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Bringing human rights due diligence into law: Addressing modern slavery or business as usual?

A postcolonial assessment of the UK Modern Slavery Act's
compliance with the UN Guiding Principles on Business and
Human Rights

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Abstract

Operating through complex supply chains and multiple jurisdictions, today's business enterprises can outsource manufacturing to different parts of the world where they can take advantage of low labour- and production costs. In the global quest of businesses to maximise their profits, deteriorating working conditions for offshore labour workers are increasing the risks of human rights abuses. Such abuses often take the form of 'modern slavery', which refers to situations of exploitation in which labour workers are trapped and that they are unable to leave due to threats, violence, deception, abuse of power or other forms of coercion. In 2015, the United Kingdom (UK) enacted the Modern Slavery Act (MSA), aimed at combatting modern slavery by requiring business enterprises to be transparent with the steps they have taken to ensure that modern slavery is not taking place within their supply chains. By putting pressure on business enterprises to display their actions taken to address adverse human rights impacts, the MSA has brought the responsibility of business enterprises to conduct 'human rights due diligence' (HRDD) – as stipulated in the UN Guiding Principles on Business and Human Rights (UNGPs) - into domestic law. While the MSA has been regarded as a 'world-leading instrument' and a 'historic milestone' by the UK government, its effectiveness in counteracting modern slavery has been questioned in various studies, pointing towards a risk that the MSA is allowing human rights abuses to prevail under a form of a legal veil. Bearing in mind the country's long colonial history, the enactment of the MSA can be seen as carrying an important symbolic value for the UK when it comes to taking accountability for human rights abuses committed overseas. However, adopting weak or ineffective legislation could instead, paradoxically, reflect an interest by the UK government to maintain beneficial trade relationships based on exploitative working conditions in a manner that reflects a continuation of former colonial power structures. This thesis is set out to examine this potential paradox by analysing the MSA's level of compliance with the UNGPs from a postcolonial perspective.

Keywords:

UK Modern Slavery Act (MSA), UN Guiding Principles on Business and Human Rights (UNGPs), modern slavery, human rights due diligence (HRDD), supply chain, transparency, postcolonialism, neo-colonialism, dependency theory

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List of abbreviations

CSR – Corporate social responsibility

HRDD - Human rights due diligence

MSA – the (UK) Modern Slavery Act (2015)

PRRF – the (UN) Protect, Respect and Remedy Framework

SRSG - the Special Representative of the UN Secretary-General on human rights and transnational corporations and other business enterprises

TISC – the Transparency in Supply Chains provision (Section 54 of the MSA)

UN – United Nations

UNGP - UN Guiding Principles on Business and Human Right

1. Background

The thesis will begin by providing a background to the thesis, its aim, and the research questions it is set out to answer. The first introductory section will start by giving a background to modern slavery in today's global context. The section will briefly introduce the UN Guiding Principles on Business and Human Rights (UNGPs) as the guiding document on business and human rights, and the UK Modern Slavery Act (MSA) as a law aimed at incorporating the UNGPs' component of human rights due diligence (HRDD) domestically. Thereafter, the chapter will introduce the thesis' problem statement, purpose and research questions.

1.1 Introduction

The globalisation of the world economy has created possibilities for business enterprises to operate through complex supply chains and multiple jurisdictions.¹ Many large corporations are today richer than nations, possessing great economic and political power through which they can influence national governments and manage control over production and supply chains to maximise their profits.² By relying on a wide range of subcontractors, business enterprises can outsource manufacturing to different parts of the world where they can take advantage of lower labour- and production costs.³ In the global quest of businesses in finding ever cheaper production methods, the risks of human rights abuses related to deteriorating working conditions (e.g. low wages, unsafe working conditions, and lack of social protection) increase.⁴ The Rana Plaza building collapse in Dhaka, Bangladesh in 2013, killing at least 1134 people, opened the world's eyes to the reality of the working conditions of garment factory workers.⁵ In 2020, the world's attention was drawn to the state-sponsored system of forced labour in Xinjiang, China, from where many of the leading global clothing brands are sourcing their cotton.⁶ Forced labour constitute one form of 'modern slavery', which in turn refers to "situations of exploitation that a person cannot refuse or cannot leave because of threats,

¹ Andrew Clapham, "Non-State Actors" in *International Human Rights Law*, 3rd edition, Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), (Oxford: Oxford University Press, 2018), p. 559-560.

² Transform Trade, *People centered trade: Why we need to transform trade now*, September 2022, p. 15.

³ Clapham, "Non-State Actors", p. 559-560.

⁴ ForumCiv, *Time to Act: The need for legislation on business and human rights*, 2020, p. 4.

⁵ Justine Nolan, "Chasing the next shiny thing: Can human rights due diligence effectively address labour exploitation in global fashion supply chains?" *International Journal for Crime, Justice and Social Democracy*, Volume 11, No 2, (June 2022), p. 2.

⁶ Ibid.

violence, deception, abuse of power or other forms of coercion”.⁷ In 2014 the International Labour Organisation (ILO) estimated that the profits obtained from the use of forced labour amounted to US\$ 150 billion per year worldwide.⁸ The latest global estimates from 2021 show that 86 percent of all forced labour is imposed by private actors.⁹

Since their adoption in 2011, the UN Guiding Principles on Business and Human Rights (UNGPs) constitute the international standard of reference when it comes to business and human rights.¹⁰ The UNGPs describe the duty of states to protect against human rights abuses and the corporate responsibility to respect human rights by carrying out human rights due diligence (HRDD).¹¹ As a soft law document, the UNGPs are however not legally binding and do not create legal obligations on states or business enterprises.¹² Recent years have however witnessed a new trend of a “hardening” of corporate human rights law in which HRDD is finding its way into domestic legislation and national regulatory frameworks.¹³ An increasing number of states have taken steps to impose mandatory obligations on business enterprises to identify and address risks of human rights violations within their business operations.¹⁴ These initiatives aim to strengthen the accountability of business enterprises that are directly or indirectly involved in human rights abuses.¹⁵ An important aspect of many of these legislations is their extraterritorial scope and how they extend business accountability throughout supply chains overseas.¹⁶

One example of domestic HRDD legislation with international reach is the United Kingdom (UK)’s Modern Slavery Act of 2015 (MSA) which has been regarded as both a “world-leading

⁷ International Labour Organization (ILO), Walk Free and International Organization for Migration (IOM), *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, September 2022, p. 2.

⁸ International Labour Organization (ILO), *Profits and Poverty: The Economics of Forced Labour*, 2014, p. 13.

⁹ International Labour Organization (ILO), Walk Free and International Organization for Migration (IOM), *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, p. 3.

¹⁰ Clapham, “Non-State Actors”, p. 568.

¹¹ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, HR/PUB/11/04, United Nations, New York and Geneva, 2011, p. 1.

¹² The Office of the United Nations High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, HR/PUB/14/3, United Nations, 2014, p. 8.

¹³ Carsten Momsen and Mathis Schwarze, “The Changing Face of Corporate Liability – New Hard Law and the Increasing Influence of Soft Law”, *Criminal Law Forum*, 29 (September 2018), p. 567.

¹⁴ Rae Lindsay, Anna Kirkpatrick and Jo En Low, “Hardly Soft Law: The Modern Slavery Act 2015 and the Trend Towards Mandatory Reporting on Human Rights”, *Business Law International*, Vol 18. No 1 (January 2017), p. 29.

¹⁵ *Ibid.*

¹⁶ ForumCiv, *Time to Act: The need for legislation on business and human rights*, p. 35, 37, 40.

instrument”¹⁷ and a “historic milestone”¹⁸ in the fight against labour exploitation and human trafficking and which has influenced other laws¹⁹ internationally. The objective of the MSA is to stamp out ‘modern slavery’ (including slavery, servitude, forced and compulsory labour, and human trafficking) by improving UK law enforcement in the area.²⁰ Business enterprises in the UK have been repeatedly connected to reports on slavery and human rights abuses in their supply chains.²¹ With the inclusion of a provision on transparency in supply chains in the MSA, the reporting of business enterprises under the MSA was expected to combat modern slavery in a manner that aligned with the UNGPs.²² However, research assessing the MSA has questioned its effectiveness in addressing forced labour and human trafficking in global supply chains,²³ and has emphasised the risk of business enterprises pursuing a cosmetic rather than substantial compliance with the act.²⁴ The next section will look closer at the problem inherent in the potential ineffectiveness of the MSA and how it forms a basis for the purpose of the thesis.

1.2 Problem statement and purpose

Bearing in mind the country’s colonial history, the adoption of the MSA as a tool to combat modern slavery can be seen as carrying an important symbolic value as a concrete step for the UK towards taking accountability for human rights abuses committed by business enterprises overseas. However, research pointing at the ineffectiveness²⁵ of the MSA may imply a risk that

¹⁷ Vera Rusinova and Segei Korotkov, “Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?” *Russian Law Journal*, Volume 9, Issue 4 (2021), p. 55.

¹⁸ Virginia Mantouvalou, “The UK Modern Slavery Act 2015 Three Years On”, *The Modern Law Review*, Volume 81, No 6 (November 2018), p. 1017-1018.

¹⁹ See for example: Amy Sinclair and Justine Nolan, “Modern Slavery Laws in Australia: Steps in the Right Direction?”, *Business and Human Rights Journal*, Volume 5, No 1 (January 2020), p. 165.

²⁰ Lindsay, Kirkpatrick and En Low, “Hardly Soft Law: The Modern Slavery Act 2015 and the Trend Towards Mandatory Reporting on Human Rights”, p. 30.

²¹ Felicity Lawrence, “Walmart, Tesco and Costco among retailers responding to revelations of slavery in supply chains”, *The Guardian*, 10 June 2014; BBC News, “Oxfam alleges abuse in UK supermarket supply chains”, BBC, 10 October 2019; Ashifa Kassam and Brenda Chavez, “Abusive working conditions endemic in Spain’s strawberry farms, report claims” *The Guardian*, 31 March 2023.

²² Home Office, *Modern Slavery and Supply Chains Consultation*, UK government, 12 February 2015, p. 10; Business & Human Rights Resource Centre and Modern Slavery Registry, *Modern Slavery Act: Five years of reporting: Conclusions from monitoring corporate disclosure*, February 2021, p. 7.

²³ Genevieve LeBaron and Andreas Rühmkorf, “Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance”, *Global Policy*, Volume 8, Supplement 3, May 2017, p. 26; David Nersessian and Dessislava Pachamanova, “Human Trafficking in the Global Supply Chain: Using Machine Learning to Understand Corporate Disclosures Under the UK Modern Slavery Act”, *Harvard Human Rights Journal*, Volume 35, 2022, p. 1.

²⁴ Ingrid Landau, “Human Rights Due Diligence and The Risk of Cosmetic Compliance”, *Melbourne Journal of International Law*, Volume 20, No.1, July 2019, p. 234-235.

²⁵ LeBaron and Andreas Rühmkorf, “Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance”, p. 26; Nersessian and Pachamanova, “Human Trafficking in the Global Supply Chain: Using Machine Learning to Understand Corporate Disclosures Under the UK Modern Slavery Act”, p. 1; Landau, “Human Rights Due Diligence and The Risk of Cosmetic Compliance”, p. 234-235.

the MSA allows for human rights abuses to prevail - and worse, to do so under a form of a legal veil. Since the MSA is meant to reflect and align with the UNGPs,²⁶ poor or weak compliance with the UNGPs may imply a maintenance of a status quo regarding modern slavery rather than a strengthening of human rights protection, reflecting a paradox in regard to the purpose of the MSA. Moreover, research assessing the Australian Modern Slavery Act (2018) – a law similar to, and inspired by, the MSA - has revealed that the business reporting under the act reiterates colonial relations of power in the way it serves to benefit the needs of corporations and consumers in the Global North over those of labour workers in the Global South.²⁷ The possibility of the MSA possessing similar postcolonial traits could explain its potential paradox of maintaining business as usual rather than strengthening human rights protection.

The purpose of this thesis is to look closer at this potential paradox by examining if a potential non-compliance between the MSA and the UNGPs can be explained by postcolonial power structures. Through a comparative analysis between the MSA and the UNGPs, the thesis will assess if there are areas within the MSA that can be seen as failing to comply with the UNGPs. To determine this, the thesis will not only aim to analyse the legal text of the MSA but also the outcome of the act: in other words, how the MSA has been applied in practice. By adopting a postcolonial analysis to the findings of the comparative analysis, the thesis aims to analyse if the MSA's level of compliance with the UNGPs can be explained by postcolonial power structures.

1.3 Research questions

For the thesis to reach its purpose, the thesis aims to answer the following overarching research question: can the MSA's level of compliance with the UNGPs be explained by postcolonial power structures? To answer this question, there is firstly a need to find out which obligations that are set out in the MSA and how they have been applied in practice. Thereafter, the thesis needs to identify the corresponding obligations set out in the UNGPs for the thesis to be able to make a comparative analysis between the MSA and the UNGPs. By conducting a comparative analysis between the MSA and the UNGPs, the thesis aims to assess if there are areas of the MSA that can be seen as failing to comply with UNGPs and which these areas are. Lastly, the

²⁶ Home Office, *Modern Slavery and Supply Chains Consultation*, p. 10; Business & Human Rights Resource Centre and Modern Slavery Registry, *Modern Slavery Act: Five years of reporting: Conclusions from monitoring corporate disclosure*, p. 7.

²⁷ Harriette Richards, "Risk, Reporting and Responsibility: Modern Slavery, Colonial Power and Fashion's Transparency Industry", *International Journal for Crime, Justice and Social Democracy*, Volume 11, No 2 (2022), p. 57.

thesis will use a postcolonial explanatory framework to analyse if the MSA's level of compliance with the UNGPs can be explained by postcolonial power structures.

2. Theoretical framework

This chapter presents the thesis' theoretical framework. Originating in postcolonial theory, the framework has a particular focus on neo-colonial economic dominance. For this reason, dependency theory will be used to provide an understanding of how neo-colonial economic dominance can be seen as present in the world today. The use of dependency theory aims to provide a bridge between postcolonialism and economics which can be seen as essential for explaining the postcolonial and economic forces at play within the subject of this thesis. The chapter will present different accounts of dependency theory made by influential theorists and writers in the area. The chapter will end with a section aimed at clarifying how the theories and viewpoints in the theoretical framework will be used to form an explanatory framework used to analyse the thesis' findings from a postcolonial perspective.

2.1 Postcolonial theory: Introducing neo-colonialism and dependency theory

Postcolonial theory seeks to study the continued and ongoing presence and influence of colonialism in the period following the end of the colonial era.²⁸ The theory explores the effects of colonialism on contemporary society and illuminates ways in which imperialism – while taking a new shape – continues to be present in the world today.²⁹ For this reason, postcolonial theory is not only committed to developing a radical critique of colonialism but also of 'neo-colonialism'.³⁰ Neo-colonialism describes the idea that although formal colonialism has ended, in reality, the control and power over the former colonies are retained through new economic and political structures.³¹ From a neo-colonial view, such power operates today less through military means and more through economic domination based on global competition over trade and commerce rather than territory.³² Dependency theory – which in many ways has become inseparable from ideas of neo-colonialism – can be used to provide a more in-depth

²⁸ Tariq Jazeel, *Postcolonialism*, 1st edition (London: Routledge, 2019), p. 5.

²⁹ Ibid.

³⁰ Anshuman Prasad, "The Gaze of the Other: Postcolonial Theory and Organizational Analysis, in *Postcolonial Theory and Organizational Analysis: A Critical Engagement*, Anshuman Prasad (ed.), (New York: Palgrave Macmillan, 2003), p. 7.

³¹ Nagesh Rao, "'Neocolonialism' or 'Globalization'?: Postcolonial Theory and the Demands of Political Economy", *Interdisciplinary Literary Studies*, Volume 1, No 2 (Spring 2000), p. 168.

³² Susan Koshy, "From Cold War to Trade War: Neocolonialism and Human Rights", *Social Text*, No 58 (Spring 1999), p. 1.

understanding of how neo-colonial economic dominance can be seen as present in today's globalised world.³³ Dependency theory holds that dominant capitalist powers have shaped, and are still shaping, the transformation of global economic and political structures in a manner that serves their own interests.³⁴ The theory has played an important part in putting light on aspects of colonialism and global economic domination within the field of economics.³⁵ The following sections are dedicated to a closer examination of dependency theory through a presentation of different ideas and sub-theories within the theory.

2.1.2 Dependency and unequal economic exchange

Much associated with dependency theory is the work of Andre Gunder Frank, who argued that the underdevelopment of the former colonies can be explained by their continuous economic dependency on the former colonial powers through the manner in which they have been incorporated into the capitalist system.³⁶ This Frankian approach – often referred to as ‘the development of underdevelopment’³⁷ - holds that by organising the production of goods at a minimal cost in peripheral nodes (“satellites”) in developing countries and by extracting the surplus value to metropolitan cores (“metropolises”) in developed countries, the capitalist system puts developing countries locked in a state of underdevelopment and economic dependency of the former colonial powers.³⁸ According to Frank, such a metropole-satellite relationship characterises the entire trade sector.³⁹ In relation to the manufacturing industry, Frank emphasised how such a relationship is constantly reproduced in how large firms – which enjoy financial, technological, and political advantages – outcompete and replace smaller local shops overseas.⁴⁰ By doing so, local businesses are becoming dependent on large foreign firms for markets, materials, and distribution; firms that in turn are able to extract the economic surplus out of the local satellite and transfer it away to the metropole.⁴¹

³³ Rao, ““Neocolonialism” or “Globalization”?: Postcolonial Theory and the Demands of Political Economy”, p. 169.

³⁴ Robert B. Potter, Tony Binns, Jennifer A. Elliot and David Smith. *Geographies of Development: An Introduction to Development Studies*, 3rd ed, (New York: Routledge, 2008), p. 112.

³⁵ Eiman O. Zein-Elabdin and S. Charusheela, “Introduction: Economics and postcolonial thought” in *Postcolonialism Meets Economics*, Eiman O. Zein-Elabdin and S. Charusheela (eds.), (London: Routledge, 2004), p. 5.

³⁶ Andre Gunder Frank, *Capitalism and Underdevelopment in Latin America: Historical Studies of Chile and Brazil* (New York: Modern Reader, 1969), p. 214.

³⁷ Potter, Binns, Elliot and Smith. *Geographies of Development: An Introduction to Development Studies*, p. 110.

³⁸ *Ibid*, p. 110-112.

³⁹ Frank, *Capitalism and Underdevelopment in Latin America: Historical Studies of Chile and Brazil*, p. 111.

⁴⁰ *Ibid*, p. 112.

⁴¹ *Ibid*, p. 112-113.

Similarly, Arghiri Emmanuel argued that the transfer of economic surplus value away from one part of the world to another through an ‘unequal economic exchange’ can explain the unevenness of development in the world and the widening of the global distribution of wealth.⁴² Emmanuel argued that the structural mechanisms which allow one country to exploit another through an “exploitation at a distance” can be used to explain this unequal economic exchange.⁴³ He argued that such exploitation is related to inequality of wages; namely to the fact that a labour worker in Lebanon is paid 30 less than his counterpart in New York, despite them both using the same tools and performing the same work.⁴⁴ According to Emmanuel, such inequality is used to enrich and uphold the wealth of Western capitalist centres through an unequal economic exchange which transfers economic surplus value from the non-Western peripheries.⁴⁵ As such, Emmanuel viewed poverty and wealth as structural (rather than accidental) phenomena, and that the enrichment of a global minority would have been impossible without the impoverishment of “most of the rest of mankind”.⁴⁶

2.1.3 *The capitalist system*

What then defines this kind of ‘capitalist system’ that traps vulnerable countries in dependency and underdevelopment? Immanuel Wallerstein defined a capitalist system by the way in which it gives priority to an “endless” accumulation of capital; how “firms are accumulating capital to accumulate still more capital, a process that is continual and endless.”⁴⁷ Wallerstein further argued that the capitalist system is defined by the structural mechanisms which favour the process of endless accumulation while penalising actions within the system that are based on other motivations.⁴⁸ By forming strategic alliances with actors that are in favour of their interests and by excluding or circumventing those that are hostile to their interests, Wallerstein holds that strong economic states can pursue their trade interests at the expense of weak economic states who often are able to do little to change their position in the world economy.⁴⁹ The beneficiaries of the capitalist system, Wallerstein argued, are not unaware of this process – rather, they struggle to maintain the status quo of the system as long as possible and will seek

⁴² Arghiri Emmanuel, *Unequal Exchange: A Study of the Imperialism of Trade*, (New York: Monthly Review Press, 1972), p. 265.

⁴³ Emmanuel, *Unequal Exchange: A Study of the Imperialism of Trade*, p. 264.

⁴⁴ Ibid.

⁴⁵ Ibid, p. 265.

⁴⁶ Ibid, p. 263.

⁴⁷ Immanuel Wallerstein, *World Systems Analysis: An Introduction* (Duke University Press, 2004), p. 24.

⁴⁸ Ibid.

⁴⁹ Ibid, p. 24, 29.

to find new ways of upholding the structural mechanisms of hierarchy and exploitation on which the system relies.⁵⁰

2.1.4 Neo-colonialism in practice and its links to colonialism

In a similar vein as Wallerstein, Eduardo Galeano argued that there is nothing competitive about capitalism that exports factories, merchandise, and capital that dominates and monopolises “every kind of activity in every corner of the earth.”⁵¹ Galeano argued that the so-called free play of supply and demand in the international market does not exist: in reality, he argued, there is a political and economic domination of one group over the other which always benefits developed capitalist countries.⁵² With the global decision-making centres of trade and commerce being based in northern capitals such as London, Paris, and Amsterdam, Galeano emphasises how strong capitalist countries posit the power to influence global market prices to fit their own interests at the expense of the weaker countries in the South that are producing the goods for the northern capitalist centres.⁵³ Latin American countries, he argued, are trapped in a situation where the products they sell constantly get cheaper while the products they buy simultaneously get more expensive.⁵⁴ In this manner, Galeano argues that imperialist capital captures markets “from within”, leaving Latin American countries locked in a state of economic dependency and powerlessness.⁵⁵ International agreements that have been signed to protect the prices of certain products have according to Galeano solely been symbolic excuses offered by strong countries when the prices of the products of the weak countries already have reached scandalously low levels.⁵⁶ As such, Galeano holds that while the invasion of foreign capital in Latin America often is framed by politicians as being a “blessing” provided by former colonial powers to the dominated countries which is claimed to benefit the region economically, it is, in reality, reflecting a postcolonial civilising mission in disguise.⁵⁷

Similarly, Walter Rodney argued that although it has been possible to witness a certain economic upswing in postcolonial Africa through an increase in certain types of goods and

⁵⁰ Immanuel Wallerstein, “Underdevelopment and Its Remedies” in *The Underdevelopment of Development: Essays In Honor Of Andre Gunder Frank*, Sing C. Chew and Robert A. Denemark (eds.), (London: SAGE Publications, 1996), p. 358.

⁵¹ Eduardo Galeano, *Open veins of Latin America: Five centuries of the pillage of a continent* (New York: Monthly Review Press, 1997), p. 208.

⁵² Ibid, p. 237-238.

⁵³ Ibid, p. 238.

⁵⁴ Ibid.

⁵⁵ Galeano, *Open veins of Latin America: Five centuries of the pillage of a continent*, p. 206.

⁵⁶ Ibid, p. 238.

⁵⁷ Ibid, p. 207.

services; since the profit made from those goods and services are transferred abroad, this has only resulted in “growth without development” in Africa.⁵⁸ Rodney describes how already in the early 19th century – when the slave trade was beginning to face difficulties in Britain – the country was able to find new ways to continue its labour exploitation and extraction of raw materials of Africa from the “inside” of Africa.⁵⁹ Such labour exploitation was made possible through the enforcement of colonial laws which enabled colonial powers to mobilise and exploit thousands of workers through minimal capital investment.⁶⁰ This was done by offering the lowest possible wages to keep workers physically alive and by using legislation (backed by force) to ensure worker compliance and the effective extraction of surplus value.⁶¹ When the workers realised the need for trade unions, the colonial powers found ways to put obstacles in their path.⁶² In this way, British trading companies were able to make large profits from small investments at the expense of the rights of labour workers.⁶³

2.2 The use and contribution of the theoretical framework

The different accounts of dependency theory above will together form an explanatory framework for suggesting a way of understanding the underlying aspects behind the MSA’s level of compliance with the UNGPs from a postcolonial perspective. While the different theoretical perspectives described above in many ways interrelate, as well as support and redevelop each other’s ideas, they each bring a specific point of view to the framework which helps to strengthen its contribution to the postcolonial analysis in Chapter 7.

Frank’s theory of ‘development of underdevelopment’ will assist in forming an overriding understanding of the dependent and exploitative power structures inherent in the relationships of trade between former colonies in the global South and former colonial powers in the global North. This understanding is useful when analysing the power relationship between UK business enterprises in the North and their offshore production within countries in the South. Furthermore, Wallerstein contributes to providing an understanding of the capitalist system in which the dependency structures between metropolises and satellites, as described by Frank, are made possible. Wallerstein’s idea of the forces that are driving behind and within the capitalist

⁵⁸ Walter Rodney, *How Europe Underdeveloped Africa*, (London: Bogle-L’Ouverture Publications, 1972), p. 256.

⁵⁹ *Ibid*, p. 170-171.

⁶⁰ *Ibid*, p. 228.

⁶¹ *Ibid*, p. 163.

⁶² *Ibid*.

⁶³ *Ibid*, p. 170-171.

system will be of importance when analysing and trying to explain underlying aspects of, and reasons for, the MSA's level of compliance with the UNGPs; in particular when it comes to the balance between profit maximisation and human rights protection. Moreover, Emmanuel's theory of unequal economic exchange assists in explaining how dependency structures and the capitalist system, as described by Frank and Wallerstein, can be seen as dependent on the structural inequality of wages between the global North and the global South. Emmanuel's theory is useful when it comes to providing an understanding of the incentives for UK business enterprises to outsource their production to countries (often former colonies) in the South, but also helps to illuminate the risk of exploitation inherent in such a trade relationship.

Galeano and Rodney each contribute with historical events from both Latin America and Africa which serve to create an understanding of how the neo-colonial structures described by Frank, Wallerstein, and Emmanuel can be understood in practice. Rodney's description of labour exploitation enabled by British trading companies through colonial laws from the 'inside' of Africa can assist in explaining how the neo-colonial structures within which foreign imperialist capital have captured markets from 'within' Latin America, as described by Galeano, can be seen as rooted in colonialism. Thus, Galeano and Rodney both assist in showing different mechanisms that have enabled capitalist powers to maintain control and power over former colonies through a – as phrased by Emmanuel - 'exploitation at a distance'. These mechanisms will together form a useful tool for analysing the content of the MSA as well as how the act has been applied in practice.

3. Methodology

This chapter will present the thesis's methodology. After introducing the thesis' methodological approaches and use of material, the chapter will provide a section aimed at explaining the delimitations of the thesis and the choice behind the areas of focus. Thereafter, by presenting previous research made in the area, the chapter will explain how this thesis differs from, and complements, previous studies in the area. Lastly, the chapter will present a section aimed at clarifying of some of the main notions used in the thesis and end with a section outlining the disposition of the thesis.

3.1 Method and material

The thesis constitutes a comparative study of the MSA as a hard law and the UNGPs as a soft law document. Through a comparative analysis between the MSA and the UNGPs, the thesis

aims to assess the MSA's level of compliance with the UNGPs. By analysing the findings from the comparative analysis from a postcolonial perspective, the thesis aims to assess if the MSA's level of compliance with the UNGPs can be explained by postcolonial power structures. The thesis adopts three specific methodological approaches described below to reach its stated purpose.

3.1.1 Legal dogmatic method

In the way the thesis will assess which obligations that are set out in the UNGPs and the MSA to do a comparative analysis between them, a legal dogmatic method will be used to determine the applicable law ('de lege lata') of the UNGPs and the MSA in order to interpret and describe each of their obligations. This method aims to describe the law as it exists and is restricted to the use of legal sources.⁶⁴ For this reason, the hard legal text of the MSA and the soft law document of the UNGPs will constitute the primary sources of analysis within this method. In addition to its legal text, the assessment of the MSA will within this method be analysed through legal preparatory documents, official state documents (e.g., statutory guidance to the MSA), government communications as well as legal doctrines. While the assessment of the MSA however will go beyond the boundaries of the legal dogmatic method (see Section 3.1.2 and 3.1.3), the UNGPs will be assessed solely through a legal dogmatic method since the purpose only is to determine the applicable law of the UNGPs and not (in contrast to the MSA) how they have been applied in practice. However, in contrast to the MSA, the UNGPs will mainly be analysed through soft law (rather than hard legal) documents, such as UN preparatory documents- and communications as well as interpretive guides related to the UNGPs. This material will be complemented by legal doctrines that will assist in analysing the meaning of the obligations within the UNGPs.

3.1.2 Legal dogmatic approach with secondary sources as part of the primary material

Since the thesis further wishes to find out the outcome of the MSA, the thesis will need to examine how the legal text of the MSA has been applied in practice. In the sense that the thesis aims to determine the applicable law of the MSA by interpreting and generating an understanding of the legal text of the MSA, the thesis adopts a legal dogmatic approach. However, since the purpose furthermore is to find out how the MSA has been applied in practice (and not only how the MSA is defined in the wording of the act), the thesis will not only use

⁶⁴ Claes Sandgren, *Rättsvetenskap för uppsatsförfattare: Ämne, material, metod, argumentation och språk*, 5th edition (Stockholm: Nordstedts Juridik, 2021), p. 51.

the MSA as the primary legal source of analysis – this since the outcome of the act cannot be understood solely by analysing its legal text.⁶⁵ Indeed, alternative sources to the primary legal documents can be used when the aim is to gain an understanding of the practical function of the law.⁶⁶ For this reason, secondary sources in the form of legal doctrines that have been analysing the MSA will serve as a complement to the legal text and as such constitute additional primary sources of analysis when it comes to the MSA. These legal doctrines will furthermore be complemented by evaluation reports and other non-legal sources (e.g., research articles within the fields of business and human rights) aimed at providing a wider understanding of how the MSA has been applied in practice. Therefore, although the approach can be considered dogmatic, since secondary sources constitute part of the primary sources of analysis the method by itself cannot be considered strictly legally dogmatic.

3.1.3 Legal analytical method

When it comes to providing an understanding of the MSA's level of compliance with the UNGPs from a postcolonial perspective, a legal dogmatic method cannot be used since such a method is restricted to determining the applicable law and cannot be used to obtain knowledge about or reasons behind why a law is fulfilling its purpose or not.⁶⁷ Instead, Claes Sandgren's legal analytical method will be used to analyse the MSA's level of compliance with the UNGPs from a postcolonial perspective. This method goes beyond determining the applicable law by allowing for a wide range of material to be used to analyse the law, which stands in contrast to the legal dogmatic method which is restricted to legal sources.⁶⁸ The width of this method thus allows for the integration of a non-legal theoretical perspective to analyse the MSA.⁶⁹ For this reason, the thesis will make use of the theoretical framework to interpret the findings from the comparative analysis between the MSA and the UNGPs from a postcolonial perspective. The use of dependency theory within the theoretical framework aims to provide a bridge between postcolonialism and economics to explain the postcolonial and economic forces at play within the subject of this thesis. Literature within postcolonial- and dependency theory will be used to develop the thesis' theoretical framework. Theories and viewpoints by influential theorists and writers within dependency theory will, as explained further in Chapter 2, form an explanatory

⁶⁵ Sandgren, *Rättsvetenskap för uppsatsförfattare: Ämne, material, metod, argumentation och språk*, p. 52-53.

⁶⁶ Karin Åhman, *Grundläggande rättigheter och juridisk metod*, (Stockholm: Nordstedts Juridik, 2015), p. 22.

⁶⁷ Sandgren, *Rättsvetenskap för uppsatsförfattare: Ämne, material, metod, argumentation och språk*, p. 52-53.

⁶⁸ *Ibid*, p. 53-54.

⁶⁹ *Ibid*, p. 55.

framework for analysing if the MSA's level of compliance with the UNGPs can be explained by postcolonial power structures.

3.2 Delimitations

The thesis will focus on Section 54 (the 'Transparency in Supply Chains etc' provision) of the MSA since it constitutes the only provision in the MSA that reflects a HRDD component for business enterprises.⁷⁰ Within this provision, the thesis has identified three areas of focus when it comes to analysing the MSA (and later its compliance with the UNGPs): 1) reporting requirement, 2) monitoring of compliance, and 3) sanctions for non-compliance. These areas are chosen on the basis that they can provide information on 1) what is required by business enterprises under the MSA, 2) how compliance with such requirements is followed up in practice, and 3) what the consequences are for business enterprises that do not comply with such requirements.

The above focus areas have in turn determined which corresponding principles within the UNGPs that constitute a relevant focus of analysis within the thesis. As such, within the UNGPs, the thesis will focus on Principle 1, 3, and 5 in relation to the duty of states to protect, as well as Principle 17, 20, and 21 regarding business enterprises' responsibility to respect human rights. While Principle 1 provides an understanding of the duty of the State in punishing and redressing human rights violations, Principle 3 and 5 elaborate further on what this duty entails in terms of oversight of business compliance and guidance on how businesses should communicate their response to human rights impacts. Similarly, while Principle 17 provides a basis for the meaning of HRDD, Principle 20 and 21 go more into detail regarding what the HRDD process requires from business enterprises in practice when it comes to how they should track and communicate steps taken to address human rights impacts. For this reason, while acknowledging that the UNGPs also include a third pillar which covers access to remedies, this thesis will only focus on the above principles within the UNGPs' first and second pillar.

Since the thesis only covers Section 54 of the MSA, the findings of the thesis can only be used to gain increased knowledge about Section 54 of the MSA and cannot be used to draw any conclusion in relation to the other parts of the MSA which have not been covered within this thesis.

⁷⁰ Rusinova and Korotkov, "Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?" p. 55.

Emphasising that this thesis has been shaped within a postcolonial theoretical framework, it is important to consider that a postcolonial perspective has permeated the writing of this thesis. Nevertheless, while the conclusions drawn from the findings will be shaped by a postcolonial perspective, the findings are not limited to being analysed from this perspective only.

3.3 Previous research

In relation to bringing the HRDD component of the UNGPs into concrete practice for business enterprises, previous research has expressed concerns related to the risk for business enterprises to pursue a strategic rather than substantial implementation of HRDD.⁷¹ Research has also shown that efforts by states to implement the UNGPs into national regulations have failed to live up to the requirements of the UNGPs.⁷² In relation to bringing HRDD into hard law, several studies have questioned national HRDD legislations' effectiveness in strengthening corporate social responsibility (CSR) in general, as well as in addressing labour exploitation in particular.⁷³ When it comes to the MSA, research has questioned its effectiveness in steering corporate behaviour towards addressing forced labour in global supply chains,⁷⁴ as well as emphasised the risk of business enterprises pursuing a "cosmetic"⁷⁵ rather than substantial compliance with the MSA. While some national HRDD legislations have been researched in the light of the UNGPs - such as the United States' Alien Tort Statute⁷⁶, the German Act on Corporate Due Diligence Obligations in Supply Chains, and the Norwegian Transparency Act

⁷¹ Björn FASTERLING and Geert DEMUINCK, "Human Right in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights", *Journal of Business Ethics*, 116 (2013), p. 799.

⁷² Daniel AUGENSTEIN, "Managing Global Interdependencies through Law and Governance: The European Approach to Business and Human Rights" in *Business and Human Rights in Europe: International Law Challenges*, Angelica BONFANTI (ed.), (New York: Routledge, 2019), p. 24.

⁷³ Guillaume DELALIEUX and Anne-Catherine MOQUET, "French law on CSR due diligence paradox: The institutionalization of soft law mechanisms through the law", *Society and Business Review*, Volume 15, No 2 (2020), p. 137-138; Marieke KOECKOEK, Axel MARX and Jan WOUTERS, "Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains", *Global Policy*, Volume 8, Issue 4 (November 2017), p. 527-528. For labour exploitation in particular, see: Nolan, "Chasing the next shiny thing: Can human rights due diligence effectively address labour exploitation in global fashion supply chains?", p. 9-10; Alexis A. ARONOWITZ, "Regulating business involvement in labor exploitation and human trafficking", *Labor and Society*, Volume 22, Issue 1, (March 2019), p. 159.

⁷⁴ LeBaron and Rühmkorf, "Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance", p. 26.

⁷⁵ Landau, "Human Rights Due Diligence and The Risk of Cosmetic Compliance", p. 234-235.

⁷⁶ Elena CORCIONE, "The Role of Soft-Law in Adjudicating Corporate Human Rights Abuses: Interpreting the Alien Tort Statute in the Light of the UN Guiding Principles on Business and Human Rights", *European Papers*, Volume 6, No 3 (2021), p. 1293.

⁷⁷, there is, to the best of my knowledge, no research that has been evaluating the MSA’s level of compliance with the UNGPs on a similar level.

Moreover, while there is much research written in relation to the impact of colonialism in shaping international law,⁷⁸ as well as the impact of colonial laws on shaping laws enacted in previous colonies after the end of the colonial era,⁷⁹ less research has examined the possibility of more recently enacted laws in nations with previous colonial power (e.g., the UK) reflecting postcolonial power structures. While research written on the Australian Modern Slavery Act (2018) has argued that the business reporting under the act reiterates colonial relations of power,⁸⁰ there is yet no research made on the MSA from a postcolonial perspective despite the resemblance of these laws. As such, the hope is for this thesis to contribute to filling this current research gap through a closer comparative analysis of the MSA and the UNGPs and by analysing their level of compliance from a postcolonial perspective.

3.4 Clarifications

To clarify the main notions used in this thesis, ‘human rights due diligence (HRDD)’ refers to the process of assessing actual and potential human rights impacts, acting upon those impacts, tracking responses, and communicating how the impacts are being addressed, as stated in the UNGPs.⁸¹ While the MSA uses its own definition of ‘commercial organisation’⁸², the author will for the simplicity of the thesis use the general term ‘business enterprises’ to refer to “all businesses, both transnational and others, regardless of their size, sector, location, ownership and structure” in line with the definition in the UNGPs regarding which businesses the UNGPs apply to.⁸³ Furthermore, while the term ‘modern slavery’ in the MSA refers to both “slavery,

⁷⁷ Markus Krajewski, Kristel Tonstad and Franziska Wohltmann, “Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?” *Business and Human Rights Journal*, Volume 6 (October 2021), p. 550.

⁷⁸ See for example: Antony Anghie, “The evolution of international law: Colonial and postcolonial realities”, *Third World Quarterly*, Volume 27, No 5 (2006), p. 739; James Thuo Gathii, “Imperialism, Colonialism and International Law”, *Buffalo Law Review*, Volume 54, No 4 (January 2007), p. 1013.

⁷⁹ See for example: Magnus Killander, “Criminalising homelessness and survival strategies through municipal by-laws: colonial legacy and constitutionality”, *South African Journal on Human Rights*, Volume 35, Issue 1 (2019), p. 70; Salmon A Shomade, *Colonial Legacies and the Rule of Law in Africa: Ghana, Kenya, Nigeria, South Africa and Zimbabwe*, 1st edition (London: Routledge, 2021), p. 1.

⁸⁰ Richards, “Risk, Reporting and Responsibility: Modern Slavery, Colonial Power and Fashion’s Transparency Industry”, p. 57.

⁸¹ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 17.

⁸² Modern Slavery Act, 2015, United Kingdom, c 30, Section 54(12).

⁸³ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 1.

servitude, forced or compulsory labour”⁸⁴ and “human trafficking”⁸⁵, the focus of this thesis will be mainly on the human rights abuses of slavery, servitude, forced or compulsory labour since the thesis is examining Section 54 of the MSA which focuses on transparency in business supply chains where these kind of human rights often occur. Lastly, ‘postcolonial power structures’ are in this thesis referred to as hierarchical, imperialist, and exploitative relationships of power that are enabling, sustaining, or recreating an economic and political domination of one country or group of people over another. Such postcolonial power structures are in this thesis viewed as a continuation of the colonial power structures exercised by former colonial powers over their colonies and colonial subjects during the era of colonialism.

3.5 Disposition

Chapter 4 will start by giving a brief introduction to the UNGPs before moving on to determining the applicable law of the UNGPs within the areas of focus. Thereafter, the thesis will move on to examining the MSA in Chapter 5. The chapter will provide a short introduction to the MSA and Section 54 within the act, before determining the applicable law of the MSA and assessing how the act has been applied in practice within the areas of focus. Chapter 6 will cover a comparative analysis between the UNGPs with the MSA within the areas of focus to illuminate potential areas of weak compliance. By adopting a postcolonial explanatory framework to discuss the findings from the comparative analysis, Chapter 7 will aim to explain the MSA’s level of compliance with the UNGPs. In Chapter 8, the thesis will draw a conclusion based on the findings from Chapter 6 and the postcolonial analysis of Chapter 7. The chapter will end with a section aimed at emphasising the contribution of this thesis and provide suggestions of future research.

4. The UN Guiding Principles on Business and Human Rights

This chapter aims to determine the applicable law of the UN Guiding Principles on Business and Human Rights (UNGPs) to provide a basis for the comparative analysis with the UK Modern Slavery Act (MSA) in Chapter 6. The chapter will begin with providing a brief background to the UNGPs. Thereafter, the chapter will look closer at three principles within Pillar I (the state duty to protect) and Pillar II (the corporate responsibility to respect) of the

⁸⁴ Modern Slavery Act, Section 1.

⁸⁵ Ibid, Section 2.

UNGPs respectively, which all correspond to the three focus areas of the MSA in this thesis (i.e., reporting requirement, monitoring of compliance and sanctions for non-compliance). In terms of Pillar I, this chapter will focus on Principle 1, 3, and 5 of the UNGPs. When it comes to Pillar II, the chapter will focus on Principle 17, 20, and 21 of the UNGPs. The reason behind the choice of these principles is explained in Section 3.2. The chapter will end with a section summarising the main points of the chapter.

4.1 Introduction to the UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights (UNGPs) were adopted in 2011 by the United Nations (UN)' Human Rights Council (HRC).⁸⁶ Developed by John Ruggie, the Special Representative of the UN Secretary-General on human rights and transnational corporations and other business enterprises (hereinafter SRSG), the UNGPs constitute the first and currently only official guidance on business and human rights issued by the UN.⁸⁷ The UNGPs consist of guidelines for states and business enterprises on how to address and prevent violations of human rights in business operations.⁸⁸ These guidelines draw on the 'Protect, Respect and Remedy Framework' (PRRF) endorsed by the UN in 2008, emphasising the duty of states to protect everyone within their territory and/or jurisdiction from human rights abuses committed by business enterprises, as well as the responsibility of business enterprises to respect human rights in their business operations.⁸⁹ An important contribution of the UNGPs has been their introduction of 'human rights due diligence' (HRDD), which refers to the responsibility of business enterprises to identify their potential human rights impacts, address those impacts, and communicate how they have been addressed.⁹⁰ Since its endorsement, the UNGPs have been considered as the international standard of reference when it comes to business and human rights and has helped to influence an international consensus on issues in the area.⁹¹

⁸⁶ The UN Working Group on Business and Human Rights, *The UN Guiding Principles on Business and Human Rights: An Introduction*, The Office of the High Commissioner for Human Rights (OHCHR), United Nations, p. 2.

⁸⁷ John Gerard Ruggie and John F. Sherman, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale", *The European Journal of International Law*, Volume 28, No 3 (2017), p. 921.

⁸⁸ The UN Working Group on Business and Human Rights, *The UN Guiding Principles on Business and Human Rights: An Introduction*, p. 2.

⁸⁹ *Ibid.*

⁹⁰ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, p. 17.

⁹¹ Clapham, "Non-State Actors", p. 568; Maddalena Neglia, "The UNGPs – Five Years On: From Consensus to Divergence in Public Regulation on Business and Human Rights", *Netherlands Quarterly of Human Rights*, Volume 34, No. 4 (2016), p. 316.

The UNGPs apply to all states and all business enterprises, regardless of size, sector, ownership, and location.⁹² Constituting a soft law document, the UNGPs are not legally binding and do not create legal obligations on states or business enterprises.⁹³ Despite this, their compliance cannot be considered completely voluntary for either states or business enterprises.⁹⁴ Rather, the UNGPs can be seen as both deriving from and referring to states' existing obligations under international law and their ratification of international human rights treaties.⁹⁵ For business enterprises, respecting human rights is a minimum expectation that often is reflected fully or partly in domestic laws or regulations which are binding upon them.⁹⁶

4.2 The state duty to protect and the corporate responsibility to conduct human rights due diligence

Principle 1 of the UNGPs spells out the duty of states to protect against human rights abuses by third parties, including business enterprises, within their territory and/or jurisdiction.⁹⁷ It requires states to take “appropriate steps” to prevent, investigate, punish, and redress human rights abuses through “effective policies, legislation, regulations and adjudication”.⁹⁸ The commentary to the principle stresses that while states are not per se responsible for human rights abuses committed by private actors, a failure of states to take appropriate steps to prevent, investigate, punish, and redress human rights abuses may amount to a breach of their international human rights law obligations.⁹⁹ The PRRF underlines that although states have discretion in deciding what measures to take, such measures should include both regulation and adjudication.¹⁰⁰ In relation to the extraterritorial aspect of the duty to protect, a guiding document to the UNGPs stresses that while states are not required under international law to regulate the extraterritorial activities of business enterprises within their jurisdiction, they are

⁹² The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 1.

⁹³ The Office of the United Nations High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, p. 8.

⁹⁴ *Ibid.*, p. 9.

⁹⁵ *Ibid.*, p. 8-9.

⁹⁶ *Ibid.*, p. 9.

⁹⁷ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 3.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, 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, United Nations, 7 April 2008, p. 7.

however not prohibited from doing so as long as there is a recognised “jurisdictional basis”.¹⁰¹ The document further emphasises that the state duty to protect includes setting clear expectations that companies domiciled in their territory and/or jurisdiction respect human rights “throughout their operations, that is, in every country and context in which they operate”.¹⁰² It further describes that states have a wide range of options in ensuring companies respect for human rights, including through the enactment of direct extraterritorial jurisdiction (i.e. jurisdiction over a company for its conduct abroad).¹⁰³

The responsibility of business enterprises to carry out human rights due diligence (HRDD) is described in Principle 17, which includes assessing actual and potential human rights impacts, acting upon those impacts, tracking responses, and communicating how the impacts are being addressed.¹⁰⁴ The commentary to the principle underlines that the HRDD process goes beyond simply identifying risks to the company itself to include risks to rights-holders.¹⁰⁵ It further acknowledges the difficulty of business enterprises with numerous entities in their value chains to conduct HRDD across all of those entities. In such cases, the commentary states that business enterprises should “identify general areas” where the risk of adverse human rights impacts is most significant” and prioritise those areas when carrying out HRDD.¹⁰⁶ In an article aimed at clarifying the meaning of HRDD, the SRSG and his legal advisor emphasised that without conducting HRDD, companies will be unable to either “know or show” that they respect human rights and will lose their credibility in claiming to do so.¹⁰⁷

4.3 Communication of steps taken to address human rights impacts

Principle 3 describes steps states should take to meet their duty to protect.¹⁰⁸ Principle 3(a) describes that states should “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights”.¹⁰⁹ The commentary to the principle further states

¹⁰¹ The Office of the United Nations High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, p. 21.

¹⁰² *Ibid.*, p. 19.

¹⁰³ *Ibid.*, p. 21.

¹⁰⁴ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 17.

¹⁰⁵ *Ibid.*, p. 18.

¹⁰⁶ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 18.

¹⁰⁷ Ruggie and Sherman, “The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale”, p. 924.

¹⁰⁸ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 4.

¹⁰⁹ *Ibid.*

that laws in this area should provide sufficient guidance to enable business enterprises to respect human rights and that they usefully can clarify what and how businesses should communicate.¹¹⁰ Principle 3(d) goes further, emphasising that states should “encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.”¹¹¹ The commentary to the principle describes that setting a requirement on business enterprises to communicate can be appropriate in regards to business operations that pose “a significant risk to human rights”.¹¹²

The responsibility of business enterprises to communicate how they address their human rights impacts is emphasised in Principle 21.¹¹³ The principle states that communications should be “accessible to its intended audiences” (Principle 21(a)) and provide sufficient information to “evaluate the adequacy of an enterprise’s response” to the human rights impact (Principle 21(b)).¹¹⁴ The interpretive guide to corporate responsibility under UNGPs (hereinafter ‘the Interpretive Guide’) emphasises that Principle 21 is first and foremost about the responsibility of business enterprises to communicate their general approaches to addressing human rights risks and that it does not ask business enterprises to reveal “all the issues identified” or the steps taken to mitigate “every risk”.¹¹⁵

4.4 Monitoring of compliance and tracking of responses to human rights impacts

Principle 5 states that states should exercise “adequate oversight” when they “contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights”.¹¹⁶ The commentary to the principle states that states should ensure that they can “effectively oversee” the business enterprises’ activities through the provision of “adequate independent monitoring and accountability mechanisms”.¹¹⁷ The commentary further clarifies that the principle relates to situations where the state is privatising the delivery of services.¹¹⁸ In legal doctrines, Principle 5 has been understood as stressing the fact that the duty of states to

¹¹⁰ Ibid, p. 5-6.

¹¹¹ Ibid, p. 4.

¹¹² Ibid, p 6.

¹¹³ Ibid, p 23.

¹¹⁴ Ibid.

¹¹⁵ The Office of the High Commissioner for Human Rights (OHCHR), *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, HR/PUB/12/02, United Nations, New York and Geneva, 2012, p. 58.

¹¹⁶ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 8.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

protect against human rights abuses does not dilute or diminish because they privatise the provision of services, and that states must continue to regulate and oversee such entities.¹¹⁹

The responsibility of business enterprises to track the effectiveness of their response to address adverse human rights impacts is expressed in Principle 20.¹²⁰ The commentary underlines the importance of tracking to evaluate the effectiveness of business enterprises' efforts to address adverse human rights impacts.¹²¹ According to Principle 20(b), tracking should include feedback from affected stakeholders.¹²² The commentary stresses that business enterprises should make "particular efforts" to evaluate the impact of their response on groups and individuals particularly vulnerable to risks of human rights abuses.¹²³ The Interpretive Guide emphasises that HRDD is about people and that it builds on the right of every human being to be treated with dignity.¹²⁴ For this reason, the Interpretive Guide underlines that the inclusion of perspectives of affected individuals and groups is key when carrying out HRDD.¹²⁵ Meaningful engagement, involvement, and dialogue with rights holders were further stressed in the preparatory work to the UNGPs as essential parts of HRDD which differs it from merely commercial, technical, or political risk management.¹²⁶ The SRSG and his legal advisor have further emphasised that the purpose of conducting HRDD is to understand the impacts on specific people in specific contexts and "not merely to manage commercial risks to the company itself".¹²⁷

4.5 Summary

This chapter has aimed to determine the applicable law of six principles within the UNGPs related to the state duty to protect and the corporate responsibility to respect human rights. The chapter has covered the duty of states to punish and redress human rights violations (Principle

¹¹⁹ Mihaela Maria Barnes, "The United Nations guiding principles on business and human rights, the State Duty to protect human rights and the State-business nexus", *Brazilian Journal of International Law*, Volume 15, Issue 2 (2018), p. 50.

¹²⁰ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, p. 22.

¹²¹ *Ibid.*, p. 23.

¹²² *Ibid.*, p. 22.

¹²³ *Ibid.*, p. 23.

¹²⁴ The Office of the High Commissioner for Human Rights (OHCHR), *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, p. 33.

¹²⁵ *Ibid.*

¹²⁶ Human Rights Council, *Business and Human Rights: Further steps toward operationalization of the "protect, respect and remedy" framework*, 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/14/27, United Nations, 9 April 2010, p. 17.

¹²⁷ Ruggie and Sherman, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale", p. 924.

1) and what this duty entails in terms of oversight of business compliance (Principle 5) and guidance on how businesses should communicate their response to human rights impacts (Principle 3). The chapter has further covered the core meaning of HRDD in the UNGPs (Principle 17) as well as what the HRDD process requires from business enterprises in practice when it comes to how they should track (Principle 20) and communicate (Principle 21) steps taken to address human rights impacts.

5. The United Kingdom's Modern Slavery Act

This chapter aims to determine the applicable law of the United Kingdom's Modern Slavery Act of 2015 (MSA) to provide a basis for the comparative analysis with the UNGPs in Chapter 6. The chapter further aims to provide an understanding of the outcome of the MSA - in other words, how the MSA has been applied in practice. The chapter will start by giving a brief introduction to MSA, before providing a short background of Section 54 of the MSA, which constitutes the section of the MSA that will be examined within this thesis. Thereafter, the chapter will provide one section for each focus area to be examined within Section 54 (i.e., reporting requirement, monitoring of compliance, and sanctions for non-compliance). The chapter will end with a summary before discussing the findings in the comparative analysis with the UNGPs in Chapter 6.

5.1 Introduction to the Modern Slavery Act

The United Kingdom's Modern Slavery Act (MSA) was passed into law in 2015 with the aim to combat 'modern slavery',¹²⁸ a term which according to the MSA comprises "slavery, servitude, forced or compulsory labour"¹²⁹ and "human trafficking"¹³⁰. Constituting the first law of its kind in Europe, and one of the first in the world to address slavery in the 21st century,¹³¹ the MSA was applauded by the UK government as a "truly groundbreaking measure"¹³² and described by the then Home Secretary, Theresa May, as a "historic milestone"¹³³ in the fight against modern slavery. The UK government stated that the MSA will provide

¹²⁸ Home Office, "Historic law to end Modern Slavery passed", UK government, 26 March 2015.

¹²⁹ Modern Slavery Act, Section 1.

¹³⁰ Ibid, Section 2.

¹³¹ Home Office, "Historic law to end Modern Slavery passed".

¹³² Lindsay, Kirkpatrick and En Low, "Hardly Soft Law: The Modern Slavery Act 2015 and the Trend Towards Mandatory Reporting on Human Rights", p. 31.

¹³³ Mantouvalou, "The UK Modern Slavery Act 2015 Three Years On", p. 1017.

law enforcement with tools to combat modern slavery, ensure punishment for perpetrators and enhance the protection of victims.¹³⁴

The main part of the MSA is dedicated to the criminalisation of slavery and human trafficking.¹³⁵ Section 54 of the MSA, which encourages business enterprises to disclose information about human rights impacts in their supply chains, constitutes the only provision of the MSA which includes a HRDD component for business enterprises.¹³⁶ However, in comparison to the MSA's hard law provisions that are targeting individuals, the MSA has adopted a soft law provision under Section 54 with an absence of hard legal rules and sanctions for non-compliant business enterprises.¹³⁷ The next section will introduce Section 54 of the MSA and thereafter look closer into its obligations when it comes to its reporting requirements, monitoring of compliance, and sanctions for non-compliance.

5.2 Section 54: the 'Transparency in supply chains etc' provision

Fundamental to the aim of encouraging business enterprises to take action against modern slavery within their supply chains was the inclusion of Section 54 in the MSA called the 'Transparency in supply chains etc' (TISC) provision.¹³⁸ The TISC provision obligates large businesses to be transparent with what actions they have taken to counteract modern slavery in their supply chains.¹³⁹ It does so by requiring commercial organisations to publish an annual slavery and human trafficking statement.¹⁴⁰ This obligation applies to corporate bodies that are carrying on a business in the UK (Section 54 (12)(a)), supply goods or services (Section 54(2)(a)), and that are having a total turnover of "not less than an amount prescribed by regulations made by the Secretary of State" (Section 54(2)(b)).¹⁴¹ This total turnover has been set at a threshold of 36 Million GBP.¹⁴² By encouraging supply chain transparency, the provision seeks to increase business enterprises' corporate social responsibility (CSR) by creating a "race to the top" to drive up CSR standards through competitive advantage.¹⁴³ By

¹³⁴ Home Office, "Modern Slavery Act 2015", UK government, 10 June 2014.

¹³⁵ Rusinova and Korotkov, "Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?" p. 55.

¹³⁶ Ibid.

¹³⁷ Mantouvalou, "The UK Modern Slavery Act 2015 Three Years On", p. 1038.

¹³⁸ Business & Human Rights Resource Centre and Modern Slavery Registry, *Modern Slavery Act: Five years of reporting: Conclusions from monitoring corporate disclosure*, p. 2.

¹³⁹ Momsen and Schwarze, "The Changing Face of Corporate Liability – New Hard Law and the Increasing Influence of Soft Law", p. 575.

¹⁴⁰ Modern Slavery Act, Section 54(1).

¹⁴¹ Ibid, Section 54.

¹⁴² Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, UK government, 29 October 2015, p. 5.

¹⁴³ Ibid.

doing so, Section 54 constitutes the only provision in the MSA that reflects a mandatory corporate HRDD component for business enterprises.¹⁴⁴

The TISC provision was not a part of the initial Modern Slavery Bill but was initiated and pushed for by a large group of non-governmental organisations (NGOs) and civil society actors.¹⁴⁵ In the consultation on the inclusion of the TISC provision in the MSA, the UK government framed the provision within the context of the UNGPs, acknowledging the due diligence and reporting elements of the UNGPs as essential for businesses.¹⁴⁶ Furthermore, the statutory guidance on the TISC provision (hereinafter ‘the Guidance’), refers to the UNGPs as a tool for business enterprises to use to gain more detailed guidance on good practice when it comes to HRDD.¹⁴⁷ As such, with the enactment of the MSA, it was anticipated that the reporting of business enterprises would be in alignment with the UNGPs.¹⁴⁸

The following sections will look closer on the reporting requirement, monitoring of compliance, and sanctions for non-compliance within the MSA.

5.2.1 Reporting requirement under Section 54

Section 54(1) requires a commercial organisation to produce an annual slavery and human trafficking statement. If the organisation has a website, the organisation must publish the statement on that website in accordance with Section 54(7). Section 54(6)(a) further states that the statement shall be signed off by a director or equivalent. A slavery and human trafficking statement is defined in Section 54(4) as:

- (a) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place (i) in any of its supply chains, and (ii) in any part of its own business, or (b) a statement that the organization has taken no such steps.¹⁴⁹

¹⁴⁴ Rusinova and Korotkov, “Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?”, p. 55.

¹⁴⁵ Lindsay, Kirkpatrick and En Low, “Hardly Soft Law: The Modern Slavery Act 2015 and the Trend Towards Mandatory Reporting on Human Rights”, p. 30; James Whiting, “Modern Slavery Bill – Social Media Push”, Corporate Justice Coalition, 8 December 2014.

¹⁴⁶ Home Office, *Modern Slavery and Supply Chains Consultation*, UK government, 12 February 2015, p. 10.

¹⁴⁷ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 32.

¹⁴⁸ Business & Human Rights Resource Centre and Modern Slavery Registry, *Modern Slavery Act: Five years of reporting: Conclusions from monitoring corporate disclosure*, p. 7.

¹⁴⁹ Modern Slavery Act, Section 54(4).

While Section 54(4)(a)(i) states that a statement should include the steps a commercial organisation has taken to ensure that modern slavery is not taking place “in any of its supply chains”, the MSA does not specify how far down the supply chain that a business enterprise should take responsibility for counteracting modern slavery.¹⁵⁰ Research analyses made of statements produced by business enterprises under Section 54 show that few statements cover contractor relationships (e.g., subcontractors) within which many labour rights violations occur and that some statements explicitly state that they exclude business operations overseas.¹⁵¹ Despite the fact that the risk of human rights abuses increases beyond the second tier in the supply chain (i.e. within the sub-suppliers), it is common that business enterprises only include reporting on the first tier (i.e. direct suppliers/suppliers that a business has a first-hand commercial relationship with).¹⁵² While the Guidance states that business enterprises should “engage their lower tier suppliers where possible”¹⁵³, a large research analysis of statements published by 934 companies shows that while 7 percent of the statements expressed vague expectations on the first-tier suppliers to ensure second-tier compliance, only one of the statements included a clear and tangible report on second tier engagement in combatting modern slavery.¹⁵⁴ Many companies argue that the complexity of the supply chain structures constitutes the main reason behind their reporting difficulties and the explanation for why their reporting is not covering the whole supply chain.¹⁵⁵

Section 54 provides a list of what a statement “may”¹⁵⁶ include information about, such as information on the organisation’s “supply chains”¹⁵⁷ and its “due diligence processes”¹⁵⁸ in relation to modern slavery. It does not however state any mandatory requirement regarding what a statement shall include. Similarly, while the Guidance states that organisations must include “all the steps” they have taken to combat modern slavery, it also states that it is up to each organisation to determine how much detail they will provide, and that this, in turn, is

¹⁵⁰ Rusinova and Korotkov, “Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?”, p. 56.

¹⁵¹ Mantouvalou, “The UK Modern Slavery Act 2015 Three Years On”, p. 1042.

¹⁵² Olga Martin-Ortega, “Due Diligence, Reporting and Transparency in Supply Chains: The United Kingdom Modern Slavery Act” in *Business and Human Rights in Europe: International Law Challenges*, Angelica Bonfanti (ed.), (New York: Routledge, 2019), E-book, p. 118.

¹⁵³ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 32.

¹⁵⁴ Luke Blindell, “Mandatory CSR Disclosure: An Empirical Analysis of the UK Modern Slavery Statements”, *European Business Law Review*, Volume 32, Issue 2 (2021), p. 336.

¹⁵⁵ Martin-Ortega, “Due Diligence, Reporting and Transparency in Supply Chains: The United Kingdom Modern Slavery Act”, p. 117-118.

¹⁵⁶ Modern Slavery Act, Section 54(5).

¹⁵⁷ Ibid, Section 54(5)(a).

¹⁵⁸ Ibid, Section 54(5)(c).

dependent on the complexity of its structure and supply chains.¹⁵⁹ The loosely defined reporting requirements have been shown to create space for business enterprises to comply with the MSA formally while, in practice, not making any changes to their business operations.¹⁶⁰ A general insight has been that although some statements comply with the MSA technically, they do not engage with the spirit of the MSA by identifying and mitigating risks of modern slavery.¹⁶¹ Research further emphasises how a lack of negative reporting within statements (i.e. in relation to what steps a business enterprise has not taken) implies a clear risk that business enterprises only choose to disclose information that puts them in a favourable light.¹⁶² An evaluation of a modern slavery statement published by one of the world's largest facilities management companies Aramark, which provides services to both private and public sector clients (including the UK government), showed that while the statement did meet the reporting requirements under the TISC provision, it failed to describe the company's steps to identify and address risks of modern slavery.¹⁶³ The statement instead focused mainly on discussing the company's use of an audit platform.¹⁶⁴

Interpreting the practical meaning of the reporting requirement for business enterprises under Section 54(4)(b), one can conclude that it is enough for a business enterprise to state that no action has been taken in addressing modern slavery for it to comply with the MSA. No part of the TISC provision compels business enterprises to take any action to address modern slavery, nor to ensure the effectiveness of potential steps taken.¹⁶⁵ While the Guidance caution against the option to not take any step to combat modern slavery, it does so with reference to the damage such inaction can do to the reputation of businesses and not to potential victims of human rights abuses.¹⁶⁶

¹⁵⁹ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 10.

¹⁶⁰ David Monciardini, Nadia Bernaz and Alexandra Andhov, "The Organizational Dynamics of Compliance with the UK Modern Slavery Act in the Food and Tobacco Sector", *Business & Society*, Volume 60, Issue 2 (2021), p. 326-327.

¹⁶¹ Mantouvalou, "The UK Modern Slavery Act 2015 Three Years On", p. 1043.

¹⁶² Blindell, "Mandatory CSR Disclosure: An Empirical Analysis of the UK Modern Slavery Statements", p. 343.

¹⁶³ Lisa K.E Hsin, Steve New, Irene Pietropaoli and Lise Smith, *Effectiveness of Section 54 of the Modern Slavery Act: Evidence and Comparative Analysis*, Modern Slavery and Human Rights Policy and Evidence Centre, London, 2021, p. 5.

¹⁶⁴ *Ibid.*

¹⁶⁵ Lindsay, Kirkpatrick and En Low, "Hardly Soft Law: The Modern Slavery Act 2015 and the Trend Towards Mandatory Reporting on Human Rights", p. 31.

¹⁶⁶ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 6.

Overall, when assessing what the reporting requirement within the TISC provision means for business enterprises (that are fulfilling the requirements for a ‘commercial organisation’) in practice, the only mandatory reporting requirements for business enterprises is that they shall 1) publish a modern slavery and human trafficking statement on their website (Section 54(1) and 54(7)), 2) have the statement signed off by a director (Section 54(6)(a)) and 3) in the case that no steps have been taken to eradicate modern slavery, to include this in the statement (Section 54(4)(b)). The other requirements under Section 54 simply constitute suggestions and are therefore not mandatory.¹⁶⁷

5.2.2 Monitoring of compliance under Section 54

The legal text of the TISC provision does not include any information related to how business compliance with the provision shall be monitored. Therefore, to reach an understanding of how compliance with the TISC provision is intended to be monitored, it is needed to turn to the Guidance. When it comes to a potential failure of business enterprises to comply with the provision, the Guidance states that:

It will be for consumers, investors and Non-Governmental Organisations to engage and/or apply pressure where they believe a business has not taken sufficient steps.¹⁶⁸

The UK government’s intention for civil society to constitute the primary actors for putting pressure on and holding to account non-compliant business enterprises was further stressed by the government in debates leading up to the enactment of the MSA.¹⁶⁹ The decision by the government to assume civil society the role as the sole monitoring body overseeing business compliance with the TISC provision has been regarded as “highly unusual” in the field of corporate regulation.¹⁷⁰

The task of civil society to monitor business compliance has faced several difficulties. To begin with, there is no central list stating which business enterprises that are covered by - and has to

¹⁶⁷ Blindell, “Mandatory CSR Disclosure: An Empirical Analysis of the UK Modern Slavery Statements”, p. 323.

¹⁶⁸ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 6.

¹⁶⁹ See statement by Karen Bradley, Parliamentary Under-Secretary of State for the Home Department in House of Commons Debate, 4 November 2014, Volume 587, Column 704.

¹⁷⁰ Hsin, New, Pietropaoli and Smith, *Effectiveness of Section 54 of the Modern Slavery Act: Evidence and Comparative Analysis*, p. 13.

report in line with – the TISC provision.¹⁷¹ The lack of information available to the public as to which business enterprises the TISC provision applies has hampered the ability of civil society and other actors to effectively monitor business compliance with the MSA.¹⁷² Secondly, up until March 2021, there had been no central repository where the slavery and human trafficking statements could be collected and opened for the public to scrutinise.¹⁷³ Instead, the task to gather statements was left to the voluntary commitment of non-governmental organisations (NGOs).¹⁷⁴ While the government now has established a modern slavery statement registry, the registry states that it is currently a “voluntary service” and that not all organisations have added their statements to the registry.¹⁷⁵ A third issue that hampers the monitoring of compliance with the MSA is the general unclarity within the definition of ‘commercial organisation’ in the TISC provision, as well as confusion as to which business enterprises are covered by this term. Section 54(12) defines a commercial organisation as a corporate body or a partnership “which carries on a business, or part of a business, in any part of the United Kingdom”.¹⁷⁶ There is however no further information in the MSA as to how this definition should be interpreted and what it means in practice. The phrase “carrying on a business” has been regarded as vague, imprecise, and as hindering consumers and NGOs from identifying which business enterprises the TISC provision applies to.¹⁷⁷ The Guidance does not bring any further clarity as to the meaning of ‘carrying on a business’ but refers loosely to the idea of using a “common sense approach” in determining its meaning in each individual case.¹⁷⁸

Furthermore, there are no requirements stated in the TISC provision as to how business enterprises shall track and monitor the steps they have taken to counteract modern slavery. In relation to the non-mandatory option of business enterprises to disclose information on their due diligence processes in accordance with Section 54(5)(c), the Guidance states – with reference to the UNGPs – that HRDD requires consultation with stakeholders in order to gain an understanding of how the business operations and supply chain structures affect their lives.¹⁷⁹

¹⁷¹ Mantouvalou, “The UK Modern Slavery Act 2015 Three Years On”, p. 1041.

¹⁷² Blindell, “Mandatory CSR Disclosure: An Empirical Analysis of the UK Modern Slavery Statements”, p. 321-322.

¹⁷³ Rusinova and Korotkov, “Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?”, p. 56.

¹⁷⁴ Ibid.

¹⁷⁵ Modern Slavery Statement Registry, “Find modern slavery statements”, UK government.

¹⁷⁶ Modern Slavery Act, Section 54(12).

¹⁷⁷ Rusinova and Korotkov, “Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?” p. 56.

¹⁷⁸ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 8.

¹⁷⁹ Ibid, p. 32.

In this way, the MSA has been viewed in legal doctrines as although implicitly encouraging not explicitly requiring business enterprises to consult with affected stakeholders.¹⁸⁰ While engagement with workers and trade unions is seen as essential for identifying modern slavery risks, particularly in the lower tiers of the supply chain, an assessment of statements made under the TISC provision by companies listed in the Financial Times Stock Exchange Index (FTSE 100) showed that less than 15 percent of the companies reported that they had engaged directly with workers or trade unions.¹⁸¹ Instead, many companies covered by the TISC provision have shown to rely heavily on social audits for monitoring, which is seen as an inadequate measure to identify labour abuse.¹⁸² As such, while the TISC provision requires business enterprises to disclose information on whether actions have been taken to mitigate risks of modern slavery, it does not oblige them to actively address such risks.¹⁸³

Conclusively, compliance with the TISC provision is neither monitored by the UK government nor by any other state-based oversight body. Instead, the task of monitoring business compliance under the MSA has been left to civil society.

5.2.3 Sanctions for non-compliance under Section 54

When it comes to the earlier sections of the MSA aimed at criminalising individuals there have been several criminal prosecutions.¹⁸⁴ Some of these prosecutions concern individuals who have supplied slave labour to companies.¹⁸⁵ However, when it comes to non-compliance of business enterprises under the MSA, there has (as of August 2022) been no single corporate prosecution.¹⁸⁶ Although the first six years of reporting under the MSA revealed that 40 percent of the applicable business enterprises did not comply with the TISC provision, there has been no single penalty for non-compliant business enterprises.¹⁸⁷

¹⁸⁰ Robert McCorquodale and Justine Nolan, “The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses”, *Netherlands International Law Review*, 68 (November 2021), p. 472.

¹⁸¹ Business & Human Rights Resource Centre, *FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action*, 2018, p. 16.

¹⁸² Business & Human Rights Resource Centre and Modern Slavery Registry, *Modern Slavery Act: Five years of reporting: Conclusions from monitoring corporate disclosure*, p.7.

¹⁸³ Virginie Rouas, *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries*. (London: University of London Press, 2022), p. 300.

¹⁸⁴ See for example: BBC News, “Sport Direct modern slavery brothers jailed”, BBC, 23 January 2017; Lin Taylor, “Man jailed for trafficking, exploiting workers in UK laundry”, *Reuters*, 28 September 2017.

¹⁸⁵ Katherine Tyler, “UK: The Modern Slavery Act 2015 – What you need to know”, OneTrust DataGuidance: Regulatory Research Software, August 2022.

¹⁸⁶ *Ibid.*

¹⁸⁷ Business & Human Rights Resource Centre and Modern Slavery Registry, *Modern Slavery Act: Five years of reporting: Conclusions from monitoring corporate disclosure*, p. 2.

The absence of sanctions for non-compliance by business enterprises can be understood from the legislative background of the TISC provision; namely from the fact that the government – despite extensive consultations with stakeholders – decided to reduce the regulatory burden of business enterprises when designing Section 54.¹⁸⁸ Contrary to the criminalisation of modern slavery applicable to individuals in the early sections of the MSA, when it comes to business enterprises the TISC provision includes a soft law approach with an absence of hard legal sanctions.¹⁸⁹ Section 54(11) holds that the duties imposed on commercial organisations under the TISC provision are enforceable by the Secretary of State who can bring civil proceedings in the High Court for an injunction if a business enterprise fails to comply with the provision.¹⁹⁰ The Guidance states that failure to comply with such an injunction is punishable by an unlimited fine and underlines the reputational damage that business enterprises risk facing if they fail to comply with the TISC provision.¹⁹¹ However, according to the most recent evaluation reports made on the TISC provision there has been no single injunction or administrative penalty for business enterprises that are non-compliant with Section 54.¹⁹²

To conclude: except for Section 54(11) which can be used to compel a business enterprise to comply with the act, the MSA does not impose any penalties for business enterprises that do not disclose transparency in their supply chains.¹⁹³

5.3 Summary

This chapter has attempted to provide an understanding of the obligations within Section 54 (the TISC provision) of the MSA and gain an understanding of how they have been applied in practice by limiting the scope of this assessment to three focus areas: reporting requirement, monitoring of compliance and sanctions for non-compliance. The next chapter will look closer at the findings from these focus areas of the MSA by comparing them to the corresponding principles within the UNGPs as presented in Chapter 4.

¹⁸⁸ Hsin, New, Pietropaoli and Smith, *Effectiveness of Section 54 of the Modern Slavery Act: Evidence and Comparative Analysis*, p. 8.

¹⁸⁹ Mantouvalou, “The UK Modern Slavery Act 2015 Three Years On”, *The Modern Law Review*, p. 1038.

¹⁹⁰ Modern Slavery Act, Section 54.

¹⁹¹ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 6.

¹⁹² Hsin, New, Pietropaoli and Smith, *Effectiveness of Section 54 of the Modern Slavery Act: Evidence and Comparative Analysis*, p. 11; Business & Human Rights Resource Centre and Modern Slavery Registry, *Modern Slavery Act: Five years of reporting: Conclusions from monitoring corporate disclosure*, p. 2.

¹⁹³ Mantouvalou, “The UK Modern Slavery Act 2015 Three Years On”, p. 1039.

6. Comparative analysis of the UK Modern Slavery Act and the UN Guiding Principles on Business and Human Rights

This chapter will present the comparative analysis between the MSA and the UNGPs. The chapter is divided into three sections that each aim to relate to the three focus areas of the thesis (i.e., reporting requirement, monitoring of compliance, and sanctions for non-compliance) and end with a section that summarises the findings of the comparative analysis.

6.1 Reporting and communication

We have seen that while the MSA states that a modern slavery statement should include the steps a commercial organisation has taken “in any of its supply chains”¹⁹⁴, it does not specify how far down the supply chain a business enterprise should take responsibility for counteracting modern slavery. While the Guidance of the TISC provision states that business enterprises should engage their lower tier suppliers “where possible”¹⁹⁵, it does not provide any further guidance regarding how “where possible” should be understood or what steps business enterprises should take in cases where lower tier engagement is not possible. Consequently, we have seen that it is common that business enterprises only include reporting on suppliers within the first tier of the supply chain, despite the fact that risks of human rights abuses increase beyond the second tier.¹⁹⁶ Indeed, the complexity of the supply chain structure is often used as an argument by business enterprises for not conducting HRDD throughout their whole supply chain when reporting under the MSA.¹⁹⁷ While the difficulty of supply chain structures is acknowledged within the commentary to Principle 17 of the UNGPs, the commentary however states that in cases where business enterprises find it difficult to conduct HRDD across all their value chains, they should “identify general areas” with the highest risk of human rights impacts and prioritise those areas when conducting HRDD.¹⁹⁸ As such, the complexity of the supply chain structure alone cannot be used by business enterprises as a legitimate argument for not

¹⁹⁴ Modern Slavery Act, Section 54(a)(i).

¹⁹⁵ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 32.

¹⁹⁶ Martin-Ortega, “Due Diligence, Reporting and Transparency in Supply Chains: The United Kingdom Modern Slavery Act” p. 118; Blindell, “Mandatory CSR Disclosure: An Empirical Analysis of the UK Modern Slavery Statements”, p. 336.

¹⁹⁷ Martin-Ortega, “Due Diligence, Reporting and Transparency in Supply Chains: The United Kingdom Modern Slavery Act”, p. 117-118.

¹⁹⁸ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 18.

conducting HRDD throughout their supply chains under the UNGPs. Still, in the case of the MSA, we have seen that the loosely defined requirements within the TISC provision have allowed business enterprises to use the complexity of the supply chain as an argument for not complying fully with the MSA.¹⁹⁹

Principle 21(b) of the UNGPs states that business enterprises' communications on how they address their human rights impacts should provide sufficient information to "evaluate the adequacy" of their response.²⁰⁰ However, interpreting the practical meaning of Section 54(4)(b), we have seen that it is enough for business enterprises to produce a modern slavery statement stating that no action has been taken in addressing modern slavery for them to legally comply with the MSA. Furthermore, we have seen that there is no part of the TISC provision that requires business enterprises to take any concrete action to address modern slavery, nor to ensure the effectiveness of potential steps taken. While Section 54(5) provides a list of what information a modern slavery statement may include, it does not state any mandatory requirement as to what a statement shall cover. Consequently, with the absence of clear and tangible reporting requirements within the MSA, the ability to evaluate the adequacy of business enterprises' response to human rights impacts is questionable.

Principle 3(d) of the UNGPs underlines that states should "encourage, and where appropriate require, business enterprises to communicate *how* they address their human rights impacts".²⁰¹ The commentary to the principle further underlines that laws enforced by the state in this area "can usefully clarify *what* and *how* businesses should communicate".²⁰² Contrary to the meaning expressed in Principle 3(d), the loosely defined reporting requirements of the MSA has shown to allow business enterprises to display parts of their business activities which puts them in a favourable light rather than demonstrating the actual steps taken to address human rights impacts.²⁰³ The responsibility of business enterprises to communicate "*how*" they address

¹⁹⁹ Martin-Ortega, "Due Diligence, Reporting and Transparency in Supply Chains: The United Kingdom Modern Slavery Act", p. 117-118.

²⁰⁰ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, p 23.

²⁰¹ Ibid, p. 4 (emphasis added).

²⁰² Ibid, p. 6 (emphasis added).

²⁰³ Blindell, "Mandatory CSR Disclosure: An Empirical Analysis of the UK Modern Slavery Statements", p. 343; Hsin, New, Pietropaoli and Smith, *Effectiveness of Section 54 of the Modern Slavery Act: Evidence and Comparative Analysis*, p. 5.

their human rights impacts is further stressed in Principle 21 of the UNGPs.²⁰⁴ We have seen that the Interpretive Guide emphasises that Principle 21 is first and foremost about business enterprises communicating their general approaches to addressing human rights risks and not about disclosing “all the issues identified” or steps taken to mitigate “every risk”.²⁰⁵ In this manner, the UNGPs can be seen as emphasising the importance of business enterprises’ HRDD processes to include information on *how* human rights abuses are being identified and addressed rather than requiring business enterprises to disclose every action they have taken towards addressing human rights risks. As such, the general focus of the UNGPs can be seen as being on the outcome rather than the output of business enterprises’ HRDD process. In other words, the UNGPs can be seen as emphasising the importance of assessing *how* human rights impacts are being addressed rather than *what* actions that have been taken or not. Conversely, with the MSA’s requirement on business enterprises to report on “all the steps”²⁰⁶ taken to combat modern slavery while lacking requirements on including any information on how human rights risks are being addressed, the focus of the MSAs can, contrary to the UNGPs, be seen as on outputs rather than outcomes.

6.2 Monitoring and oversight mechanisms

Principle 21 of the UNGPs states that business enterprises’ communications on how they are addressing human rights impacts should be “accessible to its intended audiences”.²⁰⁷ In the manner in which Section 54(1) of the MSA requires business enterprises to publish their statements on their website, the MSA can be seen as complying with Principle 21 of the UNGPs on a technical level. However, the UK government has not provided a list to the public stating which business enterprises that are covered by the TISC provision and had not until March 2021 established a central repository for the slavery and human trafficking statements.²⁰⁸ As such, the information available to the public as to which business enterprises are covered by (and must report in line with) the TISC provision has in practice been limited. Limited access to information has showed to hamper the ability of civil society to monitor business enterprises’

²⁰⁴ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p 23 (emphasis added).

²⁰⁵ The Office of the High Commissioner for Human Rights (OHCHR), *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, p. 58.

²⁰⁶ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 10.

²⁰⁷ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p 23.

²⁰⁸ Mantouvalou, “The UK Modern Slavery Act 2015 Three Years On”, p. 1041; Rusinova and Korotkov, “Mandatory Corporate Human Rights Due Diligence Models: Shooting Blanks?”, p. 56.

responses to human rights impacts, in turn aggravating the transparency of the business supply chains.²⁰⁹

Principle 5 of the UNGPs outlines that states should exercise “adequate oversight” when they privatise the delivery of services that may impact upon the enjoyment of human rights.²¹⁰ As such, the duty of the state to exercise adequate oversight can here be understood as only applying to business enterprises that provide services to the state. While there is an absence of a list of business enterprises covered by the TISC provision, we know that large business enterprises that have reported under the TISC provision are providing services to the UK government (e.g., Aramark, Section 5.2.1). Thus, we can conclude that, in line with Principle 5, the UK state has a duty to exercise adequate oversight over (at least some of the) business enterprises covered by the TISC provision. The commentary to Principle 5 further states that oversight should be exercised through the provision of “adequate independent monitoring and accountability mechanisms”.²¹¹ However, as we have seen, business enterprises’ compliance with the MSA is neither monitored by the UK government nor by any other state-based oversight body. As such, the UK government’s intention for consumers, investors, and NGOs to constitute the sole oversight actors applying pressure to business enterprises that they believe as being non-compliant with the TISC provision cannot be seen as compliant with Principle 5 of the UNGPs.

Furthermore, we have seen that Principle 20(b) of the UNGPs emphasises that business enterprises’ tracking of their human rights impacts should include feedback from affected stakeholders and that business enterprises should make particular efforts to evaluate their impact on vulnerable groups. Although the Guidance to the TISC provision acknowledges the importance of including stakeholders in the HRDD process, since the MSA includes no mention of any monitoring requirements, there is nothing in the MSA that obliges business enterprises to practice a HRDD process that includes “meaningful engagement, involvement and dialogue”²¹² with stakeholders as envisioned in the preparatory work of the UNGPs.

²⁰⁹ Blindell, “Mandatory CSR Disclosure: An Empirical Analysis of the UK Modern Slavery Statements”, p. 321-322.

²¹⁰ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 8.

²¹¹ Ibid.

²¹² Human Rights Council, *Business and Human Rights: Further steps toward operationalization of the “protect, respect and remedy” framework*, p. 17.

6.3 Sanctions and accountability

Principle 1 of the UNGPs requires states to take appropriate steps to “punish and redress” human rights abuses within their territory and/or jurisdiction through “effective policies, legislation, regulations and adjudication.”²¹³ While business enterprises that do not comply with the MSA should be held accountable in accordance with Section 54(11) of the MSA, the fact that there yet have been no civil proceedings for non-compliant business enterprises inevitably puts the effectiveness of the MSA as a legislation to “punish and redress” human rights abuses into question. Furthermore, while Principle 1 requires states to take “appropriate steps”²¹⁴ in fulfilling their duty to protect in accordance with the UNGPs, the Guidance to the TISC provision instead spells out that it will be for consumers, investors, and NGOs to “apply pressure where they believe a business has not taken sufficient steps”²¹⁵ and not the state itself. Due to the generally weak regulatory mechanisms within the MSA as well as the absence of enforcement of these, the UK State can be seen as evading its duty to take appropriate steps in its protection against human rights abuses in accordance with Principle 1 of the UNGPs.

We have seen that a guiding document to the UNGPs clarifies that the state duty to protect includes setting clear expectations that companies within their territory and/or jurisdiction respect human rights “throughout their operations”, including “in every country and context in which they operate”.²¹⁶ The guidance further states that while states are not required to regulate the extraterritorial activities of business enterprises within their jurisdiction, they are however not prohibited from doing so as long as there is a recognised “jurisdictional basis” for this.²¹⁷ An example of such a jurisdictional basis that can be understood from the guidance is ‘direct extraterritorial jurisdiction’ which can be enacted by states to ensure that domestic companies respect human rights in their business operations abroad.²¹⁸ As such, while the UK is not required under international law to protect against human rights abuses overseas, the UK government nevertheless made the decision to enact a law that can be seen as constituting an extraterritorial jurisdiction in accordance with Principle 1 and which thus puts an expectation

²¹³ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 3.

²¹⁴ Ibid.

²¹⁵ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 6.

²¹⁶ The Office of the United Nations High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, p. 19.

²¹⁷ The Office of the United Nations High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, p. 21.

²¹⁸ Ibid.

on business enterprises to respect human rights throughout their business operations overseas. Indeed, the TISC provision can be seen as having an extraterritorial scope in the sense that it covers the whole length of the business supply chain in the way it requires business enterprises to report on the steps they have taken to ensure that modern slavery is not taking place “in any of its supply chains”²¹⁹ as well as “in any part of its own business”²²⁰. As such, the TISC provision can be seen as committed to addressing human rights abuses overseas in line with Principle 1’s description of a direct extraterritorial jurisdiction. In this sense, since the TISC provision can be seen as constituting such extraterritorial jurisdiction while however not living up to Principle 1’s standards of an effective legislation in punishing and redressing human rights abuses, the UK State cannot be seen as fulfilling its duty to protect (in accordance with Principle 1) through the MSA.

6.4 Summary of findings

This chapter has shown that:

- i. While the MSA to some extent complies with the UNGPs technically (by complying to the UNGPs strictly on paper but without committing to fulfil their deeper meaning and purpose), due to its loosely defined and contradictory reporting requirements, such compliance does not translate into business enterprises taking actual steps to address risks of modern slavery in practice in accordance with Principle 17 of the UNGPs.
- ii. The MSA does not reflect the spirit of the UNGPs in the way in which it focuses on outputs (*what* actions business enterprises have taken or not) rather than on outcomes (*how* business enterprises address human rights impacts) in contrast to Principle 3 and Principle 21 of the UNGPs. As such, the content of the MSA does not mirror the intent of the UNGPs.
- iii. The MSA does not require any involvement of affected stakeholders in the tracking of responses to human rights impacts despite this constituting an essential component of HRDD in accordance with Principle 20 of the UNGPs.
- iv. The absence of any state-based mechanism overseeing compliance within the MSA needed for the state to exercise adequate oversight over business compliance makes the MSA non-compliant with Principle 5 of the UNGPs. Moreover, due to the lack of enforcement of sanction mechanisms against non-compliant business enterprises within

²¹⁹ Modern Slavery Act, Section 54(4)(a)(i).

²²⁰ Ibid, Section 54(4)(a)(ii).

the MSA, the UK State does not fulfil its duty to provide an effective legislation to punish and redress human rights abuses in accordance with Principle 1 of UNGPs.

Conclusively, when it comes to its reporting requirement, the MSA can only be seen as technically compliant with the UNGPs in the way in which it fails to require business enterprises to address modern slavery in practice in accordance with Principle 17 (i) and focuses on outputs rather than outcomes in contrast to Principle 3 and Principle 21 (ii). When it comes to monitoring of compliance, the MSA fails to comply with the UNGPs in the way in which it does not require any involvement of affected stakeholders in the tracking process in accordance with Principle 20 (iii) and in which it includes no duty for the state to monitor business compliance with the MSA in accordance with Principle 5 (iv). Lastly, when it comes to sanctions for non-compliance, the MSA does not comply with the UNGPs in the sense that the MSA does not constitute an effective legislation for punishing and redressing human rights abuses in line with Principle 1 (iv). The next chapter will analyse these findings by adapting a postcolonial explanatory framework.

7. Postcolonial analysis

This chapter will discuss the findings from the comparative analysis between the MSA and the UNGPs presented in Chapter 6 and analyse these through a postcolonial explanatory framework that has been formed out of the theories within the theoretical framework. The chapter is divided into four sections, each representing one of the main findings derived from the comparative analysis (see Section 6.4). The chapter will end with a section on concluding remarks which summarises the main points of the postcolonial analysis.

7.1 (i) Technical rather than practical compliance

At first glance, the decision to translate the HRDD component of the soft law UNGPs into national hard law through the MSA can be seen as a significant step for the UK to take the lead in addressing modern slavery; a leading position which can be seen as of particularly symbolic importance for the UK in relation to its colonial past. However, the findings of this thesis shed another light on the MSA in the way they show that the MSA in practice does not require (but solely encourages) business enterprises to address modern slavery, which stands in contrast to both the aim of the MSA and the spirit of the UNGPs. For this reason, the good intention of the MSA can be seen as turned on its head.

Seeking instead to provide an alternative understanding of the MSA’s technical rather than practical compliance with the UNGPs, the MSA can from a postcolonial perspective be seen as a tool used by the UK to manage control over UK business enterprises’ activities overseas. Similar to how Walter Rodney described Britain’s use of colonial laws for exercising power over labour workers in African colonies from the “inside”²²¹, the enactment of the MSA can be seen as another form of law being used to uphold the same forms of colonial structures in a new global context. By bringing HRDD into national hard law through its own interpretation of the UNGPs, the UK government can set the boundaries of its business enterprises’ responsibilities while still to some extent complying technically with the UNGPs (e.g. in relation to Principle 3(a) regarding the duty of states to “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights.”²²²), creating a win-win situation for the UK State in terms of both political reputation and economic advancement. By looking at this situation by applying Eduardo Galeano’s idea of a civilising mission framed as a “blessing” by former capitalist power (which allows them to continue their imperialism of trade in previous colonies),²²³ the UK government’s formally well-intended aim with the MSA can be seen as a smokescreen which clouds the underlying political and economic interests that could be maintained through the enactment of the MSA. With the UK government emphasising the MSA as constituting “the first law of its kind in Europe” and “one of the first in the world” to address modern slavery,²²⁴ the enactment of the MSA can be seen as portrayed as a blessing to the world, while in practice however lacking teeth in doing what it was set out to do.

We remember that while Section 54(4)(a)(i) of the MSA states that a statement should include the steps a commercial organisation has taken to ensure that modern slavery is not taking place “in any of its supply chains”²²⁵, the Guidance to the MSA states that it is up to each business enterprise to determine how much detail it will provide in its modern slavery statement since this is dependent on “the complexity of its structure and supply chains”²²⁶. At the same time, we have seen that business enterprises use the complexity of their supply chain structures to

²²¹ Ibid.

²²² The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 4.

²²³ Galeano, *Open veins of Latin America: Five centuries of the pillage of a continent*, p. 207.

²²⁴ Home Office, “Historic law to end Modern Slavery passed”.

²²⁵ Modern Slavery Act, Section 54(4).

²²⁶ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 10.

argue for a justifiable reason for why they do not conduct HRDD throughout all their supply chains;²²⁷ an argument which however cannot be seen as a valid excuse for not conducting HRDD throughout the supply chain in accordance with Principle 17 of the UNGPs. Hence, the very argument for not complying with the MSA is embedded within the MSA itself. In this manner, the MSA can be seen as containing a legal loophole that provides space for business enterprises to not comply fully with the MSA without technically breaking the law. From Andre Gunder Frank's view of the unequal relationship of trade between strong developed countries in the Global North and weaker developing countries in the Global South, the UK government's inclusion of an embedded space for non-compliance in the MSA can be understood as deriving from a general interest of the UK State to maintain beneficial and profitable supply chain structures with countries (often former colonies) whose labour helps to uphold the UK's position in the world economy. In the same way as Galeano refers to international trade agreements as symbolic excuses for strong economic countries to maintain extractive and exploitative trade relationships with weaker economic countries through a postcolonial civilizing mission in disguise, the MSA can be seen as used by the UK State as a legal veil for portraying to combat modern slavery while in practice largely allowing business enterprises to continue business as usual.

7.2 (ii) Focus on outputs rather than outcomes

We have seen that the MSA requires business enterprises to report on “all the steps”²²⁸ (if any) taken to combat modern slavery while simultaneously lacking any reporting requirement related to how human rights risks are being addressed. Conversely, we have seen that the UNGPs underline that it is the question of *how* business enterprises are working to counteract human rights abuses that is essential to the HRDD process. As such, the focus of the UNGPs is on the outcomes (i.e., the results deriving from how business enterprises have adapted their operations in accordance with the HRDD process) which stands in contrast to the MSA's focus on outputs (i.e., what actions business enterprises have taken or not).

How can the MSA's lack of focus on outcomes be explained from a postcolonial perspective? Knowing that Principle 17 of the UNGPs emphasises that HRDD is about assessing actual and

²²⁷ Martin-Ortega, “Due Diligence, Reporting and Transparency in Supply Chains: The United Kingdom Modern Slavery Act”, p. 117-118; Monciardini, Bernaz and Andhov, “The Organizational Dynamics of Compliance with the UK Modern Slavery Act in the Food and Tobacco Sector”, p. 326-327.

²²⁸ Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 10.

potential human rights impacts, acting upon those impacts, tracking responses, and communicating how the impacts are being addressed,²²⁹ we also understand that for business enterprises to conduct HRDD implies a need for them to redirect their business operations away from solely profit maximisation towards risk assessments, monitoring, and reporting on human rights impacts. By adapting Immanuel Wallerstein's theory of the capitalist system, it is possible to gain an understanding of the MSA's absence of hard HRDD requirements. We recall that Wallerstein viewed the capitalist system as defined by the structural mechanisms which favour the process of endless accumulation while penalising actions within the system that are based on other motivations.²³⁰ This view can help us understand how today's business enterprises are incorporated into a system that favours capital accumulation and which neither appreciates nor values business operations aimed at addressing human rights impacts; this since such operations are based on motives other than profit maximisation. From this perspective, it is possible to understand that in this system there are no incentives for business enterprises to redirect their operations towards actions that do not aim to increase their economic profits. By designing the MSA in a manner that allows business enterprises to interpret it in a way that fits their own interests, the UK government can safeguard the continuous profit maximisation of business enterprises without necessarily taking any action to address modern slavery. As we have seen, the loosely defined reporting requirements of the MSA allow business enterprises to choose to put light upon only the parts of their operations which puts them in a favourable light rather than displaying the actual steps taken towards mitigating risks of adverse human rights impacts.²³¹ The focus on business enterprises' image can from Wallerstein's perspective be seen as an important aspect in upholding their economic and profit-driven business relationships. Such a focus can further be seen as reflected in the Guidance to the TISC provision, which emphasises the reputational damage business enterprises may face if they do not comply with the MSA,²³² rather than the damage that such non-compliance can do to victims of human rights abuses. Thus, in several ways, the MSA can be seen as safeguarding business enterprises' reputations above the rights of the labour workers in their supply chains.

²²⁹ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, p. 17.

²³⁰ Wallerstein, *World Systems Analysis: An Introduction*, p. 24.

²³¹ Blindell, "Mandatory CSR Disclosure: An Empirical Analysis of the UK Modern Slavery Statements", p. 343; Hsin, New, Pietropaoli and Smith, *Effectiveness of Section 54 of the Modern Slavery Act: Evidence and Comparative Analysis*, p. 5.

²³² Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 6.

7.3 (iii) Lack of involvement of affected stakeholders

We have seen that the commentary to Principle 17 of the UNGPs stresses that the HRDD process goes beyond simply identifying risks to the company itself to include risks to rights-holders.²³³ The importance of the inclusion of feedback from affected stakeholders when evaluating the impact of business enterprises' activities has further been stressed in Principle 20(b) of the UNGPs.²³⁴ Despite this, there is nothing in the MSA that obliges business enterprises to practice a HRDD process that involves engagement or dialogue with affected stakeholders. We have also seen how assessments of modern slavery statements have revealed poor engagement with workers or trade unions.²³⁵

From the perspective of Wallerstein's idea of the capitalist system, the lack of involvement of affected stakeholders in the HRDD process of business enterprises can be understood from the fact that such stakeholders represent interests (human rights) that stands in contrast to the interests of business enterprises (profit maximisation). By using Wallerstein's idea of the capitalist system as being dependent on how strong economic states exclude or circumvent actors that are hostile to their interests,²³⁶ the exclusion of the voices of affected stakeholders through the MSA can be understood as a way for the UK State to continue to pursue its trade interests at the expense of labour workers, whom often are in an economically dependent position in which they lack social protection and are able to do little to change their work situation. Similar to how Rodney emphasised Britain's use of colonial laws to put obstacles in the path of labour workers in their attempt to form trade unions,²³⁷ the UK government's choice to design the MSA in a way that excludes the involvement of workers and trade unions from the HRDD process can be seen as a contemporary regulatory strategy which reflects previous colonial power structures. Today, colonial power structures can be seen as recreated through the outsourcing of production to countries in which business enterprises can make use of cheap labour to maximise production through exploitative working conditions, and maintained by regulations such as the MSA, which – due to its either absent, weak or loosely defined requirements - allows for labour exploitation to prevail. Relating this context to Rodney's idea

²³³ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, p. 18.

²³⁴ *Ibid*, p 23.

²³⁵ Business & Human Rights Resource Centre, *FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action*, p. 16.

²³⁶ Wallerstein, *World Systems Analysis: An Introduction*, p. 24, 29.

²³⁷ Rodney, *How Europe Underdeveloped Africa*, p. 163.

of labour as being exploited, and materials as being extracted, from the “inside”²³⁸ of African colonies, it is possible to understand that today’s form of labour exploitation is not very different from the one that British trading companies took advantage of in British colonies in the early 19th century. Now, as then, such exploitation is made possible from the inside of countries located far away from the country that owns and controls the means of production, creating a geographical and perceived moral distance to the labour workers behind their products. In the same manner as Arghiri Emmanuel argued for such “exploitation at a distance” to be the result of structural (rather than merely accidental) mechanisms,²³⁹ it is possible to view the MSA as a contemporary form of structural mechanism which, through the way it is designed, allows for a continuation of exploitation at a distance. According to Emmanuel’s theory of unequal exchange, such mechanisms work to maintain wage inequalities, which in turn enables products to be produced by labour workers in one part of the world with salaries that are 30 times lower than the salaries of their counterparts in the Northern capitals.²⁴⁰ Thus, if we think of the MSA as one such mechanism, it is possible to understand how a will to maintain high production through low costs in non-Northern parts of the world constitutes an incentive for the UK State to ensure that any potential resistance or conflicting interest to such capital accumulation is either silenced or concealed. Designing the MSA in a way that does not require business enterprises to include affected stakeholders in evaluating their human rights impacts can be seen as a way for the UK State to achieve such a goal.

7.4 (iv) Absence of oversight and sanction mechanisms

We have seen that Principle 5 of the UNGPs outlines that states should exercise “adequate oversight” when they privatise the delivery of services that may impact upon the enjoyment of human rights;²⁴¹ a principle that applies to the UK State in relation to those business enterprises reporting under the MSA that provides services to the state. Despite this, this thesis has found that compliance with the MSA is neither monitored by any state-based nor other oversight body. Instead, the UK government has assigned the task of monitoring business compliance solely to NGOs, consumers, and investors.²⁴² Moreover, we know that Principle 1 requires states to take appropriate steps to punish and redress human rights abuses through effective legislation and

²³⁸ Ibid, p. 170-171.

²³⁹ Emmanuel, *Unequal Exchange: A Study of the Imperialism of Trade*, p. 264.

²⁴⁰ Ibid, p. 264.

²⁴¹ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, p. 8.

²⁴² Home Office, *Transparency in Supply Chains etc: A practical guide (Guidance issued under section 54(9) of the Modern Slavery Act 2015)*, p. 6.

adjudication.²⁴³ At the same time, we have seen that not a single sanction has been used against a business enterprise despite widespread non-compliance with the MSA since its enactment.²⁴⁴

The UK government's decision to distance itself from the monitoring of business compliance within the MSA can from Frank's theory of development of underdevelopment be understood as an underlying will by the UK as a developed, capitalist state ('metropole') to uphold its economic interests by maintaining strategic business relationships with developing countries ('satellites'), from which surplus value can be generated and transferred back to the UK. By organising the production of goods in this manner, Frank's theory can be used to explain how labour workers in the Global South are used to uphold the economic interests of the UK State through the MSA. The economically dependent and vulnerable situation of these labour workers can through Frank's theory be seen as of strategic importance for capitalist metropolises such as the UK to maintain in the way it benefits their economic development. Putting too much pressure on business enterprises to redirect their focus away from profit maximising towards addressing human rights impacts could, in accordance with Wallerstein's capitalist system theory, risk to interrupt the flow of "endless"²⁴⁵ capital accumulation on which business enterprises are dependent and which constitute a central factor in the global economic competition between countries today. The importance of maintaining endless capital accumulation could further explain the lack of motivation by the UK government to provide information to the public as to which business enterprises the TISC provision applies to, as well as the fact that it took the government six years after the enactment of the MSA to establish a central repository for modern slavery statements.

A lack of motivation by the UK government is further apparent if we turn to the absence of sanctions against non-compliant business enterprises within the MSA. Recalling the fact that the UK government initially had no plan to include the TISC provision in the MSA,²⁴⁶ the government's incentive for applying pressure to business enterprises in the first place can be seen as weak. Once the government - after pressure and convincement from civil society -

²⁴³ The Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, p. 3.

²⁴⁴ Business & Human Rights Resource Centre and Modern Slavery Registry, *Modern Slavery Act: Five years of reporting: Conclusions from monitoring corporate disclosure*, p. 2; Hsin, New, Pietropaoli and Smith, *Effectiveness of Section 54 of the Modern Slavery Act: Evidence and Comparative Analysis*, p. 11.

²⁴⁵ Wallerstein, *World Systems Analysis: An Introduction*, p. 24.

²⁴⁶ Lindsay, Kirkpatrick and En Low, "Hardly Soft Law: The Modern Slavery Act 2015 and the Trend Towards Mandatory Reporting on Human Rights", p. 30.

decided to include the TISC provision in the MSA, it did so with a reduced regulatory burden on business enterprises (compared to individuals).²⁴⁷ Moreover, while Section 54(11) of the MSA can be used to punish and redress non-compliant business enterprises, it has not been used.²⁴⁸ The generally weak enforcement of the MSA and absence of action from the UK government when it comes to punishing and redressing non-compliant business enterprises can from Wallerstein's perspective be understood as a conscious move by the UK State to uphold the structures of the capitalist system. In the same way as Wallerstein emphasises that beneficiaries of the capitalist system will struggle to maintain the "status quo" of the system,²⁴⁹ the UK government's lack of action, motivation, and enforcement regarding the MSA can be understood as a strategy by the State to maintain its strategic trade relationships and as far as possible carry on business as usual.

7.5 Concluding remarks

This chapter has attempted to analyse the MSA's level of compliance with the UNGPs from a postcolonial perspective. The analysis shows that by setting the terms for which requirements the MSA should include or not, as well as determining the level of detail of those requirements, the UK government can decide just how far UK business enterprises' responsibility should stretch, while simultaneously creating space for business enterprises to interpret the MSA in a manner which fits their own interests. By designing the MSA in a way that favours profit maximisation and business reputation over addressing human rights impacts in practice, the government can make use of the MSA to exercise control over the regulation of UK business activities in countries far away from the UK under the legal veil of the MSA. Through the establishment of weak monitoring and sanction mechanisms, the UK government has further designed the MSA in a way that excludes the voices of affected stakeholders and their ability to receive redress for human rights abuses. By exercising indirect control over the conditions of labour workers in offshore factories in this way, the MSA can be used by UK State to uphold and retain colonial power structures in a manner which contradicts its mission to combat modern slavery.

²⁴⁷ Whiting, "Modern Slavery Bill – Social Media Push"; Hsin, New, Pietropaoli and Smith, *Effectiveness of Section 54 of the Modern Slavery Act: Evidence and Comparative Analysis*, p. 8.

²⁴⁸ Business & Human Rights Resource Centre and Modern Slavery Registry, *Modern Slavery Act: Five years of reporting: Conclusions from monitoring corporate disclosure*, p. 2; Katherine Tyler, "UK: The Modern Slavery Act 2015 – What you need to know", OneTrust DataGuidance: Regulatory Research Software, August 2022.

²⁴⁹ Wallerstein, "Underdevelopment and Its Remedies", p. 358.

8. Conclusion, contribution, and future research

This final chapter will present the conclusions drawn from the findings of the thesis. The chapter will end with a section aimed at stressing the contribution of the thesis to previous research and will also suggest future research considerations within the area.

8.1 Conclusion

The purpose of this thesis has been to examine if a potential non-compliance between the MSA and the UNGPs can be explained by postcolonial power structures. Through a comparative analysis between the MSA and the UNGPs, the thesis showed that while the MSA to some extent can be seen as technically compliant with the UNGPs when it comes to the area of reporting requirement, it does not translate into business enterprises taking actual steps to address risks of modern slavery in line with the HRDD process described in the UNGPs. Moreover, in the way in which reporting within the MSA focuses on outputs rather than outcomes, it fails to mirror the intent and spirit of the UNGPs. When it comes to monitoring of compliance, the MSA's absence of oversight mechanisms and lack of requirements in involving affected stakeholders in the tracking process fails to live up to the UNGPs. Lastly, in terms of sanctions for non-compliance, the MSA fails to live up to the standard of an effective legislation in accordance with the UNGPs due to its weak regulatory requirements and lack of enforcement of sanction mechanisms. Thus, the thesis has shown that while the enactment of the MSA was hailed by the UK government as a groundbreaking measure for combatting modern slavery, in practice the act has shown to lack teeth in doing what it was set out to do.

By using a postcolonial explanatory framework, the thesis has argued that the MSA's non-compliance with the UNGPs can be explained by the way in which the MSA is designed and applied in practice to uphold colonial power structures. The loosely defined and contradictory reporting requirements within the MSA have shown to create a legal loophole that allows business enterprises to pick and choose the type and amount of information to disclose to the public in a manner that favours business enterprises' reputation and profit maximisation above addressing human rights impacts; a fact which stands in direct contradiction to the spirit and intent of the UNGPs. The prioritisation of economic profits above ensuring the rights of labour workers within the MSA has in this thesis been explained as deriving from an interest by the UK State to maintain economic ties with lower-income countries to uphold a continuous flow of economic surplus to the UK through an unequal dependency relationship which resembles

colonial power structures. Such a relationship has been explained as dependent on an unequal economic exchange which in this thesis is understood as UK business enterprises' process of offshoring their production of goods to lower-income countries where they can take advantage of cheap labour to generate an economic surplus which is exported back to the UK. In this manner, UK business enterprises can maximise their economic profits at the expense of the rights of the labour workers in lower-income countries. By designing the MSA in a way that excludes the involvement of affected stakeholders from the process of tracking human rights impacts, the thesis has argued for the MSA to be used as a mechanism to exclude the voices of labour workers and their ability to claim their human rights to be respected and prioritised over UK business enterprises' economic interests. From a postcolonial perspective, the UK State can in this manner be seen as upholding former colonial power structures by using its own domestic legislation (MSA) to exercise indirect control over the rights of labour workers in offshore UK factories. The absence of oversight and sanction mechanisms and the UK government's lack of action and motivation related to the enforcement of the MSA have been explained as related to an interest by the UK State to maintain a status quo in terms of its strategic and profitable trade relationships with lower-income countries. As such, the UK government's formally well-intended aim with the MSA can be seen as a smokescreen that clouds the underlying political and economic interests that can be maintained through the enactment of the MSA. In this way, the MSA can be seen as used by the UK State as a legal veil for portraying to combat modern slavery while however largely allowing colonial power structures to prevail and business operations to continue as usual.

8.2 Contribution and future research considerations

The hope is for the findings of this thesis to assist in illuminating how colonial power structures can take new forms in today's global economic contexts and how regulations such as the MSA can be used as a tool to uphold these structures at the expense of the human rights of labour workers in business supply chains. The findings of the thesis confirm the risk of business enterprises conducting a strategic rather than substantial implementation of HRDD emphasised in previous research.²⁵⁰ The findings are further in line with previous studies that have questioned the effectiveness of national HRDD legislations in strengthening CSR and

²⁵⁰ Fasterling and Demuinck, "Human Right in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights", p. 799.

addressing labour exploitation.²⁵¹ By assessing the MSA's level of compliance with the UNGPs, this thesis has contributed to supporting the findings of previous research that found the Australian Modern Slavery Act's modern slavery statements to reiterate colonial relations of power;²⁵² this by showing how similar patterns can be found in the UK's modern slavery legislation while using the UNGPs as another lens for analysing postcolonial power structures.

While this thesis has focused on analysing the applicable law ('de lege lata') of the MSA, the findings of the thesis can be useful in complementing other studies and evaluations that are examining the MSA from a 'de lege feranda' perspective to evaluate how the act could be designed to reach an increased coherence between its aim and practical use without colonial implications. Moreover, since the thesis has analysed the MSA's compliance with principles within the first and second pillar of the UNGPs and found the MSA's ability to effectively address human rights abuses to be weak and affected stakeholders to be left out of the HRDD process, future studies can usefully study the MSA's level of coherence with the third pillar of the UNGPs which concerns access to remedies for victims of human rights abuses.

²⁵¹ Delalieux and Moquet, "French law on CSR due diligence paradox: The institutionalization of soft law mechanisms through the law", p. 137-138; Koekkoek, Marx and Wouters, "Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains", p. 527-528. For labour exploitation in particular, see: Nolan, "Chasing the next shiny thing: Can human rights due diligence effectively address labour exploitation in global fashion supply chains?", p. 9-10; Aronowitz, "Regulating business involvement in labor exploitation and human trafficking", p. 159.

²⁵² Richards, "Risk, Reporting and Responsibility: Modern Slavery, Colonial Power and Fashion's Transparency Industry", p. 57.

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