

The United Nations Guiding Principles on Business and Human rights: A normative account of the business and human rights norm in the Malawian sugar industry

By

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Declaration

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Abstract

This study delves into the business and human rights norm that in recent years has been drawn ever closer to center of non-state, and particularly transnational corporations (TNCs), governance debates. To date, the United Nations' *Guiding Principles on Business and Human Rights* (GPs) endures as the most authoritative text ascribing states and business enterprises with their respective responsibilities in relation to business and human rights. In the time since the GPs were endorsed by the United Nations Human Rights Council in 2011 it has been cited by enumerable state and non-state corporate governance, due diligence, and policy recommendations and frameworks. These efforts have been made with the intention aligning corporations' internal governance structures to international best practice. The GPs and its recommendations remain voluntary; nevertheless, this study accounts for the normative contribution it has imprinted despite having no legal enforcement mechanisms. To facilitate this, International Norm Theory's postulations and hypothesis on international norm dynamics are instituted as this study theoretical lens. This lens is applied to a case study of the Malawian sugar industry that sees both the Government of Malawi (GoM) and the principle corporate actor in this space, Illovo Malawi Limited, participating in processes that intended to implement the GPs. The justification for these actions fits firmly in the context of the Water-Food-Energy Nexus that describes the recent spike in global demand and investment in agricultural land and inputs. Thus, the GoM and Illovo Malawi have actively sort to counter the negative characteristics that has led to this wave of land investments being termed 'land grabs.' Through these efforts the domestic salience of the business and human rights norm can be measured. Moreover, its presence in the Malawian context proves to be an opportunity to reveal some challenges that a step beyond the GPs would need to consider and overcome for the business and human rights norm to be meaningfully internalized by business corporations.

Opsomming

Hierdie studie delf in die besigheid en mense regte norm in wat in onlangse jare so al nader aan die middel van nie-staat, en spesifieke transnasionale korporasies (TNKs), bestuurs besprekings is. tot op datum, die Verenigde Nasies se *Guiding Principles on Business and Human Rights (GPs)* verduur as die mees gesaghebbende staat en besigheid ondernemings met hulle verskillende verantwoordelikhede in verhouding met besigheid en mense regte. Gedurende die tyd sedert die GP se goedkeuring deur die Verenigde Nasies Mense Regte Raad in 2011 het die verwysings deur ontelbare staat en nie-staat korporasies bestuur omsigtigheid en polis voorstelle en raamwerk, wat bedoel is om korporasies se interne bestuur strukture op te stel tot internasionale beste praktyk gemaak. Die GP en hulle voorstelle bly vrywillig, maar dit het tog die standaard stempel wat dit ingebring het ten spyte van dat daar geen wettige handhawing meganismes in plek is nie geword. Om dit te fasiliteer word die Internasionale Norm Teorie se vooropstellings en hipotese op internasionale norm dinamika gebruik as die studie se teoretiese lens. Die lens word toegepas by n studie van die Malawiese suiker industrie wat toesien dat albei die Regering van Malawie en die hoof korporatiewe deelneemer in die spasio, Illovo Malawi Limited, deelneem in prosesse wat bedoel is om die GP te implementeer. Die regverdeding vir die aksies sit stewig in die konteks van die Water-Kos-Energie Band wat die onlangse piek in globale aanvraag en beleggings in, vir landbou grond en insette beskryf. Dus die Regering van Malawi en Illovo Malawi het aktief begin om die negatiewe aspekte op te neem wat gelei het tot die golf van grond beleggings genoem “grond vergrype”. Deur hierdie pogings word die binnelandse opvallendheid van besigheid en mense regte norm gemeet. Verder meer, die teenwoordigheid in die Malawiese konteks bewys om n geleentheid te openbaar in sekere uitdagings wat n stap buite die GPs sou oorweeg en oorkom om die besigheid en mense regte norm te internaliseer in besigheid korporasies.

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List of abbreviations

ADMARC	Agricultural Development and Marketing Corporation
ASWAp	Agricultural Sector Wide Approach
AU	African Union
CAADP	Comprehensive African Agricultural Development Programme
DCGL	Dwangwa Can Growers Ltd
DFID	Department for International Development
DPP	Democratic People's Party
DWASCO	Dwangwa Sugar Corporation
EPR	Economic Recovery Plan
EU	European Union
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
FISP	Farm Input Subsidy Programme
GBI	Green Belt Initiative
GoM	Government of Malawi
GPs	Guiding Principles on Business and Human Rights
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMF	International Monetary Fund
INGOs	International Non-Governmental Organization
IR	International Relations
KCGL	Kasinthula Cane Growers Ltd
LSLBI	Large-Scale Land-Based Investments
MCP	Malawian Congress Party
MDGs	Millennium Development Goals
MGDs	Malawi Growth and Development Strategy
MNLP	Malawian National Land Policy
NAF	New Alliance Analytical Framework for Land-Based Investments in African
NAP	National Agricultural Policy
NEPAD	New Partnership for Africa's Development
NES	National Export Strategy

NFS	National Fertilizer Strategy
NGOs	Non-Governmental Organization
NIEO	New International Economic Order
ODEC	Organisation for Economic Cooperation and Development
SOMO	Centre for Research on Multinational Corporations
SPP	Starter Pack Programme
SRSG	Special Representative of the United Nations Secretary-General
SSA	Sub-Saharan Africa
SSAu	Smallholder Sugar Authority
SUCOMA	Sugar Corporation of Malawi
TNCs	Transnational Corporations
UDF	United Democratic Front
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNCTAC	United Nations Commission on Transnational Corporations
UNGC	United Nations Global Compact
UNHRC	United Nations Human Rights Council
US	United States of America
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
WEF	World Economic Forum
WFEN	Water-Food-Energy Nexus

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1. Chapter one: Introduction

1.1. Study Overview

International and moral political theorists and philosophers have steadily extended their interests into the correlations between international law, collective moral responsibility and agency, the ethics of global governance, the nexus between sovereignty and human rights, and the relationship between human rights and human rights responsibilities (Karp, 2014:1). In this modern age, this has meant these considerations have given much attention to the conduct of agent's other than the state. Concurrently International Relations (IR) scholars have continued long-standing debates that concern the position, scope and role of these non-state actors. However, in these new discussions questions have been raised that scrutinise the orthodox rights and responsibilities of non-state entities in global politics (Avant, Finnemore and Sell, 2010).

Although there has been considerable interest in these and parallel topics, few theoretical discussions in IR scholarship account and explain why and how human rights are being internalised by non-state actors. This research study seeks to address this deficiency by incorporating and enacting International Norm Theory literature and analysis to account for the responsibility for human rights of non-state actors, using transnational corporations (TNCs) as an example. This is appropriate since a policy agenda has emerged that has emboldened international human rights legal and advocacy networks to expect more in the way human rights responsibility from non-state actors. Although this agenda has been developed along many avenues the most conspicuous manifestation of this agenda in recent years has been done by John Ruggie (Mantillia, 2009; Jägers, 2011; Blitt, 2012; Deva, 2012; Ruggie, 2013; Karp, 2014).

In 2005, Ruggie was appointed as the Special Representative of the United Nations Secretary-General (SRSG). Six years later the SRSG produced the *Guiding Principles on Business and Human Rights* (hereafter referred to as the GPs), which was universally endorsed by the United Nations Human Rights Council (UNHRC) in 2011. The efforts which formulated the GPs involved consultations across five continents, extensive research, input from local communities and firms, and pilot projects to test key aspects of the GPs. The extent of this process helps the GPs achieve unprecedented endorsement and made it the first set of specific set of standards focused on business and human rights that have been endorsed by the United Nations (UN). Moreover, it remains the only normative text endorsed by the council and commission that

governments did not negotiate themselves (Ruggie, 2014:5). The GPs fall well short of constituting a comprehensive regime of human rights that govern business and human rights; nevertheless, its rapid uptake and implementation into international and national standard-setting authorities, numerous industries business policies, and its use as an advocacy tool by worker's and non-governmental organisations justify its notoriety.

It is within this context that this study will conduct its inquest. Although this may be serviced at a multitude of sites, it is from the perspective of the transnational land governance 'rush' that has endeavoured to increase human rights responsibilities of TNCs provides a unique opportunity to use a critical theory to better appreciate the normative impact of the GPs. It is the goal of this chapter to serve as a base upon which this task will be achieved. This will be initiated by first setting the parameters of this study. For this, the momentum of TNCs, land investments and human rights will be detailed. Continuing from this, a brief theoretical reflection will be looked at and will serve two purposes. First, it will give context to how non-binding agreements (like many concerning human rights) have tangible outcomes; and secondly, it provides a precedence on which this study will build on. The third section of this chapter will communicate and demarcate the thematic concern of this study through a problem statement. The fourth section continues the sentiment of the problem statement and discusses large-scale land-based investments (LSLBI) by public and private investors in sub-Saharan Africa (SSA) and the transnational land governance 'rush' that has occurred concurrently. The following section will detail this study's research design. This will be followed by the penultimate section that details this studies research questions. Finally, this section will briefly detail the content of the chapters that follow.

1.2. The transnational corporation, land, and international human rights

The formulation of the human rights regime, as we understand it today, began in reaction to atrocities committed during the World War Two (WWII). During this time, the regime's claims are described as state-centric and its application remains focused on the action and behaviour of states, who today, remain the principal perpetrator of the worst widespread human rights abuses (Mantilla, 2009:279; Amnesty International, 2016). Nevertheless, it has become progressively necessary for the human rights regime to consider human right related conduct of agent's other than the state for the regime to maintain its relevance and utility.

The need for a reconsideration of the human rights regime has dramatically increased in the era after the Cold War, when significant strides were taken towards consolidating the global

economy through the rise of information technology and developing ever more complex transnational advocacy networks. In this era, opportunities have multiplied exponentially for dialogue exchange that has allowed international resources to become accessible to new actors in domestic social and political struggles (Keck and Sikkink, 1999:89).

As this reality set in, attention was steered to the potentially detrimental impact of paramilitaries, insurgencies, transnational cooperation, and other non-state actors can have on human rights (Mantilla, 2009:279). Of these actors, it is TNCs which is described as the “...most powerful non-state actors in the world” (Weissbrodt and Kruger, 2005:315). This has meant over the past few decades it has become more widely expected that companies have social responsibilities that extend beyond maximising returns for shareholders within the “rules of the game”.¹ Thus, it has become necessary to consider the activities of businesses in the human rights regime, for the international human rights regime to endure and remain effective.

1.2.1. The rise of the modern Transnational Corporation

It is said that the TNC can be traced back to ancient Rome; however, in the modern age is recognised in the establishment of the Dutch East Indian Trading Company (Urban, 2014:145). Nonetheless, the TNCs that we live amongst today were formed at the beginning of the twentieth century when they began establishing distinct transnational structures. Their growth continued at a relatively steady pace up until WWII, and like the human rights regime, the wars’ conclusion marked the beginning of an era where the influence of TNCs propagated at an unprecedented speed (Blitt, 2012:36). This was driven by significant advances in transportation, communication, and the attached cost savings introduced by “...containerized freight, airborne deliveries and the telex” (Vernon, 1993:59). This era was characterised by the efforts of United States (US) based industrial enterprises; which in the 1960s reached its historical peak as the number of foreign affiliates incorporated into their transnational networks reached an all-time high. By the 1990s, virtually all industrialised countries had their own TNCs, which had become “...the dominant form of organization responsible for the international exchange of goods and services” and helps define the modern age (Vernon, 1993:57).

¹ Friedman (2002:133) made the argument that “...there is one and only one social responsibility of business – to use its resources and engage in activities design to increase its profits so long as they stay within the rules of the game, which is to say, engage in open and free competition, without deception or fraud.” This is, as evident by the research of this investigation and the literature it is investigating, is increasingly seen as only one aspect of businesses responsibility.

A measure of this reality is shown in TNCs outperforming the national economies of some states (Joseph, 2004:1). Moreover, TNCs are unique in that their value-addition activities mean they can grow their businesses faster than some states can grow their economies (Blitt, 2012:37). It is not surprising then, that TNCs significantly influence the enjoyment of human rights across a wide spectrum of people that include their employees, consumers, stakeholders, and the people who live in the areas where they operate (Joseph, 1999). From this position, corporate activity is said to facilitate and even improved people's human rights by improving economic development, out of which most human rights can become more accessible (Joseph, 2004:2).

However, the reverse is also true, and in the face of their economic might, much like states, some TNCs "...have the resources and power both to perpetrate and to escape responsibility..." for human rights abuses (Grossman and Bradlow, 1993:142). This has mandated the premise that considers the state to be the exclusive actor in global affairs to be reconsidered (Higgott, Underhill, and Bieler, 2000). In parallel, efforts were increased to attach greater responsibilities and accountabilities to non-state and particularly TNCs actors. In this regard, Charles Handy (1996) comments:

If we haven't bothered much about these things in the past, it is probably because we never thought of business as political institutions, but rather as engines and instruments of commerce, as machines not communities. We did not, therefore, apply the same rules to them as we would to a nation-state, where matters of human rights, free speech and the responsibility of governors to the governed would be argued about and even fought over.

Increasing corporates responsibilities for human rights reached a significant milestone with the appointment of the SRSG. However, this did not arrive in a normative vacuum. It is noted that the similar efforts to Ruggie's began in the 1970s, all of which drew on the Universal Declaration of Human Rights (UDHR) (Jägers, 2011; Deva, 2012; Ruggie, 2014).

1.2.2. Large-scale land deals and their desirability

Before discussing the development of human rights norms, the reason for land deals being an attractive destination for TNCs investments and the attached context will be briefly detailed. Often referred to as 'land grabs', LSLBIs are motivated by transnational acquisitions of ever scarcer commercial land resources (Borras and Franco, 2012:34; Franco, 2012); and have been accelerated by financial and capital markets promoting lands as a new investment 'frontier' (Margulis and Porter, 2013:9). However, land grabbing is by no means a new phenomenon and

has in fact been going on for centuries. One only needs to think of the ‘discovery’ of new worlds and the establishment and the exploitation of colonialism. Additionally, the foreign ownership of foreign land has been an integral part of the neoliberal globalisation project long before its most recent iteration.²

Nevertheless, there are several features that distinguish this wave of land grabs. Some of these revolve around the rate that land has attracted investor sentiment, their justifications and alliances, and new mechanisms of land control (Peluso and Lund, 2011:672). Additionally, and the issue that has attracted the most significant concerns, has been the intended uses of the land in these deals. These uses, although variations and adaptations can be put forward, have been described as motivated by desires to quench new environmental considerations driving the diversification of energy sources; and to seek out new, secure, and more profitable locations for capital fleeing traditional markets (Franchi, Rakotondrainibe, Raparison and Randrianarimanana, 2013:2-3; Cotula, Vermeulen, Leonard and Keeley, 2009:3-4). Generally, these desires were constituted from the effects of the mid-2000 oil price spike, the 2008 crisis in financial markets, and the onset of the global recession in 2009 (Hall, 2011:193).

Also proving a significant motivation for land grabbing was the 2007-2008 ‘food price spikes’ and ‘food riots’ that led many countries, particularly those that rely on food imports, to develop a rationale that they can no longer rely on the market to source food from the surplus-based food regime (McMichael, 2009; Cotula, *et al.*, 2009:3). This has led some countries to seek out ways to gain greater control over their food supply and food price stability, resulting in efforts to gain direct control of offshore land and thus establishing offshore food production sites³ (White, Borras, Hall, Scoones and Wolford, 2012:628). Through these motivations, the desirability of land grabbing should be considered as both politically and financially strategic (Daniel, 2011:26).

This resurgent interest in land has created an upward shift in the economic valuation of land and water, increasing both the demand and value of land globally. Von Braun and Meinzen-Dick (2009:1), specifically allocate the cause of this increased demand to higher per unit prices for agricultural goods; which in turn, raised the expected level of returns for land investments.

² For example, Chayanow notes in 1925 that “[I]terally before our eyes the world’s agriculture[...] is being more and more drawn into the circulation of the world economy, and the centres of capitalism are more and more subordinating it to their leadership.” (seen in White, Borras, Hall, Scoones and Wolford, 2012:622).

³ For example, countries with limited land and water resources (such as Saudi Arabia in Sudan), high and increasing rates of urbanization and those with changing diets increasing rely on this practice (like South Korea in Madagascar) (Zoomers, 2010:434; White *et al.*, 2012:627).

Given renewed motivation, particularly coming from food securing projects, competition for land and water resources for agriculture are at unprecedented highs and it is not surprising that farmland prices have been steadily increasing.⁴ Encapsulating this sentiment and the motivation for LSLBIs is the World Economic Forum's (2011:7) description of the water-food-energy nexus (WFEN)⁵, which summates resource challenges the world will soon face:

“A rapidly rising global population and growing prosperity are putting unsustainable pressures on resources. Demand for water, food and energy is expected to rise by 30-50% in the next two decades, while economic disparities incentivize short-term responses in production and consumption that undermine long-term sustainability. Shortages could cause social and political instability, geopolitical conflict and irreparable environmental damage. Any strategy that focuses on one part of the water-food-energy nexus without considering its interconnections risks serious unintended consequences.”

The actors involved in LSLBIs vary. Many governments (through state-owned bodies or public-private partnerships) and private firms are turning to land abroad to secure profit in unstable markets and to negate domestic food price and supply volatility. The terms and size of these deals vary considerably; usually, however, these transactions materialise in the form of long-term leases or concessions rather than out-and-out purchases (White *et al.*, 2012:624). Proponents of this practice see it as an innovative, long-term strategy that attracts foreign direct investment that will develop local infrastructure and ultimately benefit the local population's food security.

However, critics of these practices find a deep irony in the fact that rich countries are using possible agricultural land in countries that have historically been the recipients of food aid for the purposes of production of goods that will ultimately be exported (Zoomers, 2010:434). Moreover, there is little evidence of these investments fulfilling their developmental promises. While additional scepticism of LSLBIs stems from the decision-making process around these investments are commonly done in secret and agreed to without consulting with, or gaining consent from, local communities⁶ who are most affected. Consequently, these communities are rarely able to hold the investors or governments accountable.

⁴ For example, in 2007 alone Brazil's farmland prices jumped 16 percent, in the Midwest United States by 15 percent, and in Poland by 31 percent (Von Braun and Meinzen-Dick, 2009:1).

⁵ The WFEN accounts for the complex and interrelated nature of the global resource system and is a vital consideration to keep in mind when dealing with LSLBI.

⁶ Through this study the term 'community' will be used, as it is used in Bledsoe *et al.* (2015:1), to refer to "...all tenure rights holders, both formal and informal, impacted or affected by an investment. This might include a community, communities, women and men smallholder farmers, pastoralists, or other land and natural resource users.”

In part, this scenario has been allowed to go on unchecked since there is an absence of mechanisms or political will that ensure equitability, accountability, and transparency in the decision-making process, land grabs are undermining good governance and democratic principles. This incubates a system where corruption between government officials and business is common, where human rights are violated, and where investor incentive is weighted against those willing to implement and operationalized ethical and legal tenets (Global Witness, The Oakland Institute and The International Land Coalition, 2012:5).

The recent historical peak in prices for resources in the WFEN, together with anticipation of future demand and scarcity, has formed a coalition that has provoked a search for new and alternative means to meet with global demands. In the pursuit of meeting these demands, observers note that some "...rich countries are buying poor countries' soil fertility, water and sun to ship food and fuel back home, in a kind of neo-colonial dynamic" (Leahy, 2009). This issue and commentary have shaped fresh debates (and revived some old ones) about food, water, energy, and land security and human rights is a vital aspect in ensuring the protection of local communities.

1.2.3. Drafting the history of human rights norms

The UNHCR was signed in 1948 and is commonly cited as the first modern acknowledgement, at the level of the state, of international law being able to serve as a source of rights and responsibilities for the individual as well as state actors (Moravcsik, 2000:215-216). The UN General Assembly voted universally to ratify the UNHCR with a clear understanding that it would be an aspirational statement of human rights principles and was not endowed with the power of a binding treaty. Nonetheless, as Blitt (2012:38) notes, in subsequent years the UDHR was frequently consulted during the formulation of other binding international laws. Perhaps the best example of this transition into something more tangible was the development of what became known as the International Bill of Rights in 1976. In the development of the bill⁷ the UDHR served its moral purpose while the remaining instruments of the Bill brought its human rights into international law – which is binding on all UN member states (Hannum, 1998:145; Munro, 2003:109). This helped the UDHR to become the guiding document form humanitarian law and its basic tenets have guided enumerable institutions and organizations operational guidelines with regards to human rights (Jayawickrama, 2002:40).

⁷ Which contains the UDHR; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); and two Optional Protocol.

Strictly speaking, there are no established human rights to land; and thus, it is not guarded by international human rights law.⁸ Nevertheless, there are rights enshrined in the Bill that is taken to have provisions associated with land rights. For example, a UN Special Rapporteur noted that "...[I]and is often a necessary and sufficient condition on which the right to adequate housing is absolutely contingent for many individuals and even communities." (Wickeri and Kalhan, 2011). This fulfils conditions, like the right to and adequate standard of living described in the UDHR and the ICESCR; and the protection of privacy and property rights in the UDHR and ICCPR. Gilbert and Kean (2011:152) explain that land rights are most recognisable in these property rights; which in the UDHR (1948) states "...[e]veryone has the right to own property alone as well as in association with other... [and no] one shall be arbitrarily deprived of his property."

Specifically, this recognition that property can be held "...in association with other..." proves a vital proclamation in the African context since land is traditionally held by a community and the wider global context is set towards protecting individual rights. Although it not explicitly enshrined in the UDHR, the UDHR has been used advance the position of adjacent issues, as is the case of property and land rights. Indeed, it has been argued that "...the indirect legal effect of the Declaration is not to be underestimated and it is frequently regarded as a part of the 'law of the United Nations'" (Brownlie, 2008:559). The United Nations (2016) its self has come to similar conclusions, stating on the UDHR's has:

"[o]ver the years... been translated into law, whether in the form of treaties, customary international law, general principles, regional agreements and domestic law, through which human rights are expressed and guaranteed. Indeed, the UDHR has inspired more than 80 international human rights treaties and declarations, a great number of regional human rights conventions, domestic human rights bills, and constitutional provisions, which together constitute a comprehensive legally binding system for the promotion and protection of human rights."

Ultimately, the history of the UDHR shows how non-binding, 'soft-law' principles can gather momentum and supporters to become more durable and enforceable 'hard law'. As mentioned in the quote above the UDHR has established and led binding human rights principles that have cascaded through numerous channels of social order to be internalized by them. It is in service of this research study's mandate it is prudent to express the importance of discourse and the effects it has. Through devices like the UDHR and the GPs, the way in which social issues are

⁸ The exception to this is the Optional Protocol to International Covenant on Civil and Political Rights, where it defines and protects the land rights of Indigenous Peoples and Minorities (United Nations, 1976:D(II)).

thought and spoken is shaped. Consequently, this impacts on the possibility of what gets done and might be left undone on the ground. The point here is then, at the level of the state, the UDHR has imposed its discourse upon social reality to change how we “...think, speak and do.” (Hunt and Wickham, 1994:9). However, as discussed, business corporations now play a hand in determining a community’s enjoyment of human rights and for this reason, the domain that the UDHR professionalized has been expanded in recent years. This has seen efforts which are specifically designed to address the inadequacies of the human rights regime in relations to the responsibilities of non-state actors for human rights. Thus, the induction and warm welcome of the GPs is a landmark in the enduring legacy of the UDHR and the human rights regime more generally.

1.3. A theoretical reflection

Understanding how changes occur in the international system has always been a challenge for scholars of IR to explain (Risse and Sikkink, 1999:2). Nonetheless, scholars endeavouring in IR who have focused their attentions towards international norm dynamics do more than most through their attempts to interpret change in this space. What is particularly prudent within the context of this study in Finnemore and Sikkink’s (1998) assertion that norms, at all levels are “continuous, rather than dichotomous, entities... [that] come in varying strengths” whose appropriateness and compliance builds or decays in relation to the persuasiveness of the material and normative arguments made by *norm entrepreneurs*. This process through which a norm passes is described by Finnemore and Sikkink (1998) as its *life-cycle*.

Considering the scope and goal of this chapter it is necessary to consider the meaning and relevant applications of “norms”. To supplement this task, it is prudent to begin where many other scholars have, which is with Martha Finnemore and Kathryn Sikkink’s article, *International Norm Dynamics and Political Change*. In their work, they broadly define a norm as “...a standard of appropriate behaviour for actors with a given identity...” (Katzenstein, 1996, seen in Finnemore and Sikkink, 1998:891). Expanding on this conceptualization of what a norm is, Finnemore and Sikkink (1998:892) discuss that there is no direct evidence of norms and instead is identifiable and trackable through the consequences it creates. Finnemore and Sikkink explain this is because a norm is defined by a quantity of “...‘oughtness’ and shared moral assessment...” that is dispensed to explain, justify, or defend positions. This process leaves evidence of communication and activities among actors, which possible to study and analyse (Finnemore and Sikkink, 1998:892).

The evidence which is created can be categorised into three stages that are defined by a distinct set of actors, motives and mechanisms; which define the norm and determine its position in its life-cycle (Finnemore and Sikkink, 1998:895-896) describes as the norms “life-cycle”. The first of this three-stage progression is “norm emergence”, where “norm building” occurs in order to accumulate domestic and international attention and culminates in a “tipping’ point”, which occurs when a critical mass of states accept a particular norm. The second stage is the “norm cascade”, which is defined by acceptance of the norm by most of the international community. The third and final stage of a norm is “internalisation”, which is when a norm changes behaviours (Finnemore and Sikkink, 1998:904).

The adaptation the GPs signals a significant point in the life-cycle of the business and human rights norms influence over the governance of non-state actors, since it has drawn them closer to the burdens associated with ensuring human rights are enacted. It is critical at this juncture to recognise that the GPs were not developed within a vacuum and its position shows that “...it is possible to achieve a significant degree of convergence of norms, policies, and practices even in a highly controversial issue area” (Ruggie, 2014:6) and it is widely noted the GPs have done well in this space nonetheless (Jägers, 2011; Blitt, 2012; Deva, 2012; Mantilla, 2012). This shift brought in by the GPs has begun to codify business and human rights norms, modifying and expanding the realm of actors, motives and mechanisms responsible and accountable for human rights.

1.4. Problem statement

The available record shows that political discourse and the debate on the question of land is as old as the political thought itself (Rwegasira, 2012:2) and concerns over land in recent years has proven to be an intersection where the prescription made by the GPs are observable. This provides the evidence needed to locate the GPs progression in the *life-cycle*. Ultimately, this is the goal of this research study and serves to identify which actors, motives and mechanisms remain or will become relevant to the continued propagation of human rights norms. Specifically, this will be accomplished by investigating a private LSLBI.

Since 2008, these types of transactions have been primarily directed towards land in developing countries and have become central to discussions about food, water, energy, and land security issues associated with human rights (Adamczewski, Burnod, Papazian, Coulibaly, Tonneau and Jamin, 2013:159). It has been noted that SSA has been a preferred destination for LSLBI (Borras, Hall, Scoones, White and Wolford, 2011; Von Braun and Meinzen-Dick, 2009; De

Schutter, 2011). LSLBI's are considered to have the potential to inject significantly, and much needed, investment into agriculture and rural areas in SSA. Nevertheless, concerns have been established in several cases that describe a wide range of risks inherent to LSLBI's that loom over these investments and threaten disaster at both ends of the investment. Both these perspectives have received much attention in transnational land governance literature that to a large degree has been motivated by a search for means to ensure the responsible management of LSLBIs. This has propagated efforts seeking the responsible implantation and management of these deals to mitigate their risks and facilitate opportunities for all parties involved. A common manifestation of this has been an emergence of international and institutional frameworks that intend to mitigate business-related human rights ills. Although it is not true in all cases, what has been a recurring and central theme in these frameworks has been the GPs and the acknowledgement that ignoring human rights responsibilities is likely to be to the corporation's own detriment.

Whereas the UDHR can be located promptly within state rhetoric and law, the GPs influence on business policies remains more implicit. Nevertheless, its impact on TNCs is evident in these frameworks that intend to guide LSLBI's towards international best-practice. It is in this niche that this research study aims to determine the stage that the business and human right norm is in its *life-cycle* and which actors, motives and mechanisms that are relevant to maintaining or advancing its coercion.

1.4.1. Large-scale land deals in Sub-Saharan Africa

In SSA, land grabbing is described under several definitions that resonate in accordance with position and objective of players globally. Although the concept 'land grabbing' is most often used, it is often used alongside a plethora of other terms such as "climate colonisation", "green grabs", "green colonisation", "new land colonisation" and "water plunder". In the African context and for this study, 'land grabbing' is more useful as a generic term, which is understood to describe and include "...exploration, negotiations, acquisitions or leasing, settlement and exploitation of land resources, specifically to attain energy and food security through export to investors' countries and other markets." (Matondi, Havnevik and Beyene, 2011:1). Additionally, however, the method of appropriation must also be considered. Therefore, land grabbing is a method of appropriation of land that is:

“...in violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thought assessment, or are in disregard of social, economic and

environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing; and; (v) not based on effective democratic planning, independent oversight and meaningful participation.” (International Land Coalition, *supra* note 4).

Consideration for domestic or regional commercial and state interests are not excluded from this interpretation of land grabbing; however, it is evident that there is a tendency for these more local interests to be backed or involved with external interests.⁹ Appreciating this allows for the full extent of land grabbing to be accommodated since local populations and producers are not only competing with external interests but domestic ones as well.

The reason why SSA has been the preferred location for land grabbers is brought into focus by once again referring to the context described by the WFEN. Most countries have enough land to potentially be self-sufficient food producers; however, most lack enough water resources to accomplish this.¹⁰ This makes it common practice for countries to be net food importers. This is also true for many African countries. Nevertheless, many of these countries in SSA are endowed with sufficient land and water resources to support industrial agricultural projects. Thus, the attraction is that if these endowments receive investment and are developed they may prove a viable revenue stream and they were actively sort out by SSA states (Allan, 2013:43-44). In turn, many SSA states saw the increasing demand and value of land as an opportunity to service developmental goals (Cotula *et al.*, 2009:17). This means that these transactions were often seen as foreign direct investment (FDI) for which financial and other incentives were made available, establishing significant incentives for investors (Strauss, 2013:83).

The significance of ‘land grabbing’ as a concept in this context also need to be understood in relation to the ‘unsettled’ nature of the ownership and governance system presiding over SSA’s land and natural resources. Consequently, the legitimacy, responsibilities, roles, and stakes of various actors (including the state) in these LSLBIs are often unclear. Hence, land grabbing in a broader sense relates to the changing control, use, ownership, and access to SSA land. This extends and influences the type of agricultural goods being produced, their trade and destination (Matondi, *et al.*, 2011:2).

⁹ This is frequently demonstrated by local governments including or accommodating the interests of international actors in regulatory law, often at the expense of those on the periphery, which often circumvents regulatory and legal structures and accelerating land acquisitions (German and Schoneveld, 2013:1-2).

¹⁰ Most of water resources (as much as 90 per cent) are consumed in an economy is used in food production, and for countries unable to supply this are required to meet with their needs through off-shore agricultural sights (Allan, 2013:44). The examples in footnote 3 also serve as an example here.

An increasingly evident theme is contemporary literature on land grabbing in SSA, and indeed in publication dealing with it in another part of the globe, is that ‘grabbing’ has re-emerged as a fundamental aspect of rising commercialization within the context of globalisation (White, *et al.*, 2012:622). This has most commonly described the West, with their developed, market-based economies, as being the most active ‘land grabbers’; while, the emerging East is increasingly seeking out benefits from African land. The processes through which land is ‘grabbed’ in Africa ranges from completely illegal acquisition, which are agreed to in secretive negotiations, to fast-tracked and rapidly concluded contracts that, although are legally binding, are identifiable by their apparent asymmetry in power relations and legal manipulation (White, *et al.*, 2012:624). Additionally, characterising these deals is risk stemming from incomplete or limited information, particularly for the weaker stakeholders, who are those most likely to be most affected by the deals (Matondi, *et al.*, 2011:2-3).

The speed, scale, and clandestineness of land grabbing has led to local protests and attracted international concern.¹¹ Many reports and publications illustrate the magnitude of this trend. For Example, a World Bank report shows an annual average of farmland expansion of fewer than 4 million hectares of land before 2008, as oppose to an approximate 56 million hectares of farmland deals completed by the end of 2009 (Deininger, Byerlee, Lindsay, Norton, Selod and Stickler, 2011: xiv). According to Barrett (2013:17), 40 million hectares of these deals involved African land and equates to more than all the agricultural land available in north-western Europe. Nevertheless, the same World Bank report found that only 21 percent of these deals were active or being implemented; indicating that land grabbing-related operations have a significant gestation period and, in the early stages, tend to end in failure (Deininger, *et al.*, 2011: xiv).

These false starts are not limited to any site and their failures are not limited to any one thing. However, in more extreme circumstances and in varying degrees, land grabbing has resulted in socio-political instability for the host nation. However, it is not only the host that stands to reap negative consequences of ill connived land deals, and the investing party risks significant financial and reputational losses. The degree to which these missed conceived arrangements can impact on domestic politics and the investor’s financial health is demonstrated by the attempted land grab in Madagascar. This attempt was eventually abandoned due to the local

¹¹ A testament to this attraction is the African Unions’ (AU) early response to these land deals suggesting the initial speed of these transactions left many states ill prepared to bargain effectively and were taken advantage of, which they saw at the time as a possible source of riots and political instability in the host country (Malone, 2009).

opposition through 2008 and into 2009. This is arguably the quintessential example of the worst possible consequences of LSLBIs, motivating a military coup and is a sighted contributing factor that led the South Korean company, Daewoo Logistics, to declare bankruptcy later in 2009.

1.4.1. Transnational land governance and the 'how-to' labyrinth

As the preferred destination, it is SSA states who are most likely to accumulate its consequences – both expected and unexpected and positive and negative – of these LSLBIs. These transactions are predominantly seen as agricultural and financial arrangement, in that they are meant to serve WFEN challenges for one nation and provide economic benefits for the other (Strauss, 2013:83). Additionally, however, these are political transactions since land is inherently political and land right and reform policies are often cited as causing varying degrees of political instability (Von Braun and Meinzen-Dick, 2009:2). It is these political aspects that have the greatest impacts over time, threatening the local regime's legitimacy, the investment, and the local community's human rights.

Since 2008, and in response to land grabbing, a series of regulatory initiatives and global institutions building projects have emerged at such a rate that one author appropriately refers to the process as the "...governance rush..." (Hall, 2015:3). These efforts have and continue to occur simultaneously through various levels of social organisation, void of direction from a single overarching institutional site. The variety of actors in this complex network is considerable and extremely diverse and range from individuals, local and global civil society, corporate actors, multilateral organisations, and states; who attempt to shape governance in these matters. Taken together, Margulis and Porter (2013:2), take these movements as signalling the emergence of what they term "...transnational land governance...".¹²

Nevertheless, international organisations, like the World Bank and the UN, have contributed most significantly towards this regulatory approach through the formalisation of international guidelines and policy prescriptions (Mullea, Merlet and Bastiaensen, 2014:404). Most of these recommendations put forward prescriptions that deal with the negative consequences of these deals either through legal recommendations and the formalization of land rights, protecting the

¹² Importantly, when governance is spoken about in this context it is not in the traditional sense that is a synonym for government. Rather, 'governance' here describes and is part of "...a change in the meaning of government, referring to a new process of governing; or a changed condition of ordered rule; or the new method by which society is governed" (Rhodes, 1996:652-653). Stoker (1998:17) remarks that in the literature this refers to a "...governance style in which boundaries between and within public and private sectors have become blurred."

rights of the historical landholders; or through the design and application of *voluntary* guidelines and codes of conduct that promote progressive development outcomes (Borras and Franco, 2012:35; Franco, 2012; Meullea, *et al.*, 2014:401). A significant motivation for these efforts has been to distinguish “investments,” that meet appropriate criteria and level of responsibility; from those that do not and are stigmatised as “land grabs” (GRAIN, 2012 and 2015). Regardless of their origins, the net result has been the proliferation of voluntary, self-imposing frameworks that have made little effective and reliable progress towards overcoming the fundamental challenges that LSLBI's concern. Nevertheless, these frameworks provide recurring evidence of corporations acknowledging that ignoring human rights responsibilities is likely to be to the corporation's own detriment; and although it is not true in all cases, the GPs are cited and lend legitimacy to these frameworks.

1.5. Research design and methodology

In keeping with the overall theme of this study, both scientific knowledge and normative principals are equally vital when regarding the influence of the human rights regime in transnational land governance. Although the ideal would be to enact this research question through primary data collection; secondary and tertiary sources prove sufficient to achieve this study's objective.

The method best suited to deal with this research questions and its challenges is qualitative. Strauss and Corbin (1998:10-11), describe this method as “...findings not arrived at by statistical procedures or other means of quantification”. The main advantage of this method, according to Pierce (2008:45-46), is in its ability to accommodate various variables and thus provide greater understanding between contexts and outcomes. The research questions set requires the evaluation of a wide variety of complex aspects of social and political life and is a task best served by adopting a qualitative research method. Specifically, this research study will comply with this technique by conducting a single case study, which is well suited to a desktop study. By incorporating a single case study, this research study will be able to investigate in detail an occurrence where the GPs have begun to create the ‘evidence’ that a normative study relies on to conduct its investigation.

For this, a ‘due point’ has been identified where the GPs norms, transnational land governance, and TNCs intersect. At this position and serving as this study's case study is the Malawian sugar industry. Here, the Government of Malawi's (GoM) and the Illovo Sugar Group (Illovo) – a large South African-based sugar company – activities in Malawi's sugar industry will

constitute the body of the case study. This case has been selected since the GPs norms have been incorporated into the GoM's and Illovo's policies through their participation and observation of the *New Alliance for Food Security and Nutrition* (the New Alliance) and their *Analytical Framework for Land-Based Investments in African Agriculture* (NAF). Delving into the Malawian experience is well suited to this study's research methodology since its physical constraints are somewhat mitigated by the fact that Malawi has recently been evaluated against many of the source documents of the NAF. Across these sources, both the GoM's and Illovo's participation with the GPs norms can be observed.

1.6. Formulation of the research question

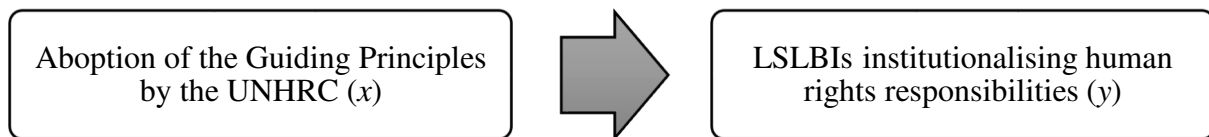
It is generally agreed that the purpose of social research is to expand our knowledge about some aspects of social life. In practice, this typically tests the appropriateness of existing theories which seek to account for the behaviour we are interested in; or in developing new insights, or new theories, to contribute to our understanding of the processes behind some aspect of social life (Henn, Weinstein and Foard, 2006:7-8).

In keeping with this tradition, this research study will be firmly located in IR theory and more specifically *International Norm Theory* literature. It is from this vantage point that the endorsement of the GPs by the UNHRC and the embrace they subsequently received from a plethora of actors across the socio-political spectrum can be put into context within the broader human rights spectrum. This effort will provide a platform from which critiques of the GPs can be acknowledged and laid to properly appreciate their normative *contribution* to land governance mechanisms and the broader human rights regime. For this reason, the GPs are considered as a step towards binding business and human rights and places the future trajectory of the norm in clearer focus. In service of this, the following research question has been formulated:

Has the discourse of the *UN's Guiding Principles on Business and Human Rights* created a norm cascade that will go beyond rhetoric and be diffused into Large-Scale Land-Based Investment practices?

This research question can be simply expressed in term of the "cause and effect" dichotomy. In this dichotomy causes are independent variables (x), and the effect is termed as the dependent variable (y). Figure 1 demonstrates the relationship inferred in the main research question:

Figure 1: Causal chain implied in the research question



Although this question stands as the principal task directing this research study, three supplementary questions have been devised to supplement answering the main research question and help navigate through the literature. These sub-questions are the following:

- A) What does International Norm Theory say about the progression of a norm through the various stages of its *life-cycle*?

The logic for this question is twofold. First, it allows the GPs influences to be located along the spectrum of a norms life-cycle, as it currently stands; and second, answering this question will describe the criteria needed to determine if the GPs influence will advance or retreat.

- B) Can Malawi be considered a country that norm literature suggests is ‘critical state’ that encourages others to implement business and human rights norms?
- C) What challenges does the Malawian case study present to the business and human rights norm as it is described by the GPs?

Both these questions will be addressed once the case study has been completed. Malawi hosts the implementation of the GPs at two locations. The first of these questions addresses the legislative adjustments made by the GoM to align their new land and agricultural related bills passed in 2016, updating their legislation to international best practice prescribed by GPs and other international guidelines. The second accounts for Illovo’s adoption of the *Illovo Group Guidelines on Land Rights* (Group Guidelines) that draws on the legitimacy and is closely based on the GPs. It is expected that the contemporary nature of LSLBIs issues provides a unique opportunity to approach the normative legacy of the GPs. Though it is true that an operation that makes no effort to interpret and implement the GPs in its self-says something about adherence to international best practice the fact that there has been significant investigation and inclusion of the GPs suggests the research question will be best served by focusing on active participants. These actions are considered since adherence to the GPs requires concerted efforts to revise existing practices at sites and/or the implementation of strategies aimed at compliance in future land investments. This creates evidence that can be

observed through a norm theory lens to help interpret the events; moreover, if the prominence of the GPs is waning, it will be evident here.

1.7. Structure of this research study

This research will be divided into an additional four chapter. The first of these is chapter two, in which a literature review will be conducted that has two principal areas of focus. The first of these concerns International Norm Theory literature; while the second concerns the normative development the human rights norm and specifically the business and human rights norm. The goal of this chapter is to place the case study and the discussion in chapter four in clear the context of wider international norm theory debates concerning the progression and implementation of a norm.

Chapter three will conduct a case study of Malawi's sugar industry. Malawi proves a dynamic and interesting case challenging International Norm Theory literature as well as revealing a variety of challenges to the business and human rights norm. Although evidence of behavioural changes is scarce, there has been discussions and consultation with normative documents and governance bodies that have brought in new policies and laws. These will prove significant to determine the influence of the GPs representations of the business and human rights norm to date.

The fourth chapter will accomplish two goals. First, it will draw on International Norm Theory literature and come to a determination of where the business and human rights norm stands in Malawian society. Second, and by drawing on lessons from the Malawian case study, it will reflect on and contribute towards a possible critique of the GPs achievements and shortfalls.

The fifth and final chapter is this research study's conclusion. Here this study's process and findings will be reflected.

2. Chapter two: Literature review

2.1. Introduction

The progression of the human rights norm along its *life-cycle* is language commonly used by scholars to describe its normative development and influence. However, the specific location of the human rights norm in the cycle changes according to the scholar's scope and perspective. A reason for this is due to the intrinsic nature of all international norms that are constituted by varying amounts of abstraction and specification (Krook and True, 2010:103-104). These variants occur across a norm's most fundamental principles, organizational values, and standardizing actions that resonate differently across states, international and domestic actors, having gained support through multiple forms that include advocacy, agreements, policies, treaties or laws (Wiener, 2009:183). Thus, when Bassiouni (1986:15) says the development of international human rights has progressed to the "enforcement" and "criminalization" stages it should be appreciated in the correct context; which concerns state compliance with human rights. Equally then, one should consider the operational intentions of the business and human rights norm; which unlike the *internalized* international human rights norm, remains in the throes of debate concerning its stage in the *life-cycle*. For example, Koenig (2008) argues that the business and human rights norm have reached the third internalization stage; whereas Karp and Mills (2015) suggests it is still in the former, cascading stage. Although, the specific utility that comes with arguing a norm's position in its life-cycle is limited, it does facilitate discussions that clarify why certain norms are preferred ahead of others.

The goal of this chapter is not to conclude with its own arguments that debate reasons for the business and human rights norm being where they are in the life-cycle. Rather, it will review the literature on international norm theory, from which the norm-cycle originates, since a significant body of its work explains what, how and when norms develop and are internalized. Within the broader context of this research study, this will help explain and justify the SRSGs approach in developing the Guiding Principles. Once completing this, the normative development of business and human rights will be reviewed. Here, the goal is to place calls¹³ for corporate enterprises to incorporate social responsibilities that go beyond maximizing return for shareholders within the 'rules of the game' in context of an ongoing project to advance the human rights regime.

¹³ That for example, range from "...corporate executive shareholders, institutional investors, states, international organisation, academic, trade unions, civil society organisations and customers..." (Deva, 2012:101).

This will begin by exploring the theoretical parameters of an international norm, which includes discussions of the norm conceptualization and norm development. The second section of norm literature that will be reviewed in this chapter concerns the way international norms are incorporated into domestic policy. This section provides vital insights that this study will use to conduct its analysis of the business and human rights norms presence in the Malawian case study. The next section shifts focus to the human rights regime. Here, the development of the international human rights norm studied and provides vital context for the following section that reviews literature on the development of the more niche, business and human rights norm.

2.2. The theoretical parameters of ‘international norms’

In the 1990s, an ‘ideational phenomena’ moved to the forefront of IR’s research agenda. This initiated an intellectual discussion about the importance of norms in international relations. Indeed, the changes in international relations during the 1990s persisted into the new millennium and forged a scenario where state behaviour relied “...less on the distribution of power and more on the soft powers of ideas, values and norms.” (Björkdahl, 2002:9).

Appropriately, in the time since norms gained significant attentions from scholars and policy makers alike as an understanding of their ability to motivate action gained ground. During the development of norms literature in IR, it is said that research took a turn towards *social constructivism*, which has since been the point from which many academics concerning themselves with normative behaviour begin to gain their bearings¹⁴ (Checkel, 1998). As these works progressed, to conclude that norms matter, became no more controversial than a rationalist approach asserting the importance of power. Nevertheless, within constructivist norm literature the precise nature of when, how, and why some norms matter and evolve while others do not, constitutes a significant portion of the field’s attention (Goertz and Diehl, 1992; Cortell and Davis, 1996 and 2000; Ropp and Sikkink, 1999; Björkdahl, 2002; Goodman and Jinks, 2003). The next sub-section of this chapter will explore the conceptualization of an international norm; as well as reviewing various positions in International Norm Theory that evaluate the progression of a norm through the various stages of daily societal order.

¹⁴ Björkdahl (2002) points to Onuf’s (1989) book as the work that introduced ‘social constructivism’ to international scholarship. Since this, Adler’s (1997) ‘Seizing the middle ground: Constructivism in world politics’ and Checkel’s (1997) ‘International Norms and domestic politics: Bridging the Rationalist-Constructivist divide’ has intertwined ‘social constructivism’ and ‘norm theory’.

2.2.1. Matters of norm conceptualization

An early conceptual challenge of international norm theory concerned the means to empirically identify a norm. As with other incentives for taking political action, a norm's presence is evident indirectly (Cortell and Davis, 1996:451-452). Because norms are by their nature intersubjective moral assessments and not simply the idiosyncrasies of individuals, the process that create them can be deciphered by examining discourse referring to certain behaviour (Florini, 1996:364). Consequently, a norm can only be studied by considering evidence from norm-induced behaviour. For instance, before a norm is formed, discussions involving justifications to motivate actions are necessary before consensus can form. This creates trails of communication that in norm literature is considered as evidence (Checkel, 1997:473; Finnemore and Sikkink, 1998:892). In this regard Björkdahl (2002:13), shares a popular opinion,¹⁵ that for norm scholars the way actors, and particularly states, talk about a norm is just as important as their actions, particularly if analysts hope to recognise a norm before they motivate actions.

Although the evidence of the norm is created through discourse, it is necessary to qualify this further. Considering the scope and goal of this chapter this requires the consideration of the relevant utility and meaning of a 'norm'. To supplement this task, it is prudent to begin where many other scholars have, which is with Martha Finnemore and Kathryn Sikkink's (1998). Their conceptualization of international norms is succinct and has endured through the literature, hardly failing to be included in later works. Nevertheless, the core thesis of their work is the norm *life-cycle* and thus it would be an oversight if more time is not spent considering elements that characterise a given norm.

An early example in which the elements of a given norm are expanded upon is Goertz and Diehl's (1992) work. In this, they undertook the task of addressing measuring the influence that international norms have on states behaviour and the corresponding conceptual and empirical aspects. Through this process, they identified four elements which help determine a normative conversation:

2.2.1.1. *Consistent and regulated behaviour*

The first element for conceptualizing norms according to Goertz and Diehl (1992:636-637) is behavioural regularity that conforms to the norm. Within this explanation, if states, all things equal, act differently it is doubtful that state behaviour is guided by normative considerations.

¹⁵ Robertson (1989:7-8), for example point to the importance of "speech-acts theory" in constructing norms; which can also show changes in rhetoric (Gränzer, 1999:125).

In this understanding, norms may do away with traditional and even effective means of achieving an end that has been ritualised and codified over time as the strength of a norm increases.¹⁶ Thus, unlike rationalists, who are concerned with achieving a predetermined goal through efficient means, norm entrepreneurs as are concerned with “desirability” of the goals and means themselves (Goertz and Diehl, 1992:637).

2.2.1.2. *Endurance beyond self-interest*

The second element considered by Goertz and Diehl (1992:637-638) to be vital in the conceptualization of norms is the extent that the norm clashes with self-interest. At times, rational behaviour may appear and coincide with norm-following behaviour, depending on the circumstances. However, norms may be “...prescriptive or proscriptive, but they are relatively rigid and context insensitive” and it is this that distinguishes them fundamentally from rational models, whose behaviour is determined by circumstance. This translates into consistent behaviour and for this reason, consistent justifications for behaviour is an identifying characteristic of a norm (Goertz and Diehl, 1992:638).

2.2.1.3. *Sanction*

The third element that Goertz and Diehl (1992) put forward as a characteristic of a norm relates to sanction. When codes of behaviour are violated sanctions are frequently endorsed to penalize and discourage other from similar actions. Axelrod (1986:1097) points to this in his definition of a norm, which argues “[a] norm exists in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way.” It is worth noting that this definition excludes considerations for actions based on self-interest, so when individual fail to follow a standard of behaviour they are sometimes punished. Within this discussion Goertz and Diehl (1992:638) interject and suggest within this conceptualization norms should be considered more than a series of “oughts” and the threat of sanctions as a deterrent is a useful means to identify a norm. In this, the concept of power is essential since the “...idea of sanctions means that groups with power and willing and able to use coercion to enforce the norm” (Goertz and Diehl, 1992:638).

2.2.1.4. *Morality and deontology*

The final identifiable normative element concern the certainty that norm means normative and thus, relate to justice and rights moulded by ethical and moral characters (Goertz and Diehl,

¹⁶ For example, gender equality norms have over the last four decades been integrated into international law and multilateral institutions that seeks to displace sociocultural traditions that are often the cause of violations of women’s rights (Zwingel, 2012:115-116).

1992:638-639). Nevertheless, this deontological characteristic of norms does not exclude the relevance of power. Indeed, it is often the most powerful groups in society that establish norms. This manifestation of a norm is described as *hegemonic socialization* in the literature (Ikenberry and Kupchan, 1990; Finnemore and Sikkink, 1998:896). The core accession here is that a hegemon has the power to establish regimes and norms, some of which may decline along with the hegemon's power. However, it is the characteristic of a norm to endure on from one hegemonic power to another through institutions and other socially held beliefs and structures (Keohane, 1988:384).

2.2.2. Types of norms and the norm 'life-cycle'

Although we might be able to identify a norm according to the criteria mentioned above, what is a recurring theme in international norm literature is that not all normative discussions translate into normative behaviour. For this reason, it is useful to consider the three stages of Finnemore and Sikkink's (1998) norm "...life-cycle..." in more detail. Each of these stages is defined by a distinct set of actors, motives and mechanisms (Table 1). Crucially, although a norm may emerge there is no guarantee that a norm will progress through the entire cycle and a norm cannot regress to a previous stage (Fukuda-Parr and Hulme, 2009:7).

Table 1: Stages of Norms

	Stage One: Norm emergence		Stage Two: Norm cascade	Stage Three: Internalization
Actors	Norm entrepreneurs with organisational platforms	Tipping point	States, international organisations, networks	Law, professions, bureaucracy
Motives	Altruism, empathy, ideational, commitment		Legitimacy, reputation, esteem	Conformity
Dominant mechanism	Persuasion		Socialization, institutionalization, demonstration	Habit, institutionalization

Source: Finnemore and Sikkink (1998:898)

This section will briefly contextualise these 'stages' and reflect on various sources that have contributed towards this explanation of a norms progress through society. Moreover, and

although it precedes the depiction of the norm life-cycle, Goertz and Diehl's (1992) work provides criteria (although under alternative phrases) that aid a comprehensive description of each stage that is distinguishable based on the relative presence or absence of three key elements: self-interest, sanctions, and deontology.

2.2.2.1. *Norm emergence*

Briefly, the comparative theme of the 'emerging' norm in Goertz and Diehl's (1992:640) article is described as a *decentralized norm*, which is defined by a:

“(1) conflict between norms and self-interest, (2) sanctioning power is diffused and based on the willingness of individual actors to “pay” for sanctions (i.e., no central sanctioning body), and (3) the deontological aspect is important.”

In this scenario, the basis for cooperation exists even though there is no central authority or hegemon because there is a strong temptation to 'buck the trend'. This poses important implication for a theory of international norms because, if there no central authority or hegemon, the norm needs to be enforced by the actors involved. A key element of a decentralised norms is understanding how certain values become persuasive enough to develop to become a central theme in international relations; which at this point is only represented by a small number of acts and is identifiable in their norm-induced behavioural changes (Goertz and Diehl, 1992:641).

A significant amount of academic attention has been paid towards developing an understanding of how this insignificant number of actors is then able to propagate the norm. Constructivists, for example, explain the desirability of a new norm by indicating the "...substantive content, or intrinsic characteristic, of particular ideas or claims." (Payne, 2001:38). Unfamiliar ideas are said to 'resonate' since at least part of it has an ideational affinity to another, already established normative framework or agenda¹⁷ (Keck and Sikkink, 1999:98). In their over view of constructivist literature on norm-building Finnemore and Sikkink (1998:896-898) make it clear this process is undertaken by "norm entrepreneurs," who attempt to connect new normative ideas to established ones when trying to construct persuasive messages. Thus, a successful norm entrepreneur can *frame* normative ideas in a manner that resonates with target audiences (Nadelmann, 1990:482).

¹⁷ This 'building' on previous positions ascribes an historical dimension to understanding norm dynamics since a norms ability to influence broader public opinion is greater if it can fit with the broader political culture (Snow and Benford, 1992:134; Keck and Sikkink, 1999:95).

A frame in this respect is a device used to “...fix meaning, organize experience, alert others that their interests and possibly their identities are at stake, and propose solutions to ongoing problems” (Barnett, 1999:25). For norm entrepreneurs to succeed at this they require a legitimate organisational platform¹⁸ from which they attempt to propagate new norms in the hope they can convince “...a critical mass of states to become norm leaders and adopt new norms...” (Finnemore and Sikkink, 1998:899-901).

These organisational platforms are sometimes constituted with the objective of promoting specific norms, as is the case for many non-governmental organisations (NGOs) like Médecins Sans Frontières, which ultimately form part of a wider *transnational advocacy network* (TAN).¹⁹ However, at other times, a norm entrepreneur work from within an established international organisation with the means and agenda to promote more than one specific norm. The UN, for example, has the distinct structural features to accommodate and influence the kind of norms that are then internalized by the organization (Finnemore and Sikkink, 1998:899).

Critical to the success of norm building is the legitimacy of the modern organizations, particularly at the international level. This legitimacy stems from an organizations consideration “...of expertise and information to change the behaviour of other actors” (Finnemore and Sikkink, 1998:899). Organizations and applicable bureaucratic structures, in turn, are scrutinised by relevant experts through empirical studies to record whether the training within these standing organisations is incorporating or dismissing the new norms (Finnemore and Sikkink, 1998:899). The reason for this approach is because norm entrepreneurs are unable to directly coerce with those actors whose norms they seek to challenge and expertise and information is a tool used to persuade who they must (Mantilla, 2009:280).

2.2.2.2. *The tipping or threshold point*

If norm entrepreneurs convince a critical mass of states to become norm leaders and adopt new norms, Finnemore and Sikkink (1998:901) say “...the norm has reached a threshold point or tipping point.” To identify the tipping point, academics have been able to produce quantitative

¹⁸ Usually, these organizations are human rights NGOs, international organisations, UN representatives, academics, grass-root organisations, and other similar entities (Mantilla, 2009:280).

¹⁹ A TAN is understood as a mechanism to “...promote norm convergence or harmonization at the regional and international levels...” in addition to encouraging “...norm implementation, by pressuring target actors to adopt new policies, and by monitoring compliance with regional and international standards.” These networks can also be understood as “...political spaces, in which differently situated actors negotiate – formally and informally – the social, cultural and political meaning of their joint enterprises.” (Keck and Sikkink, 1999:90).

empirical support for it; however, theoretical explanations accounting for why this happens is unclear. Nevertheless, Finnemore and Sikkink (1998:901) pose two hypotheses concerning aspect that constitutes a *critical mass* and where and when to expect a tipping point.

The first, suggests that the tipping point is unlikely to occur before one-third of the total number of states in the system adopt the norm. However, their second hypothesis asserts that it is also important which states adopt the norm, which then for the propagation of the norm can be referred to as a *critical state*. In their paper on "...bilateral trade as a vehicle for the diffusion of human rights practices" Cao, Greenhill and Prakash (2012:134) find strong empirical support for a threshold effect. They stipulate that their argument is "...consistent with the notion of 'tipping points' that constructivist scholars have developed..." (Cao, *et al.*, 2012:141). Nevertheless, where Finnemore and Sikkink (1998) refer to the tipping point as the critical proportion of states needed to make the near-universal transmission of the norm possible, Cao, *et al.* (2012) operationalizes the concept slightly differently. For them, the tipping point is reached when the average level of respect for human rights in the importing country reaches a threshold and reduces the tolerance for human rights violations. In turn, this sends an unambiguous message to the exporting country about the importance of human rights, making the exporting country much more likely adhere to human rights standards (Cao, *et al.*, 2012:141).

2.2.2.3. *The norm cascade*

In the cases where a norm has emerged, passed the threshold, and continued towards the second stage, Finnemore and Sikkink (1998:900) suggest that:

“...it must become institutionalized in specific sets of international rules and organisations... [s]uch institutionalization contributes strongly to the possibility for a norm cascade both by clarifying what, exactly, the norm is and what constitutes violation... and by spelling out specific procedures by which norm leaders coordinate disapproval and sanctions for norm breaking.”

The second type of norm is described as a *hegemonic norm*, which according to Goertz and Diehl (1992:604) is defined by:

“(1) at least partial conflict between self-interest and the norm, (2) sanctions are in the hands of a central actor – government or hegemon – and play an important role, and (3) there needs to be at least a moderate level of support for the norm on the part of the actors affected.”

In this category of norms, the power to sanction and champion a norm is located at a central point. For example, agents fulfilling this position are often intergovernmental organisations, like the UN and their multilateral institutions (Rushton, 2008); or domestically, corporates are understood as fulfilling this role through their avocation of certain positions (Flohr, Rieth, Schwindenhammer and Wolf, 2010:8). Sanctions are a vital enforcement mechanism since they help to ensure the cascading norm perpetuates and overcomes conflicts with actor's self-interest. Nevertheless, what is much more important to the norms progression is the level of popular support it gains since the primary mechanism for a *norm cascade* is active processes of socialization. This mechanism is designed to turn 'norm breakers' into 'norm followers'. A manifestation of socialization is rhetoric that encourages the emulation of 'heroes', the 'praise' of groups conforming to the norms, and the ridicule of 'deviants' (Waltz, 1979:75-77).

Socialization's currency is conformity, which at the level of states, international organisations, and even TNCs, is dependent on the desire to belong (Axlerod, 1986:1099;1105). Individually, this is comparable to peer pressure, where conformity contributes significantly to self-esteem. Indeed, at the level of the individual the power of conformity is well documented and has repeatedly shown in situations where one's objective reality is obscure, an individual is likely to conform to a social reality to evaluate and construct their beliefs (Asch, 1956).

This analogue is argued to exist at the international level since state leaders conform to norms in the hope of accruing diplomatic praise and enhance national esteem; while, avoiding condemnation and the chance of reputational damage for violating the norm. In this way networks of norm, entrepreneurs act as agents of socialisation since they apply focused pressure to specific actors to adopt new norms, encourage enforcing laws, monitor and compliance (Finnemore and Sikkink, 1998:902-904).

2.2.2.4. Norm internalization

If a norm progresses through the norm cycle to arrive at the extreme of a norm cascade, the norm becomes so extensively accepted they are 'internalized' by actors almost automatically. Here, norms can gain a "taken-for-granted" quality and for this reason internalized norms can be exceptionally powerful and can be difficult to detect; since the norm is not challenged and actors do not evaluate or deliberate whether to conform (Finnemore and Sikkink, 1998:904). This kind of norm, according to Goertz and Diehl (1992:640), is a *cooperative norm*, which has the following characteristics:

“...(1) it corresponds to the self-interest of the actors, (2) no sanctions are necessary as the norms are self-enforcing, and (3) the deontological component is minimal.”

At this point, “...violating an established [i.e. internalized] norm is psychologically painful even if the direct material benefits are positive.” (Axelrod, 1986:1104). This type of norm appears to be those considered by Keohane (1983) since it is rational to pursue the norm as it aligns with self-interest. At this stage, the need for sanctions is significantly less since there is little incentive to deviate from the norm. For this reason most states observe international law most of the time (Koh, 1997). Likewise, violation of this type of norms results in long-term reputational damage. For these norms, a centralised body is needed more for facilitating coordination than for dispensing punishment; and thus, do not need to be particularly powerful (Goertz and Diehl, 1992:640).

At this stage, it becomes crucial for the norm to be replicated and internalised by organisations. There are two powerful means through which agents act and contribute towards this process according to Finnemore and Sikkink (1998:905). The first of these is through professional training, which actively socializes people to value one norm above others. Moreover, professionals actively transfer technical knowledge that entrenches and systematizes a norm. In support of this hypothesis Finnemore and Sikkink (1998:905) account that “[a]s state bureaucracies and international organisation have become more and more professionalized over the twentieth century, we should expect to see policy increasingly reflecting the normative biases of the professions that staff decision-making agencies.” In support of this claim, they cite empirical studies²⁰ that have repeatedly documented that professions with extensively internalized norms tangibility affect policy. Simply, this position gives credence to the effect that indirect and evolutionary procedural changes can have in internalizing a norm over time. This encourages the second aspect of norm internalization and replication which Finnemore and Sikkink (1998:905) identifies as the habitualization of the norm’s behavioural prescriptions. Through this process, procedural changes can develop as faith in the norm grows and new political processes of convergence build normative, ideational, and political discourse.

2.3. Incorporating international norms into domestic politics

Until now, this chapter has reviewed the descriptions reviewed in norm literature whose principal focus has been international politics where the state is the principal normative actor. Without detracting from this, a second wave of scholarship developed inquiries into the effects

²⁰ For example, Burley (1993) and Burley and Mattli (1993).

that international norms have on a state's behaviour domestically (Cortell and Davis, 1996; Klotz, 1995; Gurowitz, 1999; Gilardi, 2012). Briefly, in this space Cortell and Davis (2000:66) have concluded that the likelihood of an international norm impacting on domestic politics is dependent on two factors: "...the domestic salience or legitimacy of the norm, and the structural context within which the domestic policy debate transpires."

Importantly, in this process national governments are not the only pertinent unit and the implementation of systematic policies are not the only way the norm will spread through what is termed *transnational diffusion* (Gilardi, 2012:454); or in the language of the norm life-cycle "cascade." Here attention is given to a wide range of public and private actors within the state's territory. These actors have dispersed a wide range of issues "...from specific instruments, standards, and institutions, both public and private, to broad policy models, ideational frameworks, and instructional settings" (Gilardi, 2012:254). This has in part been driven by the global "governance turn"²¹ in international relations since the mid-1990s and has shown transnational actors, like TNCs, to be active in governing world affairs (Risse, 2012:439). More generally, this has meant contemporary²² work concerning international affairs has moved their efforts from denying the role of non-state agents and has focused "...the *conditions* under which these effects are achieved..." (Risse, 2012:431).

In this section literature investigating the processes through which international norms are introduced and embedded into the features of a state's domestic politics will be reviewed. Additionally, literature expressing how international norms are absorbed into corporate policies and codes of conduct will be included.

2.3.1. The salience of domestic conditions to adopt international norms

Cass (2006:8) explains that a fundamental aspect to determine the various effects international norms have in domestic politics requires an assessment of the domestic salience for that norm. Influential work in this space has been done by Cortell and Davis (1996; 2000). In their work, *salience* in the context of domestic choice, represents the degree of influence of an international norm, which they define according to the "...prescriptions for action in situations of choice..." (Chayes and Chayes, 1995:113, seen in Cortell and Davis, 2000:69). As they have pointed out, not all international norms resonate in domestic debates. Comparatively, salience requires a robust group in the national arena who are receptive to the norm (Cortell and Davis, 2000:69).

²¹ An alternative and more broad description of the "governance rush" spoken about in chapter one.

²² As compared to Waltz (1979) influential work.

This group is vital to guide behaviour through criticism, including self-criticism, towards the emerging norm (Waltz, 1979:75; Fallon, 1993:116). When a norm is salient it quickly gains this sense of obligation; and if violated, regret and reciprocity are engendered in these actors and motivates further action (Cortell and Davis, 2000:69).

There are several conceptual challenges to measuring effects an international norms salience in domestic politics in norm literature. As an example, Cortell and Davis (2000:69) suggests tautology as an example, since it would be wrong to "...code a norm as salient merely because state behaviour is observed to be consistent with an existing international norm." This has proven an enduring caution for those considering a norms domestic salience. Gilardi (2012:454) addresses this fault and in so doing distinguishes *convergence*, "...[a] significant in policy similarity across countries..."²³ from *diffusion*, which occurs "...when governments policy decisions in a given country are systematically conditioned by prior policy choices made in other countries" (Simmons, Dobbin, and Garrett, 2006:787, seen in Gilardi, 2012:454). Expanding on this definition, it is suggested diffusion does not occur solely at the international level and incorporates a variety of actors in domestic politics. This gives diffusion characterizing feature of interdependence since within this understanding the process is emphasised rather than the outcome. Thus, diffusion is the "...interdependent process that is conducive to the spread of policies, not the extent of convergence that can result from it." (Gilardi, 2012:454).

Pointing to occasions of this interpretation of international norms in domestic politics Cortell and Davis (2000:70) reference prominent institutionalists from constructivist and rationalist schools, summing the vitality of a norm is positioned according to the level of its "institutionalization" of its tenants in a state's regulatory, judicial, or constitutional systems (Keohane, 1989:4-5). It is appropriate then to dwell on the conclusion that a "...international norm's domestic salience largely derives from the legitimacy accorded it in the domestic political context." (Cortell and Davis, 1996:456). Or in other words, an international norms level of institutionalization does not necessarily correlate with its domestic strength (Goertz and Diehl, 1992:646).

2.3.2. Measuring the domestic salience of a norm

In the literature, there has developed various prescriptions that argue certain symptoms indicate the apparent domestic salience of international norms. What's more, these works include a

²³ A more in-depth discussion on convergence is done by in Risse (2012).

scale upon which this effect can be measured (Cortell and Davis, 2000:70-71; Cass, 2006:8-10; Cass, 2016:24).

Cortell and Davis (2000:70) argue evidence for the domestic salience of international norms originates from three areas. The first of these areas is the *domestic public discourse*, which can originate from the state or societal group and can be recognised in calls to change the policy agenda. Here, norm entrepreneurs will justify policy or institutional changes and appeal to delegitimize alternative positions. Emblematic of the burgeoning domestic salience is the establishment of organized societal groups; who, press for domestic institutional change and/or government committees or working groups, appointed to formulated policy alternatives that include tenets aligning with the international norm.

National institutions are the second locations from which the tenets of an international norm can be seen having more than nominal domestic salience (Cortell and Davis, 2000:70). The form and degree of institutional change vary. Nevertheless, in this description, the early evidence is found in domestic procedures and laws (Hall and Rosemary, 1996). The implementation of an international norm will enjoy the greatest efficiency if this allows it to compete, adjust, or replace conflicting positions. This is especially true if this leads to functions that can administrate legitimate complaints against norm violations, through state sanctioned bodies. As this process creates more domestic mechanisms enforcing compliance to the international norms, it is said that it is becoming domestically salient (Cortell and Davis, 2000:71).

The third and final location that indicates its progress involves an inspection of *national policies* (Cortell and Davis, 2000:71). Caution should be practiced these investigations since the efficacy of the international norm can be reduced or diluted if the state only changes the minimal policy to quell domestic or international pressure and does not meaningfully embark on a path towards policy reform. Thus, it is necessary to scale the effects of any one policy change motivated by normative pressure against several policies related to the issue area (Cortell and Davis, 2000:71).

From the evidence sourced from any or all the above occasions, Cass (2016:26) describes eight an eight-point scale on which the international norm's domestic salience can be measured. This builds on Cortell and Davis' (2000) three-level scale of domestic salience that only focuses on domestic actors. The scale proposed by Cass (2016) is distinct since it "...differentiates between the salience of the norm for the domestic political leadership and broader public

discourse.” This is useful since it incorporates a sensitivity to the possible path a norm can take which bypasses political leadership and becomes embedded through the activism of TANs; which may then apply pressure to political leaders to conform to the norm. Considering the effects of these variables this Cass (2006:9) developed the following scale:

On this scale: (1) *irrelevance* explains that there has been no acknowledgement, action, or remorse by national leaders for not participating in the emerging international norm; at (2) *rejection*, national leadership acknowledge an emerging norm, but it is nevertheless rejected and an alternative will be preferred. It is likely that the state will engage in debate with norm entrepreneurs here, but on an international platform and the norm will not have entered mainstream domestic political debate.

At (3) *domestic relevance*, continued resilience against the proposed norm by national leadership is accounted; however, at this point, it would have entered domestic political dialogue. It is at this point a regime begins to face pressure from international and domestic actors to conform to the emerging norm; (4) *rhetorical affirmation*, explains that national leaders will begin to conform to the norm because of political pressure and the norm is now part of public dialogue, but has not been transcribed into policy.

At (5) *foreign policy impact* is where national leaders include the norm in foreign policy to be seen conforming to it and maintain their inclusion in international affairs. This change may be brought about because of the persuasion of the norms appropriateness or the coercion of international on domestic actors. Yet, there is still reluctance from national leaders or actors who continue to reject the norm to change domestic policy that would initiate its behavioural aspects; (6) *domestic policy impact*, is the stage where political and social leader’s will begin to justify the need to include the international norm in domestic policy. Typically, these changes still serve multiple purposes, nonetheless the norm serves as a source of added justification for changes to policy. At this point, the norm is fixed in domestic political discourse, yet converts to the norm are still required justify policy changes that may affect domestic stakeholders.

From (7) *norm prominence*, stakeholders wishing to continue policies that contradict the norm now have the onus to justify violating the norm. Now, the ‘burden of proof’ has transferred and the norm is effectively embedded in domestic policies and its institutions; (8) *taken for granted*, this final stage accounts from when a norm has become completely embedded in domestic institutions and compliance to the norm is close to automatic (Cass, 2006:9-10; 2016:26-27).

Cortell and Davis (2000) describe their approach as interpretivist that produces a four-value scale that is: not salient, low, moderate, and high. This, in combination with Cass (2006), is said to enable investigations into domestic rhetoric, institutions, and policies to express that when a norms purposes, prescriptions, and proscriptions are widely held and uncontested in political dialogue the norms salience is high. Similarly, when there is evidence of the norm being institutionally embedded, but with reservations, special conditions, and exceptions the norm is moderately salient. When a norm has entered public debate, but it is yet to forms an agenda or policy changes they have low domestic salience; and when the norm is not domestic salience, they have very few norm entrepreneurs who are mainly motivated by their own idiosyncrasies (Cortell and Davis, 2000:72).

2.3.3. The role and salience of corporations in norm socialization

Ultimately, business corporations are usually classified as part of *transnational networks* in norm theory literature. Although, their positions as member or target is often debated (Keck and Sikkink, 1999:98-99; Mueckenberger and Jastram, 2010: 225-227; Risse, 2012:427-428; Gilardi, 2013). Keohane and Nye's (1971: xii) the definition of *transnational interactions* describes the regular "...movement of tangible and intangible items across state boundaries when at least one actor is not an agent of a government or an intergovernmental organisation." This definition of the concept encompasses nearly all human interactions if there is agency involved, including business. Nevertheless, as literature developed it has become more refined and the actors in transnational networks can be distinguished according to their internal organizational structures and their constitutive purposes (Risse, 2012:427-428).

The first of these groups actors can be defined by their loosely associated advocacy networks connected through common beliefs, values, principles, and similar discourse (Keck and Sikkink, 1999:2), knowledge-based epistemic groups (Hass, 1992), transnational coalitions "...who coordinate shared strategies or sets of tactics to publicly influence social change..." and transnational social movements involving coordinated and continual social mobilization (Khagram, Riker and Sikkink, 2002:7-8, seen in Risse, 2012:428). These actors are principally motivated by principled beliefs or the pursuit of a 'common good' and tend to be international nongovernmental organizations (INGOs) and NGOs (Risse, 2012:482).

The second group tends to include TNCs and other 'for profit' or self-interest organisation. However, this group can include organisations which are typified by strictly defined roles, rules and relationships between members that are arranged according to some degree of hierarchy in

the context of decision making. Moreover, these networks usually conduct their operations in a fixed sector. However, this distinction should be thought as two ends of the spectrum rather than a sharp division. For example, some NGOs make profit in humanitarian interventions; and business corporations sponsor and support a variety of social development initiatives. Risse (2012:428) continues and suggest this line has become more indistinct as both INGOs and firms engage in transnational governance; especially since business has become involved in rule-making and custodians of the ‘common good’ regardless of their founding motives. Recently, business and human right’s discussions have hosted these interactions.

2.4. Building the business and human rights norm

There has been multiple efforts attempting to clarify exactly why some international norms become domestically salient. An early example of this is Ikenberry and Kupchan’s (1990:283) work that suggests the socialization of a norm occurs because of state leaders embracing the “...normative ideas articulated by the hegemon.” Later, Finnemore and Sikkink (1998:906) would pose three hypotheses in this regard under the terms “legitimation,” “prominence,” and the “intrinsic characteristics of the norm.” While other advance more specific claims and suggest norms become domestically salience through “cultural matching,” “rhetoric,” domestic interest,” “domestic institutions,” and “socialization forces” (Cortell and Davis, 2000)

In their chapter on the socialization of international human rights norms into domestic practices Risse and Sikkink (1999:5) argue the diffusion of the human rights norms is dependent on “...the establishment and the sustainability of networks among domestic and transnational actors who manage to link up with international regimes...” to make them aware of domestic human rights violations. In this arrangement, it is argued that advocacy network serve three purposes that create essential conditions for sustainable domestic salience for human rights norms:

- “1 They put norm-violating states on the international agenda in terms of moral consciousness-raising. In doing so, they also remind liberal states of their own identity as promoters of human rights.
- 2 They empower and legitimate the claims of domestic opposition groups against norm-violating governments, and they partially protect the physical integrity of such groups from government repression...
- 3 They challenge norm-violating governments by creating a transnational structure pressuring such regimes simultaneously “from above” and “from below” ... [and] the more these pressures can be sustained, the fewer options

are available to political rulers to continue repression.” (Risse and Sikkink, 1999:5).

Here, the normalization of the international human rights norm is termed *socialization* and distinguish between three categories of causal devices that are essential to enduring norm internalization. Risse and Sikkink (1999:5) describe these as processes of active adaption and bargaining; moral campaigns; and habitualization. This builds on earlier work by Risse-Kappen (1995) and Sikkink (1993) and in so doing develop a five-phase “spiral model” describing the progression and actors involved in socializing human rights norms (Risse and Sikkink, 1999:20). In principle, this model follows the same progression logic as those discussed in Finnemore and Sikkink’s (1998) norm life-cycle and the positions on Cortell and Davis’ (2000) and Cass (2006; 2016) scales measuring the domestic salience of a norm – despite it being envisioning it differently.

The development of the business and human rights norm can be said to be the continuation of the international human rights norm along its life-cycle. This section will begin by briefly discussing the development of the human rights norm more generally before moving on to discussions of its institutionalization into international law. This is necessary since it is from this context that the business and human rights norm emerged.

2.4.1. The human rights norm and its institutionalization into international law

The human rights norm, like all normative traditions, developed its characteristics over time and its claims were advanced by norm entrepreneurs looking to change the broader political context (Weston, 2006; Tomuschat, 2008; Cornescu, 2009; DeLaet, 2015). In this regard, it is useful to consider the dominant schools of thought that have formed the human rights regime’s traditions (Weston, 2006:21). For those enacting this suggestion Karl Vasak’s (1977) three ‘generations’ of human rights²⁴ has helped summate and categorise human rights; however, in more recent literature cautions is urged to avoid thinking of human rights generations in terms of the latter discarding and discrediting the former. Rather, these generations should be seen existing and be respected simultaneously and it should be understood more as political-ideological conceptual stratification (Baehr, 1994:9; Bassiouni, 1994:347; DeLaet, 2015:20).²⁵

²⁴ Which describes ‘negative’ or civil and political rights; ‘positive’ or social rights; and ‘solidarity’ or economic and developmental rights (Vaska, 1977; Tomuschat, 2008).

²⁵ Additional discussions and perspectives about the ‘generations’ of human rights are Marks (1981), Condé (2004) and Spagnoli (2007)

Significantly, the induction of the term ‘human rights’ is strongly associated with the foundation of the UN and its Charter in 1945 and the adoption of the UDHR in 1948, which replaced phrases like *natural rights* and the *rights of man*, and marked the birth of modern international human rights (Symonides, 2000:10; Griffiths, O’Callaghan and Roach, 2014:155). Since then, literature stipulates human rights has been globally institutionalized secure in the fact that the UN Charter allowed human rights to be institutionalized internationally (Buergenthal, 1997:703).

The global institutionalization of human rights has occurred most significantly with their inclusion into the body of international law (Reinisch, 2005; Meron, 2006; Steiner, Alston and Goodmand, 2007; Karp and Mills, 2015). In the roughly seven decades that have passed since the formation of the UN and adoption of the UDHR human rights lawyers have helped form consensus that human rights are inherent and inalienable; and not dependent on the goodwill of sovereign states (Reinisch, 2005:37-38). Moreover, law is said to be particularly well suited to forming cultural frames of rationality, given its universal and formal nature (Boyle and Meyer, 1995:215, seen in Koenig, 2008:99). In this, law establishes corporate and individual actors, as *legal subjects*, through which their relationship is regulated (Koenig, 2008:99); while international law, has developed a conceptual premise that human rights principally limit the state’s power and that they protect the (feeble) individual against the (formidable) state (Reinisch, 2005:38). This process can be surmised in the phrase “global institutionalization of human right,” which according to Buergenthal (1997) occurred in three stages, although again it has been pointed out that, like human right generations, it should not be taken to have occurred systematically (Bassiouni, 1994:347). Time constraints restrict a more in-depth review of these stages; however, there are significant aspects that developed through these stages that are relevant to discussion on business and human rights.

2.4.1.1. Stage one: Standing setting, 1945-1966

Unsurprisingly, the ratification of the UN Charter and the induction of the UDHR are two events that are said to have begun the modern age of human rights institutionalization;²⁶ which lasted until the adoption of the International Covenant on Human Rights in 1966. This period began with the creation of principles and standards that defend rights, beginning the normative

²⁶ As it is suggested in the previous sub-section the UDHR encompassed “...civil and political rights, social, economic and cultural rights as well as the right to a just international order...”, or in other word all three generations of human rights (Koenig, 2008:99).

consolidation of international human rights law and established a UN process that expand and enforce the norm to this day (Buergethal, 1997:705; Langley, 1999:3).

Although, at this stage significant criticism were laid and support from key international actors was not automatically given, by the 1960s the normative momentum of human rights was in little doubt. Despite the weak and vague language in the UN Charter initially, it was soon supplemented by the UDHR, which came to define basic human rights obligations of UN member states. The acceptance of some of these obligations had, to an extent, internalized human rights into international law. The exported the protective domain of a subject to the international stage, which had previously been practiced exclusively within the domestic jurisdiction of the state (Buergethal, 1997:706).

2.4.1.2. *Stage two: Binding conventions 1966-89*

This second stage, deemed to be the ratification stage by Langley (1999), bound actors to international human rights in law. The South African apartheid experience motivated this and saw institutionalization of human rights monitoring functions in the UN Charter-based system; as well as several led to the formation of several monitoring bodies.²⁷ During this stage the charter-based instruments²⁸ gained the support needed to effectively gather complaints through the TANs they fostered to hear more conflicts and violations of human rights by states. Additionally, monitoring organs like the Human Rights Committee,²⁹ established their own jurisprudence that reinterpreted human rights in an institutional setting.

These UN developments created new opportunities for transnational human rights NGOs to form; while, the moralisation of international law made ‘naming-and-shaming’ a powerful normative to yield against non-compliant non-state and state actors states (Sikkink, 1993; Smith, 1995; Mantilla, 2009). In addition, this contributed significantly to the consultation

²⁷ The evolution of UN human rights law is described as evolving along two paths, one based on the UN charter (which is comprised of human rights principles and institutional mechanisms that various UN organs have developed over time) and the other is based on human rights treaties adopted by Organisations (which is formed by many human rights treaties drafted within UN auspices, codifying most of human rights law) (Buergethal, 2006:787-788)

²⁸ This is traced to the adoption of the ECOSOC Resolution 1235 (XLII) of 1967 that authorized the UN Human Rights Commission “...to make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of *apartheid*...” and the Resolution 1503 (XLVIII) in 1970, which empowered the UN Sub-Commission of the Prevention of Discrimination and Protection of Minorities to institute a mechanism that is capable to communicate between individuals and groups showing “...a consistent pattern of gross and reliably attested violations of human rights.” (Sohn and Buergethal, 1973).

²⁹ Other noteworthy monitory bodies are said to be the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1965, the International Covenant of Civil and Political Rights (ICCPR) in 1966, and the International Covenant on Economic, Social and Cultural Rights in 1966 (Koenig, 2008:100).

duties and power of NGOs in human rights related monitoring and campaigning (Koenig, 2008:100).

2.4.1.3. Stage three: Application in the post-Cold War era

This stage is characterised by the implementation and advance of enforcement mechanisms to ensure states comply with their human rights obligations; which are areas which were previously out of the UN's reach (Langley, 1999:3; Buergenthal, 1997:712-713; Koenig, 2008:100). The end of the Cold War acted as a catalyst to these events as the ideological, economic, and political contestation between East and West ended the corresponding divisions interpreting of human rights priorities (Donnelly, 2013:40).

It is noted by several scholars (Boyle, 1995; Buergenthal, 1997; Hamm, 2001; Cardenas, 2003) that among the most significant of the efforts made during this time was the 1993 Vienna Declaration on Human rights. The reasons for its significant range, for example Mertus and Goldberg (1993:201) and Sullivan (1994:155) both acknowledge that it was the first-time woman's rights were being specifically recognised by the UN; however, in more general terms the significance of the Declarations in the variety and number of participants. Boyle (1995:790) notes this was the largest gathering on global human rights to date, bringing together 171 states and an estimated 800 non-governmental organisation to discuss most, if not all, human rights concerns in a politically balanced way.

This demonstrated that most, if not all, human rights issues were now of concern to the international community (Hamm, 2001:1007). In the context of responsibility, the Declaration left little room for states to manoeuvre³⁰ and ultimately did away with "...two major impediments to the implementation of human rights... [which were] the artificial distinction between domestic and international human rights concerns, on one hand, and cultural relativism on the other" (Buergenthal, 1997:714).

2.4.1.4. Continuing from the post-Cold War era

More recently social indicators to the fulfilment of human rights, like literacy and health and the aggregate living standard globally since the end of the Cold War have steadily improved. Hamm (2001:1007) points to neo-liberal globalization forces as being among the most significant contributing factor to this shift. However, Hamm (2001) makes an additional

³⁰ Paragraphs 4 and 5 of the Vienna Declaration on Human rights (1993:878) proclaims that the protection and promotion of all human rights are indivisible and a fundamental responsibility of the state.

observation that over this time inequality has grown; which others have interpreted as a threat to social standards that may lead to domestic consensus turning against open markets in favour of protectionism (Bhalla and Lapeyre, 2004:193-194). This holds the potential to undermine collective human rights efforts like the UN Charter and the Vienna Declaration. Hence, there has been escalating calls for human rights to be considered relevant at all levels of governance. In this trend, literature has emerged giving increasing attention to efforts calling for the development of a consensual solution to human rights that emanate responsibility for human rights beyond the nation state to include non-state actors (Alston, 2005; Reinisch, 2005; Ruggie, 2007).

2.4.2. The business and human rights norm

August Reinisch (2005:43) notes that attempts to regulate corporate conduct, despite seeming to have arrived recently, is not a new phenomenon. In fact, Reinisch (2005), like many,³¹ assert that these efforts began in 1974 with the UN's Commission on Transnational Corporations (UNCTAD) and its mandate to develop a general code of code for TNCs. Soon however, this would become one among many as the Organisation for Economic Cooperation and Development (OECD) in 1976, the International Labour Organization in 1977, and the UN Centre on Transnational Corporations in 1978 all released their interpretation of a code of conduct for TNCs (Kolk, van Tulder and Welters., 1999:144). These efforts formed part of a wider movement initiated by developing countries to broaden regulatory programmes aimed at redistribution known as the *New International Economic Order*³² (NIEO) (Ruggie, 2007:2).

However, it became "...unfashionable..." to speak of codes of conduct's for TNCs in the 1980s since its became associate with over enthusiasm of the NIEOs (Sikkink, 1986:815-816). A chronic obstacle that the NIEO could not overcome was wider international consensus, which was withheld due to concerns about its functions, wording, and the potential sanctions against delinquent firms (Kolk, *et al.*, 1999:144). This declined interest in codes of conduct, which beyond having to forgo initial intentions to make them mandatory, stagnated alongside the most visible and public effort, which was the UNCTAD (Sikkink, 1986:816). Although the UNCTAD did make a draft code public in 1984, it was not able to escape ideological

³¹ Like Sikkink (1986:816), Kolk, van Tulder and Welters (1999:145), Ruggie (2007:2), and Feeney (2009:162).

³² The NIEO's fundamental objectives were developed between 1974-78 by 102 governments, who unanimously adopted the Declaration of Aims and Principles. Points of emphasis raised aimed at "...increasing the foreign exchange earning of developing countries; diversification of Third World Exports; reduction or elimination of non-tariff barriers; non-reciprocity in conditions of trade; improving the Generalized System of Preference." (Laszlo, Baker, Eisenberg and Raman, 1981:36). For additional more in-depth discussions, see Cox (1979).

weaknesses and increasing scepticism directed towards the NIEO and in 1993 the UN abandoned the effort and it would become a cautionary tale and indicative of the context the business and human rights has emerged (Reinisch, 2005:43).

These early efforts to regulate business corporation did not feature human rights specifically and instead concerned issues like prescriptions for foreign enterprises, the transfer of technology, and other activities related to international trade (Ruggie, 2007:2; Mantilla, 2009:282). Nevertheless, human rights would drive the re-emergence of code making efforts in the 1990s as the negative effects of TNCs on socio-political and socio-economic stability were published.³³ This genre of reports directed global attention to the potential negative effects of unregulated corporate activities can have on human rights and soon companies faced scrutiny for practices ranging from hiring policies, to negative environmental impacts, and potentially contributing or exacerbating conflicts and human rights abuses (Mantilla, 2009:283).

To fully appreciate the re-emergence of efforts to introduce code of conduct, which this time would have human rights as a central theme, one should consider the discussions taking place surrounding them at that time. As mentioned, the end of the Cold War acted as a catalyst for human rights discussions to take place. One such discussion concerned the effects fuelling intrastate conflicts. Soon academics, NGOs, and policy makers would begin to explore economic aspects of intrastate conflicts away from the more traditional socio-economic and socio-political (Collier and Hoeffler, 2004). Complementing this was the rapid expansion of TANs, which in this context contributed by connecting these high-level discussions too formal and informal discussions about human rights cultural, social, and political meanings by providing resources and collecting experiences from multiple locations. This greatly increased the pressure that could be applied to key actors to change policies and practices by monitoring their activities and compliance with regional and international standards (Keck and Sikkink, 1999:90; Mantilla, 2009:283). Despite the development of these networks, few examples of corporates being legally tried have been undertaken and even fewer have found a corporation guilty (Payne and Pereira, 2015).

³³ Examples are Clark, Greeno, Livoti, Quarto, Richard, Tate, Wilson and Wysham (1999) and Human Rights Watch's (1999) on Shell in Nigeria. This began moving the conversation past *if* corporations should observe human rights to corporations *must* incorporate viable human rights policies and ensure they are implement in their operations.

Nevertheless, accompanying the force that came with a unifying human rights regime was the idea of *good governance*, which proved a powerful influence over corporates behaviour. By the mid-1990s consensus had begun to gather around this concept as the IMF advocated its principles around the world and although it is said to be a concept originally design to be used at the level of the state “[o]nce the ‘good governance’ box was opened, its demands could not be limited to states,” helping to form consensus was around issues of corporate responsibility (Reinisch, 2005:50). By the turn of the century, these developments had significantly changed the international landscape and brought unprecedented consensus that action should be taken to counter the now observable negative outcomes of corporate activity. As a result, steps were taken to usher in a new regulatory approach to corporate activities.

2.4.2.1. *Introducing norms through voluntary mechanisms to business*

Early codes of conduct, policy guideline, and implementation frameworks for non-state actors, and particularly in the corporate space, were internally developed and self-imposed to create an illusion of self-regulation. Reinisch (2005:42-43) describes this as the “...privatization of human rights...,” since non-state actors incorporated human rights norms in the style of voluntary codes, guidelines, and frameworks without state intervention. Because of this, they were non-binding and are not solely dedicated to human rights. This trend towards self-regulation was done to try escape the defensive position some large TNCs found themselves in during the 1990s and avoid customer boycotts and possible litigation.³⁴ As time passed, corporates sort to increase the legitimacy of their codes by collaborating with NGOs to evaluate and develop seemingly transparent and inclusive mechanisms (Reinisch, 2005:43-45; Mueckenberger and Jastram, 2010).

Internationally, soft approaches³⁵ were also preferred since they had the widest political appeal. In 2000, the UN launched the Global Compact as a voluntary initiative designed to engage with business, civil society, and labour on ten UN Principles in the areas of human rights, environmental protection, labour standards and since 2004 anti-corruption/transparency issues. In the time since, the Global Compact has become the world’s largest corporate social

³⁴ An early example of these actions arose from controversy concerning Nestlé baby formula marketing in developing countries (Sikkink, 1986:815). A list of current boycotts can be found at <http://www.ethicalconsumer.org/boycotts/boycottlist.aspx> (Ethical Consumer, 2017).

³⁵ The alternative to pursuing their inclusion in binding international law with bodies designed to enforce compliance.

responsibility initiative³⁶ focusing on norm diffusion, of among other thing, human rights and compliance tools (Ruggie, 2007:2; Mantilla, 2009:283).

Elsewhere, efforts were being made that included a spectrum of actors that included the US and United Kingdom (UK) governments, international human rights NGOs, and more than fifteen TNCs from mining, gas, and oil industries to create the Voluntary Principles on Security and Human Rights in 2000. This document's preamble proclaims a respect for human rights, particularly those set in the UDHR as "...common goal..." for all participants (Voluntary Principles on Security and Human Rights, 2000).³⁷ Ultimately, this orientated the documents guidelines for security and political risk as well as its considerations when conducting impact assessments and recommendations when dealing with public and private security (Mantilla, 2009:283-284).

This proto-regulatory approach is said to be unique in human rights-related regulations since its most significant victories have been through treaties directed at changing state behaviour (Mantillia, 2009:284; Reinisch, 2005:39). Here, preference for a voluntary approach was given since TNCs international responsibilities in international human rights and humanitarian law was still in its infancy and norm entrepreneurs were only beginning to gather consensus through strategic political discourse. These voluntary codes served as an incubator for more novice human rights responsibilities to gain momentum and clarity; while being slowly introduced and translated human rights to the operational conduct of TNCs (Mantilla, 2009:284-285). To be sure, as short a time ago as 1996, international legal academics were still "...unclear whether transnational corporations [were] bound to respect these [international human] rights." (Frey, 1996:163). In fact, it was not until 1998 that progress was made towards ascribing legal responsibilities to TNCs. However, as business corporation's role in human rights violations became clear consensus began to form. This meant states and corporations could no longer ignore these practices since the benefit of inaction was soon outweighed by the reputational and material cost brought on by campaigns that pointed to the hypocrisy of these usually democratic state's indifference to the conduct of their own business corporations that in some cases resulted in operations being shut down. The awoke calls in the international realm to act (Mantilla, 2009:284-285). Ultimately, the entrance of TNCs into international legal, political, and social debates on human rights would be ameliorated by legal experts mobilized both

³⁶ The Global Compact has over 9 000 company and 4 000 non-business members (United Nations Global Compact, 2017).

³⁷ Other examples of voluntary initiatives include the Kimberly Process Diamond Certification Scheme (2002) (Brouder, 2009: 969-988) and the Extractive Industries Transparency (2002) (Brouder, 2009:849-864)

within and beyond the UN's call to go *beyond voluntarism* (International Council on Human Rights Policy, 2002).

Although, voluntary codes would not stand as the only viable option for much longer, as time has passed, their legitimacy has increased along with their complexity. In sum, voluntary codes have been preferred since they are agreed to rather than imposed, which makes them a solution that is a lot easier to swallow (Jenkins 2001:iv). Other benefits for voluntary codes is that they present corporates with a means to anticipate the positive and negative outcomes of their behaviour without the collateral consequences associated with forced compliance. Nevertheless, these voluntary codes remain dependant on the sincerity of the target actors and because of their 'softness' they may never manufacture the desired behavioural changes (Jenkins, 2001:22; Vogel, 2008: 174; Mantilla, 2009:285).

2.4.2.2. The false-start of binding business and human right

At the turn of the century, norm entrepreneurs saw it as necessary to have binding alternatives to voluntary codes. Consequently, the UN Sub-Commission on the Promotion and Protection of Human Rights established a Working Group on the *Working Methods and Activates of Transnational Corporations* (the Working Group) in 1998. By 2003, the Working Group produced the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights* (draft Norms) to act as a draft code of conduct for TNCs (Mantilla, 2009:286).

This text was written in the language of treaties and comprised twenty-three articles "...setting out human rights standards for companies in areas ranging from international humanitarian law, through civil, political, economic, social, and cultural rights, to consumer protection and environmental practices," which was in keeping with its mandate (UN Sub-Commission on the Promotion and Protection of Human Rights, 1998; Ruggie, 2007:3). At the time, this was the most comprehensive document on business and human rights. Moreover, it was also decided they would be non-voluntary in nature, since TNCs are "...organs of society..." they have the corresponding legal duties within their "...spheres of activity and influence..." to promote respect for human rights and their necessary recognition and observance that is in keeping with the UDHR (Ruggie, 2007:3). This distinguished the draft Norms from earlier examples of TNC human rights regulations; however, it also proved to be its greatest source of criticism since it would muddy-the-water between the duties of government and the duties of governments

towards human rights. Alston (2005:13-14) identifies this problem and the dilemma that follows:

“If the only difference is that governments have a comprehensive set of obligations, while those of corporations are limited to their ‘spheres of influence’... how are the [obligations of] the latter to be delineated? Does Shell’s sphere of influence in the Niger Delta not cover everything ranging from the right to health, through the right to free speech, to the rights to physical integrity and due process?”

Alston (2005:14) raises concern that within this formula corporate entrepreneurship, autonomy, and risk-taking would be undermined and asks “...what are the consequences of saddling [corporations] with all the constraints, restrictions, and even positive obligation which apply to governments?” Moreover, by imposing the full spectrum of the obligation under international law to corporations will “...by definition [reduce] the discretionary space of individual governments within the scope of those duties” (Ruggie, 2007:11). Indeed, since corporations are not democratically elected public institutions they should not be permitted to fulfil the role and practice the powers of the state, except under special circumstance like when they are employed to perform state functions (Ruggie, 2007:11).

According to the principle contributor, the draft Norms became “...the first non-voluntary initiative [concerning business and human rights] accepted at the international level...” when the Sub-Commission approved them (Weissbrodt and Kruger, 2003:903). Although it would not be classified as a treaty, once approved by the UN Commission on Human Rights (the ‘Commission’) it would acquire similar legal standing to “...many other U.N. declarations, principles, guidelines, standards, and resolutions with interpret existing international law and summarized international practice...” which international law scholars term *soft laws* (Weissbrodt, 2005:288). However, this was not to pass since the Commission declared that although there is a need to address processes attaching human rights responsibilities to corporate activities the draft Norms “...had not been requested...” by the Commission and thus it did not have any legal standing (Weissbrodt, 2005:290).

Ruggie (2007:4) reflects on the wider reception of the draft Norms and notes they received endorsements from the main international human rights NGOs, who began to refer to them as the ‘UN Norms’. However, business represented by the International Organisation of Employers and the International Chamber of Commerce were stringently against them. Nevertheless, for those companies seeking to more socially responsible the draft Norms served as a tool that summated their ‘obligations’ in international human rights law, humanitarian law,

consumer law, labour law, anti-corruption law, and environmental law. This also benefited customers who wish to inform their purchasing decisions by considering a company's human rights conduct. Weissbrodt and Kruger (2003:921-922), suggest human rights became an important point to be considered in corporation's day-to-day operations, not purely because of questions of morality, but because it has become an aspect that influences a company's bottom line.

2.5. The institutionalization of the business and human rights norm

The preceding section represents the literature that debate the practical and theoretical implications of ascribing human rights responsibilities to business. This section will be focusing on the most recent developments driving this field forward, which is the SRSGs report and its subsequent endorsement by the UNHRC. The reason for focusing on this document is because Ruggie's efforts encompassed "...a lengthy and inclusive consultation process, has garnered U.N. endorsement and therefore stands as the most internationally authoritative statement in this area." (Blitt, 2012:42). Although the GPs deviate from preceding normative documents like the Global Compact and the draft Norms in terms of its goals and formulation, it is in no way the first attempt to formulate human rights responsibilities for business corporations and they will not be the last. Thus, it is appreciated "...as an important (albeit imperfect) step in humanizing business, because the GPs do not foreclose 'any other long-term developments, including further enhancement of standards' with regards to business and human rights" (Deva, 2012:102).

The appointment of the SRSG dates to 2005, following the failure of the draft Norm initiative. After finding that little headway had been made towards establishing consistent policies and practices governing TNCs by earlier efforts, the SRSG recommended a 'three-pillar framework' in 2008. This approach looked to improve the existing and fragmented 'Protect, Respect and Remedy' approach and called to preserve:

"the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication; the responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and the need for greater access by victims to effective remedies, judicial and non-judicial." (OHCHR, 2011).

From this the SRSG received a renewed mandate from the UNHRC and Ruggie moved to 'operationalize' this framework by establishing substantial and functional recommendation,

which ultimately took the form of the *Guiding Principles on Business and Human rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*.

2.5.1. The human rights parameters of the Guiding Principles

Briefly, there are two aspects that the GPs do not accomplish. First, as it is suggested in the title of the document, the GPs do not aim to establish binding international law or obligations for TNCs. As a matter of choice, its normative contribution lies “...in elaborating the implications of existing standards and practices for States and business; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.” (UN-GA, 2011: *supra* note 14). Likewise, the GPs are not a universal “...tool kit...” capable of identifying corporate’s human rights responsibilities (UN-GA, 2011: *supra* note 15). Rather, it is said to have adopted a ‘slide-scale approach’ for businesses based on their size and circumstances (Blitt, 2012:43); or in the words of the report, “[w]hen it comes to means for implementation... one size does not fit all.” (UN-GA, 2011: *supra* note 15).

Secondly, the GPs does not ascribe the responsibility of all social outcomes to businesses themselves; rather it distinguishes between the respective roles of business and governments in this space. Thus, while governments remain principally responsible for ensuring the protection and fulfilment of human rights obligations across the *entire* spectrum, the GPs instructs business to *respect* human rights “...where appropriate...” (UN-GA, 2011: *supra* note 5) which in the context of the document, “... means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.” (UN-GA, 2011: *supra* note 6).

Another key aspect to consider is the GPs interpretation of human rights. This is framed in its 12th Principle, which read:

“The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.” (Guiding Principles, 2011:13)

From this wording, the GPs set out a baseline from which a wide spectrum of rights that need to be respected (Blitt, 2012:45); which is necessary since “...business can have an impact on virtually the entire spectrum of internationally recognized human rights” and “... [d]epending

on circumstances, business enterprises may need to consider additional standards” (Guiding Principles 2011:13-14). Nevertheless, it endeavours to alleviate the daunting prospects of the entire human rights spectrum and suggests “...some human rights may be at greater risk than others in particular industries...” (Guiding Principles, 2011:14).³⁸

From this position, the GPs implore business enterprises to respect human rights by recommending that they:

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

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” (Guiding Principles, 2011:14).

For this the GPs stipulate that an enterprise should have three mechanisms in place: (1) a formal policy commitment to achieve their responsibility to respect human rights; (2) “[a] human rights due diligence process to identify, prevent, mitigate and account for...” business related impact on human rights; and (3) a remediation process to correct any “...adverse [business-related] human rights impacts...” that they may cause or contribute (Guiding Principles, 2011:16). These three mechanisms frame the discussion in the GPs (Principles 16 to 24) and operationalize the GPs human rights recommendations.

2.5.1.1. *Adoption into formal policy*

To ensure respect for human rights is embedded into businesses, the GPs recommend they should communicate their commitment to this end through a policy statement that meets five criteria. First of these criterion is that any statement must be approved at the highest level of their business structure; second, it must be informed by appropriate internal and/or external experts; third, it should stipulate the human rights expectations of the company in regards to its “...personnel, business partners and other parties directly linked to its operations, products or services...”; fourth, such a policy statement should be freely available to the public and communicated internally and externally to all relevant parties; and finally, it should become evident in all operational policies and procedures for the business to be compliant (Guiding Principles, 2011:16).

³⁸ This proclamation, together with *supra note*'s 5 and 6, avoids the same mistakes of the draft Norms.

2.5.1.2. *Developing a human rights due diligence framework*

At its most fundamental, this process should incorporate assessments of the actual and potential human rights impacts, which draws on human rights expertise and involves meaningful consultation (UN-GA, 2011: *supra* note 18). Additionally, for this recommendation to be enacted by a business the GPs recommend that time is taken to interpret and then act upon the findings of an assessment (UN-GA, 2011: *supra* note 19). For these findings to be meaningful integrated, internal processes should be established with the capability to respond to any adverse findings. For this, responsibility needs to be assigned to a dedicated position in the business with the necessary oversight, power, and resources to take meaningful actions against any human rights violations. However, ‘meaningful action’ in this regard does vary according to the business’s culpability for any adverse impacts and to its capacity to address any adverse impacts (Guiding Principles, 2011:21).

The next recommendation in terms of the operationalization of due diligence concerns tracking responses (UN-GA, 2011: *supra* note 20). This should be conducted through the appropriate quantitative and qualitative methods and should be sourced from internal and external sources, especially those stakeholders affected by the business’s operations to deduce its impact and the path forward towards its human rights responsibilities (Guiding Principles, 2011:22).

The final recommendation regarding the function of a due diligence framework in this context is that it should communicate how impacts will be addressed, particularly those raised on behalf or by the affected group of stakeholders (UN-GA, 2011, *supra* note 21). This should be observed especially if the operations pose severe risks to human rights. The GPs recommend that all communications should be produced at a frequency that matches the operational impacts of the operation and should be freely available, contain information that accurately represents the business’s response, and does not violate legitimate commercial confidentiality parameters (Guiding Principles, 2011:23).

2.5.1.3. *Enabling remediation processes*

As a foundational principle of the Guiding Principles, access to remedy is expressed as the states duty to “...protect against business-related human rights abuses...” which involves ensuring access to judicial, administrative, legislative and other appropriate steps through which remedial action can be sort (UN-GA, 2011: *supra* note 25). In the context of due diligence, where businesses have identified that they contribute or cause adverse impacts, the GPs recommend they provide or participate with legitimate processes to seek remedy (UN-

GA, 2011: *supra* note 22). An “...operational-level grievance mechanism...” (detailed in Principle 31) is recommended by the GPs to enable affected stakeholders to gain access to remediation.

What should guide this, and in fact, the entirety of the GPs recommendations is an ethos that urges business enterprises under all circumstances to:

- (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
- (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
- (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate. (UN-GA, *supra* note 23-24).

This is a final word describing the nature of the respect that business should have for human rights. The underlying message is that even in situations where domestic circumstances may result in high human rights risks, the business enterprise is never exempt from their responsibility to respect human rights. Moreover, in complex scenarios where other actors (for example state security forces) commit human right abuses, business enterprises should in no way exacerbate the situation (Guiding Principles, 2011:26).

2.5.2. Business and human rights since the Guiding Principles

The earliest reference to “business and human right literature” as a body with this specific descriptor unearthed in this review was Clapham and Jerbi (2000:342) description that it “...avoids drawing up clear boundaries for the categories of corporate complicity in human rights abuses.” Of course, by making this categorization it acknowledges the existence of innumerable publications preceding it in the field. Since then, its popularity as a term has grown and is included in the title of the GPs. Although the GPs may have fixed a name to the relevant literature, reaction to the GPs has varied from “...enthusiastic endorsement to vehement criticism.” (Blitt, 2012:50).

Unlike the draft Norms, the GPs were unanimously endorsed by the UNHRC. This was the first time that the UN adopted a dedicated set of standards for business and human rights; while it endures as the only example of where the UNHRC and the Commission on Human Rights both endorsed a normative text (for any subject) that governments did not negotiate themselves. Moreover, the GPs have been taken up by numerous international and national standard setting

bodies³⁹ like ODEC, who have added to their *Guidelines for Multinational Enterprises* (2008) a chapter on human rights that draws virtually verbatim from the GPs; and the European Commission that endorsed the GPs and requested their member states to develop and submit a national action strategy for their enactment (Ruggie, 2014:11; Blitt, 2012:50). Additionally, they have been incorporated as a policy template by companies and business associations and been deployed as an advocacy tool for workers organisations and NGOs (Ruggie, 2014:5).

There is little doubt that the GPs has advanced the business and human rights regime. However, corporate violations of human rights have largely remained "...at the periphery of transitional justice work." (Sharp, 2014:2). Practitioners and scholars from social sciences and law are only beginning to consider ways corporate violations can be included into a "...transnational justice framework..." (Michalowski, 2014; Payne and Pereira, 2015; Roht-Arriaza, 2015). A plethora of perspectives have emerged because of unsettled legal debates about international law on the subject (Payne and Pereira, 2016:65). The literature focusing on business and human rights incorporates debates over international law and questions of enforcement by the state and corporates' compliance. Here, international law, courts, and governmental institutions attempt to increase the cost corporations pay for neglecting or committing human rights violations. This international approach works to make corporate human rights violations visible and holds them accountable in domestic courts. Through this effort corporate abuses are rectified by domestic-level forces, who rely on the applicability and morality of international human rights (Payne and Pereira, 2016:64).

The efficacy at the domestic-level corresponds with assertions made by political economy of business and human rights literature. Here, it is suggested that states are less likely to employ sanctions against businesses if they operate in an industry that is indispensable to their national security or economy (Moran, 2002:412; Ite, 2004). This is because states fear that by enforcing human rights they expose themselves the risk of having companies relocate to more forgiving investment environments (Dougherty, 2011). Additionally, states are wary that this may have repercussions for foreign direct investment if they seem hostile towards business and investment. Acknowledging this, some scholars have endorsed an approach that sees states adopt persuasive and low-cost mechanisms as a realistic and less risky way of enhancing business and human rights than trails (Balmer, Powell and Greyser, 2011:1-2; Buhman, 2013:56-57); others maintain business and human rights will only be adhered to when

³⁹ Faracik (2017) is among the most recent reviews of the GPs and notes its implementation at various levels of governance and social organizations, globally.

companies perceive them as unavoidable and a source of financial risk if they are not complied with (Deitelhoff, Feil, Fischer, Haidvogl, Wolf and Zimmer, 2010:203); while some support a combination of soft and hard mechanisms (Payne, Lessa and Pereira, 2015:728). From whichever perspective, the efficacy of domestic enactment of any variation of international human rights is dependent on the work done by international norm entrepreneurs.

2.6. Conclusion

This chapter has served to review the literature on International Norm Theory and the normative development of human rights and specifically the business and human right norm. By this effort, the first supplementary research question is addressed. Briefly, the transition of a norm through its *life-cycle* can be determined by the presence or absence of varying degrees of self-interest, sanction, and deontology (Goertz and Diehl, 1992; Finnemore and Sikkink, 1998). These elements have been appreciated time and time again by scholarly attempts to identify and investigate the coercive power of a norm. An example of such work that is pertinent to this study concerns determining the domestic salience of an international norm. Here, domestic rhetoric and actions at varying levels of a nations society highlighted and shown to be vital to meaningfully investigate and appreciate a norms influence.

This chapter also shows that human rights are no single entity and Vaska's (1977) description of human rights generations is indicative of its constant evolution and shifting priorities. By reviewing the literature, it is revealed that work on advancing the business and human rights norm is a manifestation of priorities currently held by norm entrepreneur's in governance at various levels. In this regard, the GPs endure as the most influential and meaning effort made thus far; and although international pressure for business and human rights norms remains localised to soft-law and voluntary mechanisms evidence of its normative influence can be investigated (Ruggie, 2013; Payne and Pereira, 2016:66).

3. Case study: The New Alliance, their framework and the incorporation of the Guiding Principles in the Malawian sugar industry

3.1. Introduction

Globally, sugar production has been steadily rising for several decades in response to growing demands for bioethanol and human consumption. Even though considerable diversity exists in production systems and local contexts, sugarcane production is broadly considered a high impact crop that has potential for both positive and negative socio-economic and environmental. Currently, SSA bears these outcome in proportion to its 3.5 percent contribution to global sugar production (Yamba, Brown, Johnson, Jolly, and Woods, 2008:16). However, it is likely that this region will seek to increase its output. This is conceivable due to the regions favourable soil, topography, and climate for growing sugarcane making the cost of production relatively low. Moreover, the geographic proximity and colonial history of the region with the world's second largest sugar consumer, the European Union (EU); together with two duty-and-quota-free trade agreements⁴⁰ makes the EU a viable market for African sugar (Hess, Sumberg, Biggs, Georgescu, Haro-Monteagudo, Jewitt, Ozdogan, Thenkabail, Daccache, Marin and Knox, 2016:182). This, together with SSA countries agricultural development policies, has led sugarcane to draw significant interest and attention from international, regional, and national investors.

The context surrounding sugarcane production is being drawn into several current policies and academic debate that to a large degree centre around the positive and negative socio-economic and environmental impacts of sugarcane production. For some, the industry illustrates tried and tested examples of how to include small-scale producers into larger value chains through outgrower systems; while other advocates see it as an opportunity to develop African power, water, and transport infrastructure along development corridors that meet the requirements of large-scale sugar production and other economic opportunities for adjoining communities (Sulle, Smalley, and Malale, 2014:1). Nevertheless, others see the industry illustrating global agricultural trends that override national interests and policy, which ultimately affect local business and incomes most; while others note developments surrounding sugar has, in certain

⁴⁰ The 1975 Lomé Convention between African, Caribbean and Pacific countries; and the 2000 Cotonou Agreement.

cases, been linked with water and land *grabbing* (Hall, 2011; Oxfam, 2013; Chinsinga, Chasukwa, and Zuka, 2013). More generally, however, sugarcane production fits comfortably at the centre of two debates. The first involves the agricultural sector's need to increase crop and water productivity and efficiency; and the second concerns the WFEN, whose issues have arisen alongside mounting interest in sugarcane as a biofuel stock. These issues place sugarcane's developmental, economic, and environmental trade-offs, which are also at the heart of the nexus, into stark relief (Hess, Scoones and Henley, 2016:182). From either perspective, sugarcane production has environmental and social outcomes and these will have a significant role to play in shaping SSA agriculture.

In this chapter, the case of Malawi has been selected to demonstrate the enactment of the GPs for two reasons. First, relates to the geo-political topography of the country itself. Malawi is relatively small in geographical terms, is extremely poor, with a comparatively high population density, the majority of which are rural dwellers relying on subsistence farming. Thus, any LSLBIs are likely to impact significantly on local community's enjoyment of broad spectrum of human rights. Secondly, the prescription of the GPs has been enacted in this context on two levels: in state legislation; and in Illovo's Group Guidelines. From these two locales evidence indicating the domestic salience of the business and human rights norm is manufactured and reveals enduring challenges to the norm that land deals create.

3.2. The New Alliance, their framework and the Guiding Principles

Globally, and between regions there is enormous diversity in norms and values that form unique worldviews and preferences; meaning, no universally applicable morality has emerged. In this context TNCs attempt to implement and manage their actions that are commonly done through due diligence, or risk, management frameworks. This is a deeply heterogeneous phenomenon that has made standardization its evaluation and management challenging (Klinke and Renn, 2002:1072; Jakobsen, 2010:482). The transnational land governance fields' early interaction with this reality, which has produced a vast number of analytical frameworks and guidelines to land-based, is evidence of this.

Although these frameworks remain voluntary the international business community, civil society groups, and governments have at varying times acknowledge that it is in their best interest to ensure that LSLBIs are in line with international best practice (USAID, 2015). Between 2012 and 2015, three principle soft-law mechanisms emerged as the international

community's baseline for inclusiveness and responsibility in Africa.⁴¹ Even though these efforts source influence from diverse sights, commonalities in their moral rational stand in their prescriptions. The GPs can be counted among these influences and where it is interpreted evidence is created that is indicative of normative influence. Specifically, across the three soft-mechanisms and other country guidelines,⁴² the GPs is a primary motivating factor for their publication and its language can be found in crucial functions of their recommendations.

These efforts represent a watershed moment in the formulation of a common consensus amongst various international actors that implores respect for human rights. However, calls for more practical and succinct guidance concerning principles contained within these documents have been made by those investors making land-based investment decisions. In response, land experts from the African Union (AU), the United Nations Food and Agriculture Organisation (FAO), and several donor countries from the G8 collaboratively produced the NAF in 2015. This collective effort was hosted by the New Alliance for Food Security and Nutrition, which launched in 2012 and is under the auspice of the G8, with the World Economic Forum (WEF) and the AU, as co-conveners of the Leadership Council (New Alliance for Food Security & Nutrition, African Union Commission and Grow Africa, 2015:3). This organisation was formulated on the virtuous vision of creating an environment that enables participating African countries to improve agricultural productivity and advance their agrifood sector by attracting private to their agricultural sector (De Schutter, 2015). So far, ten African states, including Malawi, have signed country cooperation frameworks with donor agribusiness, advancing commercial interests in the WEF's Grow Africa Initiative⁴³ (Treasure-Evans and Lambrechts, 2015:7-8).

The New Alliance has taken a step towards ensuring this venture is done with considerations of international best practice and human rights with the development of its framework. This framework seeks to contribute towards and harmonize these older efforts advising land-based investments into one concise and convenient document (New Alliance for Food Security & Nutrition, *et al.*, 2015:3). Though this framework is not meant to replace its source documents

⁴¹ These are the FAO & the Committee on World Food Security's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) (2011); the Committee on World Food Security's Principles for Responsible Investment in Agriculture and Food Systems (2014); and, the African Union Commission, the African Development Bank, and the United Nations Economic Commission for Africa's NAF Systems (2014).

⁴² Like the United States Agency for International Development's *Operational Guidelines for Responsible Land-Based Investment* (2014); or, the French Agency for Development's *Guide to Due Diligence of Agribusiness Projects that Affect Land and Property Rights* (2014).

⁴³ Which is a partnership between the WEF, the AU and NEPAD formed in 2011 (Grow Africa, 2017).

it is poised to become a foundational structure that those looking for guidance on how to make responsible land-based investments that comply with governance, social, and environmental commitments (USAID, 2015). It contributes to this by being a tool that “...company staff, investment compliance managers, and risk assessment and management professionals...” can use to comply with international human rights and manage potential risks to their investments (New Alliance for Food Security & Nutrition, *et al.*, 2015:3). Thus, the principal audience of this framework is considered to be the investor, and in particular the investor's staff, compliance managers, and risk assessors and managers (Columbia Centre on Sustainable Investment, 2016:4; New Alliance for Food Security & Nutrition, *et al.*, 2015:6). In return, the framework has been supported by local business, TNCs, and governments who are active in the WEF (Treasure-Evans and Lambrechts, 2015:8).

Across the mechanisms that mention the GPs its most notable influence in land governance frameworks is its prescription advising communities have access to remedy through grievance mechanisms. The GPs stipulate that a remedy in this context,

“...will counteract or make good any human rights harm that has occurred... [that] may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions... as well as the prevention of harm through, for example, injunctions... [p]rocedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.” (Guiding Principles, 2011:27).

The GPs also stipulates that a grievance is:

“...understood to be a perceived injustice evoking an individual’s or a group’s sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities... [and a] grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human right abuse can be raised and remedy can be sort.” (Guiding Principles, 2011:27).

In the NAF, the GPs are used in this capacity; however, they specifically reference the GPs *effective criterion for non-judicial grievance mechanisms* as guiding its own grievance and dispute resolution mechanism stipulations (Guiding Principles, 2011:33; New Alliance for Food Security & Nutrition, *et al.*, 2015). Within the sugar industry, these considerations of remedies have been formulated into means to avoid investments being labelled as land grabs, which is one of the industry’s biggest challenges (Van der Wal, *et al.*, 2015:11). To date there is few practical examples of where the NAF has been implemented. Nevertheless, since its

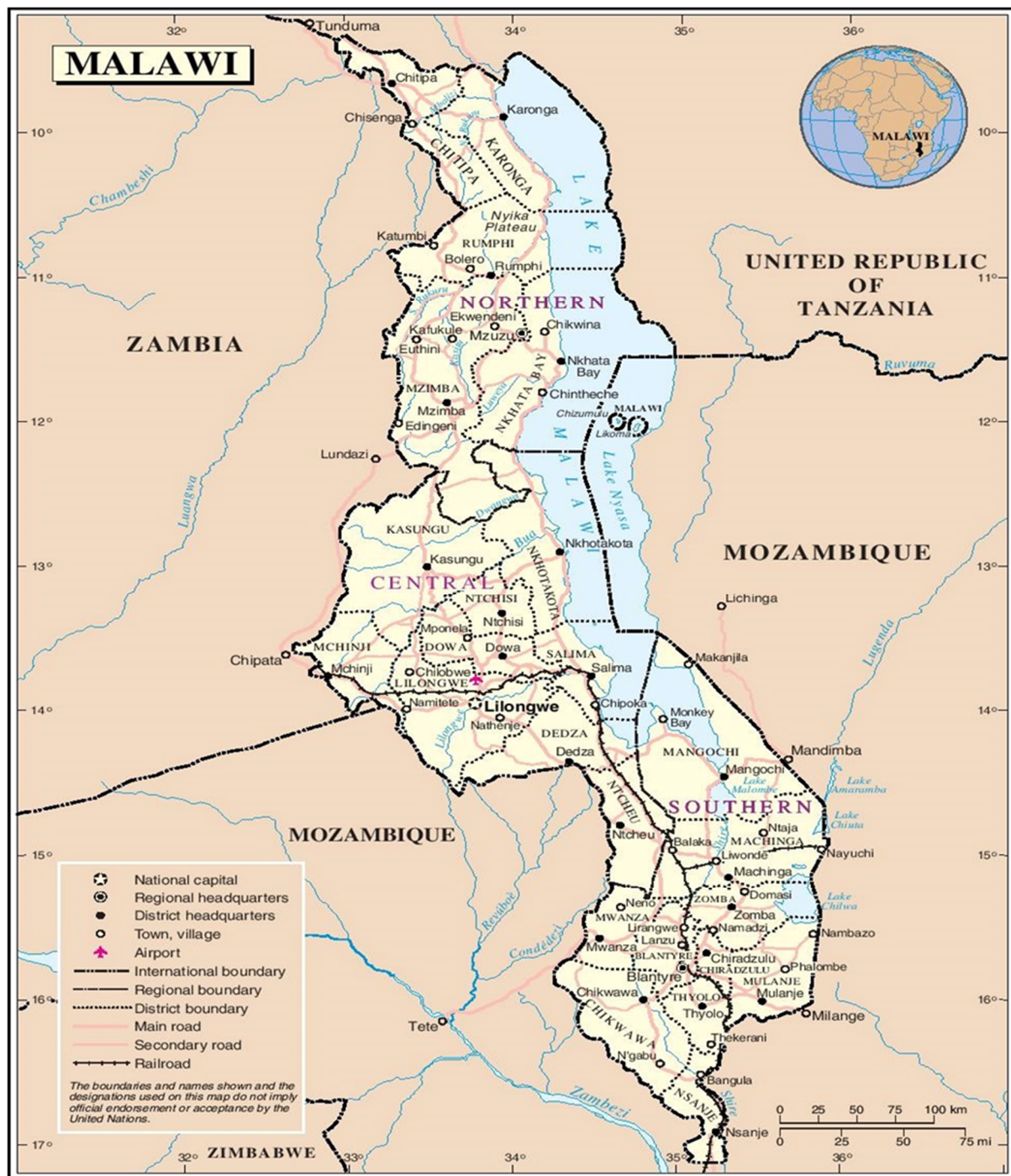
publication, this framework has attracted significant attention and acclaim from the international community. For example, the Global Donor Platform for Rural Development's Global Working Group on Land and the KPMG managed Legend Challenge Fund have endorsed the NAF (Global Donor Platform for Rural Development, 2015; Legend Challenge Fund, 2016). In addition its importance is evident in its tool that involved experts from the G7, the African Union Land Policy Initiative, and the FAO (Legend Challenge Fund, 2016). Reflecting on these considerations and the possible role that this framework may have in guiding future land-based investments in Africa, it is appropriate for it to be considered as evidence for the normative uptake of the GPs.

3.3. Becoming familiar with the Malawian context

Malawi is a small landlocked country in Southern Africa. The country's total area is 11 848 000 ha, 9 428 000 ha of this is land, and an estimated 5 790 000 ha is suitable agricultural land (FAOSTAT, 2013). The Malawian landscape has been formed and is dominated by the Rift Valley. Amongst the most preeminent features of this is Lake Malawi which is the most southern of African Rift Lakes and covers approximately one-fifth of the country's area and extends down two-thirds of the country (Conroy, 2006:15). The indigenous people of today's Malawi are the Yao originating in the south, the Tumbuka from the north, and the Maravi from the centre. Of these three groups, the Maravi people have established the largest and most powerful kingdom, expanding into present day Zambia and Mozambique before the colonisation of the region (Crosby, 1993:45-46).

Today, Malawi is divided into three major administrative regions (see figure 2). The southern region is the most densely populated; with the two major cities: Zomba, the old colonial capital and the important economic hub Blantyre. The central region is characterised but the high interior Central African Plateau. This region hosts the new capital, Lilongwe, the greatest potential for farmland, and the tobacco auction floors that are critical for the sale and export of one of the country's most crops. The northern region is the least densely populated area in the country and includes sheer escarpments, many rivers, the Nyika Plateau, forest plantations, and high-quality agricultural land (Conroy, 2006:15). Compared to other African countries, Malawi has one of the highest population densities with a population of 17 200 000 in 2015 (The World Bank, 2016a), with an estimated 1.45 people per hectare; which, when compared to neighbouring Zambia 0.22 people per hectare and Mozambique's 0.35 is contextually high (FAOSTAT, 2013; The World Bank, 2016b; The World Bank, 2016c).

Figure 2: Political map of Malawi



Source: United Nations Cartographic Section (2004)

The agrarian sector plays a preeminent role in the Malawian economy, accounting for just under a third of GDP, provides about 80 percent of the country's export earnings, and generated self-employment and wage opportunities to most of the country's population (Food and Agriculture Policy Decision Analysis, 2015:1), 83.7 percent of which is rural (FAOSTAT beta, 2016). The agricultural sector is sub-divided into smallholder farmers, who produce on customary land and about 70 percent of agrarian output, and large-scale estate farmers, who

make use of leased and freehold land to produce cash crops, most of which intended for export markets (Harrigan, 2003:847). The central role that agriculture plays in Malawi has meant its policy reforms and development strategies have focused on this sector.

Nevertheless, the combined effect of post-colonial development strategies and rapid population growth have led to a dramatic decline in per capita of land ownership since the 1960s in Malawi. This is problematic since smallholder farmers use land as a safety net and a supplementary source of income (Chinsinga, 2011:381). What has exacerbated already high levels of competition over land resources has been the dispossession of local communities' land. Historical example of this dispossession has occurred through the establishment of national parks at Nyika, Kasungu, Lengwe, and Liwonde (Greco, 2013:1104). However, more relevant examples include cash crops like tobacco at estates in Kasungu and tea estates in Mulaanje and Thyoto. An enduring and problematic theme in these dispossessions has been the land reforms that took place directly after independence and the 1967 Land Bill, which was only replaced in 2016. It is argued that this regime did not make a significant enough break with the colonial framework governing land tenure patterns and ownership, which maintained the skewed power dynamics in Malawi's governance regime in the hands of the political elite. This arrangement has not escaped the country's sugar industry. The remainder of this section will discuss in more detail its impacts and the challenges that endure Malawi land governance structures more generally and its sugar industry specially.

3.3.1. Sugar production in Malawi

Growing sugarcane in Malawi began in a pilot project called Alimenda Sugar Scheme in 1949 in the Shire Valley. This project was soon abandoned and the formal sugar industry in Malawi began in 1963 when the Lonrho International Corporation, after being invited to do so by the country's first president, began its investments and formed the subsidiary the Sugar Corporation of Malawi (SUCOMA) in the Shire Valley in Nchalo. For this, approximately 4 856 ha of public land was leased from the Government to constitute the Nchalo estate – which produced sugar for local consumption (Crosby, 1993:160; Chinsinga, 2016:4). Within a decade, demand from European and US markets motivated Lonrho to invest in a second site in Dwangwa to establish the Dwangwa Sugar Corporation (DWASCO)⁴⁴ and encouraged the formation of the Smallholder Sugar Authority (SSAu),⁴⁵ dramatically increasing sugarcane

⁴⁴ Which had most its shares held by the GoM.

⁴⁵ A grassroots pastoral society which was anchored in the 1978 Special Crops Act.

cultivation. At this second location production begin initially in an area over 5 261 ha of land, with an additional 500 ha of land being worked by over 200 farmers from all over the country under the SSAu scheme and Lonrho management to transfer the skills needed and to promote sugarcane production amongst smallholder farmers (Crosby, 1993:160; Chinsinga, 2016:4).

Over time the combined area of SUCOMA at Nchalo and DWASCO at Dwangwa increased under legal sanctions of the presidential orders of 1969 and 1975,⁴⁶ which designated extensive stretches of previously *customary land* for sugarcane plantations. These orders, and particularly the order of 1975, sort to take advantage of the demand in Europe, which in 1973 became a guaranteed market for 20 000 tons of Malawian sugar as a Most Favoured Nation in the *African, Caribbean and Pacific Sugar Protocol* (Crosby, 1993:160; Gudoshnikov, Jolly and Spence, 2004:163). From this context the Malawian sugar industry emerged, which has become a major foreign exchange earner for the country.

This new industry soon under threat when global sugar prices plummeted in 1982 and the US government re-imposed import quotas and domestic support programmes to support their own sugar industry (Anjaria, Lqbal, Kirmani and Perez, 1982:48). The GoM was strongly against this quota system but by 1990 sugar prices had recovered and its sugar industry once again aimed to increase its sugar production, which in 1990 accounted for 10 percent of the country's exports (Crosby, 1993:117). By the end of the growing season in 1998-99 the total area of sugarcane stood at 16 800 ha that produced 1.68 million tons (Chinsinga, 2016:4); while to today the evidence of the expansion of the Malawian sugar industry is seen in Illovo Malawi's 2015 annual report which describes 2013 as a peak year with a total area of 20 179⁴⁷ ha being harvested (ISML, 2015:7), which produced 2.9 million tons of sugar (ISML, 2013:7).

The introduction of the sugarcane industry to Malawi was conceived with the purpose of fulfilling a key role in jumpstarting the industrialisation process; however, from the start it was straddled with the weight of serving to sway political patronage. Under former President Bakili Muluzi, in his capacity as Secretary General of the Malawian Congress Party (MCP)⁴⁸, exploited the still developing sugar industry to gain political support by allocation sugar distribution quotas to party loyalists – a system which he perfected after being elected President

⁴⁶ This describes the control of land (Kasindula Irrigation Area) order 31 30/1969 which allocated an approximate 8 788 ha in Nchalo; and the control of land (Dwangwa sugar project) order 178/1975 which allocated an approximate 48 750 ha of land in Dwangwa along the lake shore (Malawi Legal Information Institute, 2016).

⁴⁷ 13 568 ha in Dwangwa and 6 611 ha in Nchalo.

⁴⁸ The party of Malawi's first president, Dr Hastings Kamuzu Banda, whose authoritarian regime ruled from independence in 1964 until democracy in 1994 (Crosby, 1993:50-51).

in 1994 as the leader of the United Democratic Front (UDF). This gave Muluzi significant power, which he could wield to overcome the influences of his political, greatly weakening “...the power of the residual new blood politicians and making a mockery of the original “democratic dreams”” (Lwanda, 2006:535). Keeping this in mind, it is vital to understand that the Malawian state is one of the few available avenues where wealth can be accumulated, making government contact’s a vital component for the success of any schemes or investment. In this arrangement the political and bureaucratic elite in Lilongwe and *traditional* chiefdom leaders act as gatekeepers; thus, forming strong alliances between the Malawian state officials and business (Khembo, 2004:134; Lwanda, 2006; Chinsinga, 2016). These connections have persisted, even after the sugar industry was privatised and taken out of state control.

A more recent initiative that has propagated the cultivation of sugarcane has been the Green Belt Initiative (GBI) of 2009. This project aimed to build on progress made by the Farm Input Subsidy Programme (FISP) towards the country’s food security objectives and its components are aligned with the Agricultural Sector Wide Approach⁴⁹ (ASWAp) (Chinsinga and Chasukwa, 2012:2-3). Although the GBI was meant to expand several staple food crops like maize, cassava, and sweet potatoes, sugarcane plantations have dominated in GBI areas. The reason that government has been keen on promoting sugarcane is because of the threat of the anti-tobacco lobby shrinking key markets. Sugar has already become Malawi’s second largest export commodity (surpassing tea) in terms of value, contributing about 10 percent to Malawi’s GDP, or about 35 percent of its agricultural sector (Corporate Citizen, 2014:2; CIA, 2016:2061). The desirability of sugar has also been increased by reforms in the US and EU markets brought in by the *Everything But Arms initiative*, which allows developing countries to access their markets without prejudice or preferential treatment.⁵⁰ It is vital for the GoM to continue to develop its sugar industry if it hopes to remain competitive in international markets, especially in the context of EU phasing out the restriction on their own sugar producers (Chinsinga, 2016:6). Despite challenges, Malawi does hold the potential to maintain its competitiveness in international markets.

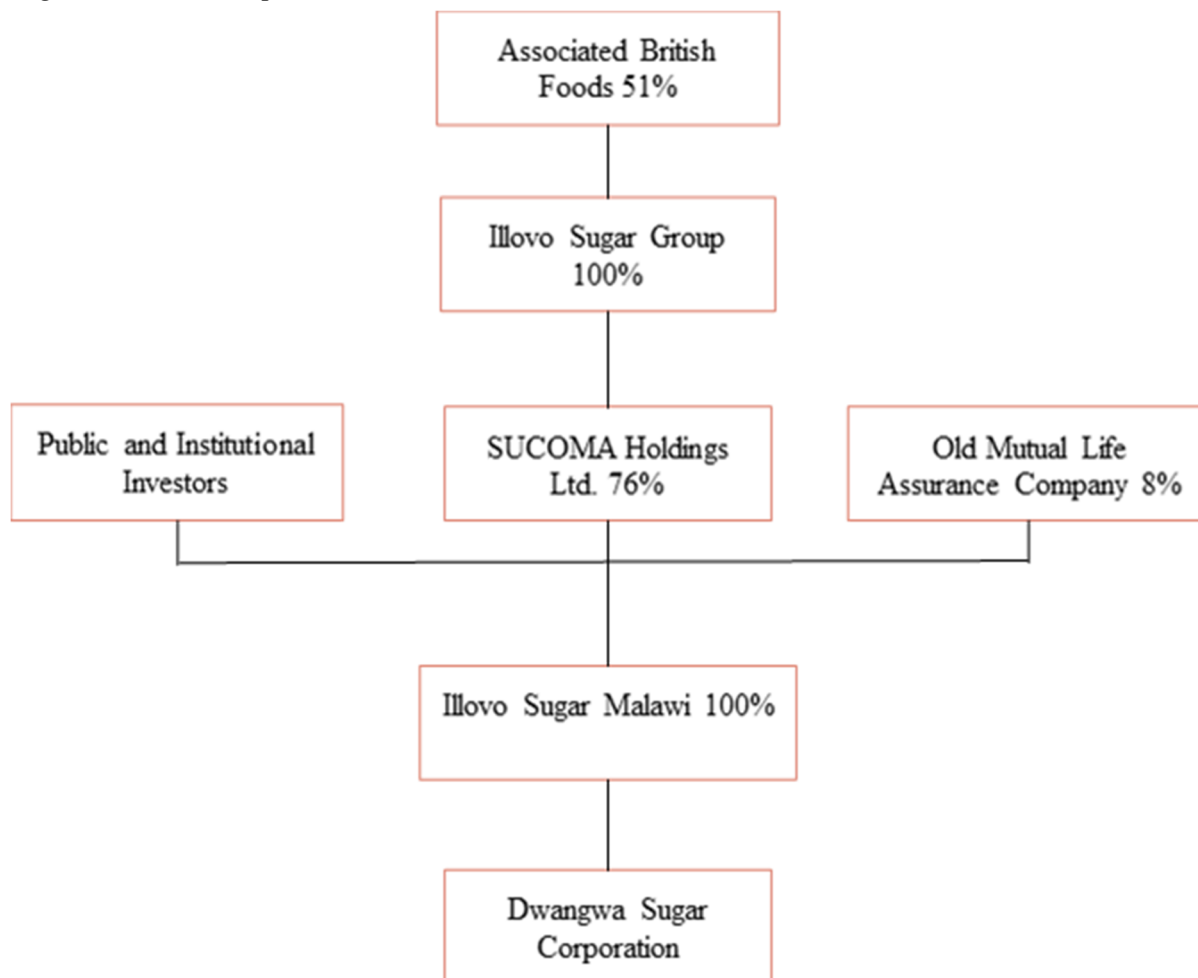
⁴⁹ Considered the main institutional framework for implementing the GBI (Chinsinga and Chasukwa, 2012:3).

⁵⁰ Although, the EU Parliament and Council have decided to reform the EU quota system for 2017 meaning EU sugar producers will be able to determine their own production levels, while taking advantage of EU subsidies (van der Wal, *et al.*, 2015:9-10). This is a move is projected to push 200 000 people in developing countries which are dependent on sugarcane production into poverty (DFID, 2012:8).

3.3.2. The private sugar industry in Malawi today

The privatisation of the sugar industry took place in 1998; when Lonrho's operation in Malawi were purchased by the South African based Illovo Sugar Group. The Group initially acquired, a controlling 60 percent share in the company, which by 2005 it had grown to 76 percent (The group structure and shareholders are shown below in figure 3). In this SUCOMA Holdings Ltd. is the holding company of Illovo Malawi with a 76 percent share of its capital. Illovo Sugar Limited holds a 100 percent share in Illovo Group Holdings Limited which owns 100 percent of SUCOMA Holdings Ltd. The principal holding company is Associate British Foods (ISML, 2016:19). The Group's corporate headquarters are in Limbe from which it coordinates its operations at its two production estates and factory operations at Nchalo and Dwangwa – which accounts for the entirety of Malawi's sugar milling and refining capacity. The initiation of Illovo's involvement in Malawi triggered the privatisation of the SSAu and the establishment of two new corporations; the Dwangwa Cane Growers Ltd (DCGL) and the Kasinthula Cane Growers Ltd (KCGL), which cultivates about 20 percent of the sugarcane processed at the Dwangwa and Nchalo mills (Chasukwa, 2013; Chinsinga, 2016:5).

Figure 3: The Group structure and Illovo Malawi Shareholders



Source: *Illovo Sugar (Malawi) Limited (2016:4)*

These changes coincided with increased access to agricultural inputs that came with the Starter Pack Programme (SPP) and the Malawi Vision 2020, which were finalised in 1998. However, in addition to these strategies, there was a greater availability of grants and loans through the Small-holder outgrower Sugar-cane Production Project of 1999, which intended to expand the number of sugarcane fields. In this, both DCGL and the KCGL are mentioned, nonetheless it is the DCGL (or DCG “Trust”) is explicitly charged with “...the overall responsibility for promoting small-holder sugar-cane production...” by providing sub-sector policies and schemes as an organ of Government and with the facilities of the preceding SSAu (RoM, 1999:15; Chinsinga, 2016:5).

3.3.3. The political context that governs Malawian agriculture

In 1994 Malawi became a multi-party democracy which was structured according to the accompanying Republican Constitution. Through this process, the right to food was enshrined; which has served as a source of legitimacy and support for various political leaders. This has

made agricultural development and food security a key platform for Government to maintain political stability, achieve sustainable economic growth, and work towards reducing poverty (FAO, 2015:21). Early on in its democracy this was proven under Muluzi's UDF (1994 – 2004), which placed poverty alleviation as the centre of its policy agenda and viewed past structural adjustments projects, especially for agriculture, as contributing little towards the country's development agenda (Chirwa and Dorward, 2013:67).

The new Government, however, remained as profoundly dependant on donors for foreign exchange as its predecessor had been, obliging democratic Malawi to continue with economic reformation projects; which under the UDF accelerated and focused on the agrarian sector. The most dramatic manifestation of this was the removal of the *Special Crops Act* (SCA), which fully liberalised Burley tobacco production in 1996 (Chinsinga, 2012:6). This signalled the return of the World Bank's orthodoxy of the 1980s, which led briefly to fertilizer subsidies being removed in 1996-97. This policy orientation, together with the devaluation of the Kwacha over the same time, made input prices for hybrid maize sore and depressed its profitability below almost all other crops. The justification for this was the thinking that individual entitlements (like food security) were best served by diversifying the sources of rural income and livelihoods, motivating donors to pursue the liberalization of the agricultural sector so more opportunities would be available (Harrigan, 2003:856). This is considered a livelihood and entitlement approach to rural development, which was beginning to develop in works such as Francis (2000) and Ellis (2000). However, it was Chambers and Conway's (1992) work that formed the foundation of this approach and it remains influential in any understanding of Livelihood is when it is spoken of as a goal and means to maintain development. In this context their definition of a *livelihood* is said to be comprised of the:

“...the capabilities, assets (including both material and social resources) and activities required for a means of living. A livelihood is sustainable when it can cope with and recover from stresses and shocks, maintain or enhance its capabilities and assets, while not undermining the natural resource base.”
(Chambers and Conway, 1992).

This gave smallholder producers full access to cultivators to which they were once excluded. Even though this policy led to smallholder growth rates to stall initially in 1997, it did contribute to an improved economic performance in the final years of the 1990 – which was

led by the smallholder sector. With this new line of policy, the market share of the ADMARC⁵¹ diminished significantly and increased its financial strain of the parastatal as private vendors began servicing the demand for agricultural inputs. Ultimately, this established a new production and market pattern based on the smallholder sector (Harrigan, 2003:853-854). There was a cost to this line of policy and maize production fell dramatically after 1996, threatening its food security. The GoM responded by rolling out universal free provisions of maize seed and fertilizer under the SPP (Booth, Cammack, Harrigan, Kanyongolo, Mataure and Ngwira., 2006:21). This program was later scaled down and became the *Targeted Inputs Program* in 1998-99 and lasted until 2004-05, which the donor community considered to be a food securing program for at risk households; rather than an agricultural subsidising programme that would be against its tenet (Dorward and Chirwa, 2011:234).

Accompanying this reactionary programme came the long-term *Malawi Vision 2020* in 2000. This laid out a road map for Malawi's development that would help it become "...secure, democratically mature, environmentally sustainable, self-reliant with equal opportunities for and active participation by all, having social services, vibrant cultural and religious values and being technologically driven middle-income economy." (Malawi Vision 2020, 2003). Together the Vision 2020 and the SPP help the country's farmers to play their part in recovering some of the maize production lost in 1996-97.

The populist political origins and the tactful ambiguity weaved into particularly the SPP helped the leadership gains short-term political gains; however, the Vision 2020 would endure (Chirwa and Dorward, 2006:67). This mood played a vital role in the 1999 election where, in the face of a stagnating economy and a host of developing environmental constraints, Muluzi chose to stake his claim to legitimacy by following populist interventionist policies in the agrarian sector (Chirwa and Dorward, 2013:67). This was at direct odds with the World Banks conditionality and donors started to become increasingly wary of the Muluzi's tendency for an untargeted approach to subsidies (Harrigan, 2003:856-857).

Overall, the liberalization process in Malawi was poorly managed and the role of complementary and compensatory policies were often ignored. Ramification from this meant little attention was ever given to investments in public goods that meant projects like social protection and large-scale infrastructure development in Malawi under Muluzi did not fruit and

⁵¹ The Agricultural Development and Marketing Corporation (1971) is a preeminent example of a Malawian state-owned enterprise which operated as the country's only buyer of smallholder produce and supplier of agricultural inputs (Chilowa, 1998:556).

hamstrung its development. Even when progressive policies were introduced they were adopted into a vacuum; while the blind faith the international community had in the private sector's ability to fill gaps in the agricultural sector proved to be naïve and neglected the gravity of Malawi's socio-political and economic reality at the time (Chirwa, 2004; Chirwa, 2005). This together with Muluzi's macro-economic mismanagement, corruption, run-away inflation, drastic drops in the value of the Malawian Kwacha eroded the governments capacity over his ten-year tenure (Chirwa and Dorward, 2013:67). This culminated in donors and the IMF restricting their contributions from 39 percent of the country's GDP in 1995 to just 14 percent in 2003, when Muluzi attempted to run for an unconstitutional third term (Said and Singini, 2014:12).

Nonetheless, through this dysfunction a nationwide consultation was conducted that produced the *Malawian National Land Policy* (MNLP) by 2003 and was hailed as a step towards correcting the country's imbalances between the estate and smallholder sub-sectors land ownership through a legal framework dedicated to land rights. However, despite the establishment of the *Malawi Land Reform Programme Implementation Strategy* (2003-2007), the absence of an implementing law and sufficient government capacity and enthusiasm means that in Malawi today the principles in the MNLP have only been taken up by a few donor-funded projects (USAID, 2010).

3.3.4. Continued politicization of Malawi's agricultural policy under its third President

In Malawi, the agricultural sector and the policies governing it have for the most part been used as a political tool used to leverage constituents support. Under Muluzi this became chronic, which lessened donors influence over the Government (Harrigan, 2003:847). This is a trend continued into the presidency of Bingu wa Mutharika, who won the 2004 election as the UDF's candidate. Mutharika, and his opponent, ran campaigns based on promises of new fertilizer subsidy programmes. The 'fertilizer politicking' and the political value that Mutharika's *Agricultural Input Subsidy Programme*⁵² (AISP) created was soon proven when it afforded Mutharika the opportunity to break-away from the UDF to establish his own party, the Democratic People's Party (DPP). Although Mutharika did not hold a majority in parliament he built strong support from the rural masses through his subsidy programme. This allowed him to overcome impeachment calls from the UDF and the MCP to implement some effective

⁵² Which replaced the SPP and the TIP and has been recently renamed the FISP (Dorward and Chirwa, 2011:346).

macro-economic management policies (Chirwa and Dorward, 2013, 2013:67; Said and Singini, 2014:13).

Among the most notable changes that the President could achieve was the appointment of a former IMF economist as his Minister of Finance, who swiftly set in motion steps to improve the capacity of the *National Action Group* (NAG).⁵³ This group, with support from government and the private sector, laid the foundation for developing the *Malawi Growth and Development Strategy* (MGDS) 2006-2011 and MGDS II 2011-2016, which serves as channels for an overarching development framework that services the ambitions of the Constitution and the Vision 2020 (The World Bank, 2012:20). These schemes focus on the increased diversification, commercialisation, and output of agricultural production. The thematic agenda of the MGDS's demonstrate a policy shifting towards an impetus on infrastructure development and economic growth that emphasises six key thematic points⁵⁴ seen as stepping stones towards accelerating progress towards the *Millennium Development Goals* (MDGs) (FAO, 2015:21).

This regime change served as fertile ground for several growth factors to be laid in 2003 that would take hold from 2004 and resulted in economic gains to the tune of an average real GDP growth rate of 5.5 percent from 2006 until 2013 (FAO, 2015:21). Amongst the most vital gains was the return of Malawi's development partners, which saw the return of Official Development Aid return to the long-term average between 20 and 25 percent of GDP (Said, McGrath, Grant, and Chapman, 2011:8). Moreover, these changes set Malawi in a strong position to take advantage of good rains in Mutharika's first term, which helped expand the tobacco sector and other cash crops. The rains also helped amplify the impact of the Presidents subsidy program, increasing food crop production; while gains in the health sector, particularly for treating HIV/AIDS, supported the country's growth. This translated into Malawi overcoming of food (in)security challenges, which had plagued the country right up 2005 and for the first time in almost two decades Malawi enjoyed a maize surplus (Chinsinga, 2012:12-13). In terms of trade, this helped Malawi improve and benefit from a higher commodity price in the mid-2000s. This was complemented by the GoM fixing its exchange rate above market equilibrium, which benefited its economic recovery by decreasing its inflation and increased consumption – nevertheless, of mostly imported goods. This led to gains such as increased construction, infrastructure, and more cars on the roads. However, this resulted in a rapid

⁵³ NAG is a public-private dialogue whose mandate is to develop the private sector.

⁵⁴ Which are sustainable economic growth, social protection, social development, prevention and management of nutrition disorders and HIV/AIDS; infrastructure development, and good governance.

increase in Malawi's trade deficit⁵⁵ and when Mutharika's regime ran out of forex in 2011, his policies began to fail (Said and Singini, 2014:14).

Despite these gains, early on in Mutharika's presidency signs of autocracy became apparent and were confirmed in accounts of corruption and cronyism⁵⁶ (Booth, *et al.*, 2006: xi). This did not prevent Mutharika from winning a second term in 2009, by a landslide. It is thought that the AISP contributed significantly towards this result by ensuring support from the schemes rural beneficiaries and through its division of resources, which gave the President the opportunity to capture and take advantage of substantial resources to ensure political patronage. The resulting majority in parliament released Mutharika from his teetering middle class support, allowing him to exert his autocratic tendencies, as well as, deepen corruption and cronyism in Malawi (Chinsinga, 2012:11-12).

As time went on Mutharika became increasingly concerned with his succession. The President favoured his brother, Peter Mutharika, as the presidential candidate for the 2014 elections and put aside his vice president, Joyce Banda. The President, however could not remove her from the role of vice president, according to the Constitution. In response, Joyce Banda formed her own party, which only had two Members of Parliament before Mutharika's death in April 2012. Following his death, the constitutional procedure prescribed that the Vice President would be appointed as President until the following election. However, the deceased president's brother and his support in Cabinet made movements towards convincing the courts to swear him in as President, which was interpreted as an attempted *coup d'état*. However, this power grab was prevented by the intervention of the Minister of Justice and the army – who supported constitutional prescriptions of power exchanges. Ultimately, Joyce Banda became the country's fourth president. Following the power shift, a significant number of DPP, and some MCP, politicians joined Banda's Peoples' Party, once again demonstrating the persuasion of patronage in Malawi (Said and Singini, 2014:15).

3.4. Locating the New Alliance framework in Malawi

Until now this chapter has accomplished two tasks: first, it has located the GPs in the NAF that operationalizes the business and human rights norm in the Malawian context; and second, it has spent considerable time presenting the socio-political and policy context that has governed

⁵⁵ Which in 2001 stood at 7 percent and had risen to 21 percent by 2010 (Said and Singini, 2014:14).

⁵⁶ This concern would grow and eventually culminate in July 2011, when Malawians marched against corruption, increasing poverty, and human right abuses, in the first anti-government demonstration since becoming a democracy (Palitza, 2011).

in Malawi since its independence. Specifically, this second task has been undertaken to fully appreciate the sheer scale of the challenges facing the internalization of the business and human rights norm. This section will turn to face the task of locating the New Alliance's influence in Malawi. This will be done by investigating the GoM and Illovo's participation in the business and human right norm.

3.4.1. The agricultural policies of Joyce Banda and the New Alliance

During the political turmoil in 2014, Malawi's economic outlook declined. The amalgamation of an overvalued fixed exchange rate, a persistent unsustainable structural trade deficit, and development aid being cut once again over Mutharika's succession politics, led to a foreign exchange calamity in 2011 (Said and Singini, 2014:14). These developments, together with adverse weather conditions, dramatically slowed the country's economy and meant that it would not achieve the sustainable and equitable growth targeted in the MGDS timeframe.

Nevertheless, the transitions of presidential power coincided with the implementation of the MGDS II with similar thematic concerns as its predecessor; attempting to reduce poverty through sustainable economic growth and infrastructure development, while also focusing on its other nine priority areas that range from integrated rural development, transport infrastructure, irrigation, and environmental management (FAO, 2015:21). Also in 2012, and formulated under Joyce Banda, Malawi's reform and development agenda began with the implementation of the *Economic Recovery Plan* (EPR). The EPR, which acknowledges the MGDS II as the country's overarching single document for its development agenda, is an implementation plan dedicate to act as an immediate measure to ease poverty in the short-to-medium term through the commercialisation of agriculture and agro-processing (including value addition), energy, tourism, mining, and infrastructure development⁵⁷ (Government of Malawi, 2012:3).

In 2013, the EPR was bolstered by the formulation of the *National Export Strategy* (NES) 2013-2018. The NES serves as a prioritized 'road-map' intended to develop the production base of the national economy,⁵⁸ to increase export competitiveness and accommodate the economic empowerment of the poor, farmers, woman, and other vulnerable groups. This

⁵⁷ The EPR describes a gauntlet through down by Banda distinguishing her Precedency and development approach from Mutharika; evident in her words "...it is observed that MGDS II, which was formulated prior to the coming in of my Government had too many priorities, and that, there was a need to focus on few priorities that are pro-growth, represent quick wins, and are highly effective." (Government of Malawi, 2012:3).

⁵⁸ This aimed to lessen the burred of the country's trade balance that had been worsening since 2007 (MIT, 2013:4).

strategy is based on four priority areas: 1) support existing export capacity; 2) foster an enabling environment; 3) advance supportive economic institutions; 4) invest in competence, skills and knowledge to increase Malawi's productive base and its export capacity (MIT, 2013:21). As part of this strategy, Malawi entered an agreement with the New Alliance in 2013 to release 200 000 ha of land for large-scale commercial agriculture by 2015. Since this agreement, the NES has entered the New Alliance Cooperation Framework. This has made an additional "...one million hectares of non-smallholder or unused arable land is to be allocated to commercial farming...", making more than 26 percent of the total arable land in Malawi available to New Alliance partners; a move that will shape the Malawian agricultural and economic landscape for the foreseeable future (Curtis, 2015:19).

3.4.2. The New Alliance in operation under the ASWAp

Although these policy guidelines consistently identify agriculture as the engine that will drive economic growth, as a developmental priority it has only been transcribed in a few specific strategic documents that overlap the Mutharika and Banda presidencies. These include the National Agricultural Policy (NAP) 2010-2016, the National Irrigation Policy and Development Strategy (2010), and the ASWAp 2011-2015 (MAIWD, 2012:1-2; FAO, 2015:22).

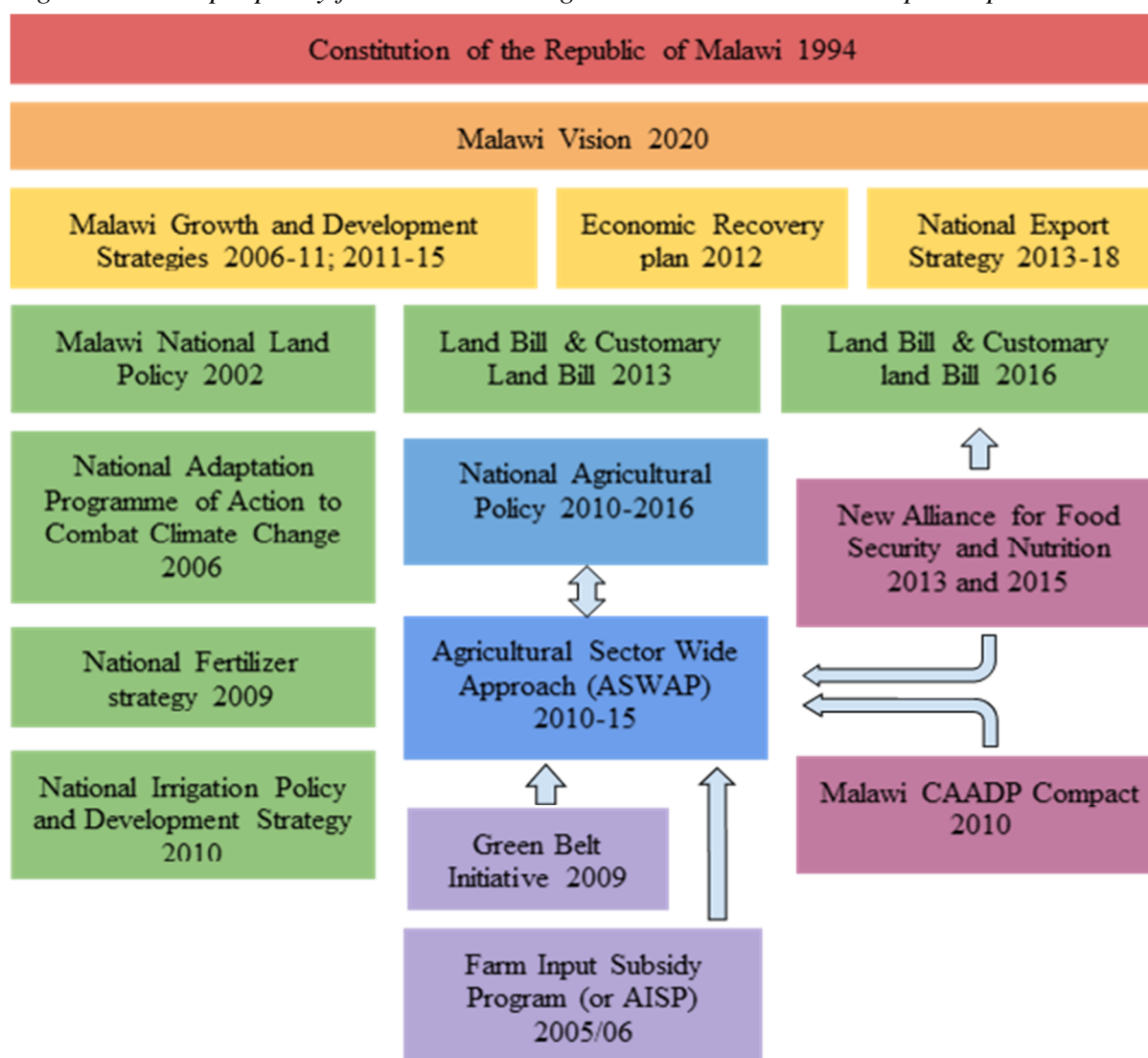
In the interest of streamlining policies, the Government reviewed a variety of agriculture related legislation and national development strategies and policies to produce the NAP. The rationale for the NAP is that the agricultural sector had been operating "...without a coherent national agricultural policy..." (MAFS, 2011:2). The NAP seeks to correct this shortfall by raising the profile of the agricultural sector to encourage agricultural productivity and ensure the sustainable management of land resources to service national food security, increase household incomes, and guarantee sustainable socio-economic development and growth that contribute to the MGDS II and MDGs (MAFS, 2006; MAFS, 2011:v; FAO, 2015:22).

The resources and implementation of the NAP are drawn from within the more encompassing ASWAp (MAFS, 2011:v). The ASWAp envisions a single priority programme and budget framework for the agricultural sector which is based on the MGDSs and meets the expectations of the Comprehensive African Agricultural Development Programme⁵⁹ (CAADP) under the auspices of the New Partnership for Africa's Development (NEPAD). Moreover, the ASWAp

⁵⁹ Which "...provides the regional context of achieving sustainable agricultural growth and development when translated into action at the national level." (MAIWD, 2012:2).

serves to formalise the processes to harmonize and better coordinate investments, promote alignment between donors and Government, and boost the participation of the private sector, civil society and farmer organisations in the implementation process (MAIWD, 2012:2); Figure 4 visually represents these policies and their respective position in Malawi's governance structures.

Figure 4: Principle policy frameworks and agricultural and rural development policies



Source: Authors elaboration of FAO (2015:22)

ASWAp planned operational time was between 2010-2015 and in this time the growth target rate was set at 6 percent per annum for the agricultural sector.⁶⁰ This approach has been counted among the most ambitious programmes in Malawi's history and is structured according to three focus areas, two key support services, and crosscutting issues interwoven throughout the

⁶⁰ That is in line with the NEPAD's 2003 Maputo Declaration on Agriculture and Food Security and the CAADP.

programme (Table 2 summates this structure). What has been instrumental to this programme is the Malawi CAADP Compact⁶¹ signed in 2010. This Compact re-evaluates and establishes principles and interactions between public institutions, the private sector, civil society, development partners, and other actors invested in food security and agricultural sectors.

Table 2: Principle features of ASWAp

Areas of focus	Focus and components
1. Food Security and Risk Management	<ul style="list-style-type: none"> • A focus on becoming a self-sufficient maize producer through increased productivity and reduced post-harvest losses; • Increasing the diversification of food production and dietary intake for improved nutrition; and • Risk management for increased food stability at a national level.
2. Commercial agriculture, agri-business and market development	<ul style="list-style-type: none"> • Promote the export of several high value agricultural commodities for increased revenue and income; • Encourage value addition and import substitution through agro-processing; and • Develop market inputs and outputs through public-private sector partnerships.
3. Sustainable land and water management	<ul style="list-style-type: none"> • Sustainable agricultural land management; and • Sustainable agricultural water irrigation and water management through the GBI.
Key support services	
1. Technology generation and dissemination	<ul style="list-style-type: none"> • Aims efforts through market and result orientated research to prioritise technological needs and ensure the provision of regulatory and technical services; and • Effective farmer-led allowance and training services.
2. Institutional strengthening and capacity building	<ul style="list-style-type: none"> • Bolster public management mechanisms; and • Build capacity among s the public and private sectors.
Cross-cutting issues	
1. HIV prevention and AIDS impact mitigation; gender equality and empowerment	<ul style="list-style-type: none"> • Bring and maintain gender and HIV/AIDS issues into mainstream discussions.

Source: MoAFS (2011); FAO (2015)

Reinforcing these objectives has been the GoM's commitment to the New Alliance. Malawi hopes that through this deal new agri-business investments will be accrued that will complement additional donor funds and the implementation of new and existing government policies to help lift 1.7 million Malawian out of poverty by 2022. This, as per the New

⁶¹ Which is expected to retrofit existing programmes and projects to ASWAp, in the interest of increasing coordination and efficiency (FAO, 2015:23).

Alliance's recommendation, directs donor's resources towards high priority, high-impact investments detailed in the ASWAp.⁶²

This relationship between the GoM and the New Alliance is supported by the government's commitment and intention to achieve several ambitious goals. The first of these is to establish and work towards maintaining a competitive environment with reduced risk for doing business for private sector investments, across a variety of value chains linked to food security, while continuing with consistent and coherent policies. Secondly, it hopes to increase the accessibility to land, water, and other basic infrastructure to support food security and nutrition. Thirdly, the GoM aims to rearrange extension services that target nutrition, agribusiness, and cooperative programmes focusing on priority crops in their most suitable growing areas (sugar cane included); and finally, it wants to limit malnutrition by encouraging production and utilization of diversified foods with elevated nutrition values (New Alliance for Food Security & Nutrition, 2012:3).

In service of improving policy coherence and harmonization, some of the country's sub-sectoral programmes have been allied to ASWAp. For example, the FISP is imperative to the first focus area of ASWAp; while the GBI is invaluable to the second and third areas. Through these projects, the GoM has created opportunities both for local and international investors to acquire land within a 20 kilometre radius of the country's three great lakes and 13 perennial rivers; which amounts to the 1 million ha commitment (Chinsinga and Chasukwa, 2012:2).

According to the FAO (2015:24), these two programmes account for 70 percent of the ASWAp budget and have attracted significantly more attention than the advancement of the private sector, capacity building, agricultural diversification, value chain development, and commercialization of agriculture (FAO, 2015b:2). However, this has resulted in some significant financial constraints for other programmes; this has proven the case for the *National Fertilizer Strategy* (NFS). This has been an enduring trend in Malawi and the GoM has tended to focus less time and effort on capital-intensive projects like the development of a strong legal regulatory framework, investments in knowledge and skill development of its agro-input dealers, or the development and meaningful implementation of subsidy programmes like the

⁶² Specifically, in the three growth product sets outlines in the NES and in the thematic areas of the *Scaling Up Nutrition Strategy*, which was introduced in 2011 which help guide the projects of the country's; Food and Nutrition Security Policy (2005); and the National Policy and Strategic Plan, 2007-2012 to improve the country's food security (FAO, 2015:23).

NFS. This has meant that the rhetoric of government does not translate into tangible benefits for the economy (FAO, 2015:24).

3.4.3. Recent developments in Malawi's land and agricultural governance

Other than retrofitting ASWAp with New Alliance commitments, the GoM has committed to revising, enacting, or implementing a total of 32 regulations relating to land and agriculture governance (Treasure-Evans and Lambrechts, 2015:6). The standout result from this commitment has been the review and replacement of the Land Act of 1965,⁶³ a process that was guided by the NAF.

Since its independence, there have been numerous attempts to replace this 1965 Act. The MNLP was the first genuine effort towards address in the legal structures governing land rights, improving security of tenure, limiting land access for non-citizens, and decentralising land administration to local and district levels (MLPS, 2002:5-8; Sahle, 2010:70; Wilson, 2015:8). The MNLP aimed to redistribute land from the large estates to the smallholder farmers and formalized customary tenure. By doing this the MNLP sort to address land tenure insecurity by establishing land tribunals, making land records more accessible, and improving overall public participation in land governance. In 2006, the GoM attempted to make amendments prescribed by the MNLP to the country's Land Bill. However, this was met with strong opposition from civil society since the proposed amendments did not go far enough to meet the legislative requirements of the MNLP that described the need for a basic land law (FAO, 2015b:3).

The Government's efforts in this regard emerged once again in 2012 in the form of the 2012 Land Bill, which was one of 11 land-related bills,⁶⁴ which had been drafted and put to Parliament in June 2013. These bills were formulated to align the existing legal framework with the tenants of the MNLP. These Bills made movements towards increase the make the management and administration of land much more efficient and effective through the enactment of a decentralised land information network. Moreover, within these documents, it

⁶³ It was under this act that landscape of Malawi's land rights would be form by the creation creating three categories of land. The first of these categories was customary land, which is "...all land which is held, occupied or used under customary law"; second, is private land, which is "...all land, which is owned, held on claim, or which is registered as private land under the Registered Land Act"; and public land, which is "...all land which is occupied, used or acquired by the Government" (Government of Malawi, 1965).

⁶⁴ Customary Land Bill, 2012; Registered Land (Amendment) Bill, 2012; Physical Planning Bill, 2012; Forestry (Amendment) Bill, 2012; Mines and Minerals (Amendment) Bill, 2012; Land Survey Bill, 2012; Land Acquisitions (Amendment) Bill, 2012; Local Government (Amendment) Bill, 2012; Malawi Housing Corporation (Amendment) Bill, 2012; Companies (Amendment) Bill, 2012 (Wilson, 2015:14).

was proposed the categorisation of land would be changed; maintaining the public and private distinction, but including *customary* land as constituting public land (FAO, 2015b:3).

Although the intention was laid here, it was only in July 2016 these land administrative bills would pass in Parliament. This delay is explained by political pressures created by the proposed Customary Land Bill and the upcoming 2014 election. In this Bill, restricted foreign ownership of land to only those that partner with locals⁶⁵ and iterates specific management of customary land. This second point aimed to limit local chief's pre-eminence in the structures that establish village committees, which under this Bill would become the new land authority (FAO, 2015b:3). Unsurprisingly, chiefs opposed the drafts of the land bills because it would in effect disposes them of their authority over customary land.⁶⁶

Civil society also opposed aspects of the Bills. For example, the *land markets* it would establish was envisaged as a means for land deals to disposes rural populations of their land on a large-scale, which are these communities most meaningful asset. As consequence of this opposition, the President declined to support the draft land administrative bills into law since she did not want to risk her election chances in 2014 (Chinsinga, 2016:25).

Antagonizing the Chiefs over this period proved costly for Banda and she would lose to May 2014 elections to Mutharika's brother, who became the country's fifth president. Her campaign was also hurt by the "cashgate" corruption scandal in 2013, maize price spikes in the same year, and the fact that many in Government remained allied to Peter Mutharika. This afforded him a strong position in an election that he would win with 36 percent of the vote; ahead of the MCP candidate with 27, and Joyce Banda with 20 Percent (Said and Singini, 2014).

3.4.4. Illovo in Malawi and the Influence of the New Alliance framework

Malawi's sugar industry and its potential for growth is an opportunity the Illovo Sugar Group (the Group) holds in high regard. In Malawi the Group operates as the Illovo Sugar (Malawi) Limited (Illovo Malawi) and is the country's only producer of sugar⁶⁷ (ISML, 2015:3). Illovo Malawi, together with its estimated 3 700 outgrowers,⁶⁸ has the capacity to produce 2.3 million tons of sugarcane and an approximate 270 000 tons of sugar annually. Of this sugar, over half

⁶⁵ Which, if one looks closer is not a new postulation and is written in MNLP, which stipulates the role of non-citizens investing in Malawi's land (MLPPS, 2002:27).

⁶⁶ Which they could construe as "unallocated land" in land deals for their own benefit.

⁶⁷ Although Limphasa Sugar Co. entered this space in 2008, it holds a marginal market share (Limphasa to invest \$40 m in sugar production, 2012; Chinsinga, *et al.*, 2013).

⁶⁸ Who produce approximately 19 percent of the total sugarcane crop supplied to its two production sites (Illovo Sugar (Malawi) Limited, 2016:2).

is sold and consumed locally, with the balance being exported to regional African, European, and American markets (ISML, 2016:2). Illovo Malawi plays a significant role in the country's economy, and as tobacco consumption becomes more regulated, sugarcane production is increasingly thought of as an alternative earner of foreign exchange for Malawi (Chinsinga, 2016:3).

3.4.4.1. *The role of Malawi in Illovo's supply chain*

Since its inclusion in Illovo's supply chain, Malawi has become a vital contributor to the group's profits. Productivity levels of Illovo Malawi are second only to the Group's operations in Zambia. Nevertheless, Malawi sugarcane has the highest average sucrose content in Southern Africa. This means that Illovo Malawi can take advantage of one of the most effective sugarcane growing location not only in Africa, but globally as the third most competitive production location in terms of cost per tonne of white sugar after Brazil and Zimbabwe, despite being landlocked and its underdeveloped infrastructure (Garside, Hills, Marques, Seeger and Thiel, 2005:14). For the Group, this has made Malawi its most profitable investment in Southern Africa, contributing on average 39 percent to their annual profits (Illovo Sugar, 2015:5). In part, the profitability of Illovo's operations in Malawi is attributed to the favourable growing condition and low production costs. However, even more significant in this regard is the fact that sugar imports into Malawi are prohibited and the Group has monopolised the sugar industry in Malawi (Chinsinga, *et al.*, 2013; Van der Wal, *et al.*, 2015:16; Chinsinga, 2016:6). Although there are investments being made by two new sugar producers in Malawi, Illovo's dominance of the sugar industry is not likely to change, at least for the medium term.

The strategic importance of the sugar industry and Illovo's role within it is further explained by the fact that it is a major contribute to Malawi's tax authorities, which in 2012/2013 amounted to 3.5 percent of the government's total tax revenues. Moreover, Illovo Malawi is the country's single largest private-sector employer, directly employing 11 552 people, while also supporting an estimated 3 434 people through outgrowing operation⁶⁹ (Corporate Governance, 2014:1). By holding this position in Malawian society, Illovo Malawi's operations and efforts to ensure they are conducted in a responsible and equitable manner has been at the centre of several investigations (Bledsoe, Gaafar and Hannay, 2015; Van der Wal, *et al.*, 2015; Hall, 2015). In recognition of this role Illovo Malawi acknowledges:

⁶⁹ It is also estimated that through indirect and induced employment Illovo Malawi contributes to the livelihoods of between 2 997 and 12 888 Malawians (Corporate Citizen, 2014:10).

“...the significant development needs of the communities in which it operates and to meet the strategic intent objectives to be welcomed in the communities in which it operates, Illovo Malawi undertakes wide-ranging corporate social responsibility initiatives mainly focusing education and health, together with a broader objective to complement Malawi’s national strategy to alleviate poverty and to contribute towards national food security.” (ISML, 2016:2).

Illovo has made decisive steps towards incorporation these objectives into their operations through their *Code of Conduct and Business Ethics*, which commits the company to the principles of the UN’s Global Compact and the GPs (Bledsoe, *et al.*, 2015:3). More recently, Illovo has joined a growing choir of companies calling for a *zero-tolerance* approach to land. In affirmation of this, their Group Guidelines codifies and reaffirms its commitment to international tenants and standards that guide practices that “...protect against human rights abuses, including land rights...” (Illovo Group, 2016a).

3.4.4.2. *Implementing the Group Guidelines*

The Group’s land procurement practices have historically avoided outright ownership and have favoured to lease land from the government or from the relative concession holders (Bledsoe, *et al.*, 2015:3). Instead, Illovo’s business strategy seeks “...to avoid the transfer of land rights away from local communities and national governments... [and instead] prioritise alternative models of investment, such as the development of small grower farming operations...” in the areas in operates (Illovo Group, 2016a). The rationale for this, according to Illovo, is to extend the benefits (such as job creation and poverty alleviation) of their presence into the wide community based on the principle of mutual benefit. Although these outgrowers operate independently from Illovo’s own cultivation locations, they are required to commit and adhere to the tenets of the Group Guidelines. Thus, prior to the initiation of any project that involves gaining access to land or property requires a:

“...detailed environmental and social impact assessment, engage with all affected stakeholders, and as a first priority, avoid the displacement of any persons from the land, or where displacement cannot be avoided, ensure that free, prior and informed consent of all the affected persons is obtained and that the appropriate and agreed compensation is paid.” (Illovo Group, 2016b).

In addition to the application of these type of assessments to new projects, Illovo endeavours to include these principles throughout their existing operations. These standards serve to ensure that the company complies with the relevant countries law’s and meets internationally accepted standards. To safeguard this, Illovo makes a concession for “...measuring and monitoring of

key risks and impacts on employees, local communities, the natural environment, land rights and land conflicts.” (Illovo Group, 2016b).

A process which Illovo has embarked upon to ensure that these criteria are met involves two initial projects in Mozambique and Malawi, which will help identify critical land-related challenges. This is part the company’s *Roadmap*, which gives timeframes and sets of key steps that need to be taken, to ensure the Group Guidelines are implemented. At this point in this process Illovo is conducting *self-assessments*, to identify any issues relating to land; while making provisions to consult with external experts if the situation demands. These assessments will be conducted on both Illovo’s own land, and as far as the situation allows, on outgrowers’ land to determine existing and potential issues that necessitate further attention or confirmation from an independent third party, who may contribute to developing a solution to any challenges.

3.4.4.3. *Illovo’s and the influence of transnational advocacy*

Illovo, as Africa’s largest sugar producer, directly impacts on SSA sugar industry’s ability minimize its negative impacts and maximize the benefits for local communities. A crucial component in the company strategy has been interaction with international forums, industry forums, civil society, and other groups related to land matters in their areas which the company operates. (Illovo Group, 2015). As suggested in the company’s Roadmap, this has led to the company to engage with prominent and independent third party experts to conduct socio-economic impact assessments to evaluate whether the requisite standards, in terms of the desired environmental, economic, and social aspects are being met.⁷⁰ Through these partnerships, and specifically with Landesa, Illovo announced in October 2016 that it has been able to secure support from the UK’s Department for International Development (DFID) to help facilitate the development company’s capabilities and capacity to enact its Guidelines and Roadmap (Illovo Group, 2016a). Through this process the company hopes to embrace local communities and organisation surrounding Illovo’ sugarcane plantations and build the capacity to *remedy* any land rights issues. Moreover, Illovo hopes this endeavour will provide the private sector with additional tools and experiences from which they can draw to improve LSLBI more generally (Illovo Group, 2016a).

⁷⁰ This includes those conducted by Corporate Citizen (2014) and the more recent Bledsoe, *et al.*. (2015) report. In addition, several unaffiliated reports have been conducted. In these example, reports of Illovo’s operations negatively affecting local populations land tenure and human rights are reported and can be seen in the SOMO report (Kiezenbrink, *et al.*, 2016), ActionAid International (Curtis, 2016), and Oxfam’s “behind the brands” campaign (Thorpe, 2016).

This project that Illovo has begun was initially titled, *From commitment to practice: Supporting the operationalisation of private sector land rights commitments through a pilot of the New Alliance Due Diligence Tool*. The ‘due diligence’ tool being referred to is the NAF which Illovo will use as a “...step by step guide to managing new land investments...” and when dealing with existing investments and long-standing legacy land tenure issues the implementation of the NAF “...requires interpretation and assistance...” (Illovo Group, 2016b). The physical location of this project is scheduled to address land issues in Tanzania, Mozambique, and Malawi. In addition, it hopes to further align the Group’s Guidelines closer to the principles embodied in the VGGT and the methods of the NAF to insure responsible LSLBIs. This project is supported by the DFID and the pilot of the New Alliance Due Diligence Tool is anticipated to begin during the second half of 2017 (Illovo Group, 2016b). So far, each company within the Illovo group has appointed *land champions* who will be responsible for driving the implementation of the guideline in countries where it operates; however, it is still developing a training program for the champions and it still needed to put in place monitoring and evaluation systems (Hall, *et al.*, 2016:25-26).

3.4.4.4. *Illovo’s and accusations of land grabs*

Poverty and inequality have proven to be an enduring historical feature of Malawi’s socio-economic regimes and since gaining its independence these regimes have been characterised by mixtures of patronage politics and consequences of donor aid conditionality’s. This has meant that the transference of power from its colonial ruler to the new national elite has translated in few gains for the man on the street in terms economic and social benefit. This course was set early on with the country’s first president, Dr Hastings Kamuzu Banda – who ruled from 1964 until 1994. Under his rule, Malawi like many other newly independent states had to weigh up the opportunity costs of widening workers’ rights and better wages, against cheap labour and favourable circumstances for private investors; as per the orthodoxy of the World Bank and IMF’s Structural Adjustment project. Ultimately, it was workers’ rights that were held back by a legal and institutional framework that sort to advance economic and political stability “...at the expense of workers’ individual labour rights, freedom of association, collective bargaining and the right to strike” (Dzimbiri, 2004:10). Within this context, numerous violations of human rights tenets, as described by the UDHR, were committed,⁷¹ and the country’s sugar industry and the land it operates form part of this history.

⁷¹ Accounts of these are discussed in work by Englund (2006) and Chirwa and Kapindu (2012).

The full scope of these defilements is beyond the scope of this paper; nevertheless, accounting for accusations for human rights violations and land grabs made against Illovo is; even though it may have inherited some of these from the country's historical context (Bledsoe, *et al.*, 2015:13-14). A report with details some of these violations was published by the Centre for Research on Multinational Corporations (SOMO) in 2015. Based on responses from 78 employees from Nchalo operations and 83 villagers involved in land disputes the report concluded Illovo Malawi committed acts of land grabs.⁷²

As discussed, Malawi has recently introduced numerous laws dealing with land issues. A recurring issue with this process has been the question of customary land. Although, the remedies passed in 2016 may contribute to the developmental goals expected for the agricultural sector, its past incarnation has contributed to many of the challenges it now faces. In the case of Illovo, the former land act distinguished between public, private, and customary land. Per the SOMO report, more than 60 percent of the country is categorised as customary land, meaning it is untitled or *unsettled*. With this arrangement, customary land is administered by traditional leaders on behalf of the GoM and local communities merely enjoying user rights. This means rural households and some farmers do not have title deeds and no guarantee they will have access to the same land from season to season. Alternatively, the government may instigate its land lease system to commercial interests for up to 99 years, which also may be renewed (Kirzenbrink, *et al.*, 2015:25-26).

This land system has led to clashes between communities claiming ancestral rights to land and business interests claiming the same plots with title deeds. The issue here is that traditional authorities have been under equipped to administer this task or have sold off customary land for their own financial benefit; while, smallholder farmers are left disposed or competing for arable land. These and similar scenarios have proven an enduring issue for Illovo's Malawian operations. In 2008, this reached a climax when Illovo Malawi staked a claim in the Chikwawa District for their Nchalo operations, evicting farmers from two villages from customary land. This land dispute can be tracked back to 1984 and the eventual solution for the company was to present the legal title to the land and have the local chief acknowledge its standing (Kirzenbrink, *et al.*, 2015:26).

⁷² Although there are other similar reports (for example News, 2012; Butler, 2014; Bledsoe, *et al.*, 2015), which will soon include the Groups own assessments, the SOMO report captures many of the recurring themes and is a recent and significantly more detailed example.

Although it can be said that Illovo's actions were within letter of the law, its commitment to the New Alliance and the GPs prescription means that in similar future scenarios they must make available means to remedy community's concerns. To date, this 2008 case dispossessed about 60 people from their land and the SOMO reports that 43 of these people have demanded proper compensation, but to no avail (Kirzenbrink, *et al.*, 2015:26). In response, Illovo notes that "...land is an extremely contentious issue across Malawi..." and referenced several steps they have taken to demonstrate their willingness to deal with land rights in good faith (Illovo Sugar Limited, 2015). One of these has been the development of guidelines that have sourced their intent from the New Alliance and the GPs.

3.5. Conclusion

This chapter has accounted for the development of several factors that are vital to determine the domestic salience of the business and human rights norm, which brings this research study one step closer towards determining the GPs role in propagating this human rights norm. Specifically, these factors have been the inclusion of the GPs as a justification for the development and core thematic content of the NAF, the referral to this framework during recent agricultural policy and land law adaptation in Malawi, and in Illovo's Group Guidelines.

However, before addressing the research question one needs to consider another aspect that was discussed at length in this chapter, which is the Malawian socio-political and geopolitical landscape. If one were to summate its experience in this space few would fail to mention its embedded systems of political patronage, corruption, fiscal and monetary mismanagement, severe poverty, a deep dependence on donor aid, and at times political violence as some of the most enduring aspects of its landscape. For these reasons, Malawi has not developed the institutional strength to be considered a *critical state* that will contribute to this norm propagation. This context should also be considered when answering the research question.

As we have seen Malawi is among the African states most influenced by the prevailing sentiments of the international community and donors. This can be traced back to the structural adjustments of the 1980s and is once again visible with the New Alliance. As discussed, a tangible footprint has already been made by the NAF on the country's agricultural policy and land law that has opened space for further investment for companies like Illovo. Although it would be pessimistic to assume these would be future sights of human rights abuses, it would be naïve to expect that the business and human rights norm has institutionalized behaviour that will make it unthinkable.

Thus, in the Malawian context, the business and human right norm exists primarily in rhetoric and has not truly been *institutionalized*, per the discussions in international norm theory literature. This raises an interesting challenge then for the literature, which stipulates that the progression of a norm into law is among the most principle requirements for *internalization*, which has unquestionably been done by the Malawian state. However, this does not end the discussion since these laws and policies are still in force and Illovo, whose operational principles informed by business and human rights norms, is subject to their jurisdiction. Therefore, in the discussion to follow the focus will be on the more nuance norm literature like that of Cass (2016) to better account for the norms progression through Malawian society before moving on to a critique of the SRSG effort to make business and human rights the norm by drawing on lesson from this Malawian case study.

4. Chapter four: The normative contribution of the Guiding Principle towards the business and human rights norm

4.1. Introduction

This chapter now turns to the principal objective of this research study that is to evaluate the normative contribution that the GPs have made towards diffusing the business and human rights norm into LSLBIs practices. As revealed in the literature the term *diffusion* shares many of the same characteristics as the *cascade*. Nevertheless, in the context of Malawi and the normative lens being used to account for the business and human rights norm a focus on transnational diffusion has distinct advantages. Briefly, and although it has been explained in chapter two, it is worth accounting once more that from this perspective attention is given to a wide range of actors, public and private within the territory of the state, which has been driven by the global *governance turn*. Importantly, this does not dismiss the efforts being conducted by international business and human rights norm entrepreneurs. Rather, it is acknowledging that the salience of a state's domestic conditions is vital for the internalization of an international norm, especially one concerning non-state actors. To facilitate and properly appreciate this discussion, this chapter will first consider the strategic aspects wielded to ensure the GPs would attain the normative influence is subsequently gained.

After this, a brief section will summate the critiques of the SRSG's GPs that have originated primarily from human right legal scholars, NGOs, and practitioners. This contributes to the goal of this research study since it is from these critiques that the future direction of the business and human rights is being forged. Here the normative contribution of the GPs to the business and human rights norm will be evaluated through the theoretical framework of international norm theory. By this effort, this study answers its research question that asks if the GPs have created a norm cascade and whether this will go beyond rhetoric and diffuse international best practice into LSLBI. For this, the domestic salience of the business and human rights norm will be measured per the criteria explained by Cortell and Davis (2000) and its expansion by Cass (2016). This task has been given little attention in International Norm Theory literature and this study does not assert that it is some great weakness. Nevertheless, it does assert is that by understanding this position one may acquire specific insights to challenge facing this norm's progression through its life-cycle. Malawi presents a case where many of the most fundamental obstacles to achieving business and human rights are deeply embedded and truly demonstrates

the tremendous challenges that the norm faces. By this effort, a perspective emerges that places the GPs, their achievements and shortfalls, into stark relief.

4.2. The strategic development of the Guiding Principles

In Ruggie's own words "[i]t would be impossible... to convey the full range of strategies and tactics... that produced the Guiding Principles." (Ruggie, 2014:8). Nevertheless, in several publications Ruggie (2007; 2013; 2014) details key strategic aspects implemented in the development of the Guiding Principles.

4.2.1. The 'building-blocks'

The first aspect that Ruggie (2014:8) incorporates into his strategy is the "building-block" approach that comes from international climate change literature and is said to accomplish two things. First, it distances itself from traditional hierarchical governance models whose "...idea of negotiating a comprehensive, universal and legally binding treaty that prescribes, in a top-down fashion..." has little agency to meaningfully deal with today's more significant global challenges (Falkner, Stephan, and Vogler, 2010:252). Secondly, it avoids sliding to become a 'bottom-up' approach that is dependent on decentralized actors (Falkner, *et al.*, 2010:257). In this way, a 'building-block' approach embeds long-term objectives into international political frameworks by appreciating the need to develop existing and diverse elements of governance (Ruggie, 2014:8; Falkner, *et al.*, 2010:252).

Ruggie explains that it is from this conceptualization he began to strategize. Soon after establishing this position his "...proximate objective became gaining strong support for a conceptual and normative framework establishing the parameters and perimeters of business and human rights as an international policy domain." (Ruggie, 2014:8). This was necessary since there was an assumption in human rights discourse of a rights-based hierarchy, despite there being little evidence of this in practice and no shared understanding of the problem of business and human rights.

4.2.2. An exercise in 'polycentric governance'

During the development of the GPs Ruggie relied on governance theory understanding that today's most pressing social challenges cannot be meaning shouldered by states alone and they need to engage with non-state actors to leverage its capacity (Ruggie, 2014:9-10). With this requires the inclusion of multi-stakeholder consultation, formal and informal cooperation, and public-private partnerships; bringing to life Abbott and Snidal's (2013) "responsive

regulation,” a measure described as a central component of regulatory efforts targeting TNCs. In short, any hope of developing an authoritative framework on business and human rights inevitably become an exercise in polycentric ‘governance’ (Ruggie, 2014:9).

The reasons why this governance approach is necessary is since, as discusses in chapter two, there are only rare exceptions where companies have been subjugated international law. This is the case since, under international law, parent companies and their subsidiaries are construed as separate and independent legal entities. Through this, a parent company is rarely liable for the violations by their overseas subsidiaries even when they are the only shareholder. Nevertheless, these subsidiaries are subject to the jurisdiction of domestic law. The literature suggests this is a challenge since governments may avoid or not be willing to enforce these laws if they perceive these operations as being strategically significant to the economy or national security (Moran, 2002:412; Ite, 2004).

Illovo Malawi can be taken as a business operating under similar characteristics. As shown in in chapter three Illovo’s dominance in Malawi’s sugar industry means this company directly and meaningfully contributes to the country’s export earnings, tax revenues, and employment. By holding this position in Malawian society and because there is a tendency for GoM officials to service business relations that align with their personal political and financial ambitions, it is not surprising that where there are land disputes the outcomes often favour the company. This is particularly pronounced in this instance since Illovo Malawi is highly profitable, the GoM prohibits sugar imports, and the company enjoys a monopoly of the industry (Chinsinga, 2016:506).

To address these and similar issues a three-level approach to governance is incorporated into Ruggie’s polycentric approach that are the *building-blocks* for the GPs. The first of these is those public law and governance systems in operation domestically and internationally. The second draws on civil governance systems that draw on a variety of social compliance mechanism like advocacy campaign and involve stakeholders affected by the business’s operations. Finally, Ruggie’s approach builds on corporate governance that internalizes elements of the other two levels. This introduced a new regulatory dynamic that aims better align all three of these governance levels to business and human rights norms. This has been done so they mutually reinforce each other’s roles and compensate for each other’s weaknesses; through which “...cumulative change can evolve.” (Ruggie, 2014:9 emphasis added).

So far then, the Protect, Respect and Remedy Framework shows what should be done to advance business and human rights and the GPs shows how this can be done. Thus, the GPs combines complementary discourse on the respective roles these three governance levels play in regulating corporate conduct. In this, the state's legal obligations are articulated in terms of their international obligations under international law to protect against human rights violations by third parties through policies that are consistent and supportive of these obligations. For business, the GPs stress companies to go beyond the legal obligations that vary between the countries they operate and suggest they manage the risks to human rights where they are involved (Ruggie, 2014:9). By assigning and clarifying the roles of states and businesses in this may the GPs gains some normative by not ascribing the entire spectrum of human rights to business, a major criticism of the business and human rights norm discussed in chapter two.

4.2.3. Orchestration

Normative conceptual arguments have little capacity to change behaviour and thus needs to be put into practice for it to be truly persuasive. In service of this, practical engagements were undertaken during and after the development of the GPs. Since then it has been interpreted by many actors, with the NAF being just one example. This process is akin to Abbott, Genschel, Snidal and Zangle (2014) concept of *orchestration* in global governance. This concept represents a mode of governance that is soft and indirect where "...on actor, the Orchestrator, enlists the voluntary assistance of a second actor, the Intermediary, to govern a third actor, the target, in line with the Orchestrator's goals." (Abbott, *et al.*, 2014:2). A fundamental logic here is that a norm, like business and human rights, can draw on the capacities of intermediary actors at multiple levels of governance. For this international organizations need to play a more substantive orchestrative role. This can be approached through either *directive* or *facilitative* orchestration. Here, directive describes when "...states and IGOs use mandatory rules, binding conditions on public benefits, and similar measures to steer..." towards desired direction (Abbott and Snidal, 2009:544); and facilitative describes "...actions that encourage and enhance the development of desired forms..." by collaborating with non-state actors, identifying best practice, and other types of partnerships (Abbott and Snidal, 2009:545). In this case, the formation and enactment of the New Alliance frame represents an effort of facilitative orchestration.

By the time Abbott and Snidal (2009; 2010; 2013) began to publish these and other works on orchestration the work on the GPs was already underway. Nevertheless, Ruggie (2014) would later explain that the strategic logic he used to develop and gain convergence and diffuse for

the GPs and the norm it represents is an illustrative case of this ‘orchestration’ concept (Ruggie, 2014:11). Briefly, within this conceptualization, the strong support from the UNHRC for the GPs is vital, both at the beginning and at the end of the SRSGs mandate. Nevertheless, this support if it stands alone is not enough to automatically lead other pertinent standard-setting bodies, national, regional or international, to defer to the UN and align their own internal structures to the GPs. This is equally true for non-state actors and their due diligence frameworks. Each institution, public or private, in every sector have their own unique ambitions that are shaped by their operational concerns and the UN’s human rights machinery is not equipped with the necessary powers to enforce implementation. For these reasons, the pursuit of convergence and diffusion for the business and human rights norm has required active engagements through mostly facilitative orchestration.

4.3. Critiquing of the SRSGs Guiding Principles

It comes as no surprise that voluntary self-regulation of non-state actors has encountered serious problems, especially where businesses are involved. Indeed, some of these codes have been criticised for providing more protection for the company than for the communities and rights they are meant to serve (Ayoub, 1999:405; Scozzaro, 2016:66-67). Accounts that endeavour to explain why this is the case suggest it is due to a severe lack of supervisory and/or enforcement of business-adopted codes (Reinisch, 2005:52). While others suggest that an absence of any meaningful supervision and/or enforcement is because “...the system currently suffers from a significant orchestration deficit” (Abbott and Snidal, 2009:501) that has resulted in “...a patchwork of uncoordinated schemes competing vigorously for adherents, resources, legitimacy, and public notice.” (Abbott and Snidal, 2013:102). Much of this summates the challenges the GPs aimed to consolidate and overcome. More significantly in the context of this study’s research question the GPs demonstrate a desirability to engage with intermediary⁷³ actors to work towards greater normative and regulatory continuity, impacts, and enduring and meaningful outcomes (Ruggie, 2014:12).

Considering the scope and the complexities in the business and human rights regime it is not surprising that the GPs have been the recipients of criticisms from human rights legal scholars to human rights NGOs and practitioners. This section will briefly consider some of these criticisms of the processes and outcomes of the GPs.

⁷³ Intermediaries that have closer links and influence over business corporation than the UN and its agencies would alone.

4.3.1. Legal scholar's perspectives

Specifically, many legal scholars question soft-law approaches to regulation like the GPs. Nevertheless, even where soft-law approaches are seen to be the most effective way to gain ground on businesses human rights responsibilities they have been criticized for not clarifying the specific obligations and standards that states and business must follow to comply with international human rights law. Paul and Schönsteiner (2013:74) point this out and suggest they may have the opposite effect since have:

“...sometimes inaccurate representations of international law regarding certain aspects of states’ obligation to protect; the lack of clarity on some aspects of the substantive dimension of the corporate responsibility to respect; and the absence of recommendations for effective enforcement mechanisms and of limits set for private reparations initiatives.”

Similar observations have been made by Sanders (2014:3) who suggest the ubiquity of GPs have influenced the way “...plaintiffs plead cases...” and “...judgments by domestic courts.” This has not proven a completely positive undertaken since some states have taken “...regressive steps [in term of the remedy] since the adoption of the UNGPs, rather than work positively to ensure that effective remedy is accessible.” (Skinner, McCorquodale and De Shutter, 2013:9). This has impacted negatively on transnational human rights litigation of legislation (Sanders, 2014:3). Significantly, this may see further regression in the enforcement of the business and human rights norm since the GPs do little to deter abusers through penal action that would raise the cost of corporations committing human rights violation. As such, the GPs attempted to apply international law to the private sector suffer the same weaknesses of accountability that other voluntary and soft-law nature projects that have come before (Horrigan, 2010:325; Payne and Pereira, 2016:67-68).

4.3.2. NGO and practitioner's criticisms

Some of the most telling criticism of the GPs has come from some of the leading human rights NGOs that argue it did not go far enough to regulate the human rights impacts of business corporations. The source of these criticism varies from more specific causes, like the Child Rights Information Network that proclaim “[i]t is a great disappointment that we see no... substantive discussion of the rights particular to children that have long been a matter of international law...” (Business and Human rights, 2011); to more overarching networks like the International Federation for Human Rights (FIDH), Human Rights Watch (HRW), and Amnesty International.

The FIDH, an umbrella group that represents more than 150 human rights groups around the world, concluded that the “...road towards accountability is still a long way ahead...” since the GPs did not safeguard “...the right to an effective remedy and the need for States’ measures to prevent abuses committed by their companies overseas.” (FIDH, 2011). Similarly, the HRW lambasted the SRSG refusal to establish a “...global standard...” for corporate human rights responsibility as instead opted for a sliding-scale set according to the size and geographic location of the business (Human Rights Watch, 2011). Moreover, the HRW accused the UNHRC of squandering an opportunity to put in place mechanisms that work to ensure the GPs are put into practice and simply “...endorsed the status quo: a world where companies are encouraged, but not obliged, to respect human rights.” (Human Rights Watch, 2011).

Parallel to this, Amnesty International criticized the SRSG for not adequately addressing key corporate accountability issues. Here, it is suggested that the GPs do not effectively prevent and punish extraterritorial human rights violations; it does not mandate but rather only recommends companies undertake human rights due diligence that are fundamental for prevention, accountability and remedy; and it fails to explicitly recognize the right to judicial remedy as a human right (Amnesty International, 2011:2). Amnesty International, in this report also was critical of the UNHRC failing to empower its newly formed Working Group on the issues relating to human rights and TNCs and other business enterprises with a mandate that will allow it to take “...proactive steps to tackle the need for greater clarity and increased *legal* protections.” (Amnesty International, 2011:3 emphasis added).

Reflecting on the criticism laid against the GPs, although there are examples of specific concerns, are based on its representation of business and human rights regime in the guise of voluntary, non-binding, and soft-law mechanisms. At best, the voluntary approach to business and human rights “...have done little to diffuse understanding of business obligations under international human rights law. At worst, they signal to business and states that these obligations are voluntary, thereby undermining efforts to strengthen global human rights protection.” (Payne and Pereira, 2016:68). When considering the GPs this it is worrying since to date it is the most authoritative project on business and human right yet undertaken. A manifestation of this that has been mentioned already concerns the incorporation of the GPs ‘sliding-scale’ into OECDs *Guidelines for Multinational Enterprises* in 2011. Blitt (2012:55-65) describes this as

“...enabled[ing] corporations to downgrade their human rights responsibilities based on the country in which they operate... cheapen[ing] a hard-fought

elaboration of international human rights law by casting aside key treaties intended to particularize safeguards for historically vulnerable groups – such as racial minorities, women, and children – and thereby shield them from further discrimination and maltreatment.”

The criticism of the voluntary approach in general and the GPs specifically proves to be a vital component to the continued development of the business and human rights norm beyond the SRSGs mandate. From this, there is growing recognition and understanding of the limitations of voluntary mechanisms to advance businesses human rights responsibilities. Perhaps in response, the UNHRC renewed the Working Group on the issue of human rights and TNCs and other business enterprises in 2014 in resolution 26/22 and again in 2017 in resolution 35/7 (OHCHR, 2017a). The task of this working group is to elaborate on the available legally binding instrument. This is an open-ended intergovernmental working group that will progress through several intergovernmental negotiation phases (Payne and Pereira, 2016:68). To date no blueprint has emerged from this working group; nevertheless, it has issued ten key recommendation for implementing business and human rights in the context of the Sustainable Development Goals Agenda. Elsewhere, the *United Nations Forum on Business and Human Rights* will take place in Geneva in November 2017 to continue the work laid down in the GPs (UNHR, 2017).

4.4. The Guiding Principles in view of the normative lens

The criticisms detailed in the section above have been laid in the main by human rights legal scholars, practitioners and NGOs. However, if one were to stop here it would neglect Ruggie’s (2014:6) own admission that the UNHRC’s endorsement of the GPs did not constitute a comprehensive and integrated global business and human rights regime; as well as the core thesis of international norm theory explanations of how norms develop.

4.4.1. The Tipping point

In the language of this theory, as explained by Finnemore and Sikkink (1998), the SGSR’s GPs signals the *tipping point* of the business and human rights norm. Progress in this regard was made when the UNHRC unanimously endorsed the GPs and the business and human rights norm they contain. For the first time, this set out “...a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.” (OHRHC, 2017b). Nevertheless, endorsing and implementing, especially voluntary norms as shown in the criticism and in the literature review, has proven to be distinctly divergent acts. Although it would be beyond the scope of this study to conduct a survey to deduce all those states that have

actively established mechanisms to implement the norm there are significant examples demonstrating the criteria of the tipping point making it the most likely location of the business and human rights norm.

Beyond the OECD, the GPs are reflected in the human rights chapter of the *Guidance on Social Responsibility* from the International Organization for Standardization, a global network of national standards bodies; and informed the revision of the *Sustainability Framework and Performance Standards* on the International Financial Corporation, which is part of the World Bank Group (Morel, 2015:262). Additionally, in 2011 the European Commission invited its European Union member states to develop National Action Plans (NAPs) for the implementation of the GPs by the end of 2012. The first NAP was launched by the UK in 2013, which has been followed by its own update in 2016 and NAPs from Denmark, Finland, Germany, Italy, Lithuania, Netherlands, Norway, Scotland, Spain and Switzerland that are in varying stages of completion (Fasciglione, 2016:625).

Interestingly, a case study in the UK's governments update on their NAP, the *Good Business: Implementing the UN Guiding Principles on Business and Human rights* (2016), it is pointed out that in 2013 in their capacity as G8 President they committed the organisation to accelerating support for land tenure and other property rights and the implementation of the VGGT. Specifically, what would be produced here in conjuncture with the US, Germany, France, and the AU Land Policy Initiative was the NAF (HM Government, 2016:13). In the US, the concept of human rights due diligence as expressed by the GPs have become a central focus for USAID, which has been described as "...the key architect of the New Alliance..." (Actionaid, 2015:11).

Here, Cao, *et al.* (2012:141) slightly different operationalization of the tipping point seems to be indicated. The New Alliance seems to describe a point at which the average level of respect for human rights, and in this case more specifically business and human right, in these investing countries has reached a threshold that has lowered the tolerance of businesses human rights violations, for LSLBIs in this case. In turn, the development of the NAF operationalizes this message, within its current limits, to the countries, like Malawi, hosting these investments increasing the chance they will adhere to human rights standards.

Considering the widespread voluntary acceptance of the GPs by States, IGOs, NGOs, and civil society the business a human rights norm can be said to have achieved a *critical mass* required by Finnemore and Sikkink's (1998) tipping point. Additionally, and it can be argued due to this

voluntary guise, implementation of its principles has been restrained. Thus, for the continuation of the business and human rights norms, as it is suggested by Finnemore and Sikkink (1998), having initiatives mechanizing the norm like the New Alliance supported by powerful and influential states like the US and UK and their G8, is vital for the longevity and success of a norm.

4.4.2. Progressing towards the cascade

According to some iterations, for a norm to reach this middle stage of its life-cycle it should have at least gained moderate support from the actors its effects (Goertz and Diehl, 1992:604). Considering the vast number of endorsements that the GPs have received, this criterion has been met and exceeded. Nevertheless, at its more unambiguous the norm cascade describes procedures that explicitly explains what the norm is, what constitutes a violation, and the corresponding avenues capable of coordinating disapproval and sanctions against norm violators from norm leaders (Finnemore and Sikkink, 1998:900).

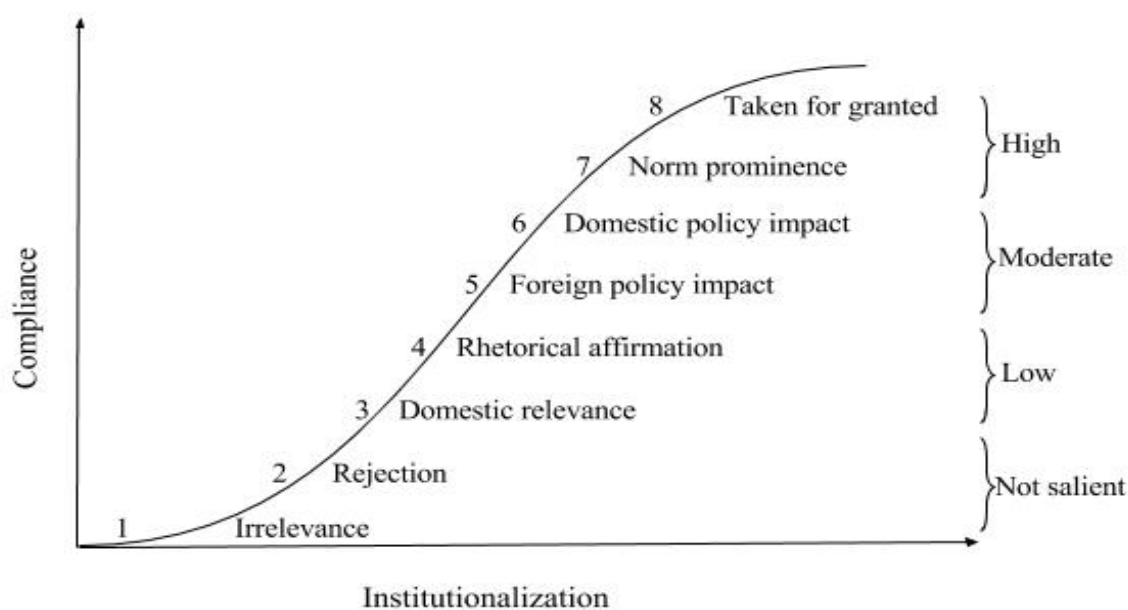
Considering the criticisms laid against the GPs, as the preeminent normative representation of the business and human rights norm, it cannot be said that its achievements have been decisive enough to have formed this regulated normative behaviour. If one were to reflect on Ruggie's strategy, the GPs in the years since its endorsement, now constitutes a building-block that current and future developments, like those of the Working Group, will build upon. A significant hindrance of this is the skeletal body of empirical research, beyond what contributed to the development of the GPs in the first place, that test the effectiveness of voluntary codes.

Here, an assessment of the domestic salience for the business and human rights norm in Malawi proves to be a promising location to address this hindrance to the future development of the norm. This is the case since a relatively straight line can be drawn between GPs and their eventual manifestation in Malawi where, through the New Alliance, they have begun to govern Illovo Malawi's sugarcane operation. Moreover, the Malawian case study reveals insights into some of the most fundamental challenges that a governance norm is likely to encounter and will ultimately have to overcome to reach the final stage of its life-cycle.

4.4.3. The domestic salience of the business and human rights norm in Malawi

To operationalize Cass's (2006; 2016) eight-point scale on which an international norm's domestic salience can be measured it is useful to represent it on an S-curve (figure 5). Although, Cass does not use her scale in this way other scholars (Rogers, 1995; Simmons and Elkins, 2004; Berry and Berry, 2007) have associated it with norm diffusion (or socialization).

Figure 5: Demonstration of norm measurements on an s-curve



Source: Author's interpretation of Cass (2006:9), Cortell and Davis (2000:72) and Gilardi, (2012:454).

Briefly, this representation serves to demonstrate the distinction between *convergence* (the slant of the curve and *diffusion* (the flattening of the curve) in norm literature. Importantly, for a pattern of adoption needs to be established so that by the time it reaches the final stage of its life-cycle most, if not all, domestic actors have conformed to the norm.

The relevant domestic actors for diffusion are not located at any one site and instead can be termed members of TANs establish links between domestic and transnational actors with, in this case, the international business and human rights regime (Risse and Sikkink, 1999:5). Specifically, the section below will argue a measurement of Malawi's domestic salience by considering the rhetorical evidence discussed in the case study and making a value judgement based on the criteria of Cass's (2006; 2016) eight-point scale. It is noted that this does not constitute a process describing the norm's emergence and progression in the norm life-cycle, rather it investigates the current relationship between the international business and human rights norm and domestic policy. The point here is to ascertain obstacle facing the norm in a more practical sense.

4.4.3.1. Domestically relevant

Within the wider framework of the modern human rights regime, some utterances of the business and human rights norm have been operationalized by states since a significant portion

of their constitutional legitimacy is sourced from the UDHR and the other documents in the International Bill of Rights. Considering this and the timeframe of this study's case study there is little question that business and human rights norm has ever been *irrelevant* in Malawi. Moreover, since the national leadership bases their legitimacy to govern in the nations Constitution, and by extension the human rights held within, there is a precedent that the state enacts a duty to serve and protect its citizens' human rights in their legislative and judicial systems. Based on this, and although their contemporary form has evolved and increased in complexity, the Malawian state has not *actively rejected* the premise that the state has the responsibility to ensure businesses operate in accordance with the laws of the state and by extension human rights.

For these reasons when the more well-formed business and human rights entered the Malawian political landscape they quickly became *domestically relevant* thanks to the normative foundations laid by the international human rights regime. In Malawi, this began was during the mid-1990s good governance and the livelihood and entitlement approach adopted to encourage rural development, which as seen in the case study, was supported by international donors. Through this, human rights were through to be best served through market liberalization and the economic developmental opportunities this would create. Typifying this period and what would codify this rhetoric was Malawi Vision 2020 and the SPP that were both introduced in 1998. In this year, and supported by these projects, the Malawian sugar industry was privatized and Illovo began its operations in the country.

In the time since the Vision 2020 project has endured and been implemented through various mechanisms like the NAP and the two MGDSs to steer government policy. Nevertheless, the policy adopted in the vein has been done to gain political patronage and little in the way of meaningful institutionalization has been credited with the advantageous characteristics of the either the good governance or the livelihood and entitlement approach.

4.4.3.2. Rhetorical affirmation

Rhetorical affirmation has been reached in Malawi since there has been an acknowledgement of the business and human rights norm (as would be recognizable to the post-GPs world) by the Malawian government, when it joined the New Alliance. The motivation for both the formation of the New Alliance and the GoM to join stems from the most recent wave of 'land grabs' and the resulting transnational land governance 'rush.' It is the goal of the New Alliance to help promote responsible private sector investment in African Agriculture. For Malawi

“...committed to policy actions in the areas of business enabling environment, inputs, land and water, nutrition, policy institutions, *resilience and risk management*, trade and markets.” (New Alliance, 2013 emphasis added).

More tangibly, the GPs and the business and human rights would be recognised by state instruments in 2015 when the Malawi Human Rights Commission (MHRC), in collaboration with the UN hosted a multi-stakeholder⁷⁴ dialogue. The agenda for this session focused on ways that the GPs can be implemented to address concerns across multiple sectors; while aiming to raise awareness and initiate discussion around key business and human rights issues in the country. Both judicial and non-judicial remedies to these challenges were discussed to comply with international best practice at all three levels of government. The outcomes of this dialogue called for a multi-stakeholder platform on business and human rights to be established and for business and human rights to be integrated into future Human Rights Action Plan's, of which the most recent is still being developed (Mkandawire, 2015).

For Illovo, the rhetorical affirmation to the New Alliance came naturally as a member of the Global Compact. Both the GPs and the New Alliance were quickly affirmed through the group's annual strategic documents account for their social impacts, among other things. As seen in the case study this has involved active participation with TANs that both criticised and aided the group's observation of the GPs.

4.4.3.3. *Foreign and domestic policy impact*

Determining the *foreign policy* impact of the business and human rights norm, as communicated by the New Alliance, is difficult to decipher. The Malawian government's pursuit of the New Alliance membership is first and for most a means to increase FDI in Malawian agriculture to achieve its development agenda and its consideration for the NAF's is conditioned by a desire to secure donor support. Similarly, the domestic policy impacts discussed in the case study operate within the logic of Malawi Vision 2020 that persists with the logic that market liberalization is the most effective means to advance the country's developmental and social agenda. Thus, in the Malawian political context, it is unclear whether it is the coercion of the business and human rights norm that has located it in the country's

⁷⁴ Participant included representatives from government and the judiciary, community leaders, civil society organizations, and business. This is perhaps the earliest dialogue to have taken place focusing on the Guiding Principles business and human rights, since prior to the event training and orientation on its content took place.

rhetoric; and it seems more likely that its position has been bolstered by Malawi's developmental ambitions.

A similar logic can be applied when considering the *domestic policy* impact that has seen the GPs, through the NAF, influencing the 2016 land related Bills and its inclusion into the ASWAp. While this deduction may prove pessimistic in time, the GoM has in the past informed its policy decisions⁷⁵ with symbolic gestures to placate the international community and any similar conclusion should be approached with caution. Perhaps in alternative case study a similar change to the policy regime, like that taking place in Malawi, would indicate *moderate* compliance to the business and human rights norm; however, one cannot ignore wider socio-economic-and-political context of the country.

Nevertheless, the business and human rights norm inclusion in the Group Guidelines, which explicitly states its position on human rights is “[i]n line with the United Nations Global Compact... and the United Nations Guiding Principles on Business and Human Rights...” (Illovo Group Guidelines on Land and Land Rights, 2017). This policy, as shown in the case study, is beginning to be enacted through the NAF and in partnership with several members of the transnational land advocacy network. Even here, and even with these efforts by Illovo and the members in this network, the business and human rights norm has not become *prominent* and are only being implemented through pilot projects and are still some way away from becoming *taken for granted*.

4.5. Conclusion and a reflection on domestic salience

As stated in this chapter's introduction, its goal has been to address this study's main research question. This study has found that the GPs marked the tipping point at which the business and human rights norms began to cascade. Nevertheless, this process is understood to be only at the very beginning of its journey and continual normative support is critical for its continuation.

To assess whether this will go beyond rhetoric and diffuse international best practice into LSLBI the domestic salience of the norm was measured in the context of the Malawian sugar industry. Reflecting on the discussion that took place, the domestic salience of the business and human rights norm appears to be most strongly associated with *rhetorical affirmation* (Cass, 2006) and can thus be described as having *low* domestic salience (Cortell and Davis, 2000) in Malawi. A significant justification of this conclusion is based on the evidence from the case

⁷⁵ The removal of the SCA spoken about in chapter three is just one example.

study. Specifically, LSLBIs are described as opportunities to increase FDI and service its developmental goals. With this, the good governance and livelihood and entitlement approaches of the mid-1990s as a mean to ensure human rights are protected endure as the more prominent normative approach to business and human rights in Malawi. Moreover, in Malawi, the institutional support that is required for the norm to take hold has been neglected under a series of Presidents and regimes that have only occasionally meaning aimed to enforce international best practice and in the main have sort-out their own enrichment.

For the business and human rights norm to advance in this society the corresponding institutional strength needs to be considered. This is not, however, within the capacity of the GPs and the jurisdiction of businesses. Nevertheless, both may contribute to the development of state institutions through international trade, which Cao, *et al.* (2012) describes is a way to diffuse human rights practices. As Africa' largest sugar producer Illovo is uniquely positioned to minimize the negative and maximize the positive outcomes of the industry. Illovo's participation in the Malawian industry, where it has no significant competition, demonstrates this fact and the significant role it plays to ensure the Malawian sugar industry operates in accordance with human rights and international best practice. Illovo currently fills this role in the spirit of voluntary mechanisms that govern business and human rights issues; however, the case study reveals the company has not been able exclude itself from accusations of land grabs and other operational issues relating to human rights. In this case it would be too simplistic to conclude that the GPs would have been more effective if they were legally binding since their introduction into Malawian society has yielded meaningful rhetorical affirmation of the business and human rights norm. Nevertheless, to maintain momentum in these dialogues and the impetus for its implementation the business and human rights norm would be significantly bolstered if it were to be enshrined in the international human rights law regime.

5. Chapter Five: Conclusion

5.1. Chapter introduction

Borrowing Ruggie's (2014:15) final remarks to the Human Rights Council that there is "...no illusion that the conclusion of my mandate will bring all business and human rights challenges to an end. But Council endorsement of the GPs will mark the end of the beginning..." expresses what this research study has put to the test. This study interprets the mandate forming the GPs as the continued expansion of the wide human rights regime, and the business and human rights norm, as one room in its overarching institutional framework. Therefore, any effort to advance the normative influence of the international human rights regime cannot discount its authority. Nonetheless, the growing influence of business corporations in international relations has mandated the GPs efforts to consolidate and advance the business and human rights norm; which, ultimately helps maintain the normative authority of the human rights regime. This study has reflected on the efficacy of the GPs in this role by accounting for the normative evidence created during its development and eventual inclusion into the Malawian sugar industry. International Norm Theory has helped facilitate this discussion by providing the tools to recognize an international norm, the means to categorize it in its *life-cycle*, and to what degree a norm can be said to be domestically salient. This final chapter serves to summate this study's process and finding, as well as, makes suggestions for future research.

5.2. Summation of the study

Chapter one served as a general introduction to this research study by developing understanding and context of how issues surrounding TNCs, LSLBI and human rights fall under the mandate of IR and specifically International Norm Theory. After this, a problem statement detailed the specific challenges and issues that LSLBI pose in the SSA context and the transnational land governance 'rush' that emerged to regulate and implement international best practice in this space. Thereafter, the research design of this study was explained and the choice of Malawi as the cases study justified. Hereafter, the main and supplementary research questions were formulated and reflected on the understanding and context discussed in chapter one. Finally, a brief contextualization of each chapter was given.

Chapter two expanded upon International Norm Theory's terminology, parameters and operational details. The starting point for this considered the various conceptualizations of international norms that can be recognised by their tendency to encourage or facilitate consistent and regular behaviour; behaviour that overcomes self-interest; motivates sanctions

against those who do not comply with the norm; and invokes a degree of moral obligation. These characteristics vary at different times in a norm's life-cycle, which describes and accommodates descriptions of a norm at its emergence, tipping point, cascade, and internalization. This process describes the accumulation of convergence in normative, ideational, political, and policy conversations.

The section that followed reviewed the literature on *diffusion* (or socialization) that is more concerned with how an international norm progressing through its life-cycle becomes incorporated into domestic politics. This reflected more nuanced aspects of International Norm Theory. From this perspective, it is suggested that the domestic salience of an international norm can be revealed by paying attention to certain domestic arenas and actors (state and non-state) interactions in domestic public discourse; variations in national institutions; and changes made to national policies. Based on the evidence from these areas the literature argues it can be placed on an eight-point scale to measure and then determine an international norm's domestic salience.

The second part of chapter two reflected on literature accounted for the normative development of human rights regime briefly and the business and human rights norm in more detail. This served to demonstrate the context and the legitimacy of the GPs that the discussions in the chapters that would follow would be able to draw on and be compared.

Chapter three demonstrates and accounts for the normative influence that the business and human rights norm, post-GPs and as expressed in by the New Alliance, has exerted. For this effort, some time was taken to become familiar with the broader Malawian context and its sugar industry in which Illovo operates. From here several key aspects from the Malawian political landscape and its land and agricultural policy that are pertinent to this study come into focus. For example, when it comes to its politics processes, particularly for land and agriculture, Malawi has been hamstrung by elite politicking to gain short term political support. This has produced an incoherent policy regime that rarely gained traction; which has been exacerbated by a tendency from political elites to implement or adjust policy that leans with whichever direction international donor's rhetoric blows. A second revelation to come from this case study was the location of the New Alliance's influence in the 2016 land related Bills and in the ASWAp. Also, by considering the Malawian sugar industry Illovo Malawi provided and proved to be an additional location at which the NAF and the GPs normative influence could be investigated.

Chapter four considered the normative contribution of the GPs towards the business and human rights governance of LSLBI. This integrated the body of International Norm Theory with the appearance of the business and human rights norm, as described by the GPs, in the Malawian case study. To begin this, the strategic approach enacted by the SRSG as a norm entrepreneur was discussed and the criticisms of its outcomes were seen from the perspectives of human rights legal scholars, NGOs, and practitioners. The point here was to appreciate the full spectrum of norm entrepreneurs who continue to advocate for the business and human rights norm. It is through these processes that the weaknesses of the current regime have been revealed and is what will shape the next incarnation of the business and human rights norm. From here the main research question of this study addressed.

5.3. Reviewing the research questions and their findings

This study's main research question asked if the GPs has created a norm cascade that will go beyond rhetoric and be diffused into Large-Scale Land-Based Investment practices?

Based on the evidence of the case study, and in the language of International Norm Theory the GPs marked the tipping point that marks the start of the norm cascade. There is strong evidence for the norm being in this position. In the years since its endorsement by the UNHRC, there has been little progress beyond symbolic gestures. A significant hindrance to its efforts has been the norms voluntary guise that has left it wanting in areas concerning its implementation and enforcement. As evident in the Malawian case study, the New Alliance project there has not gone *meaningfully* beyond rhetoric and where Illovo is concerned it is only beginning its 'land champion' program that will see the NAF being applied. For these reasons the domestic salience of the business and human rights norm in Malawi has been determined to be low.

Nevertheless, a norm and its development is a continuous and dynamic project that requires due care and attention and it is not a single destination. The development of the wider human rights regime provides evidence of this and a comparison can be made here between the UDHR and the GPs. Although this does not suggest they share equal positions in international relations or human rights literature, it does assert that the reactions by their respective target audiences upon their completion have parallel characteristics and can be said to be similar events. However, where the UDHR initiated a norm cascade that began modern international human rights norms; the GPs might be considered to have done something similar but at a lesser, although be it important and necessary scale, which appreciates nuances of more modern global circumstances.

- A) The first of this study's supplementary questions asks what does International Norm Theory say about the progression of a norm through the various stages of its 'life-cycle'?

This question guided the literature review of International Norm Theory and was seen through the normative development of the human right regime. Specifically, there are several perspectives on this *progression*, however, few are more widely used as Finnemore and Sikkink (1998) description of the norm life-cycle. This was a lynchpin for this study, providing the language and a theory from which to draw. What supplemented this was concerns of domestic salience. While the life-cycle does account for norm convergence and diffusion; measuring domestic salience, as per Cortell and Davis (2000) and Cass (2006), served as a more reactive tool with capability of accounting diffusion more meaningfully.

- B) The second supplementary question considered if Malawi could be described as a 'critical state' that encourages other to implement the business and human rights norm?

Malawi is among the first countries to have adopted elements of the GPs into legislation concerning land and agriculture policy through their partnership with the New Alliance. It is pointed out that in chapter four the business and human rights norm only recently reached the level of rhetorical affirmation and it therefore its domestic salience remains low. From this position, it is unlikely that Malawi will begin championing the norm. Moreover, the institutional mechanisms that would enable Malawi to be considered a 'critical state' struggles under the weight of own socio-economic-and-political context, let alone the weight that would be added by overseeing external projects. This means that although it may have participated in the New Alliance partnership it does not seem likely that the GoM would make resources available to promote the business and human rights norm in manner required of a 'critical state.'

- C) The third and final supplementary research question asked what unique challenges does the Malawian case study present to the business and human rights norm?

The Malawian case study revealed the just some of the political and economic challenges that the country faces. Perhaps the most relevant to this question is the lack of institutional capacity to sustain and implement the business and human rights norm. This is not isolated and unique to this norm, but is a feature of the Malawian political landscape that has endured since its independence in 1964 and has continued into its democracy. This lack of institutional capacity poses a fundamental challenge to the GPs project that goes beyond Malawi and speaks once

again to the norm's enforcement deficit. For states like Malawi, who do not have the capacity or who may not have the will to ensure business corporations fulfil their human rights responsibilities, there needs to be strong international legal mechanisms that advocacy networks can rely on to hold violating companies accountable.

5.4. Areas of future research

This study is an early empirical study of the normative impact that the GPs have had on the business and human rights norms. It has conducted this examination by investigating the corporate governance structure that have emerged in response a recent wave of LSLBI, which have been described as 'land grabs' by various members of TANs. The conclusions it has made are based on International Norm Theory literature and the evidence it gathered from conducting a case study on the Malawian sugar industry. Throughout this project several avenues emerge from which additional research could depart. This final section will reflect on some of these.

A future study assessing the normative impact of the GPs is one possibility may benefit from adopting an alternative sphere to transnational land governance and an alternative case study. Such a study may overcome some of the challenges this study encountered concerning a lack of empirical data that analyses the impact of land governance recommendations and frameworks. Moreover, and alternative case study may provide more detailed and varied tertiary sources from which it may draw. Alternatively, primary retrench gathering may serve to counter any gaps in the literature.

An additional variation could be an alternative theoretical lens and specifically and New Governance Theory that describes means to advance a norm through variations of polycentric governance and orchestration. Such a study may be able to identify specific and detailed projects that norm entrepreneurs may be able to work towards to see the advance of the business and human rights norm along its life-cycle.

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