments on "Human Rights Obligations for Business: beyond the corporate responsibility to respect"' (Letter of Opinion, 2013) <<https://www.business-humanrights.org/sites/default/files/media/ruggie-comment-surya-deva-david-bilchitz.pdf>> accessed 14 November 2018.

<sup>134</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31, Principle 1, Commentary.

<sup>135</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31 (2011), Principle 12.

<sup>136</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31, Principle 12, Commentary.

<sup>137</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.11; Universal Declaration of Human Rights, GA Res. 217 A (III) (1948), art.25(1).



expectation.<sup>138</sup> For instance, the Commentary to the UNGP12 explains that ‘the responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.’<sup>139</sup> This translates into the fact that, in practice, businesses are relatively free to choose how they will act in order to apply and monitor the corporate responsibility to respect.<sup>140</sup> Still, the UNGPs have a few guidelines that businesses must take into account in order to respect all human rights, which are to:<sup>141</sup>

Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.<sup>142</sup>

To sum up, despite the non-binding character of the UNGPs, Ruggie believes ‘international legal instruments [...] must and will play a role in the continued evolution of the business and human rights agenda, but as carefully crafted precision tools’.<sup>143</sup> In fact, the UNGPs advocate for and were created based on the new theory of polycentric governance. Ruggie explains that this term rests on the idea that the State cannot accomplish all its tasks and respond to all societal challenges on its own, so it must engage other actors to increase its capacities. He acknowledges that this is even more pressing and pertinent when it comes to regulating the activities of MNCs.<sup>144</sup> Nevertheless, Ruggie is aware of the limitations of the UNGPs and in his final presentation closing his mandate, he said: ‘I am under no illusion that the conclusion of my mandate will bring all business and human rights challenges to an end. But Council endorsement of the Guiding Principles will mark the end of the beginning.’<sup>145</sup>

## 2.2.2 Other organizations’ initiatives relevant for businesses and human rights

### 2.2.2.1 The International Labor Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

The MNE Declaration was first adopted in 1977 and amended for the last time in March 2017 to reflect new international instruments and challenges. It is a guidance document for ‘governments, employers’ and workers’ organizations of home and host countries and multinational enterprises,’ encouraging them to take ‘measures and actions and [adopt] social policies [...] to further social progress and decent work.’<sup>146</sup> In accordance with the

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<sup>138</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.196.

<sup>139</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, A/HRC/17/31, Principle 12, Commentary.

<sup>140</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.196.

<sup>141</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, A/HRC/17/31, Principle 13.

<sup>142</sup> Ibid.

<sup>143</sup> Ruggie, John G., ‘Global Governance and “New Governance Theory”: Lessons from Business and Human Rights,’ 20(1) *Global Governance* 5 (2014), p.8.

<sup>144</sup> Ibid., pp.8-9.

<sup>145</sup> Presentation of Report to United Nations Human Rights Council Professor John G. Ruggie Special Representative of the Secretary-General for Business and Human Rights, 30 May 2011 (2011), p.7.

<sup>146</sup> International Labor Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions* (2017), Para. 4.

UNGPs, the MNE Declaration differentiates the role of enterprises from that of governments. Guy Ryder, ILO Director-General explained that the 'MNE Declaration provides clear guidance on how enterprises can contribute through their operations worldwide to the realization of decent work.' At the same time, he points out 'the role of government in stimulating good corporate behavior.'<sup>147</sup> Hence, the MNE Declaration focuses mostly on the work environment but also recognizes that businesses can 'make an important contribution to the promotion of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly; and to the enjoyment of human rights.'<sup>148</sup>

The MNE Declaration indirectly recognizes the right to food by referring to particular soft law initiatives and by certain requirements it has stipulated. First, although the MNE Declaration's paragraphs 43 to 46 about safety and health only focus on the workplace without mentioning the right to food,<sup>149</sup> the MNE Declaration does refer to the International Bill of Human Rights, which recognizes the right to food.<sup>150</sup> Besides, the 2017 MNE Declaration amendment takes into account several new relevant instruments and documents addressing the right to food more or less directly; among which the UNGPs, the OECD Guidelines, and the SDGs. Indeed, the MNE Declaration refers to the UNGPs when it comes to the roles of the different stakeholders in the field of human rights.<sup>151</sup> This is a positive improvement, indirectly strengthening the case for the right to food, despite the fact that it not explicitly mentioned in the MNE Declaration.

Second, the MNE Declaration recommends that the activities of businesses be in accordance with the policy objectives and development goals of the host countries where they operate, which may include working towards food security for instance.<sup>152</sup> In fact, both host and home governments must promote good social practice in line with the MNE Declaration, among multinational enterprises operating in their territory and abroad, respectively.<sup>153</sup> Again, promoting food security may be a good social practice. Therefore, these two policies could also be of use when defending the case of the right to food, as will be discussed and illustrated in Chapter 4. Altogether, the MNE Declaration does not make any explicit reference to the right to food but its recommendations of behavior for businesses could be applied to the realization of the right to food, in particular.

#### 2.2.2.2 The OECD Guidelines for Multinational Enterprises

The OECD Guidelines were first adopted in 1976. They were later revised and strengthened according to relevant new developments and trends in the field of business, trade, international and national directives and laws.<sup>154</sup> The foreword of the OECD Guidelines indicates that they are 'recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards.'<sup>155</sup> Their aim is to stimulate enterprises to contribute to global economic, environmental and

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<sup>147</sup> International Labour Organization, 'What is the ILO MNE Declaration?' (Webpage, n.d.) <[https://www.ilo.org/empent/areas/mne-declaration/WCMS\\_570332/lang-en/index.htm](https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang-en/index.htm)> accessed 26 November 2018.

<sup>148</sup> International Labor Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions* (2017), para.1.

<sup>149</sup> Ibid., paras.43-46.

<sup>150</sup> Ibid., para.8.

<sup>151</sup> Ibid., para.10.

<sup>152</sup> Ibid., para.11.

<sup>153</sup> Ibid., para.12.

<sup>154</sup> Sauvant, Karl P., 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations,' 16(1) *The Journal of World Investment & Trade* 11 (2015), p.37.

<sup>155</sup> Organization for Economic Co-Operation and Development, *Organization for Economic Co-Operation and Development Guidelines for Multinational Enterprises 2011 Edition* (2011), p.3.

social progress.<sup>156</sup> The latest revision of the OECD Guidelines led to a new version in 2011, with as biggest change the addition of an entire chapter focusing on human rights, in line with the UNGPs.<sup>157</sup> This shows the success and impact of the UNGPs but also indicates the preference of States and businesses to work with voluntary documents, rather than legally binding documents. Still, Bernaz identified the 2011 amendments to the OECD Guidelines as a positive step forward, making it a 'key text for the international regulation of business in the human rights field'.<sup>158</sup>

The OECD Guidelines are promoted and implemented through National Contact Points (NCPs), which are 'agencies established by adhering governments to promote and implement the Guidelines' but they also serve as a platform to resolve any practical issues.<sup>159</sup> Although NCPs can be composed of independent members, Oshionebo argues that more often than not they consist of government agents and are even based in a governmental institute. This hinders the proper functioning of the NCPs as independent and impartial bodies, which in turn may negatively affect the implementation of the OECD Guidelines.<sup>160</sup> Besides, Oshionebo notes that a more worrisome observation is that each NCP has a different approach and opinion on 'its role in handling specific instances',<sup>161</sup> which is primarily caused by 'glaring jurisdictional loopholes in the OECD Guidelines'.<sup>162</sup> Moreover, he regrets that the worldwide record of NCPs is rather inconsistent and reflects a slight preference for form over substance. 'Nevertheless, such bodies have the potential to play an important role in providing access to remedies for human rights violations in the absence of enforceable norms of international law.'<sup>163</sup> Concordantly, Bernaz explains that in spite of these shortcomings, the specific instances' proceedings run by the NCPs 'remain the closest thing there exists to an international mechanism to hold corporations accountable for human rights violations', as of 2016.<sup>164</sup>

### 2.2.3 Corporate Self-Regulation

Starting at the end of the past century, the number of global companies developing and adopting codes of conducts increased dramatically, most likely to address their consumers' concerns.<sup>165</sup> Other reasons for the creation of these codes of conducts are to increase economic benefits, to improve the business' reputation<sup>166</sup> and to avoid interference with government.<sup>167</sup> Although there is a multitude of different types of voluntary codes of

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<sup>156</sup> Ibid., p.3.

<sup>157</sup> Ruggie, John G., and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementations Challenges,' 22 *Brown Journal of World Affairs* 99 (2015), pp.105-106.

<sup>158</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.202.

<sup>159</sup> Organization for Economic Co-Operation and Development, *Organization for Economic Co-Operation and Development Guidelines for Multinational Enterprises 2011 Edition* (2011), p.3.

<sup>160</sup> Oshionebo, Evaristus, 'The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing,' 17 *Lewis & Clark Law Review* 545 (2013), p.576-577.

<sup>161</sup> Ibid., p.580.

<sup>162</sup> Ibid., p.581.

<sup>163</sup> Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.444.

<sup>164</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.202. See also: Ruggie, John G., and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementations Challenges,' 22 *Brown Journal of World Affairs* 99 (2015), p.113 and p.123.

<sup>165</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.213.

<sup>166</sup> Bondy, Krista, Dirk Matten, and Jeremy Moon, 'The Adoption of Voluntary Codes of Conduct in MNCs: A Three-Country Comparative Study,' 109(4) *Business and Society Review* 449 (2004), p.450; Organization for Economic Co-Operation and Development, *Codes of Corporate Conduct: Expanded Review of their Contents, OECD Working Papers on International Investment*, OECD Publishing 2001/06 (2001), p.2.

<sup>167</sup> Bondy, Krista, Dirk Matten, and Jeremy Moon, 'The Adoption of Voluntary Codes of Conduct in MNCs: A Three-Country Comparative Study,' 109(4) *Business and Society Review* 449 (2004), p.450.

conducts, in general, such a code consists of a ‘set of activities’ that the company commits to undertake.<sup>168</sup> Sethi identifies voluntary codes of conduct as “‘private law’ or a ‘promise voluntarily made,’ whereby an institution makes a public commitment to certain standards of conduct.’<sup>169</sup> Reinisch speaks of a ‘new form of “privatization” of human rights’ when addressing the increased use of corporate codes of conducts by private businesses to self-regulate their operations.<sup>170</sup> As part of the broad range of CSR initiatives, these codes of conduct will be analyzed in more detail in section 3.1.

As mentioned, a number of different categories of codes of conducts have been developed such as universal codes of conducts (UDHR, ILO, UNGC), industry-wide codes of conduct (Marine Stewardship Council, Fair Trade Labeling Organization) and corporate codes of conduct. Particularly the two last categories mentioned are of interest here, as the examples of the first category have already been mentioned above. For a global overview of these voluntary initiatives, one can think of the OECD Report of 2001, which analyzed 246 codes of conducts issued by individual corporations or industry associations. The report found that the issues mostly addressed were those touching upon the environmental stewardship and labor standards.<sup>171</sup> Although 25 percent of the codes studied mentioned the wording ‘human rights,’ the OECD report does not indicate that the codes specifically address the right to food or ESC rights in general.<sup>172</sup>

Further, in relation to codes of conduct, one must mention the work of the Global Reporting Initiative (GRI). Although it does not establish codes of conducts itself, it aims to help ‘businesses and governments worldwide understand and communicate their impact on critical sustainability issues such as climate change, human rights, governance and social well-being;’ by developing reporting standards for use by businesses.<sup>173</sup> These reporting standards facilitate comparison between different businesses and may help clarify the multitude of independent codes of conduct developed by businesses. In fact, the GRI has partnered with the UNGC and together they established the Action Platform Reporting on the SDGs in 2017 to guide businesses in their reporting on work done, related to the SDGs.<sup>174</sup> This seems promising as SDG2 is focused on relieving hunger and malnutrition, although it does not take a legal approach. The GRI has also developed the Human Rights Task Force to help businesses report on their actions regarding human rights. Unfortunately, the focus is very much on labor rights; omitting ESC rights.<sup>175</sup> Extending the Human Rights Task Force to ESC rights may be a way to stimulate pro-active contributions by businesses to the right to food. This possibility is further studied in section 3.3.3.

Still, in general, one can agree with Reinisch when he says that

The debate on the role of corporations and their ethical standards has clearly gone beyond the famous Milton Friedman assertion that the ‘only social responsibility of business [is] to increase

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<sup>168</sup> Sethi, Prakash S., ‘Self-Regulation through Voluntary Codes of Conduct,’ in Prakash S. Sethi, *Globalization and Self-Regulation: The Crucial Role that Corporate Codes of Conduct Play in Global Business*, New York: Palgrave MacMillan (2011), p.6.

<sup>169</sup> Ibid.

<sup>170</sup> Reinisch, August, ‘The Changing International Legal Framework,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.42 and p.75.

<sup>171</sup> Organization for Economic Co-Operation and Development, *Codes of Corporate Conduct: Expanded Review of their Contents*, OECD Working Papers on International Investment, OECD Publishing 2001/06 (2001), p.8.

<sup>172</sup> Ibid., p.10.

<sup>173</sup> Global Reporting Initiative, ‘About GRI’ (Webpage, n.d.) <<https://www.globalreporting.org/Information/about-gri/Pages/default.aspx>> accessed 6 February 2019.

<sup>174</sup> Global Reporting Initiative, ‘The Corporate Action Group for Reporting on the Sustainable Development Goals: An Action Platform to help shape the future of corporate reporting on the SDGs’ (Information leaflet, n.d.) <<https://www.globalreporting.org/SiteCollectionDocuments/2018/GRI%20UNGC%20CAG.pdf>> accessed 6 February 2019.

<sup>175</sup> Global Reporting Initiative, ‘Human Rights Task Force: Tackling Modern Slavery through Transparency’ (Information leaflet, n.d.) <<https://www.globalreporting.org/SiteCollectionDocuments/TF%20Modern%20Slavery.pdf>> accessed 6 February 2019.

profit.’ Even if the ‘generation of long-term economic profit’ is still considered to be a ‘corporation’s primary objective,’ corporate ‘good governance’ clearly requires the balancing of all stakeholders’ interests.<sup>176</sup>

#### 2.2.4 What next?

To sum up, multiple soft law initiatives have been developed and adopted. Abbott and Snidal reviewed the multitude of such initiatives and found that there is indeed ‘a patchwork of uncoordinated schemes competing vigorously for adherents, resources, legitimacy, and public notice.’<sup>177</sup> They stress the need for a larger encompassing instrument that would ‘orchestrate’ all these policies and laws, bringing the whole to a higher level of efficiency by combining their capacities.<sup>178</sup> Section 3.3.3 will address this point in more depth. In his paper of 2014, Ruggie explains with moderation that the UNGPs have in a way taken on this role of ‘orchestrator’ and provides a few examples of this success such as, documents by and/or for businesses that have indeed taken the UNGPs as a basis to increase their respect for human rights.<sup>179</sup> However, ‘on the level of positive law, [...] to date little if anything has materialized.’<sup>180</sup> Those soft law initiatives that aimed at imposing clear obligations upon private actors have not succeeded on that point. Also, none of the successful soft law initiatives explicitly mention the right to food or ESC rights in general. Thus, the challenge at present is to converge public and private interests with the common aim to respect, protect and fulfill human rights in general. Here this challenge will be addressed focusing particularly on the right to food. A brief analysis of businesses and their relation to ESC rights will be given in the next section, followed by a more extensive study of the role businesses have in the realization of the right to food in section 2.4.

### 2.3 Businesses and ESC rights

ESC rights are ‘human rights which are essential for sustaining individual livelihoods and creating human capabilities.’<sup>181</sup> They consist of ‘the human right to work, the right to an adequate standard of living, including food, clothing, and housing, the right to physical and mental health, the right to social security, the right to a healthy environment, and the right to education.’<sup>182</sup> Globally, ESC rights are basic rights that are closely linked to, and essential for civil and political rights. For instance, one that has insufficient amounts or access to food, water, adequate housing, health, and education cannot truly and fully exercise its civil and political rights.<sup>183</sup> Ruggie already acknowledged the importance of covering all human rights obligations in one of his 2008 reports: ‘business

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<sup>176</sup> Reinisch, August, ‘The Changing International Legal Framework,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.51.

<sup>177</sup> Abbott, Kenneth W., and Duncan Snidal, ‘Taking Responsive Regulation Transnational: Strategies for International Organizations,’ 7(1) *Regulation & Governance* 95 (2013), p.102.

<sup>178</sup> Ibid.

<sup>179</sup> Ruggie, John G., ‘Global Governance and “New Governance Theory”: Lessons from Business and Human Rights,’ 20(1) *Global Governance* 5 (2014), pp.11-12.

<sup>180</sup> Tomuschat, Christian, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press (3rd edition, 2014), p.133.

<sup>181</sup> Letnar Černej, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.87.

<sup>182</sup> Center for Economic and Social Rights, ‘What are Economic, Social, and Cultural Rights?’ (Webpage, n.d.) <<http://www.cesr.org/what-are-economic-social-and-cultural-rights>> accessed 6 February 2019. See also: International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.6-15.

<sup>183</sup> Letnar Černej, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), pp.87-88.

can affect virtually all internationally recognized rights. Therefore, any limited list will almost certainly miss one or more rights that may turn out to be significant in a particular instance, thereby providing misleading guidance.’<sup>184</sup>

With regards to the relationship between businesses and ESC rights, according to CESCR’s General Comment No. 24 on State Obligations under the ICESCR in the Context of Business Activities, ‘under international standards, business entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice.’<sup>185</sup> This entails that all businesses have – at the minimum – the responsibility to respect all ESC rights mentioned in the ICESCR, which is in line with the conclusions reached for human rights in general in section 2.2. In reality, some States go beyond the responsibility to respect human rights, by recognizing that businesses also have positive duties. General Comment No. 24 specifies that

In certain jurisdictions, individuals enjoy direct recourse against business entities for violations of economic, social and cultural rights, whether in order to impose on such private entities (negative) duties to refrain from certain courses of conduct or to impose (positive) duties to adopt certain measures or to contribute to the fulfillment of such rights.<sup>186</sup>

This recognition of positive corporate human rights obligations is due to the ‘prescriptive’ nature of ESC rights, as they require active steps for their realization. Some argue that because these rights pose positive duties on States and non-State actors for their realization, ‘fulfillment is fundamentally a matter of social and government policy and ought not to be considered the domain of the courts.’<sup>187</sup> However, ‘while the prescriptive nature of certain ESC rights might require a nuanced approach when brought before a court, it is to be hoped that the emerging recognition of the justiciability of ESC rights will in time engender a commensurate body of referable jurisprudence that will also be applicable to corporations.’<sup>188</sup> Indeed, although ESC rights are increasingly recognized in international law and soft law initiatives, they still are treated as inferior rights in practice, especially compared to civil and political rights. As Alston explains: ‘despite the rhetoric of indivisibility, both national and international endeavors to promote and protect ESC rights are overshadowed by the assumption that while ESC rights are desirable long-term social goals, they should not be treated as full-fledged human rights.’<sup>189</sup> This is also reflected in the extensive regulation addressing businesses to protect labor rights compared to the weak and vague guidelines for businesses to protect ESC rights.

Overall, this lack of accountability for ESC rights is worrisome because as Nolan and Taylor explain, the exponential growth of foreign direct investment (FDI) by corporations coupled with the common lack of regulation by governments of host States has increased the capacity of businesses to infringe ESC rights.<sup>190</sup> For instance, ESC rights have in general mostly been recognized and protected through soft law initiatives, which tend to focus on social, environmental and labor-related issues. An overview of these soft law initiatives has been given in section 2.2. Fortunately, ‘the inadequacy of a system based almost entirely on public pressure and corporate awareness

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<sup>184</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5 (2008), para.6.

<sup>185</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017), State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, E/C.12/GC/24 (2017), para.5.

<sup>186</sup> *Ibid.*, para.4.

<sup>187</sup> Nolan, Justine, and Luke Taylor, ‘Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?’ 87(2) *Journal of Business Ethics* 433 (2009), p.436.

<sup>188</sup> Nolan, Justine, and Luke Taylor, ‘Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?’ 87(2) *Journal of Business Ethics* 433 (2009), p.437.

<sup>189</sup> Report of the Special Rapporteur on Extreme Poverty and Human Rights: Philip Alston, UN Doc. A/HRC/32/31 (2016), para 65.

<sup>190</sup> Nolan, Justine, and Luke Taylor, ‘Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?’ 87(2) *Journal of Business Ethics* 433 (2009), pp.434-436.

(and arguably acceptance) of corporations' "moral" responsibility with respect to human rights is progressively apparent.<sup>191</sup> Following these thoughts from Nolan and Taylor, Letnar Čerňič argues that corporations really do have obligations towards ESC rights-holders. He acknowledges that corporations are not to take over States' obligations, however, they are another source for financial contributions to the realization of ESC rights in the areas where they operate. Moreover, good practices from businesses can supplement existing State provision of ESC rights.<sup>192</sup> He insists that 'negative obligations of the private sector are accompanied by its positive commitments to bring added value to both the local population and wider community.'<sup>193</sup> These responsibilities and claimed duties of the business sector regarding ESC rights will be analyzed in more detail in the following section with a specific focus on the right to food.

## 2.4 Businesses and the right to food

The right to food is an ESC right, which has been recognized in a number of international legal instruments. Pursuant to Article 25(1) of the UDHR, 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food'.<sup>194</sup> This section aims to analyze the meaning and the extent of the right to food, from a legal perspective. As mentioned above, human rights traditionally address States only, which is why the legal description below limits the duty bearers to States. However, as mentioned in section 2.1, some scholars believe the parties to a human rights treaty should be extended to include businesses.<sup>195</sup> This would allow a clear integration of businesses as human rights duty bearers, alongside the States. Therefore, the legal interpretation of the right to food will be followed by an analysis of the possible extension of States' duties – concerning the right to food– to businesses.

### 2.4.1 Legal interpretation of the right to food

As an ESC right, the right to food has been legally acknowledged and defined in Article 11 of the ICESCR in 1967. The article reads as follows: 'the States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food.'<sup>196</sup> The States also agree to take actions necessary for the realization of this right.<sup>197</sup> This is of significant importance, as the Covenant has been ratified by 169 countries and signed by four, as of 11 February 2019.<sup>198</sup> The above-mentioned Article 11 has been extensively explained and interpreted in the CESCR General Comment No. 12. Although this Comment is not legally binding, it guides States to a proper application of ICESCR's Article 11. In fact, Comment No. 12 starts by stressing the irrefutable importance of adequate food for the enjoyment of all human rights, which applies to everyone. For instance, the ICESCR writes about 'himself and his family' but Comment No. 12 clarifies that the expression

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<sup>191</sup> Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.438.

<sup>192</sup> Letnar Čerňič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.79.

<sup>193</sup> *Ibid.*, p.59.

<sup>194</sup> Universal Declaration of Human Rights, GA Res. 217 A (III) (1948), art.25(1).

<sup>195</sup> Clapham, Andrew, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press (2006), p.91; Letnar Čerňič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.91.

<sup>196</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.11(1).

<sup>197</sup> *Ibid.*

<sup>198</sup> United Nations Human Rights Office of the High Commissioner, 'Status of Ratification Interactive Dashboard' (Interactive Dashboard, 2019) <<http://indicators.ohchr.org/>> accessed 5 February 2019.

'himself and his family' does not exclude individuals nor does it ignore female-headed families.<sup>199</sup> Besides, Article 2(2) of the ICESCR states that all rights enunciated in the Covenant 'will be exercised [by the States parties] without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'<sup>200</sup> Further, Article 3 of the ICESCR specifies that the States parties undertake to ensure the same rights for men and women regarding the enjoyment of all rights mentioned in the Covenant.<sup>201</sup> Also, the first paragraph of above-mentioned Article 2 is crucial for a thorough understanding of the Covenant as it has a 'dynamic relationship with all of [its] other provisions.'<sup>202</sup> This Article 2(1) has been interpreted by the CESCR in General Comment No. 3 in its general context; and in General Comment No. 12, paragraph 17 with a specific focus on the right to food. Here, a brief overview will be given of CESCR's recommended interpretation of the right to food, first focusing on ICESCR's Article 11 and next on Article 2(1).

In order to correctly and fully realize the right to food mentioned in ICESCR's Article 11, one must first obtain a thorough understanding of the obligations bound to that right in particular. This Article 11 is thoroughly explained in CESCR's General Comment No. 12. To begin, similarly to other human rights, the right to food entails three types of obligations for States parties: the obligations to *respect*, to *protect* and to *fulfill*.<sup>203</sup> To begin, in order to respect the right to food, States parties should honor this right and must, therefore, refrain from taking part in any activities that would result in limited access to adequate food for anyone. In fact, it should never be possible to pursue any activity that would result in limited access to adequate food. Thus, the second obligation entails that States parties must set measures to prevent individuals or private entities from limiting one's access to adequate food. The last obligation, the obligation to fulfill, actually integrates two obligations: to *facilitate* and to *provide*. The obligation to fulfill (facilitate) signifies that States parties must pro-actively engage in activities to ease one's 'access to and utilization of resources and means to ensure [one's] livelihood, including food security.'<sup>204</sup> The obligation to fulfill (provide) is applicable when people do not have the possibility to obtain adequate food themselves, due to circumstances beyond their control. In those cases, States parties are bound to provide restricted and vulnerable people with food directly.<sup>205</sup> The overall aim of these individual obligations, which can be applied in different ways and times, is to gradually achieve the full realization of the right to food.<sup>206</sup>

Comment No. 12 gives the following more explicit and specific interpretation of the right to adequate food:

The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.<sup>207</sup>

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<sup>199</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para.1.

<sup>200</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.2(2).

<sup>201</sup> Ibid., art.3.

<sup>202</sup> Committee on Economic Social and Cultural Rights, General Comment No. 3 (1990), The Nature of States Parties' Obligations (Art. 2, Para. 1 of the International Covenant on Economic, Social and Cultural Rights), E/1991/23 (1990), para.1.

<sup>203</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para.15.

<sup>204</sup> Ibid., para.15.

<sup>205</sup> Ibid., para.15.

<sup>206</sup> Ibid., para.16.

<sup>207</sup> Ibid., para.8.



Comment No. 12 further explains the choice of the terms used in this interpretation of the right to food and the implications they have. To begin, food must be *available*, which means that one must be able to eat by harvesting food from his/her own fields or a natural resource. One can also obtain food from a nearby distribution or market system.<sup>208</sup> The food must be of *sufficient quality* and obtained in the right *quantity*, when and where necessary. This is crucial because the food must meet one's *dietary needs*, which means that it should match the number of calories and nutrients a person needs for a healthy diet.<sup>209</sup> The WHO has published a 2018 Healthy Diet fact sheet with requirements to be met for a healthy diet. These requirements differ for each individual, based on age, health status, and activities, among others.<sup>210</sup> In fact, it is important to underline that adequate food refers not only to an individual's dietary needs. Food must also be in accordance with an individual's cultural beliefs and habits, hereby ensuring the *acceptability* of the food.<sup>211</sup> Besides, the food must be *free from adverse substances* and should be handled in a proper hygienic way, to guarantee its safe consumption.<sup>212</sup> Lastly, the term *accessibility* refers to two elements: economic access and physical access. Food must be available against a reasonable price, without threatening or hindering the other rights of an individual. It must also be available to individuals with reduced mobility like infants, children, (mentally and/or physically) handicapped people, and the elderly but also indigenous people with limited access to their ancestral land.<sup>213</sup> Hence, realizing the right to food is not simply about distributing food to the hungry, it integrates health and nutrition, culture, as well as the financial and geographical access to food.

After this clarification of the right to food, an analysis follows, highlighting the ways by which States parties must realize this right. Article 2(1) of the ICESCR indicates that all States parties that have ratified the said Covenant are accountable for the rights dealt with in the document, which includes the right to food. The article entails that States parties have to pro-actively 'take steps [...] with a view to achieving progressively the full realization of the rights recognized in the present Covenant.'<sup>214</sup> There are no specifications about any time frame wherein these steps must be taken. In fact, the article acknowledges the difficulty and extended work needed to realize the right to food 'progressively.'<sup>215</sup> Yet, according to CESCR's General Comment No. 3, paragraph 2, States parties must take 'deliberate, concrete and targeted' steps as soon as the Covenant enters into force in order to comply with the latter.<sup>216</sup> The Covenant recognizes that realizing all ESC rights is a lengthy process, thus it obligates the States parties 'to move as expeditiously and effectively as possible towards that goal.'<sup>217</sup>

The required steps can be taken 'individually and through international assistance and co-operation' as each State party must exploit the 'maximum of its available resources' for the 'full realization of the rights recognized in the present Covenant.'<sup>218</sup> In fact, General Comment No. 3, paragraph 14 recalls the obligation of all States with the means to assist those in need to offer international cooperation for development.<sup>219</sup> This principle is also outlined

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<sup>208</sup> Ibid., para.12.

<sup>209</sup> Ibid., para.9.

<sup>210</sup> World Health Organization, 'Healthy Diet' (Webpage, n.d.) <<http://www.who.int/en/news-room/fact-sheets/detail/healthy-diet>> accessed 24 October 2018.

<sup>211</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para.11.

<sup>212</sup> Ibid., para.10.

<sup>213</sup> Ibid., para.13.

<sup>214</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.2(1).

<sup>215</sup> Ibid.

<sup>216</sup> Committee on Economic Social and Cultural Rights, General Comment No. 3 (1990), The Nature of States Parties' Obligations (Art. 2, Para. 1 of the International Covenant on Economic, Social and Cultural Rights), E/1991/23 (1990), para.2.

<sup>217</sup> Ibid., para.9.

<sup>218</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.2(1).

<sup>219</sup> Committee on Economic Social and Cultural Rights, General Comment No. 3 (1990), The Nature of States Parties' Obligations (Art. 2, Para. 1 of the International Covenant on Economic, Social and Cultural Rights), E/1991/23 (1990), para.14.

in Articles 55 and 56 of the Charter of the UN, and in the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986.<sup>220</sup> This aid offered by other States parties is incorporated in the term ‘available resources’ as an addition to the domestic resources of a State party.<sup>221</sup> This is also the reason why, following CESCR’s General Comment No. 12, any State party unable to meet the right to food must prove that it has indeed ‘unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.’<sup>222</sup> Further, CESCR’s General Comment No. 3 recognizes that the Covenant does not have any preference as to the national political or economic system in place but the steps taken must be especially of an ‘economic and technical’ nature.<sup>223</sup> Finally, ICESCR’s Article 2(1) gives information about the instruments needed for the undertaking of steps to realize the rights defined: one must use ‘all appropriate means, including particularly the adoption of legislative measures.’<sup>224</sup> Indeed, creating legislative measures is highly advisable as it is often crucial for the protection of a right. More importantly, these measures should be targeted and well defined to serve the right purpose. Therefore, CESCR’s General Comment No. 3 recommends States to not only implement the right measures but to also motivate their choice for those particular measures in a written report to the CESCR. The CESCR is then the one to determine whether the measures applied are sufficient and appropriate for the full realization of the right to food.<sup>225</sup>

#### 2.4.2 The scope of business accountability for the right to food

According to this brief doctrinal analysis of the ICESCR, only the States that ratified the Covenant are ultimately accountable to comply with it and thus are accountable for the right to food. However, following General Comment No. 12, paragraph 20 ‘all members of society - individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities in the realization of the right to adequate food.’<sup>226</sup> Here, the interest lays specifically in the mentioned responsibilities of the private business sector. In fact, paragraph 20 continues by explaining that each State has the duty to smoothen and stimulate the implementation of these responsibilities by creating a corresponding favorable environment. The CESCR General’s Comment No. 12, paragraph 20 goes further by suggesting that the private sector ‘should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.’<sup>227</sup> Hence, businesses should ensure – and are responsible for – the respect of the right to adequate food throughout all their activities.

It is important to note the subtle difference in the meanings of the terms ‘accountability’ and ‘responsibility’ as both are commonly used as synonyms but carry different implications and legal requirements. The difference between the two terms resembles the differentiation made by the Framework and the UNGPs between the use of the words ‘duty’ and ‘responsibility,’ as explained in section 2.2.1.5. The term accountability being linked to the

<sup>220</sup> Charter of the United Nations, 1 UNTS XVI (1945), art.55 and art.56; Declaration on the Right to Development, A/RES/41/128 (1986), art.3 and art.4.

<sup>221</sup> Committee on Economic Social and Cultural Rights, General Comment No. 3 (1990), The Nature of States Parties’ Obligations (Art. 2, Para. 1 of the International Covenant on Economic, Social and Cultural Rights), E/1991/23 (1990), para.13; International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.2(1).

<sup>222</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para.17.

<sup>223</sup> Committee on Economic Social and Cultural Rights, General Comment No. 3 (1990), The Nature of States Parties’ Obligations (Art. 2, Para. 1 of the International Covenant on Economic, Social and Cultural Rights), E/1991/23 (1990), para.13; International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.2(1).

<sup>224</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.2(1).

<sup>225</sup> Committee on Economic Social and Cultural Rights, General Comment No. 3 (1990), The Nature of States Parties’ Obligations (Art. 2, Para. 1 of the International Covenant on Economic, Social and Cultural Rights), E/1991/23 (1990), para.4 and para.6.

<sup>226</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para.20.

<sup>227</sup> Ibid., para.20.

words ‘duty’ and ‘obligation.’ Bivins makes a distinction between both terms by giving the following definitions of moral responsibility and accountability:

[...] As early as Aristotle, moral responsibility was viewed as originating with the moral agent (decision maker), and grew out of an ability to reason (an awareness of action and consequences) and a willingness to act free from external compulsion.<sup>228</sup>

Accountability is the readiness or preparedness to give an explanation or justification to relevant others (stakeholders) for one’s judgments, intentions, acts and omissions when appropriately called upon to do so. It is [also] a readiness to have one’s actions judged by others and, where appropriate, accept responsibility for errors, misjudgments and negligence and recognition for competence, conscientiousness, excellence and wisdom. It is a preparedness to change in the light of improved understanding gained from others.<sup>229</sup>

According to Cornock, ‘taking responsibility does not necessarily mean one will be asked to give an account – undertaking the action will fulfill the responsibility one has.’<sup>230</sup> On the other hand, ‘accountability is a higher-level activity than responsibility in that it does not merely designate who is responsible for an action but also requires that the person who undertakes the task is able to give an account, reason or explanation for the action.’<sup>231</sup> A third term that is closely linked to these two is liability. Liability is ‘a legal concept and implies there is a disadvantage to the person who is liable. [...] With liability, in addition to the requirement to give an account, there is also the possibility of a sanction.’<sup>232</sup> Based on the definitions of both authors, it follows that one can be responsible for actions, while another can be accountable for the consequences of those actions. In fact, as mentioned in CESCR’s General Comment No. 12, the *accountability* of the right to food is limited to the entities capable of ratifying the Covenant but the *responsibility* for the right to food remains a concern for all members of society.<sup>233</sup> Ideally, the same person or entity would be responsible and accountable for his/her/its actions, which is linked to the idea defended in this thesis, hence the title: ‘Making businesses *accountable* for the realization of the right to food.’<sup>234</sup>

This follows upon the discussion led in section 2.1, about the role of businesses with regards to international human rights. The conclusion reached there naturally applies to all types of human rights and thus to the specific right to food. The right to food has explicitly been stated in at least 28 States and indirectly recognized through the right to an adequate standard of living for example, in 40 States.<sup>235</sup> Similarly to other human rights, ‘the national level [therefore] provides the strongest evidence that corporations are also obliged to observe the right to food. However, this level is thereafter supplemented by emerging international regulation and voluntary commitments made by various food industry sectors and corporations themselves.’<sup>236</sup> As mentioned above, under the UNGPs, businesses are considered responsible for the respect of the right to food like States. However, the obligations to

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<sup>228</sup> Bivins, Thomas H., ‘Responsibility and Accountability,’ in Kathy Fitzpatrick and Carolyn Bronstein (eds.) *Ethics in Public Relations: Responsible Advocacy*, California: SAGE (2006), pp.19-38.

<sup>229</sup> Ibid.

<sup>230</sup> Cornock, Marc, ‘Legal Definitions of Responsibility, Accountability and Liability,’ 23(3) *Nursing Children and Young People* 25 (2011), p.25.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

<sup>233</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para.20.

<sup>234</sup> Bivins, Thomas H., ‘Responsibility and Accountability,’ in Kathy Fitzpatrick and Carolyn Bronstein (eds.) *Ethics in Public Relations: Responsible Advocacy*, California: SAGE (2006), pp.19-38.

<sup>235</sup> Food and Agriculture Organization, ‘The Right to Food: Past Commitment, Current Obligation, Further Action for the Future: A Ten-Year Retrospective on the Right to Food Guidelines’ (2014), para.20.

<sup>236</sup> Letnar Černič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.131.

protect and to fulfill are limited to States. Thus, businesses are not legally required to take pro-active actions towards the right to food and are not accountable for its full realization, rather they are responsible for its respect.

Here, the idea defended is that those positive duties concerning the right to food should be extended to businesses. As developed in the above sections 2.1 and 2.3, making businesses accountable for human rights, and specifically the right to food, will speed up the realization of this right compared to the current situation where only the State has positive obligations. Letnar Čerňič believes corporations should put in place a human rights policy to promote the full realization of all ESC rights. Some businesses have already voluntarily published such a document; examples are given in section 3.1.2. Indeed, businesses have large economic and political power, which could greatly advance food security if well managed.<sup>237</sup>

At present, although the State is the main duty bearer of human rights, it is not always in command of activities impacting ESC rights. Other powerful actors such as international institutions and businesses also impact these ESC rights, sometimes with 'a much larger and profound impact [...] than the territorial State.'<sup>238</sup> In today's globalized world, there is no doubt that businesses – and especially MNCs – are 'politically powerful.'<sup>239</sup> They have the capacity to control 'who does or does not have access to vital things like wealth, security, essential goods and services such as drugs, nutritious food, credit or education.'<sup>240</sup> For instance, as mentioned in chapter 1, the question of food insecurity and malnutrition is not due to a shortage of food but a result of a disproportionate distribution of resources.<sup>241</sup> Consequently, Wettstein declares that 'it is time that we acknowledge the changing role of powerful corporations in the global political economy, and it is time that we start thinking more thoroughly about the normative consequences deriving from it.'<sup>242</sup> Vandenhoele agrees and notes that 'economic globalization has so far not been paralleled by a "globalization of human rights law." But it should.'<sup>243</sup> This would greatly advance human rights as businesses could take on the role of promoters of human rights.<sup>244</sup> Moreover, as mentioned already above, it is clear that each State must 'take steps, individually and through international assistance and cooperation' for the realization of the right to food, by using the maximum of its own resources or resources made available through international assistance and cooperation.<sup>245</sup> Hence, States have the obligation to come in aid to those States with insufficient resources to fulfill the right to food.<sup>246</sup> This obligation of cooperation and international assistance could be extended to businesses, as they have large resources and economic capacities.

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<sup>237</sup> Wettstein, Florian, 'From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?', in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.85.

<sup>238</sup> Vandenhoele, Wouter, 'Emerging Normative Frameworks on Transnational Human Rights Obligations', *EUI Working Papers, RSCAS 2012/17* (2012), p. 1.

<sup>239</sup> Wettstein, Florian, 'Beyond Voluntarism, Beyond CSR: Making a Case for Human Rights and Justice,' 114(1) *Business and Society Review* 125 (2009), p.141.

<sup>240</sup> Ibid., pp.141-142.

<sup>241</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para. 5; Barrett, Christopher B., and Dan Maxwell, *Food Aid After Fifty Years: Recasting its Role*, London and New York: Routledge (2007), p.110; Letnar Čerňič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.58; Clover, Jenny 'Food Security in Sub-Saharan Africa' 12(1) *African Security Studies* 5 (2003), p.7.

<sup>242</sup> Wettstein, Florian, 'Beyond Voluntarism, Beyond CSR: Making a Case for Human Rights and Justice,' 114(1) *Business and Society Review* 125 (2009), p.143.

<sup>243</sup> Vandenhoele, Wouter, 'Emerging Normative Frameworks on Transnational Human Rights Obligations', *EUI Working Papers, RSCAS 2012/17* (2012), p. 1.

<sup>244</sup> Reinisch, August, 'The Changing International Legal Framework,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.63.

<sup>245</sup> Committee on Economic Social and Cultural Rights, General Comment No. 3 (1990), The Nature of States Parties' Obligations (Art. 2, Para. 1 of the International Covenant on Economic, Social and Cultural Rights), E/1991/23 (1990), para.14; International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.2(1).

<sup>246</sup> Ibid.

As mentioned in section 2.3, Letnar Černič believes corporations already have both negative and positive obligations under ESC rights. Indeed, they have the negative obligation not to directly infringe on ESC rights and the positive obligation to ‘adopt active measures to guarantee their provision,’ which links to the due diligence process described in the UNGPs.<sup>247</sup> Where businesses have taken over public responsibilities, through privatization acts, Letnar Černič argues that they have positive obligations resembling those of a State. He gives illustrations of ways for businesses to realize their positive obligations, but these are limited to controlling the impact of a business’ behavior. A brief presentation of his analysis will now be given, although with the view of applying it to all businesses – not merely those having taken up public functions – and focusing on the right to food rather than all ESC rights.

To begin, the obligation to respect is a negative obligation, as can be deducted from UNGP 11: ‘Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.’<sup>248</sup> Černič Letnar explains that ‘the obligation to respect would require corporate actors to adopt comprehensive human rights policies and conduct human rights impact assessments and due diligence before taking on a new investment and production projects.’<sup>249</sup> This is described in the UNGP 15.<sup>250</sup> Next, businesses must ‘avoid infringing on the human rights of others and [...] address adverse human rights impacts with which they are involved.’<sup>251</sup> In the case of the right to food this would imply that businesses should respect the right to food and avoid any direct interference with their employees or the local communities’ right to food. This would specifically apply to the ‘essential features’ of the right to food, which have been presented above in section 2.4.1 (availability, accessibility, cultural or consumer acceptability, dietary needs, sustainability, free from adverse substances).<sup>252</sup> In case their operations adversely impact individuals’ right to food, businesses have the duty to address this issue. As mentioned in the UNGP’s commentary of Principle 11, businesses are required to take ‘adequate measures for [the] prevention, mitigation and, where appropriate, remediation’ of adverse human rights impacts they have caused or may cause.<sup>253</sup> The commentary adds that ‘the responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.’<sup>254</sup>

The two other obligations are positive obligations. Little is said about the obligation for businesses to protect human rights, as this is mostly seen as a State obligation. Still, Černič Letnar argues that ‘corporations are [...] obliged to protect socio-economic rights; that is, to adopt preventive measures so that their connected corporations in groups of corporations, business partners, suppliers and distributors do not violate socio-economic rights or at minimum their reasonable minimum cores in their global supply chains.’<sup>255</sup> Hence it could be seen as an obligation to *monitor* all stakeholders’ actions along the supply chain, ensuring that they do not negatively impact

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<sup>247</sup> Letnar Černič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.102.

<sup>248</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, A/HRC/17/31 (2011), Principle 11.

<sup>249</sup> Letnar Černič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.106.

<sup>250</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, A/HRC/17/31 (2011), Principle 15.

<sup>251</sup> Ibid., Principle 11.

<sup>252</sup> Letnar Černič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.106.

<sup>253</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, A/HRC/17/31 (2011), Principle 11, Commentary.

<sup>254</sup> Ibid.

<sup>255</sup> Letnar Černič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.107.

individuals' right to food.<sup>256</sup> The term 'individual' here refers to the employees of a business and the communities where it operates. Indeed, 'the obligation to protect requires businesses to do whatever is possible to ensure the minimum levels of socio-economic rights for both their employees and communities.'<sup>257</sup>

Then, regarding the obligation to fulfill, its scope and content differ when applied to businesses, as they do not have the same means (the revenue collection system for example) as States to provide for ESC rights in general. Still, there is an increased belief that businesses have an obligation to ensure the minimum core of the right to food, especially when governments fail to do so. Concurrently, Letnar Čerňič argues that 'corporations are obliged to ensure some minimum level of socio-economic rights to their maximum of available resources, particularly where government services are absent. Elsewhere, they have to endeavor, possibly in cooperation with governments, to ensure provisions of the minimum reasonable core of the right to [...] food [...], as applied in the proximity of the geographical areas where they operate.'<sup>258</sup> Letnar Čerňič identifies two types of obligation to fulfill an ESC right: a preventive obligation and a remedial one. The *remedial obligation to fulfill* human rights refers to the activities of monitoring whether businesses comply with their tasks to fulfill human rights.<sup>259</sup> On the other hand, the *corporate preventive obligation to fulfill* would be for corporations to 'create conditions for maintenance and improvements of socio-economic livelihoods,'<sup>260</sup> to achieve food and nutrition security among the local community. This implies that businesses must undertake actions to realize the right to food, by financial or material donations. Examples of corporate obligations to fulfill identified by Letnar Čerňič are:

Participate in partnerships and make a financial commitment to contribute to individuals' enjoyment of the right to food; strive to assist states in providing at least the reasonable minimum core of right to food, particularly in the local communities in which they operate; help local communities with providing individuals with the right to food; create internal funds and contribute to external funds for use in providing for the right to food; work with governments to provide the reasonable minimum core of the right to food<sup>261</sup>

Chapter 4 will address business initiatives that could be developed to help States progressively fulfill and eventually realize the right to food. To clarify, businesses are not asked to take over government functions, but to assist them financially with the provision of socio-economic rights.'<sup>262</sup>

Letnar Čerňič is of the opinion that 'businesses should not only comply with their obligations to respect, protect and fulfill, but should seriously consider their existing and potential financial contribution to sustainable development.'<sup>263</sup> Indeed, if all actors would contribute to the SDGs, achieving those goals and thus eradicating extreme poverty and ensuring food security – among others – would be much easier and faster. In fact, the SDG 17 aims to 'strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.' Hence, Letnar Čerňič's recommendation of multi-stakeholder financial partnerships is in accordance with the SDGs. For instance, SDG 17.16 and 17.17 read as follows:

17.16 Enhance the Global Partnership for Sustainable Development, complemented by multi-

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<sup>256</sup> Ibid., p.110.

<sup>257</sup> Ibid., p.111.

<sup>258</sup> Ibid., p.114.

<sup>259</sup> Ibid., p.115.

<sup>260</sup> Ibid., p.114.

<sup>261</sup> Ibid., Table 6.2, p.135.

<sup>262</sup> Ibid., p.115.

<sup>263</sup> Ibid., p.134.

stakeholder partnerships that mobilize and share knowledge, expertise, technology and financial resources, to support the achievement of the Sustainable Development Goals in all countries, in particular, developing countries

17.17 Encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships<sup>264</sup>

To sum up, although some scholars believe businesses have or must have negative and positive obligations for the right to food, this is not the case in practice. At present, businesses are not fully accountable for the right to food, 'their obligation only complements that of the state.'<sup>265</sup> In reality, they are only *subject to* or rather responsible for the negative obligation to respect. Hence, as shown here, only by extending the positive obligations of States to protect and fulfill the right to food upon businesses will the latter become fully accountable for the realization of this right. The best way to achieve this accountability of businesses for the right to food will be discussed in the following chapter.

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<sup>264</sup> Transforming our World: The 2030 Agenda for Sustainable Development, A/RES/70/1 (2015), Goal 17.16 and Goal 17.17.

<sup>265</sup> Letnar Černič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.59.

# 3

## Merging ideas from the CSR and BHR approaches to make businesses accountable for the right to food

The previous chapters have highlighted the state of the art concerning corporate accountability for the right to food. Businesses' obligations for the right to food are stated in several documents, whether directly or indirectly through the right to life. It has been stated at the international level in voluntary guidelines following the failure of a series of proposals for binding documents. It has also been defined in national laws and in codes of conduct elaborated by businesses themselves. Clearly, the way forward is to move the debate beyond the question of whether businesses have human rights obligations, towards the study of 'management strategies needed to promote human rights standards in practice.'<sup>266</sup> Therefore, an attempt is made here to determine which set of instruments can best achieve full accountability of businesses for the right to food, with a focus on attributing positive obligations to businesses. First, this will be explored through the lens of the CSR approach in section 3.1, then through the view of the BHR approach in section 3.2 and finally section 3.3 will present propositions based on ideas from these two approaches.

### 3.1 CSR approach

#### 3.1.1 What is the CSR approach?

CSR is a 'dynamic and open term.'<sup>267</sup> Although there is no single definition for it, scholars and practitioners agree that CSR means that businesses assume responsibility and act upon their social and environmental impact.<sup>268</sup> The

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<sup>266</sup> Obara, Louise J., and Ken Peattie, 'Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies' 53(6) *Journal of World Business* 781 (2018), p.781.

<sup>267</sup> Buhmann, Karin, 'Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case', 7(2) *International Journal of Law in Context* 139 (2011), p. 146.

<sup>268</sup> Buhmann, Karin, 'Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case', 7(2) *International Journal of Law in Context* 139 (2011), pp.139 and p.146; Newell, Peter, and Jędrzej G. Frynas, 'Beyond CSR? Business, Poverty and Social Justice: An Introduction,' 28(4) *Third World Quarterly* 669 (2007), p.678; Hopkins, Michael, 'What is Corporate Social Responsibility all About?', 6(3-4) *Journal of Public Affairs: An International Journal* 298 (2006), p.299; Wan-Jan, Wan S., 'Defining Corporate Social



CSR approach originated from business scholars and has traditionally focused on corporate voluntarism and responsible behavior: *doing good*. It views businesses as social partners with responsibilities towards society. Therefore, businesses are stimulated to engage in a broad range of activities varying from philanthropy to providing aid in case of government failure. In his definition of CSR, Wettstein insists that it is not only about businesses donating a part of their profit to good causes, it is also and mostly about the way the profit was generated.<sup>269</sup> Traditionally, CSR is linked to voluntary actions and making businesses responsible, rather than accountable. These terms have already been defined above in section 2.4.2. To summarize, corporate accountability is strongly linked to 'commitment, legal responsibility and mechanisms that allow for enforcement of human rights. It assumes reference to a process whereby a company considers, manages and can be held accountable for the long-term human rights impact of its decisions on its stakeholders.' This is in opposition to the softer terms related to CSR, which imply a 'more voluntary uptake of ethical conduct by corporations that is not necessarily legally enforceable.'<sup>270</sup>

In fact, CSR is often seen as action 'beyond legal requirement.'<sup>271</sup> 'The law is not part of the CSR equation, but rather defines the boundaries or limits of CSR.'<sup>272</sup> This view has unfortunately, led to the general idea that CSR and law are two different and independent matters,<sup>273</sup> enlarging the gap between CSR and BHR, which will be addressed in section 3.3. In general, one should not mistake CSR as an alternative to existing or new legal instruments touching upon social rights or environmental standards. The EU Green Paper about a Framework for CSR insists that 'in countries where regulations [concerning social rights or environmental standards] do not exist, efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible practices can be developed.'<sup>274</sup>

Renouard and Ezvan use a more holistic approach and define CSR as 'a normative approach to assessing a company's responsibility towards human development, according to its level of accountability, in all spheres impacted by its activities.'<sup>275</sup> They use the terms 'responsibility' and 'accountability' in their CSR definition. In fact, they believe that the responsibility of corporations extends beyond profit maximization to include human development and planet preservation. They view businesses not only as economic actors but also as political institutions, which 'share the responsibility of promoting capabilities in conjunction with the government and with civil society.'<sup>276</sup> In fact, they argue that business 'commitment for social benefits and environmental protection'

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Responsibility,' 6 (3-4) *Journal of Public Affairs: An International Journal* 176 (2006), p.183; Commission of the European Communities, *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, COM(2002) 347 final (2002), p.5.; European Commission, 'Corporate Social Responsibility (CSR)' (Webpage, 2018) <[https://ec.europa.eu/growth/industry/corporate-social-responsibility\\_en](https://ec.europa.eu/growth/industry/corporate-social-responsibility_en)> accessed 5 December 2018.

<sup>269</sup> Wettstein, Florian, 'Beyond Voluntarism, Beyond CSR: Making a Case for Human Rights and Justice,' 114(1) *Business and Society Review* 125 (2009), p.131.

<sup>270</sup> Nolan, Justine, 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights,' 24 *U. Queensland LJ* 445 (2005), p.448.

<sup>271</sup> Buhmann, Karin, 'Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case', 7(2) *International Journal of Law in Context* 139 (2011), p.140.

<sup>272</sup> Wettstein, Florian, 'From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?,' in Dorothée Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.81.

<sup>273</sup> Buhmann, Karin, 'Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case', 7(2) *International Journal of Law in Context* 139 (2011), p.140.

<sup>274</sup> European Commission, *Green Paper: Promoting a European Framework for Corporate Social Responsibility*, Doc/01/9 (2001).

<sup>275</sup> Renouard, Cécile, and Cécile Ezvan, 'Corporate Social Responsibility towards Human Development: A Capabilities Framework' 27(2) *Business Ethics: A European Review* 144 (2018), p.147.

<sup>276</sup> *Ibid.*, p.146.

must evolve from voluntary to compulsory.<sup>277</sup> This explains their use of the term ‘accountability’ in their definition of CSR, which leans on the BHR approach. The BHR approach will be presented in section 3.2. However, the CSR approach will be studied first, with a presentation of existing CSR business initiatives, followed by an analysis of these initiatives and the CSR approach as a whole.

### 3.1.2 CSR initiatives developed by businesses to take action

There is already a wide range of non-legal, CSR initiatives pushing businesses to contribute to economic, social and cultural development. An overview of these initiatives will be given here, linking them to the right to food, even though businesses might not make that link themselves. Indeed, most operate towards the eradication of food insecurity as part of SDG 2 or simply to *do good*, without explicitly making the link with the right to food. Share Action, a UK based charity serving savers, society and the environment, issued a report showing that businesses are willing to engage and invest in projects supporting the SDGs.<sup>278</sup> This is a good sign as ‘several of the SDGs have direct human rights relevance’, with SDG 2 linked to the right to food.<sup>279</sup> Besides, the worldwide adoption of the SDGs makes them ‘one of our best, contemporary global opportunities to oppose social injustices that human rights advocates can use as a tool.’<sup>280</sup> The respondents of the study are already taking action on some of the SDGs, however, SDG 2 does not figure among the top three Goals attended to by investors, or among the three Goals that will see the largest increase in activities in the next 15 years.<sup>281</sup>

In accordance with the above, and based on the UNGC Progress report 2018, 92 percent of businesses have policies in place that are related to human rights in particular. Yet, the top five aspects of human rights that are addressed in these policies are linked to the ‘workplace health and safety’, ‘non-discrimination’, ‘gender equality’, ‘health’ and lastly, ‘life, liberty, security of the person’. Although aspects such as ‘health’ and ‘life’ are related to the right to food, globally, businesses do not have policies focusing specifically on food and nutrition.<sup>282</sup> The UNGC report also studied the activities of businesses related to the SDGs and found that the three goals on which businesses work most are: SDG 8 – Decent Work and Economic Growth (69 percent of respondents address this goal), SDG 5 – Gender Equality (64 percent of respondents address this goal) and SDG 3 – Good Health and Well-being (62 percent of respondents address this goal). Unfortunately, SDG 2 – Zero Hunger is third from the bottom in this list of 17 SDGs, classified according to what businesses target most in their activities. Only 23 percent of businesses that actively engage in the UNGC have activities targeted at resolving SDG 2.<sup>283</sup> On the other hand, when one looks at the numbers from the food and beverage producers and retailers, 85 percent of them report having a significant to positive impact on hunger alleviation and 60 percent declare setting targets related to the elimination of hunger.<sup>284</sup> However, these numbers must be analyzed carefully as they are statements from businesses without details on the process of achievement or monitoring. Indeed, affirming corporate commitment to the SDGs or to the protection of human rights is not sufficient to assess the real impact of these investments.

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<sup>277</sup> Ibid.

<sup>278</sup> Share Action, ‘Transforming our World through Investment: An Introductory Study of Institutional Investors’ Role in Supporting the Sustainable Development Goals’ (2016), p.2.

<sup>279</sup> Buhmann, Karin, Jonas Jonsson, and Mette Fisker, ‘Do No Harm and Do More Good Too: Connecting the SDGs with Business and Human Rights and Political CSR Theory,’ *Corporate Governance: The International Journal of Business in Society* (2018), p.6.

<sup>280</sup> Winkler, Inga T., and Carmel Williams, ‘The Sustainable Development Goals and Human Rights: a Critical Early Review’ 21(8) *The International Journal of Human Rights* 1023 (2017), p.1024.

<sup>281</sup> Share Action, ‘Transforming our World through Investment: An Introductory Study of Institutional Investors’ Role in Supporting the Sustainable Development Goals’ (2016), p.2. See also: United Nations Global Compact, United Nations Global Compact Progress Report 2018 (2018), p.7.

<sup>282</sup> United Nations Global Compact Progress Report (2018), pp.8-9.

<sup>283</sup> Ibid., p.7. See also: Share Action, ‘Transforming our World through Investment: An Introductory Study of Institutional Investors’ Role in Supporting the Sustainable Development Goals’ (2016), p.2.

<sup>284</sup> United Nations Global Compact Progress Report (2018), p.24.

This lack of accountability regarding corporate initiatives is a common issue, discussed already briefly in section 2.4.2. Overall, this again shows that a lot remains to be done before the full realization of the right to food. An overview of what is already being done by the business sector will now follow.

To begin, the increased consumers' concern and sensitivity for production conditions have, in a 'non-legal' manner, put pressure on businesses to become more socially responsible in their operations. Indeed, 'the goodwill, reputation, and publicity attaching to a company's human rights performance has become an important intangible business asset which is vigilantly guarded.'<sup>285</sup> This increased pressure for businesses to *do good* has led to the creation of corporate good practices. According to Letnar Čerňič, these 'good practices include activities on the part of corporations that contribute to the maintenance and increase in the level of the socio-economic rights protections. They complement governmental and civil society activities in the provision of socio-economic rights' without substituting them.<sup>286</sup> Essentially, the idea of corporate good practices is that a corporation 'must do something more than what constitutional obligations impose.'<sup>287</sup> Corporate good practices are beneficial for both parties as 'business networks and organizations underlined that CSR is a vital component of business competitiveness.'<sup>288</sup> These corporate good practices can take the form of employees' voluntary work as well as in-kind or financial donations for the provision of ESC rights.<sup>289</sup> A recommended business initiative for the realization of the right to food will be elaborated in chapter 4 as a practical illustration, building upon the findings of this chapter.

An interesting movement in the corporate world is 'intellectual philanthropy', the idea of employees volunteering their time to share their knowledge and experience with smaller companies in developing countries. This idea started in 2008 when at that time UN Secretary-General Kofi Annan and then chief executive officer of General Mills Ken Powell discussed the challenges of food insecurity at the World Economic Forum in Davos. General Mills' intellectual philanthropy was a success and eventually grew into an independent non-governmental organization (NGO) named 'Partners in Food Solutions', which is composed of a number of large MNCs: General Mills, Cargill, DSM, Bühler, Hershey, Ardent Mills.<sup>290</sup> As stated on its website, Partners in Food Solutions 'is working to strengthen food security, improve nutrition and increase economic development across Africa by expanding and increasing the competitiveness of the food processing sector. We link corporate volunteers from our consortium of world-class food companies with promising entrepreneurs in nine African countries.'<sup>291</sup> From a distance, employees of those corporations volunteer their time to address food insecurity through virtual technical assistance.<sup>292</sup> The NGO's work addresses several UN SDG Goals, among which SDG 2 and 17.<sup>293</sup>

Another way of contributing to the right to food is for businesses to make financial or in-kind donations. In its 2018 Global Responsibility Report, General Mills indicates increasing food security by 'expanding food access' and 'supporting food banks' through food donations (\$46 million worth of food donated in 2017), grants and employee expertise.<sup>294</sup> Besides, in 2013, Kellogg Company launched its initiative 'Breakfasts for Better Days.' It has since then

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<sup>285</sup> Reinisch, August, 'The Changing International Legal Framework,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.68.

<sup>286</sup> Letnar Čerňič, J., *Corporate Accountability under Socio-Economic Rights*. London and New York: Routledge, (2018), p.65.

<sup>287</sup> Letnar Čerňič, J., *Corporate Accountability under Socio-Economic Rights*. London and New York: Routledge, (2018), p.67.

<sup>288</sup> Buhmann, Karin, 'Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case', 7(2) *International Journal of Law in Context* 139 (2011), p.157.

<sup>289</sup> Letnar Čerňič, J., *Corporate Accountability under Socio-Economic Rights*. London and New York: Routledge, (2018), p.68.

<sup>290</sup> Partners in Food Solutions, 'A Decade of Impact' (2018), p.3.

<sup>291</sup> Partners in Food Solutions, 'About' (Webpage, n.d.) <<https://www.partnersinfoodsolutions.com/about>> accessed 18 December 2018.

<sup>292</sup> Partners in Food Solutions, 'A Decade of Impact' (2018), p.10.

<sup>293</sup> *Ibid.*, p.9.

<sup>294</sup> General Mills, *2018 Global Responsibility Report* (2018), p.46.

donated more than two billion servings of food to people in need. The Company has committed to donating another 2.5 billion servings by 2025, expanding its feeding and nutrition programs targeted at children, among other commitments.<sup>295</sup> In 2017, the corporation has reached 586,772 children through their feeding programs and nutrition education projects.<sup>296</sup> Next, Share Our Strength, a US non-profit organization, that received 42.6 percent of its revenues from corporations in 2017,<sup>297</sup> has developed the 'No Kid Hungry' Campaign. This campaign has provided 775 million meals to schoolchildren and has ensured that 2.9 million more children eat school breakfast since its launch in 2010.<sup>298</sup> Hence, businesses already voluntarily contribute to the fulfillment of the right to food through business or industry-wide initiatives.

Letnar Černič gives an overview of several other existing business initiatives aiming at the realization of individual ESC rights, such as the right to food. His review shows that businesses are already aware of the importance to invest in ESC rights of communities where they are active, and also really do so.<sup>299</sup> However, he is also aware that these initiatives have to be analyzed carefully as it is difficult to objectively assess their results. Indeed, they are developed and monitored by the business sector itself, without any accountability mechanism. Consequently, businesses may be active for the sole purpose of promoting their image to a public that is increasingly concerned by production methods and its social, environmental consequences. Still, the bright side is that businesses can now do both simultaneously: contribute to the greater good by protecting and fulfilling socio-economic rights while generating more revenues by improving their public image.<sup>300</sup>

Aside from good practices, an increasing number of businesses issue human rights policies, in which they voluntarily commit to human rights. PepsiCo issued a 'Global Human Rights Statement' in which it affirms that 'PepsiCo is committed to respecting human rights in [its] value chain and in the communities where [it] operate[s].'<sup>301</sup> The corporation also mentions the following:

We have the ability to contribute to positive human rights impacts and recognize that we have a responsibility to prevent, mitigate, and address adverse impacts through our direct operations and to use our leverage to encourage our suppliers and business partners to respect human rights in our broader value chain.<sup>302</sup>

Kellogg Company has issued a similar Human Rights Policy document. Therein it affirms that 'Kellogg Company is committed to respecting human rights in accordance with international standards [...]. We believe these rights are inherent for all human beings and we acknowledge that these rights are interrelated, interdependent, and indivisible.'<sup>303</sup> Another example is Unilever, which declares in its human rights policy statement: 'we believe that business can only flourish in societies where human rights are protected and respected. We recognize that business has the responsibility to respect human rights and the ability to contribute to positive human rights impacts.'<sup>304</sup>

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<sup>295</sup> Kellogg Company, *Nourishing Families so they can Flourish and Thrive 2017-2018 Corporate Responsibility Report* (2018), p.20.

<sup>296</sup> Ibid., p.19.

<sup>297</sup> Share our Strength, 'Financials' (Webpage, n.d.) <<https://www.shareourstrength.org/financials>> accessed 18 December 2018.

<sup>298</sup> No Kid Hungry, 'No Kid Hungry 2017 – Share Our Strength's Annual Report' (2017), p.5.

<sup>299</sup> Letnar Černič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), pp.69-78.

<sup>300</sup> Ibid., p.79.

<sup>301</sup> PepsiCo, *Global Human Rights Statement* (2017), p.1.

<sup>302</sup> Ibid.

<sup>303</sup> Kellogg Company, *Human Rights Position Statement* (2016), p.1.

<sup>304</sup> Unilever, *Unilever's Human Rights Policy Statement* (2017), p.1.

All three corporations mentioned developed their human rights policy based on the UNGP, the International Bill of Human Rights (consisting of the UDHR, the International Covenant on Civil and Political Rights and the ICESCR) and the principles concerning fundamental rights set out in the ILO's Declaration on Fundamental Principles and Rights at Work. They also all follow the OECD Guidelines and are signatories to the UNGC. They are committed to following the highest human rights standards, and in cases where international and national standards are in conflict, to follow national law, while seeking ways to respect international human rights law to the greatest extent possible.<sup>305</sup> Letnar Čerňič recognizes that such corporate human rights policies are 'quite promising' however, one should remember that their biggest limit is the lack of sanctions in case of violation, resulting in a lack of accountability. This is also why they fall under CSR initiatives. Letnar Čerňič classifies these policies as '*lex imperfecta*': imperfect legal norms that do not provide for any sanctions.<sup>306</sup>

### 3.1.3 Analysis of the benefits and limits of CSR initiatives

As shown above, businesses are already taking steps towards the protection, respect, and fulfillment of the right to food, despite the absence of a direct legal obligation to do so. They operate as part of their CSR program. Indeed, 'governments and companies themselves have shown a distinct preference for limiting the debate to voluntary standards and self-regulation.'<sup>307</sup> Still, scholars criticize the current voluntary initiatives and identify several possible improvement points. The benefits and limits of the CSR approach for the realization of the right to food will now be analyzed. For this analysis, previously mentioned UN and business initiatives will be used as illustrations of CSR initiatives, namely: business or industry-wide initiatives, the OECD Guidelines, the ILO MNE Declaration, the UNGC, and the UNGPs. Scholars from both the CSR and the BHR fields have analyzed the UNGPs. Indeed, CSR scholars recognize its lack of legally binding power, whereas BHR scholars acknowledge its legal basis and its focus on negative obligations.<sup>308</sup> Hence, the UNGPs will be analyzed from the view of CSR scholars here and from that of BHR scholars in section 3.2.3.

Founders and supporters of CSR initiatives present these as win-win situations for all institutions and people involved in order to tackle world poverty.<sup>309</sup> To begin, voluntary initiatives taken by the business sector are said to be economically beneficial for them: The OECD Guidelines state that 'many multinational enterprises have demonstrated that respect for high standards of business conduct can enhance growth.'<sup>310</sup> In addition, the business sector's response to the EU Green Paper on CSR showed a large agreement among businesses that 'CSR

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<sup>305</sup> Kellogg Company, *Human Rights Position Statement* (2016), p.1; PepsiCo, *Global Human Rights Statement* (2017), p.1; Unilever, *Unilever's Human Rights Policy Statement* (2017), p.1.

<sup>306</sup> Letnar Čerňič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), (2018), p.101.

<sup>307</sup> International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), p.2.

<sup>308</sup> Blitt, Robert C., 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance,' 48 *Texas International Law Journal* 33 (2012), p.47 and p.50; Jägers, Nicola, 'UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?,' 29(2) *Netherlands Quarterly of Human Rights* 159 (2011), pp.160-161; Ramasastry, Anita, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,' 14(2) *Journal of Human Rights* 237 (2015), p.245; Smith, Jeffery, 'Corporate Human Rights Obligations: Moral or Political?,' 1(2) *Business Ethics Journal Review* 7 (2013), p.9; Wettstein, Florian, et al., 'International Business and Human Rights: A Research Agenda,' 54(1) *Journal of World Business* 54 (2019), p.56.

<sup>309</sup> Global Compact Participants Travellers on 'Common Historic Journey' to Fairer, More Stable World Says Secretary General at UN Summit, UN Doc. SG/SM/9383-ECO/69 (2004); Nelson, Jane, *Building partnerships: Cooperation between the United Nations System and the Private Sector*, New York: United Nations Publications (2002), p.15; Thérien, Jean-Philippe, and Vincent Pouliot, 'The Global Compact: Shifting the Politics of International Development?,' 12(1) *Global Governance: A Review of Multilateralism and International Organizations* 55 (2006), p.63.

<sup>310</sup> Organization for Economic Co-Operation and Development, *Organization for Economic Co-Operation and Development Guidelines for Multinational Enterprises 2011 Edition* (2011), p.14.

will be of strategic importance to ensure the long-term business success.’<sup>311</sup> As explained in the above section 3.1.2, the idea is that being a responsible, sustainable and ethical business is a good branding strategy for increasingly conscious and demanding consumers: ‘human rights are good business.’<sup>312</sup> Besides, Steinhardt observes that the UNGC can ‘contribute towards the coalescence of voluntary standards into meaningful and practical norms of behavior’ through its corporate development and training programs.<sup>313</sup> Kell and Levin believe the UNGC has successfully shown its participants how important it is for their business and for society to respect human rights.<sup>314</sup> Indeed, CSR initiatives are also said to enable the development of local communities through dialogue between different stakeholders: ‘CSR may play a positive role in fostering development in third countries by helping to establish a dialogue between these countries, their public authorities, social partners, civil society and foreign companies.’<sup>315</sup> Lastly, governments benefit from the technology and expertise businesses have, which are ‘needed to resolve today’s global economic challenges.’<sup>316</sup> In fact, ‘many of the global problems we are facing today cannot be solved by any single actor alone anymore.’<sup>317</sup> The solution would ‘require joint action of a variety of actors and sectors, all with a genuine interest in truly global solutions.’<sup>318</sup>

Others question this win-win theory and wonder whether it is all so simple. In fact, CSR is costly for businesses in the short-term. Although some scholars claim it might lead to increased profit for businesses,<sup>319</sup> others argue this will only occur in the long-term and has yet to be proven. Indeed, they claim that there is no evidence that ethical and responsible corporate behavior offers those businesses a competitive advantage, or that sustainable business practices contribute to human development.<sup>320</sup> Hence, there are limits to the effects of good corporate practices. Monetary or in-kind donations from businesses to local communities may be seen positively by consumers and bring short-term benefits to the recipients but it ‘has also fostered clientelism, corruption, and passivity.’<sup>321</sup> In fact, ‘philanthropy may [...] be harmful for the social and economic networks and general economic performance’ of its recipients.<sup>322</sup> This may be explained by the fact that ‘many codes [of conduct developed by corporations] are a minimalist response to public pressure and are highly selective’ in terms of actions, favoring corporations’ interests

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<sup>311</sup> Commission of the European Communities, Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM(2002) 347 final (2002), p.9.

<sup>312</sup> Reinisch, August, ‘The Changing International Legal Framework,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.89. See also: Buhmann, Karin, ‘Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case’, 7(2) *International Journal of Law in Context* 139 (2011), p.157; UN High Commissioner for Refugees, ‘UN and AU Commit to Advance Business and Human Rights Agenda in Africa’, (DisplayNews, 2014) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15053&LangID=E>> accessed 7 December 2018.

<sup>313</sup> Steinhardt, Ralph G., ‘The New Lex Mercatoria’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p. 206. See also: Thérien, Jean-Philippe, and Vincent Pouliot, ‘The Global Compact: Shifting the Politics of International Development?’, 12(1) *Global Governance: A Review of Multilateralism and International Organizations* 55 (2006), p.64-65.

<sup>314</sup> Kell, Georg, and David Levin, ‘The Global Compact Network: An Historic Experiment in Learning and Action,’ 108(2) *Business and Society Review* 151 (2003), p.166.

<sup>315</sup> Commission of the European Communities, Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM(2002) 347 final (2002), p.9. See also: Kell, Georg, and David Levin, ‘The Global Compact Network: An Historic Experiment in Learning and Action,’ 108(2) *Business and Society Review* 151 (2003), p.166; Ruggie, John G., ‘Global-Governance. Net: The Global Compact as Learning Network,’ 7 *Global Governance* 371 (2001), pp.373-375.

<sup>316</sup> Nelson, Jane, *Building partnerships: Cooperation between the United Nations System and the Private Sector*, New York: United Nations Publications (2002), p.15.

<sup>317</sup> Wettstein, Florian, ‘Beyond Voluntarism, Beyond CSR: Making a Case for Human Rights and Justice,’ 114(1) *Business and Society Review* 125 (2009), p.148.

<sup>318</sup> Ibid.

<sup>319</sup> Organization for Economic Co-Operation and Development, *Organization for Economic Co-Operation and Development Guidelines for Multinational Enterprises 2011 Edition* (2011), p.14.

<sup>320</sup> Renouard, Cécile, and Cécile Ezvan, ‘Corporate Social Responsibility towards Human Development: A Capabilities Framework’ 27(2) *Business Ethics: A European Review* 144 (2018), p.147.

<sup>321</sup> Ibid., p.151.

<sup>322</sup> Ibid., p.151.

over the real needs of local communities.<sup>323</sup> Another explanation is that most CSR initiatives focus on *output* while it is equally important to address the *process* by engaging the intended beneficiaries during the design, enforcement and evaluation steps. The *content* and the *process* used to develop CSR initiatives need to reflect the priorities of the poorer groups.<sup>324</sup> Taking into account the needs of the local community will ensure the initiative's long-term success.<sup>325</sup>

However, focusing on these local needs may go to the detriment of the level of publicity gained from CSR initiatives. Indeed, 'to be effective, [CSR activities] need to engage less visible audiences of poorer and marginalized groups in a way that prioritizes qualitative issues of process' over 'quantifiable benchmarks of achievement' aimed at re-assuring consumers and shareholders.<sup>326</sup> Newell and Frynas refer to this dilemma as 'the conflicting logics of CSR as business tool and CSR as development tool.'<sup>327</sup> Hence,

Whether [a company's investment and employment measures] is altering the sustainability of local livelihoods or bringing cleaner production processes and improved technologies, displacing local industry or boosting it, fueling war through investment in conflict zones or providing much needed resources to resolve such conflict, it is in the day-to-day management of the firm and through the taking of key investment decisions that development gains come to be realized or denied, rather than in the well-intended, but isolated and discrete activities of firms in developing areas.<sup>328</sup>

This idea that coordinated and coherent business initiatives seem more efficient than numerous isolated ones, will be addressed in section 3.3.3. Unfortunately, expecting businesses to direct their activities with poverty elimination as their main objective is clearly unrealistic.<sup>329</sup>

Another important limit of voluntary initiatives is their lack of accountability – intrinsically linked to a lack of transparency and comparability – because of non-existent or weak supervisory and/or enforcement mechanisms.<sup>330</sup> First, the UNGC, the UNGPs, and the OECD Guidelines have been criticized for their lack of clarity and the use of a 'weak language', thus leaving much space for interpretation and even 'weaken[ing] existing

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<sup>323</sup> International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), p.16.

<sup>324</sup> Newell, Peter, and Jędrzej G. Frynas, 'Beyond CSR? Business, Poverty and Social Justice: An Introduction,' 28(4) *Third World Quarterly* 669 (2007), pp.676-678; Renouard, Cécile, and Cécile Ezvan, 'Corporate Social Responsibility towards Human Development: A Capabilities Framework' 27(2) *Business Ethics: A European Review* 144 (2018), p.151.

<sup>325</sup> *Ibid.*

<sup>326</sup> Newell, Peter, and Jędrzej G. Frynas, 'Beyond CSR? Business, Poverty and Social Justice: An Introduction,' 28(4) *Third World Quarterly* 669 (2007), pp.676-678.

<sup>327</sup> *Ibid.*, p.677.

<sup>328</sup> *Ibid.*, p.674.

<sup>329</sup> *Ibid.*, pp.678-679.

<sup>330</sup> Amnesty International, et al., 'Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights' (Press Release, 2011) <[https://www.fidh.org/IMG/pdf/Joint\\_CSJ\\_Statement\\_on\\_GPs.pdf](https://www.fidh.org/IMG/pdf/Joint_CSJ_Statement_on_GPs.pdf)> accessed 21 November 2018; International Federation for Human Rights, 'UN Human Rights Council adopts Guiding Principles on Business Conduct, Yet Victims Still Waiting for Effective Remedies' (Press Release, 2011) <<https://www.fidh.org/en/issues/globalization-human-rights/business-and-human-rights/UN-Human-Rights-Council-adopts>> accessed 21 November 2018; Nolan, Justine, 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights,' 24 U. Queensland LJ 445 (2005), p.456 and pp.462-463; Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), pp.444-445; Oshionebo, Evaristus, 'The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing,' 17 *Lewis & Clark Law Review* 545 (2013), p.582; Reinisch, August, 'The Changing International Legal Framework,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.52; Sauvart, Karl P., 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations,' 16(1) *The Journal of World Investment & Trade* 11 (2015), p.37; Sethi, Prakash S., and Donald H. Schepers, 'United Nations Global Compact: The Promise—Performance Gap,' 122(2) *Journal of Business Ethics* 193 (2014), pp.196-197 and p.199.



human rights obligations' according to Jägers.<sup>331</sup> Second, critics of the UNGC, the UNGPs, the OECD Guidelines, and the ILO MNE Declaration regret that the initiatives do not provide for their own enforcement or monitoring mechanisms in order to sanction non-complying participants and thus ensure the continuing effectiveness of the instruments.<sup>332</sup> In reality only 33 percent of businesses taking part in the UNGC monitor and evaluate their performance in the field of human rights, which implies that they 'systematically and objectively assess an on-going or completed project, program or policy, and its design, implementation and results.'<sup>333</sup> In the case of the ILO MNE Declaration and the OECD Guidelines, the instruments were strengthened over time.<sup>334</sup> Third, there is a lack of transparency. Indeed, businesses must 'do more to publicly communicate their actions and the impact of their specific sustainability initiatives.'<sup>335</sup> According to Sethi, 'in the absence of these linkages, the [UNGC] will suffer the fate of all such grand designs in which process becomes all too consuming and the end result becomes lost'.<sup>336</sup> This declaration from Sethi could apply to all voluntary initiatives. Fourth, there is a vast range of business operations relating to CSR, which makes accountability more challenging. Although a wide diversity can be positive by generating a large amount of novel and innovative voluntary enterprise initiatives,<sup>337</sup> these do not compensate for the negative consequences of insufficient accountability mechanisms. To sum up, several characteristics of CSR initiatives are at the source of its lack of accountability, which is a major limitation for the realization of the right to food. Reinisch argues that 'it is therefore not surprising that steps "beyond voluntarism" are demanded.'<sup>338</sup>

Moreover, De Schutter believes that without any framework or monitoring of voluntary codes of conduct, there is a real risk that consumers wishing to buy products ethically and socially sourced or produced will be misled by businesses using 'window-dressing initiatives [...] to satisfy the ethical requirements of consumers.'<sup>339</sup> As an illustration, scholars have noted the frequent use of the UNGC by businesses as a marketing tool, in order to appear fair and social. This phenomenon of free riding or window-dressing has been largely studied and is

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<sup>331</sup> Jägers, Nicola, 'UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?', 29(2) *Netherlands Quarterly of Human Rights* 159 (2011), pp.160-161. See also: Blitt, Robert C., 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance,' 48 *Texas International Law Journal* 33 (2012), p.47 and p.50; Nolan, Justine, 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights,' 24 *U. Queensland LJ* 445 (2005), pp.460-462 and pp.464-465; Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), pp.444-445; Oshionebo, Evaristus, 'The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing,' 17 *Lewis & Clark Law Review* 545 (2013), p.574; Sethi, Prakash S., and Peter Utting, 'UN-Business Partnerships: Whose Agenda Counts?' 3 *Transnational Associations* 118 (2001), 120.

<sup>332</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.195; Nolan, Justine, 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights,' 24 *U. Queensland LJ* 445 (2005), p.454, p.456 and p.464-465; Oshionebo, Evaristus, 'The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing,' 17 *Lewis & Clark Law Review* 545 (2013), p.582; Ottaway, Marina, 'Corporatism Goes Global: International Organizations, Nongovernmental Organization Networks, and Transnational Business,' 7(3) *Global Governance* 265 (2001), pp.265-266; Sauvart, Karl P., 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations,' 16(1) *The Journal of World Investment & Trade* 11 (2015), p.37; Sethi, Prakash S., *Setting Global Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations*, Hoboken, New Jersey: John Wiley & Sons (2003), pp.120-122; Thérien, Jean-Philippe, and Vincent Pouliot, 'The Global Compact: Shifting the Politics of International Development?', 12(1) *Global Governance: A Review of Multilateralism and International Organizations* 55 (2006), p.67.

<sup>333</sup> United Nations Global Compact, United Nations Global Compact Progress Report 2018 (2018), p.18.

<sup>334</sup> Sauvart, Karl P., 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations,' 16(1) *The Journal of World Investment & Trade* 11 (2015), p.79.

<sup>335</sup> United Nations Global Compact, United Nations Global Compact Progress Report 2018 (2018), p.8.

<sup>336</sup> Sethi, Prakash S., *Setting Global Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations*, Hoboken, New Jersey: John Wiley & Sons (2003), p.126.

<sup>337</sup> Commission of the European Communities, Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM(2002) 347 final (2002), p.12.

<sup>338</sup> Reinisch, August, 'The Changing International Legal Framework,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.52.

<sup>339</sup> De Schutter, Olivier, 'The Accountability of Multinationals for Human Rights Violations in European Law,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp.300-301. See also: p.303.



commonly referred to as ‘*bluewashing*’, in connotation to the blue logo of the UN.<sup>340</sup> Some scholars go further by stating that the partnership between the UN and businesses might ‘tarnish the image and reputation of the UN’.<sup>341</sup>

Still, this lack of accountability has not prevented voluntary codes of conduct to be successful. In fact, through the pressure from ‘extra-legal enforcers’, such as consumer boycotts or negative publicity, businesses have been *pushed* to follow, at least partly, the recommendations from codes of conduct, taking into account ethics when operating.<sup>342</sup> Reinisch refers to the latter as ‘ethical investing’.<sup>343</sup> Other extra-legal enforcers are ‘naming-and-shaming’ strategies: ‘the argument goes that exposing corporate violations of human rights will make businesses react and change the way they operate.’<sup>344</sup> Besides, De Schutter observes that if a company adopts a code of conduct, it cannot refuse to discuss the conformity of its activities with the code without damaging its public reputation of a responsible corporation.<sup>345</sup> Already in 1977, Daniel Plain stated that the chances that corporations act against the recommendations from the OECD Guidelines are very small since they are the ones who participated in its drafting and it now serves as ‘standards of good conduct’ for MNCs.<sup>346</sup> Thus, whether human rights standards are legally binding or not tends to become increasingly irrelevant in practice. As Reinisch notes,

Regardless of whether a strict obligation to respect human rights exists *de lege data*, many of the current “enforcement” measures are used in order to induce compliance. This is true not only of the “non-legal” means of consumer boycotts *vis-à-vis* TNCs and “socially responsible” investments, but it also applies to the recent surge of suing TNCs before national courts as long as they are “doing business” within the forum state.<sup>347</sup>

On top of this, Steinhardt mentions the success of the UDHR to defend the potential power of voluntary measures in the field of business and human rights: ‘It is well to remember that the Universal Declaration of Human Rights – now routinely considered the authoritative interpretation of States’ human rights obligations under the U.N. Charter – began life as an entirely aspirational document, and there is some doubt that states would have voted for it had they predicted its legal trajectory.’<sup>348</sup> In fact, one of the main arguments of the UNGPs’ supporters is that soft law initiatives can be as efficient as hard law, ‘when it concerns reputation, access to financing, share value,

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<sup>340</sup> Corporate Europe Observer, ‘Toothless UN Website on Global Compact with TNCs’ (Blog post, 2000)

<http://archive.corporateeurope.org/observer6/toothless.html>, accessed 8 November 2018; Sethi, Prakash S., and Donald H. Schepers, ‘United Nations Global Compact: The Promise–Performance Gap,’ 122(2) *Journal of Business Ethics* 193 (2014), pp.196-197 and p.199; Fomerand, Jacques, *Mirror, Tool, or Linchpin for Change? The UN and Development*, Academic Council of the UN System (ACUNS), International Relations Studies and the United Nations Occasional Papers No. 2 (2003), accessed on 8 November 2018, from: <https://acuns.org/wp-content/uploads/2012/06/MirrorToolorLinchpinforChange.pdf>, pp.27, 28; Nolan, Justine, ‘The United Nations’ Compact with Business: Hindering or Helping the Protection of Human Rights,’ 24 *U. Queensland LJ* 445 (2005), p.453; Sethi, Prakash S., and Peter Utting, ‘UN-Business Partnerships: Whose Agenda Counts?’ 3 *Transnational Associations* 118 (2001), p.121; Zammit, Ann, *Development at Risk: Rethinking UN-Business Partnerships*, Geneva: South Center, (2003), pp.85-86.

<sup>341</sup> Zammit, Ann, *Development at Risk: Rethinking UN-Business Partnerships*, Geneva: South Center, (2003), pp.85-86.

<sup>342</sup> Reinisch, August, ‘The Changing International Legal Framework,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.53; Sen, Amartya, ‘Elements of a Theory of Human Rights,’ 32(4) *Philosophy & Public Affairs* 315 (2004), p.328.

<sup>343</sup> Reinisch, August, ‘The Changing International Legal Framework,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.78.

<sup>344</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.92.

<sup>345</sup> De Schutter, Olivier, ‘The Accountability of Multinationals for Human Rights Violations in European Law,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.303.

<sup>346</sup> Plaine, Daniel J., ‘The OECD Guidelines for Multinational Enterprises,’ 11 *International Lawyer* 339 (1977), p.344. See also: pp.343-345.

<sup>347</sup> Reinisch, August, ‘The Changing International Legal Framework,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.69.

<sup>348</sup> Steinhardt, Ralph G., ‘The New Lex Mercatoria’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp. 206-207.

license to operate, employee recruitment and retention’.<sup>349</sup> In addition, Blitt notes that ‘put simply, although SRSG Ruggie’s freshly minted Guiding Principles might strike one as plainly non-binding and aspirational today, these same principles can and will find surreptitious ways of growing up and becoming enforceable international norms that may carry serious repercussions for corporations, officers, and ill-prepared shareholders.’<sup>350</sup> Indeed, Bernaz recognizes that, given the historical context in the field of business and human rights, the UNGPs constitute ‘a great achievement.’<sup>351</sup> ‘Crucially, most businesses and governments have accepted the Guiding Principles as an adequate basis for discussion. While the NGOs’ reactions to the Framework and the Guiding Principles have been much cooler, they now tend to use the Guiding Principles in their advocacy work while acknowledging their limitations and calling for more robust mechanisms.’<sup>352</sup> Moreover, as mentioned in the description of soft law initiatives in section 2.2, these all recognize human rights standards, based on the International Bill of Human Rights. Consequently, some argue they are a way to raise awareness about human rights issues between businesses. According to Buhmann: ‘international law comes to inform CSR in terms of its normative substance in ways comparable to the role that sources of law play in conventional legal practice and analysis.’<sup>353</sup>

Hence, CSR initiatives have led to a number of positive developments, yet some still believe insufficient attention has been given to the legal possibilities of making businesses accountable for human right abuses at the international level:<sup>354</sup> ‘Instead of properly addressing [corporations’ responsibilities] in the language of rights, they have been framed in the common language of supererogation. Consequently, they have been approached with the same urgency (or lack thereof) and moral importance as any other issue that might fall in the realm of CSR.’<sup>355</sup> Indeed, Bernaz argues that the UNGC cannot truly tackle human rights violations committed by businesses, but only discuss issues that businesses want to tackle.<sup>356</sup> This is unfortunate and contrary to the principles and characteristics of human rights. As Wettstein notes:

If we accept human rights as undeniable and inherent moral entitlements of all human beings, then we cannot allow for any exceptions in regard to respective obligations. To exempt

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<sup>349</sup> Brabant Stéphane, ‘Commentary Regarding Joint Civil Society Statement on Draft Guiding Principles on Business & Human Rights’ (Comment, 2011) <<https://www.business-humanrights.org/media/documents/ruggie/brabant-commentary-re-ngo-statement-on-draft-guiding-principles-25-jan-2011.doc>> accessed 21 November 2018.

<sup>350</sup> Blitt, Robert C., ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance,’ 48 *Texas International Law Journal* 33 (2012), p.41. See also: International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), pp.8-9 and p.160; Nolan, Justine, and Luke Taylor, ‘Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?’ 87(2) *Journal of Business Ethics* 433 (2009), p.434; Sen, Amartya, ‘Elements of a Theory of Human Rights,’ 32(4) *Philosophy & Public Affairs* 315 (2004), p.327; Sethi, Prakash S., ‘Self-Regulation through Voluntary Codes of Conduct,’ in Prakash S. Sethi, *Globalization and Self-Regulation: The Crucial Role that Corporate Codes of Conduct Play in Global Business*, New York: Palgrave MacMillan (2011), p.6; Steinhardt, Ralph G., ‘The New Lex Mercatoria’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp. 206-207; Tomuschat, Christian, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press (3rd edition, 2014), p.45.

<sup>351</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.195.

<sup>352</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.196.

<sup>353</sup> Buhmann, Karin, ‘Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case’, 7(2) *International Journal of Law in Context* 139 (2011), p.152.

<sup>354</sup> International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), p.2.

<sup>355</sup> Wettstein, Florian, ‘Beyond Voluntarism, Beyond CSR: Making a Case for Human Rights and Justice,’ 114(1) *Business and Society Review* 125 (2009), p.142.

<sup>356</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.181.

corporations from direct moral responsibility in regard to human rights means to question the legitimacy and ethical standing of human rights in general.<sup>357</sup>

As an illustration to the above quote, Jägers regrets that the UNGPs place human rights duties on States alone, making businesses only responsible to 'do no harm,' a typical negative obligation.<sup>358</sup> In reality,

We must shift our perceptions of the corporation as a purely economic institution to one that reflects the new realities of the corporation as a political actor. It is against this background that moving beyond conventional conceptions of CSR seems inevitable; the existence of human rights denotes an ethical imperative for corporations to become agents of justice in a globalized world.<sup>359</sup>

This perspective makes it inevitable to integrate businesses' human rights obligations into the CSR approach.<sup>360</sup> This view also recognizes that businesses have economic and political powers, which 'must be controlled' to ensure that businesses at least protect and preferably actively contribute to the local communities' quality of life<sup>361</sup> and their right to food, in particular. Besides, history has shown us that voluntarism is not sufficient to ensure the full respect, protection, and fulfillment of human rights.<sup>362</sup> Consequently, many are in favor of a binding regulatory document that would make businesses accountable for their activities.<sup>363</sup> According to Tomuschat, 'when the ILO was founded in 1919, it was hoped that by elaborating international conventions and recommendations the whole world would, in the long run, be placed under a tight network of legal norms that would satisfy all legitimate needs. This hope has not materialized.'<sup>364</sup> Also, Bernaz stresses that the support of the private sector is crucial to develop a code of conduct if the code is to be voluntary in nature. On the other hand, if States support the initiative, a binding document can be created, without depending on the support of the private sector.<sup>365</sup> After an analysis of the UNGC's impact, Nolan concluded the following: 'It may be time to rethink the soft voluntary format of the learning network model of the Global Compact in favor of stronger notions of enforcing corporate accountability as set out in the UN Norms.'<sup>366</sup> In relation to this, Jägers notes that:

As a result of the desire to keep everyone at the table, the Guiding Principles on Business and Human Rights lack the teeth needed to bring to account those corporations and States unwilling

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<sup>357</sup> Wettstein, Florian, 'Beyond Voluntarism, Beyond CSR: Making a Case for Human Rights and Justice,' 114(1) *Business and Society Review* 125 (2009), p.138.

<sup>358</sup> Jägers, Nicola, 'UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?,' 29(2) *Netherlands Quarterly of Human Rights* 159 (2011), p.160-161.

<sup>359</sup> Wettstein, Florian, 'Beyond Voluntarism, Beyond CSR: Making a Case for Human Rights and Justice,' 114(1) *Business and Society Review* 125 (2009), p.141.

<sup>360</sup> *Ibid.*, p.142.

<sup>361</sup> Renouard, Cécile, and Cécile Ezvan, 'Corporate Social Responsibility towards Human Development: A Capabilities Framework' 27(2) *Business Ethics: A European Review* 144 (2018), p.146.

<sup>362</sup> International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), pp.7-8.

<sup>363</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.181; Fomerand, Jacques, 'Mirror, Tool, or Linchpin for Change? The UN and Development,' *Academic Council of the UN System (ACUNS), International Relations Studies and the United Nations Occasional Papers No. 2* (2003) <<https://acuns.org/wp-content/uploads/2012/06/MirrorToolorLinchpinforChange.pdf>> accessed 8 November 2018, pp.27-28; Oshionebo, Evaristus, 'The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing,' 17 *Lewis & Clark Law Review* 545 (2013), p.573.

<sup>364</sup> Tomuschat, Christian, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press (3rd edition, 2014), p.132.

<sup>365</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.182.

<sup>366</sup> Nolan, Justine, 'The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights,' 24 *U. Queensland LJ* 445 (2005), p.454.

to respect human rights. It is therefore desirable that further development in this area builds upon the work done by professor Ruggie towards a higher standard for both States and corporations when it comes to the protection of human rights.<sup>367</sup>

On the other hand, it would take much more time and effort to create a new legally binding document rather than working with the existing instruments. This entails that victims would be left without help for longer, which is why Ruggie chose the most time-efficient and promising method when developing the UNGPs. He declares:

My aim, as I have stated explicitly from the beginning, is to reduce corporate-related human rights harm to the maximum extent possible in the shortest possible period of time. And I am doing so primarily by recommending significant changes in policies and practices, on the part of governments and businesses alike.<sup>368</sup>

All in all, the large number of voluntary codes of conduct being developed is clearly a positive sign that businesses are increasingly aware of the relationship between their operations and the human rights of people living in areas where they operate. Nevertheless, the freedom around the development of these codes also allows the occurrence of multiple, different or diverging codes of conduct. This leads to a variety of different business initiatives, which, although elaborated and implemented with good intentions, may not be as efficient as possible. Indeed, they may not take into account national policies and development goals, targets or national programs already running. Therefore, the suggestion made here and developed in section 3.3.3, would be for businesses willing to participate in the protection or fulfillment of a human right, to collaborate with the national government at all times. This would facilitate the development of coherent business initiatives, truly meeting the local needs and supporting the national government in its development targets.

Moreover, this section has shown that all these guiding or voluntary tools, as diverse as they are, are the beginning of the development of benchmarks against which the social and environmental behavior of businesses can be measured and compared for monitoring and evaluation. These benchmarks are useful to gain transparency and help measure the results of business initiatives in the field of CSR.<sup>369</sup> However, we are not there yet. These guidelines do not (yet) provide full and effective transparency about businesses' social and environmental performance. Indeed, 'as expectations for CSR become more defined, there is a need for a certain convergence of concepts, instruments, practices, which would increase transparency without stifling innovation, and would offer benefits to all parties.' In order to achieve this, the EU recommends that all CSR benchmarks be built upon internationally agreed instruments like the ILO core labor standards and the OECD Guidelines.<sup>370</sup> Others recommend implementing an entirely new legally binding document,<sup>371</sup> which is, in fact, being developed at the UN Human Rights Council.<sup>372</sup> Another less drastic option would be to further integrate human rights into the CSR

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<sup>367</sup> Jägers, Nicola, 'UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?', 29(2) *Netherlands Quarterly of Human Rights* 159 (2011), p.163.

<sup>368</sup> Ruggie, John G., 'John Ruggie Response to Human Rights Watch' (Letter of Opinion, 2011) <<https://www.business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-response-to-letter-by-arvind-ganesan-28-jan-2011.pdf>> accessed 21 November 2018.

<sup>369</sup> Commission of the European Communities, Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM(2002) 347 final (2002), p.12.

<sup>370</sup> *Ibid.*, p.13.

<sup>371</sup> International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), pp.8-9 and p.157.

<sup>372</sup> Business & Human Rights Resource Centre, 'Binding Treaty' (Blog Post, n.d.) <<https://www.business-humanrights.org/en/binding-treaty>> accessed 8 January 2019.

discussion or vice versa. This possibility will be addressed in section 3.3, but first, the BHR approach, which originates from the legal field of human rights, will be presented and analyzed.

## 3.2 BHR approach

### 3.2.1 What is the BHR approach?

The BHR approach originated from the work of legal scholars and human rights advocates, who focused on 'formalistic notions of rights and remedies.'<sup>373</sup> The aim of BHR is to make businesses accountable for their infringement of human rights, hereby mitigating and hopefully preventing adverse impacts of business operations on individuals' human rights.<sup>374</sup> The approach advocates corporate human rights obligations on the basis of law, aiming 'to directly establish and enforce human rights standards for business.'<sup>375</sup> In fact, the use of international human rights norms as a basis for the BHR debate provides it with a strong and universal point of reference, transcending differing national legal system. This universality is one of the perceived strengths of BHR as it enables all stakeholders to work together, within a common legal and conceptual framework. It also provides transparency and accountability for business operations, as it leaves less room for businesses to subjectively interpret their own responsibilities, which is the case with the CSR approach.<sup>376</sup>

In general, the BHR approach has focused more narrowly on remedying harm already caused, rather than seeking ways for businesses to positively contribute to the protection and promotion of human rights, alongside States. In fact, the BHR approach has limited itself to addressing negative corporate human rights obligations, attributing positive human rights obligations to States solely.<sup>377</sup> Ramasastry regrets that this focus on the *legal* has excluded all moral or ethical considerations.<sup>378</sup> Still, BHR's concern about human rights extends beyond labor and employment issues, to which earlier studies of the topic had been limited in the past. The debate is now much broader, extending to ESC rights for example.<sup>379</sup> Therefore, issues such as business and the right to food can be addressed within the BHR debate.

### 3.2.2 Existing legal instruments

There is currently no international legally binding document for businesses about their impact on human rights, both the UN Code of Conduct and the UN Norms being failed attempts of this. In reality, finding common grounds on which to base a binding document is difficult because of the different interests of all parties involved.<sup>380</sup> Still,

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<sup>373</sup> Ramasastry, Anita, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,' 14(2) *Journal of Human Rights* 237 (2015), p.237.

<sup>374</sup> *Ibid.*, p.238.

<sup>375</sup> Wettstein, Florian, 'From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?,' in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.82.

<sup>376</sup> Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.438; Wettstein, Florian, et al., 'International Business and Human Rights: A Research Agenda,' 54(1) *Journal of World Business* 54 (2019), p.58.

<sup>377</sup> Ramasastry, Anita, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,' 14(2) *Journal of Human Rights* 237 (2015), p.238.

<sup>378</sup> *Ibid.*, p.240.

<sup>379</sup> Wettstein, Florian, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide,' 22(4) *Business Ethics Quarterly* 739 (2012), p.742.

<sup>380</sup> Bernaz, Nadia, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap*, London and New York: Routledge (2016), p.173 and p.185; Kinley, David and Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of

the Human Rights Council is working on a binding treaty on Business and Human Rights ‘to regulate, in international human rights law, the activities of transnational corporations and other business enterprises,’ which will be discussed in section 3.3.3.<sup>381</sup> Besides, as an initiative underscoring ‘the role of the State as a regulator and enforcer of the laws,’ the UNGPs fit within the BHR discussion.<sup>382</sup> In fact, Smith claims Ruggie’s tripartite framework constitutes the “‘state of the art” within the BHR literature.’<sup>383</sup>

Aside from these international initiatives, both businesses and national governments have touched upon the issue of business and human rights. To begin, contracts between supplier and buyer companies increasingly include codes of conduct. This new requirement is a way for CSR commitments defined in the codes of conduct to become ‘legally binding on the supplier in the *intra partes* relationship’ through contract law.<sup>384</sup> In relation to this, Jägers acknowledges that contract law may also be a way of making the UNGPs legally binding, in those cases where companies support the ideas of the UNGPs and implement those principles into contracts with suppliers. However, as stated in section 3.1.3, this will only be the case for businesses that support the UNGPs.<sup>385</sup> Next, in the public domain, a number of countries with strong capital markets (including the United Kingdom, France, Sweden, Australia and, most recently, Denmark) have tried to promote corporate responsibility by making social disclosure mandatory. The idea is that companies have to report on the ‘sustainability’ of their operations, including their environmental impacts and their compliance with human rights standards. Depending on the countries, legal infrastructure requiring this corporate disclosure is more or less advanced.<sup>386</sup> Also, it is possible for countries to impose trade sanctions on certain countries where human rights abuses occur regularly and on a large scale. However, this type of legislation would not truly help advance the right to food as these sanctions can be challenged at the World Trade Organization (WTO).<sup>387</sup> Besides, the imposition of trade sanctions would not promote positive obligations but rather negative ones. Steinhardt identifies other legal procedures that exist, which aim at preventing human rights abuses but again, these address negative obligations rather than positive ones.<sup>388</sup>

Further, De Schutter identifies ways by which the EU member States could impose legal obligations upon MNEs domiciled on their territory but infringing human rights when operating abroad directly or through their subsidiaries. He identifies two possibilities, which could be set up at the international level as well. Referring to the United States Alien Tort Statute – also known as the Alien Tort Claims Act (ATCA) – and the European Union System, – based on the 1968 Brussels Convention and currently transformed into Regulation No. 1215/2012 – he

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Public International Law,’ 6(3) *Human Rights Law Review* 447 (2006), p.491; Sauvant, Karl P., ‘The Negotiations of the United Nations Code of Conduct on Transnational Corporations,’ 16(1) *The Journal of World Investment & Trade* 11 (2015), p.48.

<sup>381</sup> Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights, A/HRC/RES/26/9 (2014), para.1.

<sup>382</sup> Ramasastry, Anita, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,’ 14(2) *Journal of Human Rights* 237 (2015), p.245.

<sup>383</sup> Smith, Jeffery, ‘Corporate Human Rights Obligations: Moral or Political?,’ 1(2) *Business Ethics Journal Review* 7 (2013), p.9.

<sup>384</sup> Buhmann, Karin, ‘Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case,’ 7(2) *International Journal of Law in Context* 139 (2011), p.148.

<sup>385</sup> Jägers, Nicola, ‘UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?,’ 29(2) *Netherlands Quarterly of Human Rights* 159 (2011), p.163.

<sup>386</sup> Buhmann, Karin, ‘Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case,’ 7(2) *International Journal of Law in Context* 139 (2011), p.148; Steinhardt, Ralph G., ‘The New Lex Mercatoria’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp.188-189.

<sup>387</sup> Steinhardt, Ralph G., ‘The New Lex Mercatoria’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp.189-190.

<sup>388</sup> Ibid., pp.187-202.

mentions the possibility for individuals to bring MNCs to court for having violated ‘universally recognized norms of international law’ through its operations or those of its branch within or outside the home country.<sup>389</sup> He also mentions imposing criminal liability under EU law.<sup>390</sup> The ATCA reads: ‘The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’<sup>391</sup> This US statute has been used to bring businesses to court for infringing human rights, however, the fact that a plaintiff must ‘prove a “violation of the law of nations or a treaty of the United States” has proven to be a greater obstacle for plaintiffs. This has the effect of almost wholly excluding ESC rights from the purview of ATCA.’<sup>392</sup> Hence, the existing legal instruments addressing businesses regarding their responsibilities or duties towards human rights seem limited. An analysis of the BHR approach as a means to make businesses accountable for human rights follows in the next section.

### 3.2.3 Analysis of the benefits and limits of the BHR approach

As presented, there is no international legal document prescribing human rights obligations to businesses. Still, BHR scholars seek ways to render businesses accountable for infringements of human rights law. Here the benefits and limits of the BHR approach as an instrument to render businesses accountable for the right to food are discussed.

The opponents to binding documents mainly use Milton Friedman’s argument that businesses’ only aim is to make economic profit and to meet expectations of shareholders.<sup>393</sup> As Friedman declares:

In [a free economy] there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud. Similarly, the “social responsibility” of labor leaders is to serve the interests of the members of their unions.<sup>394</sup>

He then quotes Adam Smith to explain how it is the role of ‘the rest of us’ to develop a legal framework pushing businesses to contribute to a better world indirectly, ‘led by an invisible hand.’<sup>395</sup> Indeed, he argues that businesses explicitly aiming to do good for society have never succeeded.<sup>396</sup> Likewise, according to Ruggie, making businesses accountable for human rights, which are historically the duties of States, will only undermine the efforts done by States to fulfill all rights:<sup>397</sup> ‘While it may be useful for some purposes to think of corporations as “organs of society,” they are specialized organs, performing specialized functions. The range of their duties should reflect that fact.’<sup>398</sup>

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<sup>389</sup> De Schutter, Olivier, ‘The Accountability of Multinationals for Human Rights Violations in European Law,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp.262-266.

<sup>390</sup> Ibid., p.282.

<sup>391</sup> 28 U.S.C. §1350.

<sup>392</sup> Nolan, Justine, and Luke Taylor, ‘Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?’ 87(2) *Journal of Business Ethics* 433 (2009), p.439.

<sup>393</sup> Steinhardt, Ralph G., ‘The New Lex Mercatoria’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p. 213.

<sup>394</sup> Friedman, Milton, *Capitalism and Freedom*, Chicago: University of Chicago Press (2009), p.133.

<sup>395</sup> Ibid.

<sup>396</sup> Ibid.

<sup>397</sup> Ruggie, John G., ‘Business and Human Rights: The Evolving International Agenda,’ 101(4) *American Journal of International Law* 819 (2007), p.826.

<sup>398</sup> Ibid., p.827.

Closely related to the above arguments is ‘the conviction that human rights are better protected by engagement, even with an abusive government, than by divestment and quarantine.’ The idea is that investment and operations from businesses – especially large MNCs – in developing countries always indirectly advance human rights. The reasoning behind this idea is that having businesses active is more efficient than the imposition of strict norms prohibiting businesses to operate in countries with a government infringing human rights, for example. Based on this theory, strict human rights norms may eventually isolate a country economically and culturally, by prohibiting foreign investment due to poor human rights conditions.<sup>399</sup> Steinhardt presents this argument but also weakens it by saying that the ‘empirical defense of the multinational corporation as a force for good in the protection of human rights cannot be directly tested and confirmed.’<sup>400</sup> He explains that ‘a company might adopt a voluntary code or adhere to the voluntary principles in order to protect its market or brand and nothing in that decision requires divestment or avoidance of economic opportunity.’<sup>401</sup> Thus, it is unclear whether business operations and investments in a third country always advance human rights conditions.

Still, one may correctly state that developing countries are very much dependent on the investments made by MNCs in their country: ‘[FDI] represented half the level of official development aid in 1990; ten years later, it represented three times that level.’<sup>402</sup> De Schutter argues that this places developing host states in a ‘prisoner’s dilemma’. He explains that while ‘*all* States may have preferred to be presented with a different set of options, no State *individually* wishes to impose too heavy a burden on the corporations investing in its territory, out of fear that these corporations might choose to shift their activities to less restrictive locations.’<sup>403</sup> Although De Schutter refers here to negative obligations, his argumentation can be applied to positive obligations as well: No one State would want to impose *alone* the positive obligation to contribute to food and nutrition assistance programs upon businesses, by fear of losing their investment to another *less demanding* country. In this way, due to their economic power, businesses are able to indirectly influence national human rights laws or standards.

Another reason why some are against the development of regulatory frameworks to make businesses accountable for human rights is the idea that one must let the market regulate the course of business. Based on this thought, making mandatory human rights standards only disrupts the force of the market and may undermine a business’ will to contribute to the public good. From this point of view, ‘preference should be given to the regime of market-induced and market-enforced human rights aspirations’<sup>404</sup> rather than risking businesses to stop adopting voluntary codes of conduct. However, Steinhardt disagrees as he sees ‘the choice of proceeding by means of aspirational codes rather than obligatory standards [as resting] on a misleading and unstable distinction.’<sup>405</sup> Indeed, he argues that markets and legal frameworks are not necessarily contradictory. In reality, legal obligations have historically mostly resulted from voluntary undertakings by commercial actors. He further develops that the market should indeed be allowed to work but regulations or norms should exist to define the lower and upper threshold wherein the market may operate.<sup>406</sup>

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<sup>399</sup> Steinhardt, Ralph G., ‘The New Lex Mercatoria’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.219.

<sup>400</sup> *Ibid.*, p.220.

<sup>401</sup> *Ibid.*

<sup>402</sup> De Schutter, Olivier, ‘The Accountability of Multinationals for Human Rights Violations in European Law,’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.238.

<sup>403</sup> *Ibid.*

<sup>404</sup> Steinhardt, Ralph G., ‘The New Lex Mercatoria’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.219.

<sup>405</sup> *Ibid.*

<sup>406</sup> *Ibid.*



Despite the high cost that each State would face when imposing strict human rights regulations on businesses active on their territory, it would benefit all developing States to do so. Indeed, putting in place global standards and monitoring business operations in all developing countries would make each country less vulnerable to the threat of having more demanding and costly regulations for businesses to abide by, than neighboring countries. In fact, these regulations would be even more efficient to protect human rights if they would be applied internationally, in which case developing countries would also stand equally to developed States.<sup>407</sup> Yet, one must remind oneself of the comparative advantage enjoyed by developing countries because of the absence of strict environmental, social or ethical standards as opposed to developed countries. This is also the reason why, as mentioned in section 2.2.3, developing countries opposed the recognition of these concerns and the development of stringent standards in those fields at the WTO level.<sup>408</sup> However, this reasoning from developing countries is limited as it rests on short-term development based on economic gains only. Indeed, as explained in chapter 1, realizing the right to food will have wide and long-term advantages for a country and its inhabitants.

Also, focusing solely on economic gains does not take into account the improvement of an individual's basic freedoms, as Amartya Sen defines it.<sup>409</sup> He recognizes that economic freedom and 'the freedom to satisfy hunger, or to achieve sufficient nutrition' are interlinked and development can only be achieved when all these freedoms are guaranteed.<sup>410</sup> Explaining how important it is to continuously improve one's living conditions and freedoms, Sen states that 'without ignoring the importance of economic wealth, we must go well beyond it.'<sup>411</sup> He also clearly notes that suffering from hunger is one of the most elementary forms of 'unfreedom', as the victim is denied the 'basic freedom to survive.'<sup>412</sup> Černič Letnar goes further and argues that because these ESC rights are extensively connected to the procurement of basic services, they are dependent on a State's budgetary financial resources 'but also require financial resources from private actors, particularly when governments are absent.'<sup>413</sup> Indeed, as Alston declared: 'free markets and private enterprise hold the key to economic and social rights in the wake of clear governmental failures in this domain.'<sup>414</sup> Therefore, 'the business of business is not just to do business: [...] it is to use its influence on governments, which abuse human rights to promote a fuller respect for these rights.'<sup>415</sup> Further, 'many of the critics of voluntary codes claim that they are intended primarily to forestall new regulation (whether at the national or international level).'<sup>416</sup>

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<sup>407</sup> De Schutter, Olivier, 'The Accountability of Multinationals for Human Rights Violations in European Law,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp.238-239.

<sup>408</sup> De Feyter, Koen, *World Development Law: Sharing Responsibility for Development*, Antwerp: Intersentia (2001), p.99.

<sup>409</sup> Sen, Amartya, *Development as Freedom*, Oxford: Oxford University Press (1999), p.3 and p.14.

<sup>410</sup> *Ibid.*, p.4 and p.11.

<sup>411</sup> *Ibid.*, p.14.

<sup>412</sup> *Ibid.*, p.16.

<sup>413</sup> Letnar Černič, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), pp.87-88

<sup>414</sup> Report of the Special Rapporteur on Extreme Poverty and Human Rights: Philip Alston, UN Doc. A/HRC/32/31 (2016), para 18.

<sup>415</sup> De Schutter, Olivier, 'The Accountability of Multinationals for Human Rights Violations in European Law,' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), p.262.

<sup>416</sup> International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), pp.8-9. See also: p.160; Blitt, Robert C., 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance,' 48 *Texas International Law Journal* 33 (2012), p.41; Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.434; Sen, Amartya, 'Elements of a Theory of Human Rights,' 32(4) *Philosophy & Public Affairs* 315 (2004), p.327; Sethi, Prakash S., 'Self-Regulation through Voluntary Codes of Conduct,' in Prakash S. Sethi, *Globalization and Self-Regulation: The Crucial Role that Corporate Codes of Conduct Play in Global Business*, New York: Palgrave MacMillan (2011), p.6; Steinhardt, Ralph G., 'The New Lex Mercatoria' in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp. 206-207; Tomuschat, Christian, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press (3rd edition, 2014), p.45.

Hence, despite the critics, scholars increasingly recognize the need to develop a new international legally binding document to render businesses accountable for human rights, as it presents numerous advantages for all parties involved.<sup>417</sup> First and foremost, a new treaty would clarify that businesses do have human rights duties based on international law.<sup>418</sup> Next, it would guarantee a solid foundation for corporate legal accountability. It would provide common and universal benchmarks to measure businesses' behavior and verify their claims of being a responsible business based on international human rights law.<sup>419</sup> Indeed, international human rights law 'is the only existing internationally-agreed expression of the minimum conditions that everyone should enjoy if they are to live with dignity as human beings. It provides a wide range of guarantees – including the [right] to food.'<sup>420</sup> Fortunately, a new treaty would not only be beneficial to human rights victims, as businesses could also profit from these clear legal expectations. In fact, companies that are truly committed to respecting human rights should not fear binding norms on business and human rights.<sup>421</sup> On the contrary, clear laws might actually provide them with significant advantages: Firstly, 'where commitments are voluntary, more enlightened companies can lose out to competitors which do not make similar commitments or are not serious about compliance (the so-called "free rider" phenomenon).'<sup>422</sup> Secondly, some business leaders acknowledge that they would prefer obligation and clarity to voluntarism and confusion. [...] Thirdly, where clear minimum standards exist, companies that do more can rightly claim to be more socially responsible.'<sup>423</sup>

Clearly, the more States ratify it, the more important and effective such a binding document will be. However, 'even if not widely ratified initially, it would affect the development of customary international law and would likely have an impact in national court proceedings.'<sup>424</sup> Its effectiveness will be the inclusion of clear and strict enforcement procedures. Indeed, current initiatives are criticized for their 'poorly-resourced and often ineffective' human rights enforcement procedures.<sup>425</sup> This will be an important step towards the provision of justice and remedies for victims. Naturally, 'one would not expect international legal rules to change company practice overnight – as they have not immediately transformed the behavior of governments. Nevertheless, as soon as a course of action is judged to be illegal – and a violation of human rights – a deterrence is created, particularly where the judgment has international weight and authority.'<sup>426</sup>

Unfortunately, developing a new treaty on business and human rights is bound to a number of difficulties. To begin, negotiating and drafting a new treaty would take years, without any guarantee of its rapid entry into force after an agreement has been reached. Besides, international law already has difficulty ensuring its correct and proper application. Indeed, because of the 'absence of a single sovereign to issue commands, disseminate propaganda, or impose sanctions, no effective institution exists to encourage allegiance to international law.'<sup>427</sup> In practice, international law can be relatively abstract: 'the big picture debates about business and poverty look too fuzzy from a distance. Only closer up, upon attention to micro-detail and the nuances of context, do the fault lines

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<sup>417</sup> International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), pp.8-9 and p.157.

<sup>418</sup> *Ibid.*, p.156.

<sup>419</sup> *Ibid.*, p.15.

<sup>420</sup> *Ibid.*, p.15.

<sup>421</sup> *Ibid.*, p.18.

<sup>422</sup> *Ibid.*

<sup>423</sup> *Ibid.*, p.19.

<sup>424</sup> *Ibid.*, p.157.

<sup>425</sup> *Ibid.*, p.156.

<sup>426</sup> *Ibid.*, pp.10-11.

<sup>427</sup> Charney, Jonathan L., 'Transnational Corporations and Developing Public International Law,' 1983 *Duke Law Journal* 748 (1983), p. 756.

of *what is possible and how* become clear.’<sup>428</sup> This thesis defends that this is valid for the broad discussion about business and human rights as well. This is why the focus is laid on the right to food, in particular. Clearly, this remains a broad theme, with heterogeneous needs and demands of people deprived of their right to food. Taking all these differences into account to develop a broad but culturally and locally adapted legal framework will be a difficult task. Regrettably, this is linked to another difficulty in the implementation of a new binding treaty, namely its scope of application. Indeed, ‘a new treaty setting out the obligations on companies might have to address broader issues of social and environmental responsibility.’<sup>429</sup> Overall, the International Council on Human Rights Policy argues that because ‘international law evolves slowly’ it is necessary to immediately start building international consensus around the creation of binding regulation as a crucial method for the enforcement of international human rights law.<sup>430</sup>

In reality, once the difficulties mentioned above have been overcome, there are no real barriers preventing States from implementing a binding treaty for businesses on human rights. Because States are the main subjects of international law, they ‘have all the rights and obligations possible under that law.’<sup>431</sup> Hence, States may impose direct international and legal (positive) human rights obligations upon businesses, if they wish to do so.<sup>432</sup> Indeed,

Some actors other than states [...] have certain rights and obligations under international law. This is true of international organizations, insurgent or rebel groups, companies, and private individuals. It does not matter that they have taken no part in negotiating the treaty that creates an obligation. The point is that no *conceptual* obstacle prevents States from requiring companies to abide by legally binding international human rights obligations.<sup>433</sup>

The international legal system might have been elaborated by States; it no longer exclusively applies to States.<sup>434</sup> Thus, ‘at some point, and some would argue that this point has already been reached, the soft law duties of companies will be recognized as, or consciously transformed into, unambiguous and binding legal obligations on companies.’<sup>435</sup>

Unfortunately, Ramasastry fears that the work on a new binding treaty on business and human rights has shifted the BHR discourse ‘once again to a focus on the legal and political rather than on an underlying assessment of the

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<sup>428</sup> Newell, Peter, and Jędrzej G. Frynas, ‘Beyond CSR? Business, Poverty and Social Justice: An Introduction,’ 28(4) *Third World Quarterly* 669 (2007), p.679.

<sup>429</sup> International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), p.157.

<sup>430</sup> *Ibid.*, p.8.

<sup>431</sup> *Ibid.*, p.57. See also: p.160.

<sup>432</sup> *Ibid.*, p.160.

<sup>433</sup> *Ibid.*, p.57.

<sup>434</sup> *Ibid.*, p.160.

<sup>435</sup> International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), p.160. See also: Blitt, Robert C., ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embracing Approach to Corporate Human Rights Compliance,’ 48 *Texas International Law Journal* 33 (2012), p.41; International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), pp.8-9; Nolan, Justine, and Luke Taylor, ‘Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?’ 87(2) *Journal of Business Ethics* 433 (2009), p.434; Sen, Amartya, ‘Elements of a Theory of Human Rights,’ 32(4) *Philosophy & Public Affairs* 315 (2004), p.327; Sethi, Prakash S., ‘Self-Regulation through Voluntary Codes of Conduct,’ in Prakash S. Sethi, *Globalization and Self-Regulation: The Crucial Role that Corporate Codes of Conduct Play in Global Business*, New York: Palgrave MacMillan (2011), p.6; Steinhart, Ralph G., ‘The New Lex Mercatoria’ in Philip Alston (ed.), *Non State Actors and Human Rights*, Oxford: Oxford University Press (2005), pp.206-207; Tomuschat, Christian, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press (3rd edition, 2014), p.45.

role companies might play in a larger protection and fulfillment of human rights.’<sup>436</sup> Indeed, as mentioned in section 3.2.1, the BHR discourse has mostly concentrated on negative human rights obligations when addressing businesses, as opposed to CSR, which is more about *doing good*, addressing positive human rights responsibilities. This division of obligations between States and businesses has been particularly important since the SRSg’s took his position in 2005.<sup>437</sup> Indeed, ‘the use of “do no harm” language has caused most attention to be focused on how companies can avoid violations.’<sup>438</sup> Still, one must note here that the UNGPs’ ‘do no harm’ requirement for businesses may entail some positive steps, relating to the due diligence process for example.<sup>439</sup> However, overall, BHR has mainly been about negative obligations of businesses, while all positive obligations are ascribed to the State.<sup>440</sup>

Interestingly, Wettstein’s conception of human rights as ‘fundamental moral’ rights allows him to incorporate broader human rights issues and obligations into the BHR debate.<sup>441</sup> He argues that the SRSg’s view of negative responsibilities for businesses to respect human rights by ‘doing no harm’ is becoming ‘increasingly problematic in today’s context of globalization.’<sup>442</sup> Indeed, because of the complex interplay of a multitude of actors, one cannot easily pinpoint a single actor responsible for a particular human rights infringement. Consequently, many more discrete or subtle consequences of a business’ operations on human rights may be left unaddressed. Thus, Wettstein criticizes the rigidity of the UNGPs and defends a broadening of BHR, focusing on ‘the more inclusive moral dimension of human rights for the derivation of corporate human rights obligations.’<sup>443</sup> In order to achieve this, he suggests analyzing human rights as an ‘integral part of CSR.’<sup>444</sup> In fact, while Ruggie’s Framework may have ‘lifted the profile of the business and human rights debate in CSR circles,’<sup>445</sup> it has not led to dramatic changes in either one of the fields: ‘Attempts to make human rights accessible for informing a general conceptual understanding of CSR [...] have generally been rare.’<sup>446</sup> Consequently, the next section will address the possibilities to further link ideas from the CSR and BHR discourses with the aim to attribute – specifically positive – human rights obligations to businesses regarding the right to food, in particular.

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<sup>436</sup> Ramasastry, Anita, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,’ 14(2) *Journal of Human Rights* 237 (2015), p.238.

<sup>437</sup> Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.745 & p.751; Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?’, in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.83.

<sup>438</sup> Nolan, Justine, and Luke Taylor, ‘Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?’ 87(2) *Journal of Business Ethics* 433 (2009), p.443.

<sup>439</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/8/5 (2008), para.55; Nolan, Justine, and Luke Taylor, ‘Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?’ 87(2) *Journal of Business Ethics* 433 (2009), p.443.

<sup>440</sup> Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.745 and p.751; Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?’, in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.83.

<sup>441</sup> Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.744.

<sup>442</sup> Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?’, in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.83.

<sup>443</sup> Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.745.

<sup>444</sup> Ibid.

<sup>445</sup> Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.74; Wettstein, Florian, et al., ‘International Business and Human Rights: A Research Agenda,’ 54(1) *Journal of World Business* 54 (2019), p.56.

<sup>446</sup> Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.747.

### 3.3 Merging ideas from the CSR and BHR approaches to make businesses accountable for the right to food

#### 3.3.1 Possibilities for an integration of the CSR and BHR approaches

CSR and BHR are like ‘two close cousins—they are intertwined concepts focused on companies engaging in responsible and socially beneficial activities—but both concepts have key differences and hence distinct identities based on their origins’, as presented in the above sections 3.1 and 3.2.<sup>447</sup> Most importantly, the role of law differs in both approaches: while the law *simply* provides a ‘passive frame that shapes the context’ of voluntary CSR initiatives,<sup>448</sup> it has a ‘more defining and fundamental’ role in the case of BHR.<sup>449</sup> Where CSR encourages responsible behavior, BHR focuses on a narrower, legally binding commitment of businesses to human rights.<sup>450</sup> Besides having different views on the role of the law, both approaches have other views on the role of the government. CSR opts for a more traditional separation of the public and the private domain, rarely engaging with the State when considering corporate responsibilities.<sup>451</sup> CSR tends to assume ‘a functioning and well-ordered State as a background condition.’<sup>452</sup> On the other hand, BHR has blurred this separation of the State and businesses. In fact, the UNGPs offer a framework to address the human rights obligations of States and responsibilities of the business sector in an integrated way. This vision holds direct practical implications: ‘while governments have watched developments in the CSR field largely from the sidelines in the past, they are drawn squarely into the fold in BHR.’<sup>453</sup>

Some argue that ‘BHR is, in part, a response to CSR and its perceived failure.’<sup>454</sup> Obara and Peattie claim that businesses increasingly use international human rights standards as ‘bedrock’ to guide their activities, suggesting that CSR’s concept of a self-regulatory tool is inadequate for businesses.<sup>455</sup> Unlike CSR that has failed to develop coherent and lasting instruments, BHR has successfully developed tools and instruments – like the human rights due diligence process – that can objectively evaluate and assess businesses’ activities.<sup>456</sup> In fact, BHR offers the

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<sup>447</sup> Ramasastry, Anita, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,’ 14(2) *Journal of Human Rights* 237 (2015), p.237.

<sup>448</sup> Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?’, in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.81.

<sup>449</sup> Ibid., p.82.

<sup>450</sup> Smith, Jeffery, ‘Corporate Human Rights Obligations: Moral or Political?’, 1(2) *Business Ethics Journal Review* 7 (2013), p.8; Ramasastry, Anita, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,’ 14(2) *Journal of Human Rights* 237 (2015), p.247.

<sup>451</sup> Ramasastry, Anita, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,’ 14(2) *Journal of Human Rights* 237 (2015), p.238; Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?’, in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.81.

<sup>452</sup> Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?’, in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.81.

<sup>453</sup> Ibid.

<sup>454</sup> Ramasastry, Anita, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,’ 14(2) *Journal of Human Rights* 237 (2015), p.238.

<sup>455</sup> Obara, Louise J., and Ken Peattie, ‘Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies’ 53(6) *Journal of World Business* 781 (2018), p.783.

<sup>456</sup> Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?’, in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.82.

'kind of targeted reference point for practical tools and initiatives that has always been missing from CSR.'<sup>457</sup> For instance,

Relying on the human rights stipulated in the International Bill of Human Rights, the Guiding Principles provide a concrete and tangible reference point for practical initiatives for both governments and companies. In contrast, CSR initiatives have always been scattered in terms of targets, instruments and audiences, reaching from the funding of cultural events and exhibitions to volunteering of employees to projects targeting water scarcity and waste reduction.<sup>458</sup>

Wettstein believes the definition of CSR as something “fundamentally” voluntary is directly tied to the relative lack of attention it has given to human rights.<sup>459</sup> As a consequence, although many issues addressed by CSR scholars are fundamentally human rights problems, they have rarely been dealt with as such. Instead of being addressed in the terminology of justice, they have been addressed ‘in that of virtue and beneficence or even philanthropy and charity. This not only sells CSR’s own importance and relevance short, but it threatens to empty human rights of the moral urgency that constitutes and defines their very nature as the most fundamental claims and imperatives on the moral spectrum.’<sup>460</sup> On the other hand, it is exactly this voluntariness assumption that enables businesses to be proactive and socially involved in activities ‘beyond the (negative) realm of doing no harm.’<sup>461</sup> Indeed, while the CSR approach lacks a constitutive focus on human rights, the BHR debate fails to acknowledge and stimulate the potential of businesses to resolve human rights infringements and contribute to a better society.

Both BHR and CSR have their advantages and drawbacks. Thus, the “solution” may be to take the best of the two approaches and to integrate them into a consistent philosophy of corporate responsibility for human rights. An integrated approach would advance corporate responsibilities beyond “mere” respect for human rights.<sup>462</sup>

An integration of the CSR and the BHR debate, strengthening both approaches rather than undermining one in favor of the other, might be the solution for the realization of the right to food through pro-active business initiatives. This would indeed allow the conceptualization of positive human rights obligations for businesses in addition to the current *negative responsibility* of businesses to respect human rights.<sup>463</sup>

In order to achieve this, both approaches will have to make concessions and broaden their scope. On the one hand, the CSR debate will need to implement human rights law at its core. This will ensure a global, transparent and consistent framework integrating a universal set of moral principles for corporate accountability.<sup>464</sup> Indeed,

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<sup>457</sup> Ibid.

<sup>458</sup> Ibid.

<sup>459</sup> Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.748.

<sup>460</sup> Ibid., p.751.

<sup>461</sup> Ibid.

<sup>462</sup> Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?’, in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.84.

<sup>463</sup> Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.752; Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?’, in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.86.

<sup>464</sup> Obara, Louise J., and Ken Peattie, ‘Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies’ 53(6) *Journal of World Business* 781 (2018), p.784; Ramasastry, Anita, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,’ 14(2) *Journal of Human Rights* 237 (2015), pp.239-240;

CSR has much to gain from international human rights law, as the human rights field has identified ‘the most fundamental and basic human interests that must be respected for a dignified life, irrespective of end-goals.’<sup>465</sup> Principles from the BHR approach will also help CSR move beyond voluntarism, guaranteeing action and accountability from all businesses.<sup>466</sup> For instance, human rights may be useful to implement CSR policy goals.<sup>467</sup> Breaches of ESC rights, such as the right to food, cannot be dealt with by depending solely on soft laws.<sup>468</sup> On the other hand, the BHR debate will have to broaden its scope in order to incorporate positive business obligations in the area of human rights. Indeed, CSR has always focused on the potential of economic power to improve society at large and the importance of responsible business cultures and values. It has promoted more than narrow compliance with the rules by putting much weight on the idea that businesses must do more for society than not harming it.<sup>469</sup> All in all, an integrated approach of CSR and BHR would support corporate responsibilities regarding the negative obligation to respect, as well as the positive obligations to protect and realize the right to food.<sup>470</sup>

### 3.3.2 The integration of the CSR and BHR debates in practice

It appears that ideas from the CSR and the BHR approach are already – to some extent – interlinked in practice. Ramasastry claims the UNGC is an illustration of ‘an initiative where CSR and BHR have overlapped like two concentric circles.’<sup>471</sup> Although it was a voluntary initiative, typically categorized as belonging to the CSR movement, without a binding accountability mechanism to sanction businesses involved in human rights violations, it provided a ‘universal measurement tool for corporate conduct – international human rights treaties. As such, it forms an integral part of the history of BHR.’<sup>472</sup> Besides, as mentioned already, the UNGPs ‘can be seen as an impetus for the development of BHR into an inter-disciplinary academic field,’ prompting more systematic debates on the topic in non-legal fields such as CSR.<sup>473</sup> Further, Obara and Peattie, who studied the application of

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Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.752.

<sup>465</sup> Obara, Louise J., and Ken Peattie, ‘Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies’ 53(6) *Journal of World Business* 781 (2018), p.784.

<sup>466</sup> Obara, Louise J., and Ken Peattie, ‘Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies’ 53(6) *Journal of World Business* 781 (2018), p.784; Ramasastry, Anita, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,’ 14(2) *Journal of Human Rights* 237 (2015), pp.239-240; Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.752.

<sup>467</sup> Buhmann, Karin, ‘Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case,’ 7(2) *International Journal of Law in Context* 139 (2011), p.140; Obara, Louise J., and Ken Peattie, ‘Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies’ 53(6) *Journal of World Business* 781 (2018), p.781; Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?,’ in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.86.

<sup>468</sup> Nolan, Justine, and Luke Taylor, ‘Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?’ 87(2) *Journal of Business Ethics* 433 (2009), p.439.

<sup>469</sup> Obara, Louise J., and Ken Peattie, ‘Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies’ 53(6) *Journal of World Business* 781 (2018), p.784; Ramasastry, Anita, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,’ 14(2) *Journal of Human Rights* 237 (2015), pp.239-240; Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.752; Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?,’ in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.84.

<sup>470</sup> Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?,’ in Dorothee Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.84.

<sup>471</sup> Ramasastry, Anita, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability,’ 14(2) *Journal of Human Rights* 237 (2015), p.243.

<sup>472</sup> Ibid.

<sup>473</sup> Wettstein, Florian, et al., ‘International Business and Human Rights: A Research Agenda,’ 54(1) *Journal of World Business* 54 (2019), p.56.

CSR and BHR in practice by UK-based businesses, found a close link between the application of CSR and BHR. CSR was often used as a 'clear organizational "frame" (the retained knowledge and "memory" of the organization) that directly influenced when companies noticed HR [human rights] and how these commitments were then organized and implemented.'<sup>474</sup> Indeed, CSR provided a rapid, easy and economical way for businesses to understand and implement human rights.<sup>475</sup>

In fact, not all businesses explicitly noticed and/or engaged with human rights. In most cases, CSR initiatives focusing on community development were those implicitly addressing human rights. This 'suggests that community initiatives may represent something of a "hidden bridge" across the CSR and HR [human rights] divide, and could provide the type of opportunity that some have been calling for in terms of CSR broadening the HR [human rights] debate beyond its current "do no harm" focus.'<sup>476</sup> Just a few businesses saw these positive and proactive activities as belonging to the human rights domain, and this only occurred under specific conditions during their global operations.<sup>477</sup> Concurrently, the food donations from businesses mentioned in section 3.1.2 were all reported in businesses' CSR reports, without any link to the right to food. Instead, these business initiatives for the betterment of communities were linked to SDG goals. Thus the challenge BHR scholars face is not only to stimulate businesses to adopt positive and proactive actions throughout all their business operations. It is equally important to understand the reasons behind businesses' avoidance of human rights language and their reluctance to move beyond the largely 'do no harm' approach.<sup>478</sup> Obara and Peattie conclude that

By considering *all* CSR activity, particularly community investment measures practitioners can explore and better appreciate the connections and overlaps between CSR and HR [human rights], allowing them to identify how CSR strategy can contribute in a positive way towards the realization and promotion of HR [human rights] (beyond the narrow "do no harm" approach) and to demonstrate this to both internal and external stakeholders.<sup>479</sup>

Unfortunately, addressing human rights issues in CSR language is not without risks for the value of human rights:

Reducing BHR to a subset of CSR and thus applying this moral voluntarism to it may prove momentous from both a conceptual and a practical perspective. Conceptually, it will inevitably reduce human rights responsibility to mere acts of corporate goodwill. Shifting human rights from the domain of owed obligation into the domain of supererogatory moral discretion threatens to undermine the very core of what human rights aim to protect: the unconditional and equal dignity of all human beings. This is also of practical relevance: it results in public indifference towards corporate human rights conduct; it leads to corporations selectively meeting human rights standards based on economic incentives (the so-called "business case for human rights responsibility"); and it promotes hands-off public policy, which sees little need to hold companies accountable for their human rights impact.<sup>480</sup>

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<sup>474</sup> Obara, Louise J., and Ken Peattie, 'Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies' 53(6) *Journal of World Business* 781 (2018), p.790.

<sup>475</sup> *Ibid.*

<sup>476</sup> *Ibid.*, p.791.

<sup>477</sup> *Ibid.*

<sup>478</sup> *Ibid.*

<sup>479</sup> *Ibid.*

<sup>480</sup> Wettstein, Florian, 'From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?', in Dorothée Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.80.



Thus, there is a risk of reducing the intensity and meaning of human rights, when incorporating them within CSR.<sup>481</sup> Wettstein also warns about businesses seeing human rights ‘as just another compliance issue’ when accentuating the rule of law to enforce human rights.<sup>482</sup> Still, the fact that Obara and Peattie found that human rights were used to facilitate the navigation between different legal, economic and value systems confirms the claims made by BHR scholars that human rights ‘strengthen[s] CSR by providing it with a moral foundation and ethical code for global conduct.’<sup>483</sup>

Buhmann et al. propose a slightly different approach to link CSR and BHR, by taking BHR as a basis and adding elements of the CSR approach to it. They suggest combining BHR mechanisms and the SDGs to strengthen monitoring and accountability of SDG commitments, drawing on the strength of both frameworks.<sup>484</sup> In fact, the authors see a great deal of resemblance between the SDGs and political CSR (PCSR), as both seek to determine ‘how companies can help address institutional voids and the delivery of public goods.’<sup>485</sup> According to PCSR theory, the presence of weak governments in certain regions of the world indicates ‘a need for practical and moral legitimacy purposes for companies to contribute to human rights fulfillment.’<sup>486</sup> Hence, the idea is to require businesses to contribute to the overall welfare of society. Meanwhile, the authors state that: ‘The UNGPs underscore the importance of firms exercising leverage to influence business relationships to address human rights impacts.’<sup>487</sup> Thus, the authors propose to further the operations of Ruggie’s due diligence process to add elements of CSR into it by merging it with the SDG goals.<sup>488</sup>

They suggest that businesses ‘extend human rights due diligence from a process to identify and manage potential or actual harm, into also identifying societal needs to be translated into business potential for SDG contribution.’<sup>489</sup> This extension would allow companies to maximize their investments in the process of due diligence while contributing to the improvement of society in a targeted way, matching local needs.<sup>490</sup> Hence, businesses would continue preventing harmful consequences of their activities and, building upon that, they would also contribute to specific SDGs.<sup>491</sup> Particularly SDG 2 and 17 would be addressed in this case. This goes beyond the requirements of the UNGPs, but it ‘is in line with PCSR and may contribute to moral legitimacy through human rights fulfillment.’<sup>492</sup> In reality, as mentioned above and presented in section 3.1.2, certain responsible businesses already indicate taking action to contribute to particular SDGs, without mentioning any specific link to human rights. Moreover, aside from identifying opportunities for businesses to make a positive difference to society, the idea of

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<sup>481</sup> Obara, Louise J., and Ken Peattie, ‘Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies’ 53(6) *Journal of World Business* 781 (2018), p.790; Wettstein, Florian, et al., ‘International Business and Human Rights: A Research Agenda,’ 54(1) *Journal of World Business* 54 (2019), p.57.

<sup>482</sup> Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?,’ in Dorothée Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.83.

<sup>483</sup> Obara, Louise J., and Ken Peattie, ‘Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies’ 53(6) *Journal of World Business* 781 (2018), p.790.

<sup>484</sup> Winkler, Inga T., and Carmel Williams, ‘The Sustainable Development Goals and Human Rights: a Critical Early Review’ 21(8) *The International Journal of Human Rights* 1023 (2017), p.1027.

<sup>485</sup> Buhmann, Karin, Jonas Jonsson, and Mette Fisker, ‘Do No Harm and Do More Good Too: Connecting the SDGs with Business and Human Rights and Political CSR Theory,’ *Corporate Governance: The International Journal of Business in Society* (2018), p.2.

<sup>486</sup> *Ibid.*, p.11.

<sup>487</sup> *Ibid.*, p.4.

<sup>488</sup> *Ibid.*, p.2.

<sup>489</sup> *Ibid.*, p.8.

<sup>490</sup> *Ibid.*, p.9.

<sup>491</sup> *Ibid.*, p.8.

<sup>492</sup> *Ibid.*, p.10.

extending the use of the due diligence model will also eliminate the ‘need for companies to distinguish between “doing no harm” and “doing good,” as the two aspects are often interconnected.’<sup>493</sup>

All in all, it is clear that limiting business human rights responsibility to the obligation to respect and excluding the two positive obligations *beforehand* is not rational. Many human rights issues can no longer be solved by a single actor, but require ‘institutions of all kinds and sectors’ to work together towards an adapted solution, hence the suggestion to involve businesses.<sup>494</sup> Still, international human rights law does not acknowledge business duties or its positive responsibilities. In reality, the difficulty with the implementation of positive business obligations lays in determining the scope and extent of these obligations.<sup>495</sup> Scholars have suggested determining the limits of the ‘fair share’ of responsibilities for businesses by using factors of proximity, power, relationship to the victims and situation of the victims.<sup>496</sup> Thus, one can state that ‘capability must be complemented with the requirement of a morally relevant connection in order to *limit the scope* of an agent’s obligation and with the criterion of reasonableness of the normative burden in order to *limit the extent* of the obligation.’<sup>497</sup> Linking to that, Letnar Čerňič believes ‘the corporate obligation to fulfill depends on the available measures and financial resources of particular business actors.’<sup>498</sup> Here, the proposition would be for businesses to be held accountable for the right to food of the local community in the areas where they operate, proportionally to their resources and financial means. Moreover, to be efficient, it is crucial that business initiatives complement or at least are in line with ‘efforts by local governments and global development agendas.’<sup>499</sup> Indeed, consulting and involving a broad range of stakeholders, including the local community, will increase the likelihood that businesses’ SDG related initiatives are relevant, respond to the local needs, have a positive impact on human rights and accentuate the initiative’s moral legitimacy.<sup>500</sup> This proposition will be developed further in the next section.

### 3.3.3 Making businesses accountable for their contribution to the realization of the right to food

Much has already been achieved. Businesses now know and realize how their operations affect the human rights of their employees and the local communities where they are active. They have started to develop their own initiatives to actively contribute to the respect, protection and especially the fulfillment of the right to food. Besides, UN initiatives and public-private partnerships have been developed. Further, scholars have presented ways of merging ideas from the CSR and BHR approaches to attribute positive human rights responsibilities or obligations to businesses. These are clearly important improvements and can be seen as promising steps towards the realization of the right to food through State and business involvement. Without undermining these positive developments, this thesis aims to critically review them to keep moving forward and achieving the full realization of the right to food as quickly and efficiently as possible, involving all entities capable of contributing to this right.

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<sup>493</sup> Ibid., p.7.

<sup>494</sup> Wettstein, Florian, ‘From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?’, in Dorothée Baumann-Pauly and Justine Nolan (eds.), *Business and Human Rights: From Principles to Practice*, London and New York: Routledge (2016), p.86.

<sup>495</sup> Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, A/HRC/40/48 (2019), para. 8.

<sup>496</sup> Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.755.

<sup>497</sup> Wettstein, Florian, ‘CSR and the Debate on Business and Human Rights: Bridging the Great Divide,’ 22(4) *Business Ethics Quarterly* 739 (2012), p.755.

<sup>498</sup> Letnar Čerňič, Jernej, *Corporate Accountability under Socio-Economic Rights*. London and New York: Routledge, (2018), p.134.

<sup>499</sup> Buhmann, Karin, Jonas Jonsson, and Mette Fisker, ‘Do No Harm and Do More Good Too: Connecting the SDGs with Business and Human Rights and Political CSR Theory,’ *Corporate Governance: The International Journal of Business in Society* (2018), p.5.

<sup>500</sup> Ibid., p.9.

From this perspective, a multitude of individual and independent business, UN and/or multi-sectoral initiatives may not be the most efficient way of realizing the right to food. Indeed, the multitude of diverging types of initiatives targeting malnutrition and food insecurity must be linked and harmonized to speed up positive results for society. Also, for such initiatives to be successful, it is crucial that they take into account the needs of the local communities as well as the broader needs of a region or country. For instance, even Buhmann et al.'s promising idea to extend due diligence and further encourage businesses to address the SDGs would result in a multitude of unaligned and uncoordinated business initiatives. Further, those actors developing initiatives must be held accountable for their plans, actions and the outcomes thereof. Last but not least, human rights responsibilities of businesses must become international legal obligations, enabling full accountability across the globe. All these elements, which are essential for the successful and efficient realization of the right to food through business and governmental involvement, will now be discussed in more detail.

To begin, aligning and consolidating the multitude of existing or future initiatives will require businesses to adapt their initiatives according to national development policies and goals elaborated by States. Ideally, these businesses must collaborate with the governments of States where they operate in order to reach national development goals together. Therefore, governments should first have clear policies that provide an enabling environment for private sector investments. Clearly, this collaboration between private and public sectors can only function with governments willing to act upon and recognize the right to food. Interestingly, even when governments are unwilling to address the issue of malnutrition or unwilling to work towards the realization of human rights, businesses could still make a difference. This illustrates the importance of making businesses accountable for the right to food at the international level, allowing the realization of that right worldwide. Yet, as mentioned in section 3.2.3, an international treaty on business and human rights would be restricted by the States ratifying it, although such a treaty would certainly be a step in the right direction. Overall, aside from ensuring coherence between diverse business initiatives in a single country or community, this collaboration between governments and businesses will increase food security in the shortest period of time possible.

Interestingly, the Scaling Up Nutrition (SUN) Movement may already partly address this need to involve businesses together with governments, in the fight against malnutrition and food insecurity. It is a multi-sectoral and multi-stakeholder approach gathering governments and people from civil society, the UN, donors, businesses, and researchers, 'in a collective effort to improve nutrition.'<sup>501</sup> Indeed, the vision of the SUN Movement is the following: 'By 2030, a world free from malnutrition in all its forms. Led by governments and supported by organizations and individuals – collective action ensures every child, adolescent, mother and family can realize their right to food and nutrition, reach their full potential and shape sustainable and prosperous societies.'<sup>502</sup> The SUN Movement is specifically interesting because it allows States and businesses to collaborate towards the same aim to improve the food and nutrition status of people around the globe. It is a tool to achieve the promise of the SDGs, in particular, SDG 2 and 17.<sup>503</sup> Two important aspects of the Movement – described in its vision – are the mobilization of resources by multiple actors, including businesses and the fact that all these actors align their initiatives with governmental targets and goals to tackle malnutrition. This aligned implementation is crucial, as it

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<sup>501</sup> Scaling Up Nutrition, 'The Vision and Principles of SUN' (Webpage, n.d.) <<https://scalingupnutrition.org/about-sun/the-vision-and-principles-of-sun/>> accessed 21 February 2019.

<sup>502</sup> Scaling Up Nutrition, 'Vision' (Webpage, n.d.) <<http://scalingupnutrition.org/wp-content/uploads/2016/06/Strategy-mountain-1.jpg/>> accessed 21 February 2019.

<sup>503</sup> Scaling Up Nutrition, 'The Vision and Principles of SUN' (Webpage, n.d.) <<https://scalingupnutrition.org/about-sun/the-vision-and-principles-of-sun/>> accessed 21 February 2019.

will allow the achievement of far greater outcomes than those resulting from isolated, independent business or State initiatives.<sup>504</sup>

On top of this, the countries that have joined the SUN Movement are all developing States. As of February 2019, 60 States – exclusively from the South – and three Indian States have voluntarily joined the Movement. It is a great sign that governments from developing States take the lead and collaborate directly with other actors – rather than being simple recipients of aid – in order to face their national issues around malnutrition. Indeed, ‘SUN is a Movement which puts national priorities at the heart of global efforts to improve nutrition.’<sup>505</sup> Further, the Movement has developed ten ‘Principles of Engagement,’ which include transparency regarding intentions and impact (Principle of Engagement 1) as well as the need to act in accordance with human rights (Principle of Engagement 3).<sup>506</sup> These two principles tend towards ideas from the BHR approach, namely accountability and a universal framework based on international human rights law. Besides, although the SUN Movement is considered to hold all stakeholders accountable, it sees the government as the primary actor accountable for the right to food, which again is in line with the traditional BHR discourse.<sup>507</sup> On the other hand, the pro-activeness and involvement of voluntary businesses is typical of the CSR approach.

Still, as all initiatives, the SUN Movement faces critics and difficulties. It seems collaboration between different ministries within a country can be challenging. This may be accentuated by a lack of political commitment resulting in insufficient policies developed with the aim of tackling malnutrition. On top of these political difficulties, several member countries – being developing countries – have limited financial resources, thus relying heavily on donors. Although this may not always be problematic, some countries are skeptical about involving the private sector as they question their true motivation to voluntarily contribute to the SUN Movement. These doubtful countries believe businesses must be sufficiently regulated and must engage in SUN initiatives within a particular framework.<sup>508</sup> To elaborate further upon this suggestion, States could determine the percentage of each target that must be fulfilled by the business sector. However, a sufficient number of businesses would first have to be willing to participate in the Movement. Another possibility would be for businesses to have the obligation to engage in the fight against malnutrition, which links to the idea of attributing negative and positive human rights obligations upon businesses.

In fact, the only element lacking in all existing undertakings – whether falling within the CSR or the BHR approach – is a legal recognition that businesses have human rights obligations, enabling their accountability. For example, despite the SUN Movement’s monitoring mechanisms that seek to render actors accountable, it remains a fundamentally voluntary initiative, without legally binding power. Regrettably, all existing voluntary initiatives focus on those businesses that are already responsible or already willing to become responsible. In order to address all businesses, and ensure their pro-activeness, they must obtain legal duties to do so. Only by becoming accountable for the right to food and by having the same duties as States, will all businesses actively participate in the realization of the right to food. This is the reason why, as mentioned multiple times in this thesis, the idea of defining corporate human rights obligations is gaining support. In fact, as stated in section 2.4.1, ICESCR’s Article

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<sup>504</sup> Scaling Up Nutrition, ‘Vision’ (Graphic illustration, n.d.) <<http://scalingupnutrition.org/wp-content/uploads/2016/06/Strategy-mountain-1.jpg/>> accessed 21 February 2019.

<sup>505</sup> Scaling Up Nutrition, ‘About SUN Countries’ (Webpage, n.d.) <<https://scalingupnutrition.org/sun-countries/about-sun-countries/>> accessed 21 February 2019.

<sup>506</sup> Scaling Up Nutrition, ‘The Vision and Principles of SUN’ (Webpage, n.d.) <<https://scalingupnutrition.org/about-sun/the-vision-and-principles-of-sun/>> accessed 21 February 2019.

<sup>507</sup> Gillespie, Stuart, et al., ‘The Politics of Reducing Malnutrition: Building Commitment and Accelerating Progress,’ 382(9891) *The Lancet* 552 (2013), p.555.

<sup>508</sup> Ibid.

2(1) recommends that States adopt legislative measures to realize human rights.<sup>509</sup> When implementing such legislative measures, States could address businesses directly, imposing human rights obligations upon them. Consequently, the UN treaty on business and human rights, which is currently being developed, may well be the solution to make businesses accountable for the realization of the right to food.

Indeed, one must mention the UN treaty on business and human rights – entitled ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises’ –, which is currently being developed at the UN. A Zero Draft Treaty has already been published in 2018, sketching the main lines of the future document.<sup>510</sup> Four UN working sessions have been held to improve the Zero Draft and the next draft version is in process. Although the title of the Zero Draft mentions ‘other business enterprises; according to its statement of purpose, the document only addresses TNCs.<sup>511</sup> This could be seen as a step back from the UNGPs, in terms of scope. Fortunately, several NGOs and State delegations found this scope too narrow and it was suggested that the future instrument covers all business entities, in accordance with the UNGPs.<sup>512</sup>

Besides, several NGOs present during the fourth working session noted the lack of an adequate monitoring mechanism and stressed the need for an ‘independent monitoring body.’<sup>513</sup> Indexes used to monitor the actions of specific actors towards malnutrition reduction already exist. Hence, they could be used as a starting point to develop a specific index to monitor business involvement relating to the right to food. For instance, the Hunger and Nutrition Commitment Index (HNCI) measures government accountability for the reduction of undernutrition.<sup>514</sup> Also, the Global Alliance for Improved Nutrition has launched an index – the Access to Nutrition Index – to measure policies, practices, and performance of food and beverage manufacturers contributing to the reduction of malnutrition.<sup>515</sup> Next, the SUN Movement has elaborated a system for Monitoring, Evaluation, Accountability and Learning (MEAL).<sup>516</sup> Further, the CESCR’s General Comment No. 12 gives indications on ways to benchmark and monitor the right to food:

In implementing the country-specific strategies referred to above, States should set verifiable benchmarks for subsequent national and international monitoring. In this connection, States should consider the adoption of a *framework law* as a major instrument in the implementation of the national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular, the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national

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<sup>509</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), art.2(1).

<sup>510</sup> Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, A/HRC/4048 (2019), para. 6.

<sup>511</sup> Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises <<https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf>> (2018), art.2.

<sup>512</sup> Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, A/HRC/4048 (2019), para.14 and para.73.

<sup>513</sup> *Ibid.*, para.56.

<sup>514</sup> Gillespie, Stuart, et al., ‘The Politics of Reducing Malnutrition: Building Commitment and Accelerating Progress,’ 382(9891) *The Lancet* 552 (2013), p.558; Hunger and Nutrition Commitment Index Global, ‘The Index’ (Webpage, n.d.) <<http://www.hancindex.org/the-index/>> accessed 21 February 2019.

<sup>515</sup> Access to Nutrition Index, ‘About Us’ (Webpage, n.d.) <<https://www.accesstonutrition.org/foundation/about-us>> accessed 21 February 2019.

<sup>516</sup> Siekmans, Kendra and Patrizia Fracassi, ‘SUN Movement Monitoring, Evaluation, Accountability, Learning (MEAL) – 2016 Baseline Report on Key Indicators’ (2017), p.2.

mechanisms for its monitoring, as well as possible recourse procedures. In developing the benchmarks and framework legislation, States parties should actively involve civil society organizations.<sup>517</sup>

Although focused on the State, it does include the idea of collaborating with the private sector and could be *mutatis mutandis* applied to businesses.<sup>518</sup> When applied to businesses, the State would still have to be the party setting the benchmarks, to ensure compliance with national targets and development plans. Also, paragraph 31 of the General Comment No. 12, specifically about ‘Monitoring’, could be applied to businesses while keeping the role of the State just described:

States parties shall develop and maintain mechanisms to monitor progress towards the realization of the right to adequate food for all, to identify the factors and difficulties affecting the degree of implementation of their obligations, and to facilitate the adoption of corrective legislation and administrative measures, including measures to implement their obligations under articles 2.1 and 23 of the Covenant.<sup>519</sup>

Lastly, the Human Rights Task Force established by the GRI to support and guide businesses reporting on their actions regarding human rights – mentioned in section 2.2.2.3 – could be extended to ESC rights and the right to food, in particular. Similarly, the GRI’s Action Platform Reporting on the SDGs could be extended to address the right to food through SDG 2. To sum up, there is a multitude of options available that could be adapted and improved to objectively evaluate and monitor potential business initiatives targeting the right to food.

Continuing upon the analysis of the Zero Draft, its fundamental goals are ‘the protection against business-related human rights abuse, the elimination of impunity and access to justice for victims.’ Unfortunately, the Zero Draft has focused mainly on the role of the State towards the protection, respect, and fulfillment of human rights,<sup>520</sup> limiting the role of the business sector to respect human rights. Indeed, it opts for a similar division of responsibilities between State and business as the UNGPs when it comes to human rights responsibilities and obligations.<sup>521</sup> It relies on the due diligence process for businesses to ensure full respect for human rights. Like the UNGPs, the draft’s Article 9 about due diligence clearly limits the goal of this model to the prevention of human rights infringements by businesses. In fact, the title of that article is ‘Prevention.’<sup>522</sup> Point (2.g.) of this same Article 9 refers to ‘meaningful consultations with groups whose human rights are potentially affected by the business activities and other relevant stakeholders,’ which are to be undertaken as part of the due diligence.<sup>523</sup> However, the current version of the Zero Draft does not extend the due diligence model. To resume, the current Draft Zero has failed to interlink ideas from the CSR and the BHR approach, ignoring the contributions businesses could bring for the betterment of society.

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<sup>517</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para. 29.

<sup>518</sup> Letnar Černej, Jernej, *Corporate Accountability under Socio-Economic Rights*, London and New York: Routledge (2018), p.115.

<sup>519</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para. 31.

<sup>520</sup> Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises <<https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf>> (2018), art.2.

<sup>521</sup> *Ibid.*, art.9.

<sup>522</sup> *Ibid.*

<sup>523</sup> *Ibid.*

This focus of the Zero Draft on States as only duty bearers of human rights, ignoring eventual positive contributions from businesses to focus solely on their negative responsibilities, is clearly disappointing. Once again, this UN document lacks the teeth to address businesses directly and profit from their capacities to speed up food security and the realization of the right to food. As explained in section 3.3.3, in order to truly profit from businesses' potential for the realization of the right to food, the Zero Draft would have to extend the States' positive obligations to the business sector. Indeed, as mentioned in section 2.3, ESC rights have the particularity of requiring mainly active steps for their fulfillment.<sup>524</sup> Interestingly, during the fourth working session on the Draft Zero, 'several delegations mentioned the 2030 Agenda for Sustainable Development and pointed out that the Sustainable Development Goals recognized the positive role that could be played by business.'<sup>525</sup> Moreover, several NGOs shared their hope that the future treaty will 'impose direct obligations on companies under international law.'<sup>526</sup>

Concurrently, this thesis defends the idea of developing legal documents requiring businesses to take pro-active steps towards the realization of human rights. This is in line with SDG 17, which encourages businesses to contribute to the SDGs through private-public partnerships for example. Besides, stimulating pro-active engagement from the business side is in line with ideas of the CSR approach. An instrument like the SUN Movement could be a promising basis for collaboration between businesses and States. However, this is not sufficient. Businesses need to be made accountable for the realization of the right to food. Therefore, this thesis recommends strengthening the UN's Zero Draft to address businesses directly. Indeed, all human rights obligations of States must be extended to businesses in order for the latter to be legally accountable. Only by doing so, will all businesses become active in the fight for food security. Further, as mentioned above, businesses must collaborate with States, which must define national development goals and benchmarks. These goals and benchmarks will objectively and quantitatively define States' expectations from businesses. For instance, the due diligence process mentioned in the current draft zero could be extended, for governments to profit from the data gathered by businesses. Also, the UN binding treaty could define international standards that would constitute a framework for States to define their goals and benchmarks.

Overall, attributing human rights obligations to businesses and recognizing the positive change they could make to the human rights of the locals where they operate would bring the eventual achievements of this new treaty one step further. It would be a way of successfully making businesses accountable for the right to food while stimulating them to actively engage towards the full realization of the right to food. Clearly, businesses will not tackle the issue of food insecurity and malnutrition on their own, just like States are not able to do so either. This is why; again, a collaboration between the two entities is crucial. To sum up, businesses should more clearly and pro-actively show that they contribute to the right to food in communities they work with or affect in one way or another. By linking with communities, but also by contributing and adhering to local, regional, national development plans that have clear goals, will businesses efficiently contribute to the realization of the right to food. Further, by recognizing that they have positive and negative human rights obligations, will businesses move from being responsible to being accountable for the right to food. Already in 1972, the UN Department of Economic and Social Affairs observed that:

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<sup>524</sup> Nolan, Justine, and Luke Taylor, 'Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?' 87(2) *Journal of Business Ethics* 433 (2009), p.436.

<sup>525</sup> Report on the Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights, A/HRC/4048 (2019), para.19. See also: para.85.

<sup>526</sup> *Ibid.*, para.12. See also: para.35, para.55 and para.65.

Many will agree that some measure of accountability of multinational corporations to the international community should be introduced.

Many will also agree that the vast capabilities of multinational corporations can be put to the service of mankind.<sup>527</sup>

The time has come to realize these observations. Therefore, chapter 4 will provide a recommended initiative for businesses to positively and actively contribute to the realization of the right to food in a durable and harmonized way, matching local needs and national development plans.

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<sup>527</sup> World Economic Survey 1971, Current Economic Developments, UN Doc. E/5144 (1972), p.3.



## 4 Business and the right to food in practice

### 4.1 The right to food remains unfulfilled in several regions of the world

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As mentioned in chapter 2, States are the entities with the duty to respect (together with businesses), protect and fulfill the right to food. Fukuda-Parr et al. measured the extent to which States fulfill the right to food and other ESC rights using the SERF [Social and Economic Rights Fulfillment] Index.<sup>528</sup> The authors recognize that the enjoyment of rights by the inhabitants and the degree to which the State is fulfilling its obligations are the factors impacting and determining State performance in realizing human rights.<sup>529</sup> They find that despite a general improvement in the SERF Index values over the past years, more than half of the world population resides in 'countries where rights fulfillment falls below 70 percent of what is feasible –a dismal performance in respecting, protecting and fulfilling universal human rights guaranteed under international law.'<sup>530</sup> Naturally, the evolution of the fulfillment of ESC rights has differed between countries but also between types of ESC rights. Regrettably, as illustrated by Figure 1, the right to food was the least fulfilled type of ESC right in several regions of the world in 2013. The deficit was most alarming in South Asia, which does not even achieve 50 percent of the 'feasible level on the right to food;' followed by Sub-Saharan Africa and East Asia.<sup>531</sup> This reflects the alarming situation of worldwide malnutrition and food insecurity described in chapter 1. Hence, one has still a long way to go before the full realization of the right to food and thus the elimination of food insecurity in the world.

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<sup>528</sup> Fukuda-Parr, Sakiko, Terra Lawson-Remer, and Susan Randolph, *Fulfilling Social and Economic Rights*, Oxford: Oxford University Press (2015), p.19.

<sup>529</sup> Ibid.

<sup>530</sup> Ibid., p.103.

<sup>531</sup> Ibid., p.110.

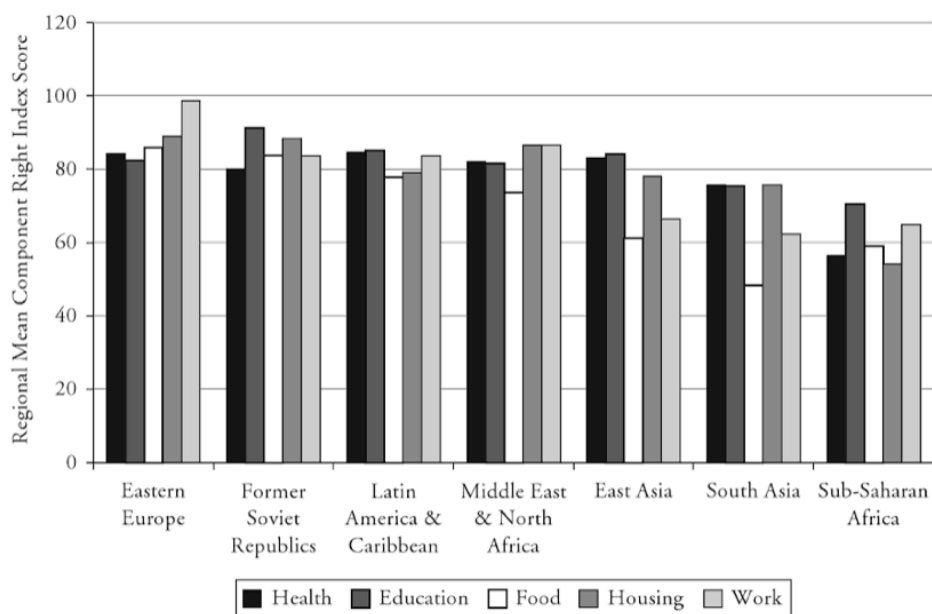


Figure 1 SERF Component Mean Scores by Region in 2013, indicating the percentage of the fulfillment of each ESC right, based on the feasibility for complete fulfillment.<sup>532</sup>

Fortunately, States are not the only actors that can positively impact human rights. As defended in chapter 3, businesses must pro-actively contribute to the realization of the right to food, in ways that are consistent with national policies and targets through collaboration with the government. Acting towards the elimination of hunger and malnutrition is a crucial and pressing need as large sections of the global population suffer from food insecurity. Specifically food businesses, as producers or distributors of food, have the knowledge and resources to improve access to food globally and directly. Hence, one must find ways to further encourage businesses to act upon the right to food, working towards food security, through enhanced access to food. Chapter 3 has already focused on theories to make businesses pro-active and accountable for the respect, protection, and fulfillment of the right to food. Considering this, the focus here is to find ways for businesses to collaborate with governments in the improvement of global access to food as a contribution to the progressive realization of the right to food. It can be seen as an illustration of the findings of the previous chapters. As stated by Barrett: 'Never has there been a time when the capacity to end global hunger has been greater, yet significant gaps remain between rights and reality.'<sup>533</sup>

<sup>532</sup> Fukuda-Parr, Sakiko, Terra Lawson-Remer, and Susan Randolph, *Fulfilling Social and Economic Rights*, Oxford: Oxford University Press (2015), Figure 5.9 p.113.

<sup>533</sup> Barrett, Christopher B., and Dan Maxwell, *Food Aid After Fifty Years: Recasting its Role*, London and New York: Routledge, (2007), p.112.

## 4.2 Food and nutrition assistance programs for food security and the realization of the right to food

### 4.2.1 Overview and analysis of food and nutrition assistance programs aiming to achieve food security

As explained in chapter 1, food security is a matter of both food availability and access, among others.<sup>534</sup> This is reflected in the FAO's definition of food security: 'A situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.'<sup>535</sup> Generally, the programs aiming at facilitating access to food for people in need, can be regrouped under the term 'food and nutrition assistance programs.' Especially in developed countries, one can think of community-based food programs such as food banks or food pantries, food stamps, good food boxes, emergency soup kitchens, collective kitchens or community gardens. These have all emerged in developed countries, as a response to the 'continuing crisis of food poverty' and with the aim to ensure food and nutrition security, each in a slightly different way.<sup>536</sup> To give an overview of these programs and their consequences on people's nutritional status, two of them will now be discussed in more detail.

First, food banks distribute surplus food to those in need; but they may vary in their specific aims, size, scope, and role.<sup>537</sup> However, food banks have globally faced critique from scholars. Riches is of the opinion that 'the growth and expansion in food banks since the early 1980s [in North America] suggests on the one hand that food poverty and inequality are increasing and on the other that food banks are an inadequate response to the complex issue of social exclusion and the state's failure to "respect, protect and fulfill" the right to food.'<sup>538</sup> Besides, scholars have found that people obtaining food from these food banks tend to consume insufficient amounts of nutrient-rich foods, eating low-nutrient density and high-fat foods instead.<sup>539</sup> As a result, many recipients remain food insecure. Indeed, Robaina and Martin found that only 16 percent of the 212 food bank users studied were food secure. Besides, women using food banks were four times more likely than men to develop obesity. The authors found a strong correlation between food insecurity and the insufficient consumption of fruit, vegetables, and fiber, which may be due to poor access to grocery stores offering affordable healthy foods.<sup>540</sup>

Second, the food stamp program, a US federal food assistance program, provides 'electronic benefit cards' to low-income individuals, which can be used to purchase food items.<sup>541</sup> However, the efficiency of this program has also

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<sup>534</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para. 5; Barrett, Christopher B., and Dan Maxwell, *Food Aid After Fifty Years: Recasting its Role*, London and New York: Routledge, (2007), p.110; Clover, Jenny 'Food Security in Sub-Saharan Africa' 12(1) *African Security Studies* 5 (2003), p.7.

<sup>535</sup> Food and Agriculture Organization, *The State of Food Insecurity in the World* (2001), Glossary.

<sup>536</sup> Riches, Graham, 'Food Banks and Food Security: Welfare Reform, Human Rights and Social Policy. Lessons From Canada?', 36(6) *Social Policy & Administration* 648 (2002), p.649.

<sup>537</sup> *Ibid.*, pp.649-651.

<sup>538</sup> *Ibid.*, p.650.

<sup>539</sup> Bell, Michele, Lee Wilbur, and Chery Smith, 'Nutritional Status of Persons Using a Local Emergency Food System Program in Middle America,' 98(9) *Journal of the American Dietetic Association* 1031 (1998), p.1033; Robaina, Kate A., and Katie S. Martin, 'Food Insecurity, Poor Diet Quality, and Obesity among Food Pantry Participants in Hartford, CT,' 45(2) *Journal of Nutrition Education and Behavior* 159 (2013), p.160.

<sup>540</sup> Robaina, Kate A., and Katie S. Martin, 'Food Insecurity, Poor Diet Quality, and Obesity among Food Pantry Participants in Hartford, CT,' 45(2) *Journal of Nutrition Education and Behavior* 159 (2013), pp.161-162.

<sup>541</sup> Dinour, Lauren M., Dara Bergen, and Ming-Chin Yeh, 'The Food Insecurity-Obesity Paradox: A Review of the Literature and the Role Food Stamps May Play,' 107(11) *Journal of the American Dietetic Association* 1952 (2007), p.1953.

been questioned because researchers have found that it does not ensure consumption of nutritionally adequate foods by the beneficiaries and fails to bring all of them to a level of food security.<sup>542</sup> Some even claim that the food stamp program can contribute to the development of obesity in long-term participants, especially women because they tend to purchase unhealthy foods. In order to fulfill the right to adequate food, defined in section 2.4.1, one may consider educating people about the importance of consuming nutritious and healthy foods, especially when people are given cash or vouchers for free food.<sup>543</sup> All in all, there seems to be sufficient space for improvement regarding food and nutrition assistance programs in developed countries.

Other forms of food and nutrition assistance programs, mostly occurring in developing countries are referred to as 'food aid' or 'food assistance'. Food aid refers to food donations as part of emergency humanitarian programs; it is primarily a temporary relief measure for acute food shortages.<sup>544</sup> Food aid has evolved much and is now mainly referred to as food assistance. Food aid consisting mostly of in-kind donations from developed countries, food assistance is now increasingly about local and regional food procurement with also an increasing trend in the use of vouchers or cash donations to buy food.<sup>545</sup> In general, critics of food aid programs point out to the political and commercial motivation of long-lasting food donors, the possible negative impacts of food aid on the local agricultural production and trade, and the risk of creating dependency amongst recipients of food aid.<sup>546</sup> Indeed, Stewart argues there is a clear discrepancy between food aid and long-term goals on food and nutrition. He adds that this is connected to the fact that it does not stimulate local food production, people are given unfamiliar food and this food aid is mostly given during periods of time too short to truly improve a person's nutritional status.<sup>547</sup> In fact, 'if food aid becomes a persistent and a long-term assistance intervention, there is no doubt that it can create dependence, affect agricultural production, influence market prices and trigger migration, which greatly and negatively impacts food production leading to severe food insecurity.'<sup>548</sup> It may also distort community behavioral norms.<sup>549</sup> 'At the macro-level, food aid, if not properly designed, can be a killer to smallholder agricultural production.'<sup>550</sup> Hence, food aid can only be beneficial when one has no other way of obtaining food, in which case self-reliance must be temporarily ignored in order to avoid or address the malnourished. Still, if this is the case, the food aid has to be of sufficient nutritional value and must not compromise long-term food and nutrition goals. If this is the case, then it is clear that food aid can have positive impacts on the reduction of malnutrition, improving access to food and availability of food.<sup>551</sup>

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<sup>542</sup> Ibid., p.1959.

<sup>543</sup> DeBono, Nathaniel L., Nancy A. Ross, and Lea Berrang-Ford, 'Does the Food Stamp Program Cause Obesity? A Realist Review and a Call for Place-Based Research,' 18(4) *Health & Place* 747 (2012), p.755.

<sup>544</sup> Morris, James, *Crises in Africa: The Political Dimensions of Hunger, Statement to the United Nations Security Council* (2002); Stewart, Julia, 'The World Food Program's Response to the Southern African Humanitarian Crisis,' 12(1) *African Security Review* 17 (2003), p.18.

<sup>545</sup> Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food Aid and the Challenge of Food Security in Africa,' 56(3) *Development* 396 (2013), p.397.

<sup>546</sup> Shaw, John D., 'Food Aid in Sub-Saharan Africa: Policy Lessons for the Future' 23(3) *Canadian Journal of Development Studies* 571 (2002), p.572. See also: Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food aid and the challenge of food security in Africa,' 56(3) *Development* 396 (2013), p.398.

<sup>547</sup> Stewart, Frances 'Food Aid: Pitfalls and Potential,' 11(4) *Food Policy* 311 (1986), p.311.

<sup>548</sup> Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food Aid and the Challenge of Food Security in Africa,' 56(3) *Development* 396 (2013), p.398.

<sup>549</sup> Barrett, Christopher B., and Dan Maxwell, *Food Aid After Fifty Years: Recasting its Role*, London and New York: Routledge, (2007), pp.182-183.

<sup>550</sup> Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food aid and the challenge of food security in Africa,' 56(3) *Development* 396 (2013), p.400.

<sup>551</sup> Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food Aid and the Challenge of Food Security in Africa,' 56(3) *Development* 396 (2013), p.396; Stewart, Frances 'Food Aid: Pitfalls and Potential,' 11(4) *Food Policy* 311 (1986), p.311.

As Clover declared: 'It is no longer tenable for the world to throw money at the problem of widespread hunger. Planned humanitarian support is not an end in itself.'<sup>552</sup> Instead, to efficiently tackle the issue of food insecurity at its root, one must seek solutions focused in the long-term, objectively and thoroughly addressing chronic food insecurity, rather than acute food insecurity.<sup>553</sup> Clover gives the example of combining food assistance with improved farming and health care provision.<sup>554</sup> Others speak about the importance of political will and stability as well as the implementation of non-food programs touching upon agriculture, market links, or storage facilities for example.<sup>555</sup> Recognizing that this is indeed crucial, one cannot discuss all issues at once, and hence the focus is kept on reducing chronic food insecurity by tackling one of its main causes: access to food.

Food assistance can be delivered in multiple different ways: it can be supplied for free to specific groups like schoolchildren or distributed in exchange for work, it can be donated in-kind from a local or a foreign source or given in cash.<sup>556</sup> In his article, Shaw defends the idea that food assistance or assistance for food – financial assistance provided specifically to obtain food – are essential to provide food to those starving and eradicate hunger.<sup>557</sup> In general, one can define the following categories of food assistance: 'general food distribution' (GFD), 'food for education' (FFE) and 'food for assets' (previously: 'food for work'). GFD programs target refugees, internally displaced persons and people suffering from a famine.<sup>558</sup> FFE programs target school children participating in school meal programs. The food can be distributed at school in the form of a warm meal or a nutritious snack but can also be given as a take-home package for specific target groups, mostly girls.<sup>559</sup> Food for assets is the distribution of food in exchange for work.<sup>560</sup> Food for assets programs may have positive outcomes if well established. However, in most cases, their contribution to 'development objectives is quite mixed.'<sup>561</sup> Barrett and Maxwell analyze the benefits and limits of food for assets programs but remain skeptical and conclude that it 'is nowhere near the magic bullet suggested by some of its proponents.'<sup>562</sup> To resume, there are many different ways to enhance access to food for vulnerable people through food and nutrition assistance programs.

At present, the World Food Program (WFP) is the largest institution supplying food assistance to millions of people in need.<sup>563</sup> James Morris, executive director of the WFP, stressed the overload of work the WFP has delivering emergency food to those in need. He claims the WFP has been pushed to become the 'UN equivalent of an ambulance service for the starving,' as 80 percent of its operations are dedicated towards emergency food aid.

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<sup>552</sup> Clover, Jenny 'Food Security in Sub-Saharan Africa' 12(1) *African Security Studies* 5 (2003), p.14.

<sup>553</sup> Clover, Jenny 'Food Security in Sub-Saharan Africa' 12(1) *African Security Studies* 5 (2003), p.14; Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food Aid and the Challenge of Food Security in Africa,' 56(3) *Development* 396 (2013), p.396; Stewart, Frances 'Food Aid: Pitfalls and Potential,' 11(4) *Food Policy* 311 (1986), p.401; Stewart, Julia, 'The World Food Program's Response to the Southern African Humanitarian Crisis,' 12(1) *African Security Review* 17 (2003), p.18.

<sup>554</sup> Clover, Jenny, 'Food security in sub-Saharan Africa,' 12(1) *African Security Studies* 5 (2003), p.14.

<sup>555</sup> Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food Aid and the Challenge of Food Security in Africa,' 56(3) *Development* 396 (2013), p.396; Stewart, Frances 'Food Aid: Pitfalls and Potential,' 11(4) *Food Policy* 311 (1986), p.401.

<sup>556</sup> Ferrière, Nathalie and Akiko Suwa-Eisenmann 'Does Food Aid Disrupt Local Food Market? Evidence from Rural Ethiopia' 76 *World Development* 114 (2015), p.114.

<sup>557</sup> Shaw, John D., 'Food Aid in Sub-Saharan Africa: Policy Lessons for the Future' 23(3) *Canadian Journal of Development Studies* 571 (2002), p.572.

<sup>558</sup> Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food Aid and the Challenge of Food Security in Africa,' 56(3) *Development* 396 (2013), p.396.

<sup>559</sup> Bundy, Donald, et al., *Rethinking School Feeding: Social Safety Nets, Child Development and the Education Sector*, Washington DC: World Bank and Rome: WFP (2009), pp.8-9; Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food Aid and the Challenge of Food Security in Africa,' 56(3) *Development* 396 (2013), p.396.

<sup>560</sup> Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food Aid and the Challenge of Food Security in Africa,' 56(3) *Development* 396 (2013), p.396.

<sup>561</sup> Barrett, Christopher B., and Dan Maxwell, *Food Aid After Fifty Years: Recasting its Role*, London and New York: Routledge, (2007), p.131.

<sup>562</sup> *Ibid.*, p.131.

<sup>563</sup> Stewart, Julia, 'The World Food Program's Response to the Southern African Humanitarian Crisis,' 12(1) *African Security Review* 17 (2003), p.17; World Food Program, 'Overview' (Webpage, n.d.) <<https://www1.wfp.org/overview>> accessed 31 January 2019.

Consequently, the WFP lacks the resources to address the needs of the chronically ill people, through nutrition and school feeding programs.<sup>564</sup> In fact, it is crucial to remember that ‘food aid is inherently a short-term solution. The people of the developing world must be given the conditions and tools they need to feed themselves.’<sup>565</sup> In the words of James Morris, addressing the UN Security Council: ‘In the end, hunger is a political creation and we must use political means to end it.’<sup>566</sup> Out of five conditions Morris identified in order to tackle the hunger problem in the world at its roots, one is the need to invest more in ‘nutrition, educational and school feeding programs in the developing world, especially targeted on girls.’ He puts an accent on girls, as seven out of ten people suffering from hunger are female.<sup>567</sup>

#### 4.2.2 Benefits of school meal programs

One less controversial food and nutrition program to improve access to food; would be school meal programs, targeting children. Although there has been a lot of attention focused on the importance of the first 1000 days – from pregnancy to a child’s second birthday – the entire childhood period consists of critical phases during which a child develops and grows rapidly. During the pubertal period, for example, nutrient requirements increase. In fact, it is now proven that although the first 1000 days are of paramount importance for later growth and development, being in good health during that period is not sufficient. The 7000 days after a child’s second birthday are also critical for a child’s ability to develop to its full potential.<sup>568</sup> Prentice et al. have shown that childhood and adolescence offer another window of opportunity for development and growth.<sup>569</sup> As a result, although school meal programs may not reach infants too young for school, it will reach children immediately when they start school until the end of their adolescence. Thus, the aim here is to determine whether the global prevalence of malnutrition can be addressed by implementing school meal programs.

The Convention on the Rights of the Child (CRC) explains the importance of nutritious foods for the proper growth and development of children in Article 24, paragraph 2 (c).<sup>570</sup> This Article 24 has been interpreted and operationalized in detail by the Committee on the Rights of the Child. In the Committee’s General Comment No. 15, the Committee highlights the numerous benefits of school meal programs, extending beyond the improved diet of the targeted children.<sup>571</sup> Besides, the WFP has long been advocating for the multiple benefits of school meal programs and has been implementing such programs in multiple regions and environments.<sup>572</sup> In fact, 20 million children benefit yearly from school meals provided by the WFP, while most governments have their own school meal programs. In total, around 368 million children worldwide receive food at school on a daily basis.<sup>573</sup> In 2012, approximately one-third of children attending primary school and lower-year secondary school around the world received food or meals at school. However, only about 12 percent of children in low-income countries benefitted from school meal programs, against 37 percent of children in upper-middle-income countries.<sup>574</sup> This is

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<sup>564</sup> Morris, James, Crises in Africa: The Political Dimensions of Hunger, Statement to the United Nations Security Council (2002).

<sup>565</sup> Ibid.

<sup>566</sup> Ibid.

<sup>567</sup> Ibid.

<sup>568</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.3.

<sup>569</sup> Prentice, Andrew M., et al., ‘Critical Windows for Nutritional Interventions against Stunting’ 95(5) *The American of Clinical Nutrition* 911 (2013), pp.916-917.

<sup>570</sup> Convention on the Rights of the Child, A/RES/44/25 (1989), art.24(2)(c).

<sup>571</sup> UN Committee on the Rights of the Child, General Comment No. 15 (2013), The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24 of the Convention on the Rights of the Child), CRC/C/GC/15 (2013), para.46.

<sup>572</sup> World Food Program, *WFP School Feeding Policy*, WFP/EB.2/2009/4-A (2009), p.12.

<sup>573</sup> World Food Program, ‘School Meals,’ (Webpage, n.d.) <<https://www.wfp.org/school-meals/>> accessed 1 February 2019.

<sup>574</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.8.

unfortunate because school meal programs are seen as safety nets for governments in the short term and as investments in human capital, the local economy, the reduction of hunger and equity in the long run.<sup>575</sup> In fact, as stated in chapter 1, one of the key messages from the FAO, et al., 2018 report on the State of Food Security and Nutrition in the World was that access to adequate food must be framed as a human right. Besides, the most vulnerable groups of people – including school-age children and adolescent girls – must be helped first, to end malnutrition.<sup>576</sup>

It is clear that ‘schools can play an integral role in the promotion of human rights, in particular, the right to adequate food, the right to the highest attainable standard of health, and the right to education.’<sup>577</sup> In fact, school meal programs can have multiple positive outcomes, specifically in poor communities. The programs protect the nutritional status of the children; consequently, the children’s learning abilities and cognitive development are enhanced. It also stimulates parents to send their children to school, lowering dropout rates during difficult times.<sup>578</sup> The latter is especially relevant for girls. Indeed, girls benefit particularly from school meal programs because of gender-based exclusion and vulnerability, placing girls at higher risk of illness, neglect and food insecurity.<sup>579</sup> Moreover, children that have participated in school meal programs can act as influencers, positively impacting their younger siblings and families. This may help reduce the number of children who are already malnourished when starting school.<sup>580</sup> Because of these benefits on the children, ‘school meal programs are justifiably considered valuable long-term investments in human capital.’<sup>581</sup> Barrett and Maxwell even declare that ‘well-targeted food for education programs are generally desirable, if not always of the highest priority.’<sup>582</sup> The UN System Standing Committee on Nutrition’s discussion paper stresses that seeing schools as a ‘(food) system’ is a great opportunity to improve the nutrition of the students during their school years but also long after that, extending the positive outcomes beyond the school territory.<sup>583</sup> In fact, the positive outcomes of school meal programs extend far beyond improved nutrition and health, enhancing education, stimulating the local economy, agricultural development and diversification of food production when involving local producers for the provision of

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<sup>575</sup> Bundy, Donald, et al., *Rethinking School Feeding: Social Safety Nets, Child Development and the Education Sector*, Washington DC: World Bank and Rome: WFP (2009), p.13 and p.17.

<sup>576</sup> Food and Agriculture Organisation, et al., *The State of Food Security and Nutrition in the World 2018. Building Climate Resilience for Food Security and Nutrition* (2018), p.26.

<sup>577</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.6.

<sup>578</sup> Barrett, Christopher B., and Dan Maxwell, *Food Aid After Fifty Years: Recasting its Role*, London and New York: Routledge, (2007), p.131; UN Committee on the Rights of the Child, General comment No. 15 (2013), The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24 of the Convention on the Rights of the Child), CRC/C/GC/15 (2013), para.46; Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, ‘Food Aid and the Challenge of Food Security in Africa,’ 56(3) *Development* 396 (2013), p.396; UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.4; World Food Program, *Revised School Feeding Policy: Promoting Innovation to Achieve National Ownership* (2013), p.13.

<sup>579</sup> Barrett, Christopher B., and Dan Maxwell, *Food Aid After Fifty Years: Recasting its Role*, London and New York: Routledge, (2007), p.131; Bundy, Donald A.P., et al., ‘The School as a Platform for Addressing Health in Middle Childhood and Adolescence,’ in Bundy, Donald, et al. (eds.), *Disease Control Priorities in Developing Countries*, Washington DC: World Bank (3rd edition, volume 8, 2017), p.136; World Food Program, *School Feeding Policy: Promoting Innovation to Achieve National Ownership* (2013), p.13 and pp.131-147.

<sup>580</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.4.

<sup>581</sup> Barrett, Christopher B., and Dan Maxwell, *Food Aid After Fifty Years: Recasting its Role*, London and New York: Routledge, (2007), p.131.

<sup>582</sup> *Ibid.*, p.118.

<sup>583</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.4.

safe, diverse and healthy food.<sup>584</sup> Hence, intervening in schools for the promotion and distribution of healthy and nutritious foods seems critical to protect, respect and realize the right to food.<sup>585</sup>

Analyzing the conditions for the right to food to be realized in the school system, the UN System Standing Committee on Nutrition concludes that:

The duty bearers, namely the government, teachers and other school personnel, must respect the rights of children to good nutrition, and respect local food cultures that are conducive to healthy diets. Second, protecting the right to adequate food and the highest attainable standard of health means ensuring that children are not confronted with an unhealthy or unsafe school food environment, or are subject to abuse by third parties, including private enterprises. [...] The third level of obligation, to “fulfill”, implies duty bearers should act to fulfill children’s rights through facilitation (e.g. school food standards, nutrition education, training of staff, parent involvement) or provision (e.g. school meals). The school curriculum, as set by ministries of education, should provide children with adequate information on healthy diets and nutrition, as well as a quality education.<sup>586</sup>

The UN System Standing Committee on Nutrition again takes States as sole duty-bearers in its practical recommendations for the realization of the right to food within schools. However, following the findings from the previous chapters of this thesis, it is clear that the potential benefits brought by businesses initiatives to the realization of the right to food must be taken into account at all times. Clearly, this also applies when developing school meal programs. Thus, possible contributions from businesses to school meal programs will be studied in the next section, together with an analysis of the conditions needed for the development of a successful school meal program, addressing the realization of the right to food in a durable and harmonized way, meeting local needs and national development policies.

### 4.3 How can businesses contribute to successful school meal programs?

To begin, it is clear that the success of school meal programs is highly dependent on the will, effective contribution and collaboration of strategic partners, especially in relation to the receiving children and their parents or guardians.<sup>587</sup> It is also important to involve and ensure co-operation between all stakeholders to guarantee the success of a food and nutrition assistance program. One can think of the donors, government and UN agencies, but also community elders and transport companies.<sup>588</sup> Experience has shown that ideally, the Ministry of Education

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<sup>584</sup> Ibid.

<sup>585</sup> Ibid., p.6.

<sup>586</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), pp.6-7.

<sup>587</sup> Bundy, Donald A.P., et al., ‘The School as a Platform for Addressing Health in Middle Childhood and Adolescence,’ in Bundy, Donald, et al. (eds.), *Disease Control Priorities in Developing Countries*, Washington DC: World Bank (3rd edition, volume 8, 2017), p.136; World Food Program, *Revised School Feeding Policy: Promoting Innovation to Achieve National Ownership* (2013), p.138.

<sup>588</sup> Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, ‘Food Aid and the Challenge of Food Security in Africa,’ 56(3) *Development* 396 (2013), p.398.



and the Ministry of Health share the responsibility for these school meal programs, even if collaboration between two different sectors can be difficult.<sup>589</sup>

Another critical element for a school meal program's success is the adequacy of the food provided, which must be of nutritional value. In fact, the use of the term 'food security' instead of 'hunger' is aimed at including people in need of *better* food in contrast with the previous term limiting itself to those in need of *more* food. Indeed, many people facing food insecurity, specifically in developed countries, may not be physiologically hungry. Still, although their energy consumption may be adequate, they may be lacking nutrients essential for 'physiological and psychological health.'<sup>590</sup> One may remember the different parameters that have to be met for the realization of the right to food, presented in section 2.4.1: food must be available,<sup>591</sup> of sufficient quality and in the right quantity, it must meet one's dietary needs.<sup>592</sup> It must also be acceptable,<sup>593</sup> free from adverse substances<sup>594</sup> and both economically and physically accessible.<sup>595</sup>

Consequently, the food distributed through school meal programs must be diverse and meet the nutrient and caloric needs of the children, taking into account gender, age and health status.<sup>596</sup> National or international dietary guidelines can be used as a basis to determine what a healthy diet entails. The WHO has developed a European 'Food and Nutrition Policy for Schools,' which includes dietary guidelines for children divided by age category.<sup>597</sup> However, there is currently no international dietary recommendation specifically aimed at children and adolescents. Generally, it is advised to prioritize the consumption of fruits, vegetables, legumes, whole grains, and nuts. On the other hand, one must limit the consumption of foods with high sugar or high-fat content, while giving preference to unsaturated fats over saturated fats.<sup>598</sup> These are general guidelines, which are essential to take into consideration when developing meals or selecting foods for school meal programs.

Also, the school meals provided to children must be adapted to the local food culture.<sup>599</sup> Indeed, human rights are universal in nature but do not imply that they have to be applied in the same way across the globe. On the contrary, they serve as a horizontal, broad basis to ensure human dignity but must be applied differently in each region according to those local values and ethical principles.<sup>600</sup> William et al. studied the preference of food aid recipients in different African countries for locally sourced food or imported food from the U.S. The recipients were mostly households but for Burkina Faso, the food was donated to school meal programs where school cooks prepared it. The authors found no significant preference of the school cooks concerning the origin of the food

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<sup>589</sup> Bundy, Donald A.P., et al., 'The School as a Platform for Addressing Health in Middle Childhood and Adolescence,' in Bundy, Donald, et al. (eds.), *Disease Control Priorities in Developing Countries*, Washington DC: World Bank (3rd edition, volume 8, 2017), p.138.

<sup>590</sup> Bell, Michele, Lee Wilbur, and Chery Smith, 'Nutritional Status of Persons Using a Local Emergency Food System Program in Middle America,' 98(9) *Journal of the American Dietetic Association* 1031 (1998), p.1031.

<sup>591</sup> Committee on Economic Social and Cultural Rights, General Comment No. 12 (1999), The Right to Adequate Food (Art. 11 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/1999/5 (1999), para.12.

<sup>592</sup> *Ibid.*, para.9.

<sup>593</sup> *Ibid.*, para.11.

<sup>594</sup> *Ibid.*, para.10.

<sup>595</sup> *Ibid.*, para.13.

<sup>596</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.8.

<sup>597</sup> World Health Organization, *Food And Nutrition Policy for Schools: A Tool for the Development of School Nutrition Programs in The European Region*, (2006).

<sup>598</sup> World Health Organization, 'Global Strategy on Diet, Physical Activity and Health: Children's diet,' (Webpage, n.d.) <[https://www.who.int/dietphysicalactivity/childhood\\_diet/en/](https://www.who.int/dietphysicalactivity/childhood_diet/en/)> accessed 31 January 2019.

<sup>599</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.8.

<sup>600</sup> Wettstein, Florian, 'Beyond Voluntarism, Beyond CSR: Making a Case for Human Rights and Justice,' 114(1) *Business and Society Review* 125 (2009), pp.144-145.

donated.<sup>601</sup> However, the authors warn that these findings might be biased in the case of Burkina Faso, as the school cooks were not the direct consumers of the food donated, unlike the households. In fact, households had a significant preference for locally sourced foods.<sup>602</sup> Besides, William et al. claim that food assistance programs in general, do not pay sufficient attention to cultural acceptance and food preferences of the recipients, resulting in the use of donated food as livestock feed,<sup>603</sup> or processed into home-made alcohol<sup>604</sup> for example. Although this would be unlikely to occur in the case of school meal programs, it is interesting to see how important cultural acceptance is in determining the success of food assistance programs. When food donated is inappropriate to local consumption and cooking habits, it may disrupt consumption patterns.

School meal programs in developed countries already largely depend on locally and regionally produced foods whereas those in developing countries rely more on external food aid.<sup>605</sup> In fact, purchasing local food for school meal programs has already been proved to yield significant benefits in high- and middle-income countries. Studies from Guatemala, Chile, Indonesia, and the UK showed the benefits of school meal programs on the local economy and agricultural sector in particular when the majority of the food was sourced locally.<sup>606</sup> 'Because school feeding programs run for a fixed number of days a year (on average 180) and normally have a predetermined food basket, they provide the opportunity to benefit local farmers and producers by generating a stable demand for their products.'<sup>607</sup> Governments from Africa have noticed this and now realize the potential of school meal programs to boost their agricultural sector while improving children's nutritional status and education. However, studies still need to show whether the benefits seen in high- and middle-income countries also occur in low- income countries, such as some African countries.<sup>608</sup>

In fact, the use of local and regional food for food assistance programs may have certain disadvantages. There may be production deficits in the countries targeted, especially in the case of developing countries.<sup>609</sup> Hence, in those countries, one may have difficulties relying entirely on local and regional foods. Besides, local foods may not be sufficient to meet the nutrient requirements for a healthy diet. If this is the case, one may need to add fortified foods or nutritional supplements to the school meals.<sup>610</sup> In order to compensate for the nutritional shortfalls in local foods, school meal programs could collaborate with food businesses, which could donate nutritious foods, fortified foods or nutritional supplements.<sup>611</sup> However, the UN System Standing Committee on Nutrition warns about the risks when cooperating with the private sector in school meal programs. Indeed, it is crucial to eliminate all potential sources of conflicts of interests when involving food businesses or businesses in general. As an illustration, a business producing beverages with a high-sugar content should not be allowed to display its logos

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<sup>601</sup> Violette, William J., et al. 'Recipients' Satisfaction with Locally Procured Food Aid Rations: Comparative Evidence from a Three Country Matched Survey' 49 *World Development* 30 (2013), p.37.

<sup>602</sup> Ibid., p.38.

<sup>603</sup> Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food Aid and the Challenge of Food Security in Africa,' 56(3) *Development* 396 (2013), p.398.

<sup>604</sup> Barrett, Christopher B., and Dan Maxwell, *Food Aid After Fifty Years: Recasting its Role*, London and New York: Routledge, (2007), p.182.

<sup>605</sup> Bundy, Donald, et al., *Rethinking School Feeding: Social Safety Nets, Child Development and the Education Sector*, Washington DC: World Bank and Rome: WFP (2009), p.46.

<sup>606</sup> Ibid., pp.46-48.

<sup>607</sup> Ibid., p.45.

<sup>608</sup> Ibid., p.48.

<sup>609</sup> Diriye, Mukhtar, Abdirizak Nur, and Abdullahi Khalif, 'Food Aid and the Challenge of Food Security in Africa,' 56(3) *Development* 396 (2013), p.399.

<sup>610</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.8.

<sup>611</sup> Bundy, Donald, et al., *Rethinking School Feeding: Social Safety Nets, Child Development and the Education Sector*, Washington DC: World Bank and Rome: WFP (2009), p.75; Gillespie, Stuart, et al., 'The Politics of Reducing Malnutrition: Building Commitment and Accelerating Progress,' 382(9891) *The Lancet* 552 (2013), p.562.

anywhere in the school environment.<sup>612</sup> Moreover, one must ensure that food donations from large MNCs do not suppress local agricultural production. In order to avoid this and ensure that the local economy benefits from school meal programs, one could put minimum requirements for the amount of food that has to be locally or regionally-sourced.<sup>613</sup>

One could also accept only financial donations from businesses as support for school meal programs. In this way, businesses from all sectors could contribute to the right to food of the children living in the areas where they operate. In fact, costs of school meal programs are an important limitation for developing countries in particular, as most rely on annual funding from external donors.<sup>614</sup> Overall, the costs of school meal programs depend on a multitude of different factors, 'including the choice of modality, the composition, and size of the rations, whether the food is purchased locally or is imported, and the number of beneficiaries and school feeding days per year.'<sup>615</sup> On top of this, logistics, climatic conditions, and the geographical context (depending on the origin of the food) impact program expenditures.<sup>616</sup> Table 5.3 from the World Bank and the WFP report by Bundy et al. compares the costs and benefits for different types of school meal programs (distribution of meals, snacks, or take-home rations).<sup>617</sup> In lower- to middle-income countries, the average cost for school meal programs amounts to USD 41 per child per year for a meal containing 401 kcal.<sup>618</sup> As an illustration, a seven-year-old girl has an estimated average requirement of 1530 kcal per day. For a boy the same age, the EAR amounts to 1649 kcal per day.<sup>619</sup> In low-income countries, 83 percent of resources for school meal programs originate from donor assistance, mostly channeled through the WFP. This shows the heavy reliance of low-income countries on external donors to fund their school meal programs.

Eventually, the aim is to ensure all States can fully fund their school meal programs, thus their reliance on WFP support must gradually decrease.<sup>620</sup> The World Bank and WFP report by Bundy et al. claims that more case studies are needed to understand how countries eventually manage to finance a national school meal program, moving away from WFP-funds, and the possible interim solutions for the transition.<sup>621</sup> Collaborating with the private sector, such as food businesses for the funding of national school meal programs may be a considerable option benefitting both sides: States can implement their own school meal programs and businesses can fulfill the right to food for the local communities where they operate. Hence, financial donations from businesses could help pay for school meal programs. The World Bank and WFP report by Bundy et al. also recognizes the multiple benefits

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<sup>612</sup> UN Committee on the Rights of the Child, General Comment No. 15 (2013), The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24 of the Convention on the Rights of the Child), CRC/C/GC/15 (2013), para.47; UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.7.

<sup>613</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), pp.9-10.

<sup>614</sup> Bundy, Donald, et al., *Rethinking School Feeding: Social Safety Nets, Child Development and the Education Sector*, Washington DC: World Bank and Rome: WFP (2009), p.39; UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.16.

<sup>615</sup> Bundy, Donald, et al., *Rethinking School Feeding: Social Safety Nets, Child Development and the Education Sector*, Washington DC: World Bank and Rome: WFP (2009), p.60.

<sup>616</sup> Ibid.

<sup>617</sup> Ibid., Table 5.3 pp.64-65.

<sup>618</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.16.

<sup>619</sup> British Nutrition Foundation, 'Nutrition Requirements' (Fact Sheet, 2016) <[https://www.nutrition.org.uk/attachments/article/234/Nutrition%20Requirements\\_Revised%20Oct%202016.pdf](https://www.nutrition.org.uk/attachments/article/234/Nutrition%20Requirements_Revised%20Oct%202016.pdf)> accessed 13 March 2019. **Note:** The EAR is an estimate of the average requirement of energy or a nutrient needed by a group of people (i.e. approximately 50% of people will require less, and 50% will require more).

<sup>620</sup> World Food Program, *Revised School Feeding Policy: Promoting Innovation to Achieve National Ownership* (2013), p.7.

<sup>621</sup> Bundy, Donald, et al., *Rethinking School Feeding: Social Safety Nets, Child Development and the Education Sector*, Washington DC: World Bank and Rome: WFP (2009), p.43.

brought by a public-private partnership to develop school meal programs: ‘In many cases the private sector can play a very important role not only in the production of the food but also in the management and distribution functions of the program.’<sup>622</sup> The report further acknowledges that food companies could also provide cash donations, alongside other donors such as the WFP.<sup>623</sup> In fact, any business could give financial donations to support school meal programs. Still, as defended in section 3.3, it is important that States remain the main responsible actors of school meal programs, in order to guarantee durability and implementation within the larger national social-protection strategies.<sup>624</sup>

Besides, as seen in section 3.3.3, the entire business sector will only contribute to the realization of the right to food if it is legally required to do so. In other words, making businesses accountable for the realization of the right to food is the only way to ensure a wide and universal involvement from the private sector through business initiatives funding public school meal programs for example. Indeed, school meal programs appear to be a fitting strategy for businesses to contribute to the realization of the right to food – through financial or in-kind donations – in a sustainable way, which is in harmony with larger national development plans and nutrition-related goals.

However, a few limitations can be identified regarding the present recommendation to develop public school meal programs supported by businesses. The proposition addresses only school children, whereas additional initiatives could target other vulnerable groups such as pregnant women or infants. Moreover, the proposition is developed based on the choice to resolve food insecurity as this was identified as the main cause of malnutrition worldwide. Yet, other causes of malnutrition, which are more or less related to access to food – for instance lack of education about healthy and nutritious foods, situations of war, climate change or gender roles – could be targeted as well. While these other causes of malnutrition and other groups of vulnerable people were not taken into account here, it is clear that all causes of malnutrition and all affected people must be addressed to allow the full realization of the right to food across the globe.

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<sup>622</sup> Ibid., p.71. See also: p.94.

<sup>623</sup> Ibid., p.129.

<sup>624</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.17.

## 5 Conclusion

Malnutrition is on the rise and it is primarily due to food insecurity – a lack of access to nutritious, affordable and acceptable food. This is worrying as it has negative consequences extending far beyond the nutritional status of a person. Especially children are vulnerable to nutrition-related disorders. As a result, their behavior, proper growth and cognitive development are disturbed, with long-term consequences on the national economy and development. Besides, the high prevalence of malnutrition and food insecurity reflects a widespread infringement of those people's right to food, recognized in a number of legal and non-legal documents. This is alarming, considering that the right to food is a moral right, the full realization of which is essential for a person to live her/his life in dignity.

The entities legally accountable for the right to food are States. There is an increasing trend recognizing, indirectly, the accountability of businesses to the right to food. Yet, at the moment, States are accountable for the obligations to protect, respect and fulfill all human rights, while businesses are responsible for the negative obligation to respect. This applies to all human rights, including the right to food. A multitude of UN soft laws and private sector initiatives have been developed to regulate the impact of businesses on human rights but none attributes legal obligations to businesses. Previous UN initiatives with the aim to develop human rights duties for businesses have never been adopted due to their ambitiousness. Hence, to date, international human rights law imposes obligations upon States, while businesses are simply responsible to abstain from infringing those rights.

This thesis has highlighted the opportunities missed by this limit of human rights obligations towards businesses. In fact, businesses are increasingly becoming political bodies with large economic powers. They have extended capabilities to contribute to the positive obligations regarding the right to food. Thus, their contribution would hugely benefit the realization of the right to food, thereby increasing food security across the globe for as many people as possible. Although some responsible businesses already indirectly contribute to the realization of the right to food, through actions addressing SDG 2 'Zero Hunger,' they do so in an independent manner, without external monitoring procedures. They operate as part of their CSR program, 'doing good' for the sake of *doing good*. This thesis argues that clearly this pro-activeness of businesses is welcome and should be encouraged, yet, in a controlled, monitored and targeted way, guaranteeing harmonization of different business initiatives and effectiveness.

It is indeed crucial for the success of business initiatives that they address the needs of the local people and are in line with national development strategies, hereby guaranteeing that different initiatives developed within a community, region or country are harmonized and coherent. Those initiatives must also be regularly evaluated for

eventual improvements and monitored to verify compliance with their responsibilities and possible future duties. In fact, an accountability aspect could be obtained through ideas from the BHR approach, which offers a universal legal human rights framework to set objective benchmarks. It also enables the monitoring of business initiatives by independent third bodies, rendering businesses accountable for their business operations as well as their good practices. The proposition advanced here is to incorporate these ideas of the BHR approach together with principles from the CSR approach. The CSR principles of interest are specifically those relating to the pro-active involvement of businesses towards the realization of the right to food. The CSR approach recognizes that businesses could and should play an important role in the fight for food security and sustainable development of society as a whole, which is also reflected in the SDGs. Indeed, an incorporation of the CSR and BHR approaches would make it possible to recognize positive human rights obligations for businesses, regarding the right to food. These positive obligations are truly essential for the realization of the right to food, because of the very nature of that right.

Several ways can be thought of for the incorporation of ideas from the CSR and BHR discourses. The UNGPs' current due diligence approach could be extended to obtain more information on the specific needs of the community where the business operates. However, this would not be sufficient for the realization of the right to food, as it does not address the fulfillment obligations entirely. Existing initiatives such as the SUN Movement, which is a multi-sectoral and multi-stakeholder initiative for the reduction of malnutrition especially in developing countries could be a good example of a way to involve businesses and governments in the common fight for the realization of the right to food. However, this movement being typical of the CSR approach, the accountability aspect from the BHR approach would have to be added to it. For instance, States' human rights obligations could be extended to businesses. Unfortunately, there is still a long road to be paved before that objective can be reached. The Zero Draft of the new UN treaty on business and human rights, which is currently being developed, still focuses mainly on the State as primary duty bearer of human rights obligations, limiting businesses' responsibilities to the negative realm. Instead, this new treaty should ideally extend the current States' human rights obligations to businesses. This would enable the clear and universal attribution of international positive human rights obligations upon all businesses, making the private sector fully accountable for human rights. Indeed, 'for undernutrition reduction [and malnutrition reduction – in general] to be sustained, nutrition leaders at all levels should be able to forge strong alliances (across and between government, civil society, and the private sector), take timely and decisive action, and create and be subject to strong accountability.'<sup>625</sup>

Despite the difficulty of the task at hand, this thesis has identified a recommended business initiative that would respond to the obligation of businesses to protect and fulfill the right to food. After an analysis of different food and nutrition assistance programs, the idea of school meal programs appeared the least controversial and the most efficient to address food insecurity among one of the most vulnerable groups, which are children. School meal programs have multiple benefits, as they improve and complete children's dietary intake hereby directly contributing to the decrease of malnutrition and the enhancement of food security. Aside from these nutritional benefits, it also indirectly improves children's cognitive development and learning abilities, encourages school attendance and stimulates the local and national economy in the long term.

Overall, when school meal programs are thoughtfully planned and supported by an appropriate institutional, political and legal environment, and implemented with strong cross-sectoral coordination, they can act as an investment, producing benefits across multiple sectors. They

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<sup>625</sup> Gillespie, Stuart, et al., 'The Politics of Reducing Malnutrition: Building Commitment and Accelerating Progress,' 382(9891) *The Lancet* 552 (2013), p.559.

also provide the opportunity to involve a multitude of community actors, including civil society, farmer organizations and the private sector.<sup>626</sup>

Thus, rendering businesses accountable for the right to food, by making them support school meal programs, for example, would increase the speed of realizing the right to food. Concretely, it would help tackle the global burden of malnutrition as well as stimulate the economic development of those countries where malnutrition occurs most. Naturally, other business initiatives could be thought of, addressing different vulnerable groups or different causes of malnutrition. Also, additional research could shed more light into the practical fusion of the CSR and BHR approaches, suggested here. Still, overall, it is clear that ‘companies would be short sighted, and governments negligent, if they ignore this trend’<sup>627</sup> towards new international legal obligations, specifically regarding the right to food.

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<sup>626</sup> UN System Standing Committee on Nutrition, *Schools as a System to Improve Nutrition: A New Statement for School-Based Food and Nutrition Interventions* (2017), p.10.

<sup>627</sup> International Council on Human Rights Policy, *Beyond Voluntarism – Human Rights and the Developing International Legal Obligations of Companies*, Versoix: International Council on Human Rights Policy (2002), p.19.

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